

COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548



B-130515

JUL 20 1973

The Honorable Alan Cranston  
United States Senate

Dear Senator Cranston:

Your letter of June 12, 1973, raises certain questions concerning matters discussed in an advance copy of our report, B-130515, entitled "Activities of the California State Economic Opportunity Office." This report was formally issued on June 14, 1973.

The activities of the California State Economic Opportunity Office (CSEOO) are funded in part by an Office of Economic Opportunity (OEO) grant under section 231 of the Economic Opportunity Act of 1964, as amended. Our report concerns various aspects of CSEOO's operations for its program year 1972 (fiscal year 1972).

Chapter 6 of our report examines charges that CSEOO failed to comply with non-Federal contribution requirements for program year 1972. Chapter 6 states in part, at page 33:

OEO requires State agencies to provide either cash or in-kind contributions of at least 20 percent of program costs.

CSEOO's non-Federal contribution requirement for program year 1972 amounted to \$249,436, including \$78,436 of mostly non-Federal contributions which had been questioned by OEO audits in previous years. We found that CSEOO's non-Federal contribution for program year 1972 may have been deficient by \$145,585 because of questionable claims.

CSEOO recorded claims for non-Federal contributions of \$482,300 for the year, \$233,064 more than actually required. Our examination of CSEOO's documentation, however, showed that about \$376,649 of the total was questionable because of inappropriate claims or improper valuation. The balance, \$105,831, was either not examined or not questioned. \* \* \*

The report lists the following categories and amounts of non-Federal contributions which we questioned:

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<u>Description</u>	<u>Non-Federal contributions</u>		
	<u>Claimed</u>	<u>Examined</u>	<u>Questioned</u>
— Migrant program "excess"	\$276,700	\$276,700	\$276,700

The amount claimed represents the State's required contributions under another OEO grant not involving CSECO. OEO required this contribution so the State could qualify for Federal funding under the migrant program.

— Volunteer services	95,200	95,200	53,449
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About \$38,800 of the amount questioned consists of Federal and matching non-Federal expenditures by a county under a Department of Housing and Urban Development grant. The remaining \$14,649 consists of claims for donated services unrelated to CSECO, unidentified, or unfairly valued.

— State supportive services	30,200	30,200	26,500
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The amount claimed consists of difference between what the State charged CSECO for services rendered and what CSECO estimates the actual cost would be outside the State system. For example, CSECO estimates it would have cost \$3,600 more to rent private space rather than use State-owned space. In another instance, CSECO claimed \$8,700 as the difference between what the State charged it for duplicating services and what it estimated such services actually should cost.

— State expenditures under Emergency Employment Act	20,000	20,000	20,000
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The amount claimed is actually the State's required in-kind contribution under another Federal (Department of Labor) grant.

Total			\$376,649
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On October 11, 1972, we wrote to CSECO and the OEO regional director for Western Region IX (San Francisco) to inform them of these questioned costs and to obtain their comments. On April 4, 1973, CSECO officials advised us that they were awaiting a decision from OEO headquarters regarding the allowability of the questioned migrant program excess. CSECO officials also stated that the non-Federal contribution is not a "statutory" requirement but rather an OEO "administrative" requirement and, therefore, that OEO could waive this requirement. The OEO regional director advised us on April 12, 1973, that OEO Office of General Counsel had not yet determined whether the questioned costs should be allowed. By letter dated May 21, 1973, in commenting upon our report, the Acting Director of OEO indicated that this matter is still under review by the Office of General Counsel.

Your letter of June 12 refers to the alleged non-Federal contributions for migrant program excesses (\$275,700), county expenditures in connection with a Department of Housing and Urban Development grant (\$38,800), and State expenditures in connection with a Department of Labor grant (\$20,000). You specifically request our opinion as to:

- the permissibility under the law and applicable Government-wide and OEO regulations of counting a State expenditure twice for the purposes of two separate Federal grants, each requiring a particular non-Federal share; and
- the permissibility of retroactive and ad hoc waiver of a regulatory requirement with respect to non-Federal contributions in connection with a grant under section 231(a) of the Economic Opportunity Act.

Subsequent to receipt of your letter, we attempted without success to obtain from OEO's Office of General Counsel some indication as to the status of their consideration of these issues, as well as any tentative conclusions which they might be able to offer. We are not, of course, precluded from passing upon the issues which you raise in the absence of an opinion or submission by OEO. As a general practice, we prefer to obtain the views of the agency having primary expertise and initial responsibility with respect to such issues in order to arrive at the most thorough determination possible and as a matter of fairness to parties who may be affected by our determinations. However, in accordance with your request and in view of our inability to obtain a response from OEO, we will proceed to consider the issues raised on the basis of the information now before us.

Section 231(a) of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. 2824(a), authorizes grants to State agencies for the provision of technical assistance, coordination, and other advice and assistance in connection with community action programs under title II of the act. We are not aware of any provision in the act which specifically requires a

non-Federal contribution for State agency grants under section 231. Compare, for example, section 225(c) of the act, 42 U.S.C. 2812(c), as amended by Public Law 92-424, 86 Stat. 692, which does impose specific non-Federal matching requirements with respect to certain other title II grants. However, OEO Instruction 7501-1 (Role of State Economic Opportunity Offices), dated March 25, 1970, states in paragraph 9(b):

The state's share for funding under section 231 shall be a minimum of 20 percent of the total cost of the operation in cash and/or in kind.

