

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: September 29, 1987
CASE NO. 82-CTA-343

U.S. DEPARTMENT OF LABOR

v.

NEW YORK CITY DEPARTMENT
OF EMPLOYMENT

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the Comprehensive Employment and Training Act, as amended by the Youth Employment and Demonstration Projects Act of 1977, Public Law No. 95-93, 91 Stat. 627, 29 U.S.C. §§801-993 (Supp. I 1977). The Grant Officer made a timely request that the Secretary assert jurisdiction after Administrative Law Judge (ALJ) Reno E. Bonfanti issued a Decision and Order holding that New York City was not liable for disallowed costs of **\$186,769.83** incurred by Ministerial Interfaith Association, Inc., in the operation of a Youth Community Conservation Improvement Project (YCCIP). I asserted jurisdiction on August 1, 1985, and the parties have submitted briefs in compliance with my briefing schedule of the same date.

BACKGROUND

The Comprehensive Employment and Training Act of 1973 (CETA), defined prime sponsors as states, local governments, and consortiums

of local governments. 1/ New York City (the City) was a **prime** sponsor at all relevant times in this case.

Prime sponsors with approved comprehensive employment and training plans received funds according to various formulae under Title I of CETA, "Comprehensive Manpower Services", to carry out a variety of job training, vocational education and related services programs. The Secretary of Labor (Secretary) had funds available under Title III, "Special Federal Responsibilities", for use at his discretion to carry out **all** the programs and services under other titles of CETA by making grants directly to institutions and organizations to meet special needs.

CETA was amended in 1977 by the Youth Employment and Demonstration Projects Act of 1977, Public Law No. 95-93, 91 Stat. 627. Among other things, that act added a new Part C to Title III of CETA, Subpart 2 of which was Youth Community Conservation and Improvement Projects (YCCIP).

Eligible applicants, which included prime sponsors, seeking funds under YCCIP would compile applications for specific projects (**e.g.**, weatherization of specific buildings) from project applicants submit the applications to the prime sponsor's planning council for comment, develop a list of approved applications and assign priorities to each. 29 U.S.C. § 893e. When entering into an agreement with

1/ CETA was repealed by § 181 of the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781 (1982), but the legislation contained a provision at 29 U.S.C. § 1591(e), which provided for the continuation of pending proceedings.

an eligible applicant for YCCIP programs, the Secretary could approve or disapprove any specific project application on the list. 29 U.S.C. § 893f.

In April 1978, officials of the New York City Department of Employment were invited to a meeting in Philadelphia. Hearing Transcript (T.) at 16. It is not clear from the record whether the meeting was called by the Department of Labor or by an intermediary organization known as the Corporation for Public Private Ventures. Representatives of a number of other prime sponsors also attended the meeting. They were all invited to submit proposals for funding of YCCIP programs as part of a national demonstration program known as Ventures in Community Improvement (VICI). T. at 18.

The New York representatives were told that two sites in New York City could receive funding, one in the South Bronx and one in Central Harlem. However, the City was told that the subcontractor for the Harlem site had already been selected. New York City had to accept Ministerial Interfaith Association, Inc. (MIA), as the Harlem subcontractor as a condition of receiving any YCCIP funds. T. at 21. With respect to the South Bronx site, New York City engaged in a deliberate selection process to choose the subcontractor. The City reviewed a list of **10-12** candidates to assess their prior performance with the Department of Employment and their fiscal and administrative records. T. at 19-20. If New York City had been given the discretion to choose a subcontractor for the Harlem site, it would not have chosen MIA. T. at 23.

From the beginning, New York City had problems dealing with MIA. MIA representatives were incapable of or unwilling to prepare the documents required for the subcontract, including the budget for the project. They did not provide documentation required before funds could actually be provided after the contract was signed. T. at 29-30. A representative of the Department of Labor Office of Youth Programs (OYP) in Washington met with City officials and provided a list of problems which would have to be resolved before the MIA **program, could** proceed. The OYP representative told the City unless these problems were resolved immediately, the MIA program was so far behind the other parts of the national demonstration program that she would recommend to Robert Taggart (who was director of OYP at the time) that funding for the MIA program be withdrawn. T. at 31, 38. When City officials tried to deal with representatives of MIA to resolve these problems, the MIA representatives objected, saying they would deal directly with the Department of Labor in Washington. T. at 32. Once the MIA project got under way, both the City and a representative of OYP conducted audits of its operations. T. at 42.

The basic grant and contract agreements between the Department of Labor, the City of New York and MIA were not introduced in the record, so the exact scope of authority and responsibility of the Department of Labor and the City with respect to the MIA project cannot be determined. Fredda Peritz, Deputy Assistant Commissioner of the New York City Department of Employment, who was the City Official responsible for oversight of the MIA project,

testified that she believed the City had the authority to cut off funds for the MIA project, but that the City did not do so because the Department of Labor was actively involved in the program... T. at 38, 49. Representatives of OYP kept Ms. Peritz informed of the findings of their audits. They told her these findings would be discussed with Mr. Taggart and the Department of Labor would contact the City. Ms. Peritz told them she would continue to monitor the MIA program, but would not take any action until she was informed of the results of **OYP's** findings. T. at **50**.

The Acting Regional Administrator of the Employment and Training Administration for Region II (which includes New York) testified that funds for the VICI program came from discretionary funds available from OYP. T. at 71. The Regional Office played no role in monitoring these projects: monitoring was the responsibility of project officers from OYP who worked out of the National office. T. at 72-74.

