U.S. Election Assistance Commission (EAC)

Comments on Inspector General 4-19-2010, Letter

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I was requested by MLKenefick, llc to provide comments on two issues raised by the EAC IG regarding the EAC Maintenance of Expenditure (MOE) proposed policy. My viewpoints for these two issues are as follows:

- Applicability of the MOE Requirement – do not agree with the IG's view
- Depreciation of Capital Assets is not Allowed by Law – agree with IG's view

The basis for my views is stated below. As a brief introduction, I retired from the Federal Government in 2005 after a career of more than 29 years in Federal financial management. Specifically, I was Chief Financial Officer for the Library of Congress for 15 years, and prior to working at the Library, I was Deputy Assistant Director for Financial Control and Management for OPM's benefit programs. Since retiring, I have performed independent consulting and training services, including appropriations law training.

Issue #1 Applicability of the MOE Requirement

Background: 42 U.S.C. 15404(a)(7) states:

> "**(7)** How the State, in using the requirements payment, will maintain the expenditures of the State for activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000."

Analysis: The EAC proposes to track MOE based upon "expenditures of the State," including any funds appropriated by the State to lower tier entities. The IG uses legislative history to apply the MOE requirement to both state and local government expenditures. However, the law is plain, and there is no basis to refer to legislative history. The Government Accountability Office (GAO) states the following in Appropriations Law, Volume 1, page 2-76:

> "The extent to which sources outside the statute itself, particularly legislative history, should be consulted to help shed light on the statutory scheme has been the subject of much controversy in recent decades. One school of thought, most closely identified with Supreme Court Justice Antonin Scalia, holds that resort to legislative history is *never* appropriate.

> This approach is sometimes viewed as a variant of the plain meaning rule. A more widely expressed statement of the plain meaning rule is that legislative history can be consulted but only if it has first been determined that the statutory language is "ambiguous"—that is, that there is no plain meaning."

The HAVA language is not "ambiguous" and using legislative history to rewrite the law or recognize the intentions of legislators not anchored in the law has been denied in GAO opinions.

As an illustration, Senator McCain put into the 2003 Defense Appropriations Act (Section 8147) the following provision:

> "None of the funds appropriated by this Act may be used for leasing of transport/VIP aircraft under any contract entered into under any procurement procedures other than pursuant to the Competition in Contracting Act (CICA)."

Senator McCain also gave a speech saying that the provision would require the use of competitive procedures, and the legislative history supports this interpretation.

However, a GAO decision dated 3/28/03, B-300222, states that the Department of Defense (DOD) did comply with Senator McCain's provision even though DOD awarded a sole source procurement to Boeing because the CICA has a loophole that allows going to a sole source when the agency decides that there is only one capable bidder. The "plain meaning" allowed a sole source and was not "ambiguous."

One way that a law may be considered "ambiguous" is if terms are used differently in the law. As an example of this "whole statute cannon", GAO states on page 2-89 of Appropriations Law, Volume 1:

> "When Congress uses the same term in more than one place in the same statute, it is presumed that Congress intends for the same meaning to apply, absent evidence to the contrary."

The word "State" is used many times in the HAVA statute and is defined in 42 USC 15541. When looking at the whole statute, in my view, the use of the word "State" in 42 USC 15404 (a)(7) does not include local governments. The IG uses another closely related statutory canon, no surplusage, that all of the words of a statute should be given effect, if possible. However, GAO states on page 2-88 of Appropriations Law, Volume 1:

> "Although frequently invoked, the no surplusage canon is less absolute than the whole statute cannon."

I believe it is difficult to see how the "no surplusage cannon" as used by the IG outweighs the "whole statute cannon" in the HAVA law.

Using a final illustration to show what would trigger the ambiguous criteria, GAO ruled 12/5/2000, B-285794, that an appropriations law provision was ambiguous when it required competition in the award of certain Housing and Urban Development (HUD) block grants because these HUD grants were allocated by a statutory formula. GAO cited a fundamental principle that:

> "statutory constructions that produce unreasonable or absurd results should be avoided when they are at variance with the purpose and policy of the legislation as a whole because laws are presumed to have been intended to produce reasonable consequences."

Therefore the question is: what is unreasonable or absurd? During my visit to the State of Wisconsin for technical grant assistance, we discussed MOE with the Director, Wisconsin Government Accountability Board (WGAB). The Director, WGAB, who is Wisconsin's Chief Election Official, stated that Title III HAVA funds were used to meet new requirements at the State level. For example, a statewide voter registration system (SVRS) was implemented. The WGAB made no general distributions to local governments, and funds were allocated to local election offices, up to $6,000, upon the approval of an application for accessibility funds. Local offices submitted invoices to seek reimbursement of approved application items. The Director, WBAB interprets the MOE base to apply to "State" HAVA activities, primarily the SVRS, which did not exist before at the state level. This interpretation is consistent with the proposed EAC MOE guidance and does not appear to be "unreasonable or absurd."

In my view, the IG did not present definitive information (e.g., audit findings) that would invoke this high bar of "unreasonable or absurd" consequences.

Viewpoint: Do not change MOE guidance.

Issue# 2 Depreciation of Capital Assets is not Allowed by Law

Background: The IG states that the law requires the grantee maintain the same level of expenditures as was made in the base year, not some portion of that expenditure. The proposed MOE guidance states: "when calculating MOE baselines capital expenditures may be expensed in a manner consistent with IRS depreciation tables, over the expected life of the equipment purchased." Allowing states to include depreciation rather than capital expenditures in the MOE baseline would, in effect, waive a portion of the requirement.

Analysis: In accordance with GAO's Glossary of Terms Used in the Federal Budget Process (issued pursuant to 31 USC 1112), the term expenditure is defined as:

“E**xpenditure -** The actual spending of money; an outlay.”

The plain meaning of the law does not differentiate between expenditures for capital items, and the EAC does not have authority to waive the MOE requirements.

Viewpoint: Change EAC MOE guidance to reflect the IG comment

Thank you for the opportunity to provide a statement to the Commission, and I am available to answer your questions.