The text of this instruction, including the non-Federal contribution requirement, is also set forth at 45 CFR §§ 1075.1-1, 1075.1-11(b) (1973). The OEO instruction does not specify any qualifications or exceptions to the 20 percent non-Federal contribution for section 231 grantees. On the contrary, paragraph 9(1), 45 CFR § 1075.1-11(1), states in part: "As OEO grantees, the SEEOs [State economic opportunity offices] shall comply with all applicable OEO Instructions. \* \* \*"

The preamble to the text of OEO Instruction 7501-1 in the Code of Federal Regulations states that it is issued under the authority of section 602 of the act, as amended, 42 U.S.C. 2942. Section 602 provides in part, quoting from the United States Code:

In addition to the authority conferred upon him by other sections of this chapter [the act], the Director [of OEO] is authorized, in carrying out his functions under this chapter, to--

\* \* \* \* \*

(a) \* \* \* establish such policies, standards, criteria, and procedures, prescribe such rules and regulations \* \* \* and generally perform such functions and take such steps as he may deem necessary and appropriate to carry out the provisions of this chapter.

Also relevant are the following excerpts from OEO Instruction 6000-2 (Applicability of Directives), dated May 10, 1971, page 1:

#### 1. POLICY

The general conditions of all OEO administered grants made under the authority of Titles I-D, II and III-B of the Economic Opportunity Act, as amended, provide that program funds expended under the grant are subject to OEO directives. \* \* \*

## 2. BACKGROUND

OEO's present issuance system is made up of the following types of issuances which either set forth policy and procedures to be followed by a grantee or offer advice as to how a grantee may better accomplish its objectives: OEO Instructions, OEO Notices, OEO Guidelines, and OEO Handbooks. \* \* \*

- a. OEO Instructions: These issuances set forth policies and procedures and are binding on the grantees to which they are applicable as shown in the Appendix to this instruction.

It is clear that OEO Instruction 7501-1, having been issued and promulgated by the Director pursuant to express statutory authority, constitutes a "statutory" regulation in the sense employed in numerous decisions of our Office. As such it has the force and effect of law; and the agency has no authority to waive its requirements on a retroactive and ad hoc basis. See, e.g., B-158553, July 6, 1966; 43 Comp. Gen. 31, 33 (1963); 37 id. 820 (1958); 31 id. 193 (1951); 22 id. 895, 899-900 (1943); 21 Comp. Dec. 482, 484 (1915). Compare 21 Comp. Gen. 550, 555 (1941). To hold otherwise would undermine the uniformity which such regulations are designed to insure, and would be manifestly unfair to other grantees which have complied with applicable requirements. Moreover, once provision of a non-Federal contribution has been undertaken by acceptance of a grant which incorporates this requirement, it becomes in effect an obligation owing to the United States which cannot be waived or given away. See 51 Comp. Gen. 162, 164-165 (1971); 47 id. 81, 83-84 (1967) and authorities cited therein.

It remains to consider whether the three CSECO claims referred to in your letter may be applied to the non-Federal contribution requirement. As noted previously, we determined that these three claims actually constituted required contributions under grants other than CSECO's section 231 grant. None of the three claims bears any relationship to CSECO. The \$38,800 and \$20,000 items, relating respectively to grants by the Department of Housing and Urban Development and the Department of Labor, require no further explanation. The \$276,700 item represents an expenditure by the State of California in satisfaction of a special condition imposed under an OEO migrant program grant, which required off-season maintenance of migrant housing facilities. Accordingly, even if this expenditure could somehow be related to the CSECO grant, it does not appear to be "access" with respect to the migrant program.

OEO Instruction 7501-1 merely imposes a 20 percent cash and/or in kind non-Federal contribution requirement for section 231 grants, without further

elaboration in terms of the acceptability of particular claims. We believe it is obvious, however, that a grantee cannot apply a single claim in satisfaction of more than one non-Federal contribution requirement. Cf., 47 Comp. Gen. 81 (1967); 32 *id.* 561 (1953); *id.* 141 (1952). Such double credit would, of course, effectively nullify one of these requirements. In any event, it appears that OEO Instruction 6802-08 (Non-Federal Share), dated May 10, 1971, expressly prohibits such double credit. This instruction states in part:

The non-Federal share may be provided by any public or private agency, but may not include assistance provided through other Federal programs, nor may any portion of the non-Federal share under any other Federal program be used to meet matching requirements for community action programs. \* \* \* (Underscoring supplied.)

Section 231 grants are part of community action programs under title II of the act. The preface to OEO Instruction 6802-08 states that it applies to all grants under title II; and OEO Instruction 6000-2, *supra*, Appendix A, page 8, specifically indicates that Instruction 6802-08 applies to section 231 grantees.

For the reasons stated above, we conclude (1) that the 20 percent non-Federal contribution requirement set forth in OEO Instruction 7501-1 constitutes a statutory regulation which is binding upon CSECO and cannot be waived; and (2) that the purported non-Federal contributions discussed herein do not constitute valid claims against this requirement. We have today transmitted a letter to the Acting Director of OEO advising him of the foregoing conclusions, and requesting that OEO take appropriate action in accordance therewith.

We are forwarding a copy of this response to your June 12 letter to the Honorable Chat Holifield.

Sincerely yours,

(SIGNED) ELMER B. STAATS

Comptroller General  
of the United States