



U.S. ELECTION ASSISTANCE COMMISSION
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U.S. Election Assistance Commission
Funding Advisory Opinion
FAO-09-002

Date Issued: December 3, 2008

Requestor: West Virginia Office of the Secretary of State - (AOR-08-024)

Questions:

1. Should county funds paid to reimburse the State for the cost of HAVA-compliant voting systems that the State purchased with HAVA funds maintain the character of HAVA funds?
2. Is equipment that was initially purchased by the State with HAVA funds and subsequently funded by counties through payments to the State considered to be purchased with Federal funds?

Background:

West Virginia purchased new voting systems for its counties with HAVA funds. Subsequently, West Virginia entered into “Monthly Repayment Loan Agreements” with its counties to recover the cost of the voting systems. West Virginia deposited the repayments into a revolving loan fund known as the “county assistance voting equipment fund.” The revolving loan fund was authorized by state law for the purpose of making non-interest bearing loans to counties for the purchase of only HAVA-compliant voting equipment and related services.

According to the West Virginia Code (§3-1-48), the special revenue revolving fund was established to “maximize the available funds [to purchase HAVA-compliant voting systems] by establishing a non-interest loan program to assist any county . . . in purchasing necessary voting equipment and services.” The Code provides that the fund:

shall consist of an initial transfer not to exceed eight million five hundred thousand dollars from the State Election Fund established under subsection (b) of this section pursuant to legislative appropriation; any future funds received from the federal government under the "Help America Vote Act of 2002", PL 107-252, 42 U.S.C. §15301, et seq., or subsequent acts providing funds to states to obtain, modify or improve voting equipment and obtain necessary related

services including voting systems, technology and methods for casting and counting votes; and funds appropriated by the legislature or transferred by any public agency as contemplated or permitted by applicable federal or state law; and any accrued interest or other returns on the moneys in the fund.

However, based on information provided by the State, West Virginia did not transfer HAVA funds into the loan fund. Instead, it purchased the voting systems with HAVA funds and then entered into “Monthly Repayment Loan Agreements” with its counties to recover the cost of the voting systems. The State subsequently deposited the repayments from the counties into the loan fund, which were then available for future loans to the counties for voting system purchases. The end result of these transactions is that the cost of equipment initially purchased with HAVA funds was ultimately paid for with county funds.

The “Monthly Repayment Loan Agreements” between the state and the counties includes the following provisions which protect the Federal investment in the loans:

- the WVSEC [West Virginia State Election Commission] shall retain a first lien on and a security interest in the amount of the Loan on the voting equipment, software and/or services . . .
- the WVSEC may exercise any right, power or remedy permitted to it by law, which includes but is not limited to the Statutory authority granted to the SOS [Secretary of State] to institute a civil action, mandamus or other judicial or administrative proceeding to compel the Commission's performance under the agreement.
- Counties shall be in compliance with and shall thereafter remain in compliance with all Federal and State laws” so long as any part of the loan is outstanding. Furthermore, as long as any part of the loan is outstanding, the county “shall maintain proper books of records and accounts in accordance with generally accepted accounting principles consistently applied, in which full, true and correct entries shall be made.

Based on information provided by the State in May 2008, the original loan totals for the counties was \$2,788,715. And, the State Election Commission had issued new loans of \$281,786 that were financed with County repayments.

In reviewing this matter, EAC has determined that a state may create a revolving fund and issue loans using HAVA funds. In that regard, Federal law specifies that Federal agencies must have specific statutory authority in order to create a revolving fund (31 U.S.C. §3302(b)). However, the Government Accountability Office (GAO) has determined that this requirement does not apply to state recipients of grant funds. Specifically, if the establishment of a revolving fund is not prohibited by authorizing statutes, regulations, or grant agreements, GAO has ruled that a recipient may establish a revolving fund consistent with the grant’s use requirements. (44 Comp. Gen. 87 (1964)). Consequently, as neither HAVA nor EAC guidance prohibits the use HAVA funds to

establish a revolving fund; West Virginia may use this mechanism consistent with uses of payments authorized by HAVA.

Answers to the specific questions are as follows:

Answers:

1. County payments to reimburse the State for the cost of voting systems purchased with HAVA funds should be treated as Federal funds. This determination is based on the fact that the mechanism used by West Virginia to finance the purchase of HAVA-compliant voting systems resulted in the temporary use (loan) of HAVA funds to financing the purchase of the voting systems. EAC research disclosed that other Federal agencies' grant programs that authorized the use grant funds to create revolving loan funds¹ reserved the loan repayments for program purposes consistent with the provisions of the Common Rule, the uniform administrative requirements for grants and cooperative agreements with the Federal government.

In that regard, the Common Rule includes in the definition of program income² both interest and principal repaid to a grantee for a loan made with grant funds. (41 U.S.C. §105-71.125(a)). Additionally, the Common Rule limits the treatment of program income to the three options listed below:

- As a deduction from a total allowable grant costs. (41 U.S.C. §105-71.125(g)(1)).
- To meet a state grantee's cost sharing or matching requirements under the grant. (41 U.S.C. §105-71.125(g)(3)).
- As an addition to the funds committed to the grant by the Federal government and used for the purposes and under the conditions of the grant. (41 U.S.C. §105-71.125(g)(2)).

EAC has authorized states to use the last option, commonly referred to as "addition" for disposition of program income (see EAC Advisory 07-002). EAC's conclusion on the disposition of program income is based on the fact that HAVA payments are made in advance and are available until expended and that HAVA requires matching funds to be appropriated in advance as a condition for receipt of HAVA requirements payments. As such, the practical option for the use of program income is to add it to the funds available for program purposes. Thus, all program income, including loan

¹ The U.S. Environmental Protection Agency grant program for brownfields clean up, for example, authorizes the use of grant funds to establish a revolving loan fund. According to the Program Manual, program income - including principal repayment, loan fees, and interest on outstanding loan principal - must be used to preserve the fund's principal for lending purposes or to cover eligible programmatic costs.

² The Common Rule defines program income as "gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period."

repayments and interest earned on loan repayments deposited in the loan fund³, must continue to be reserved for uses authorized by HAVA.

2. Equipment that the State purchased with HAVA funds is considered Federal equipment only until such time as counties repay the State for the cost of the equipment. However, for as long as the repayment is outstanding, the Federal government has a financial interest in the equipment equal to the proportion of the outstanding repayment financed with HAVA funds to the total cost of the equipment. For example, if the \$100,000 cost of the equipment was funded entirely with HAVA funds and the outstanding balance is \$20,000, then the Federal government has a 20 percent interest in the equipment. Stated differently, to the extent that the loan amount remains outstanding; the value of the equipment purchased with it must be viewed as program debt (potential income). The value of this debt must be retained by the state for use consistent with the conditions and purposes of HAVA requirements payments.

³ According to the West Virginia Code (§3-1-48), “The moneys of the fund [special revenue revolving fund] shall be invested pursuant to article six, chapter twelve of this code and in such a manner that sufficient moneys are available as needed for loans authorized under this section.”