DISCUSSION

The Administrative Law Judge held that **"MIA's** participation in the grant program was primarily the responsibility of the federal DOL [Department of Labor], and New York City should not be held liable for disallowed costs." **ALJ's** Decision and Order (**D.** and **0.**) at 3. The Grant Officer argues that the record does not support the ALJ's finding that the Department of Labor deprived the City of its authority to control MIA. The Grant Officer also contends that the fact that the Department of Labor

selected MIA as a subgrantee does not relieve the City of **responsibility for** MIA's misexpenditure of funds. CETA imposed a number of requirements on prime sponsors, all of which must be complied with, the Grant Officer argues, when the prime sponsor agreed to receive CETA funds: the condition of accepting MIA as a subgrantee, he asserts, is no different from any other grant condition.

In most cases arising under CETA, it is well established that a prime sponsor is responsible **for** violations of CETA and the regulations by its contractors and subgrantees. Commonwealth of Kentucky Department of Human Resources v. Donovan, 704 **F.2d** 288, 293 (6th Cir. 1983); San Diego Regional Employment and Training Consortium v. Donovan, 704 **F.3d** 288, 293 (9th Cir. 1983); Milwaukee County v. Peters, 682 **F.2d** 609, 613 (7th Cir. 1982). But the particular facts of this case, when considered in light of the statutory scheme, as well as the principle enunciated in the above cited cases, lead to the conclusion that New York cannot be held liable for these disallowed costs.

The basic approach of CETA, as the court said in San Diego RETC, was "to decentralize the planning and administration of its employment programs, subject to federal supervision. ..." 713 **F.2d** 1441, 1444. Thus, "[t]he prime sponsorship program [was] developed in an effort to give as much local control over the particular programs" as was consistent with the purposes of the Act. Commonwealth of Kentucky, 704 **F.2d** 288, 293. Under the CETA regulations, prime sponsors are "responsible for the development,

approval and operation of all contracts and subgrants"

Id. (emphasis in original).

Here, in particular, under Title III, Part C, Subpart 2 of CETA (as amended by the Youth Employment and Demonstration Projects Act of 1977, Pub. L. No. 95-93, 91 Stat. 627) "eligible applicants" for YCCIP funds were required to "submit a proposed agreement to the Secretary, together with all project applications approved by the eligible applicant ... within the area served"

29 U.S.C. § 893e (Supp. I 1977). Specific procedures were provided by statute for reviewing and approving project applications. 29 **U.S.C. § 893(c)**.

None of these procedures was followed here with respect to selection of MIA. From the beginning, responsibility for selection of the project applicant for the YCCIP project in Harlem was never given to the City; indeed, MIA was selected by the Department of Labor over the objection of the City. Although there may have been some ambiguity after funds were made available to MIA as to who was responsible for supervising the MIA project, the record as a whole makes it clear that the MIA project was being supervised by the Department's national Office of Youth Programs, and that the City of New York had limited, if any, authority over it. See discussion at 5-6 above. Project officers in the Office of Youth Programs from the national OYP office in Washington, had continuous, direct involvement in oversight of the MIA program. Representatives of MIA themselves refused to deal with New York City and told New York they were dealing directly with the national office. The national office representatives told New York they

would **make** their recommendations to the Director of the Office of Youth Programs and would inform New York of the outcome. The only Department of Labor official who testified, the Acting **Regional Administrator** for Region II, stated that this was a national program managed by project officers from the national office. Responsibility for the program, he said, was in Washington.

Ordinarily, the prime sponsor must comply with the express terms of its agreement with the Department of Labor and is liable for the misconduct or negligence of **its** subgrantee. But under the facts of this case, where the subgrantee was selected, monitored and controlled by the national office of the Department of Labor, that is where responsibility for misspent funds should lie. "The CETA program is a two way street." Commonwealth of Kentucky Department of Human Resources v. Donovan, 704 **F.2d** at 294. Where authority for oversight and control is granted to the prime sponsor, the prime sponsor can be held responsible to the federal government for the action of those it supervises and controls. Milwaukee County v. Peters, 682 **F.2d** 609, 613 (7th Cir. 1982). Where, as here, that authority has not been extended, the prime sponsor should not be held accountable.

I do not think the government procurement cases cited by the grant officer are controlling here, in the context of this specific statutory scheme./ Moreover, on the facts of this case, the principles of oral discharge, variation and substitution

3/ The facts of those cases, cited in the Grant Officer's **Initial** Brief at pages 9 and 10 are only remotely analogous to the facts here.

of contracts may well be applicable. See 6A Corbin, Contracts §1293, p.197 (1962 ed.) Thus, it has been held by the Court of Claims that a contract term may be held inapplicable when "a party has administered an initially unambiguous contract in such a way as to give a reasonably intelligent and alert opposite party the impression a contract requirement has been suspended or waived." Gresham & Co., Inc. v. United States, 470 F.2d 542, 555 (Ct. Cl. 1972).

Accordingly, the decision of the ALJ is affirmed.

SO ORDERED.



Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: U.S. Department of Labor v. New York City
Department of Employment

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Document : Final Decision and Order

A copy of the above-referenced document was sent to the following persons on September 29, 1987.

A handwritten signature in cursive, appearing to read "Ann L. ...", is written over a horizontal line.

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