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Opinion No. 06-133

Matching Funds for Federal Grant

QUESTION

Fayette County has applied for several grants administered by the Tennessee Aeronautics Division to develop its airport. The county will purchase a tract of land from an adjacent property owner at a price of $120,000. The owner will then donate $120,000 to the county. The county will build T-hangars on the property. May Fayette County use cash received from an adjacent property owner from whom the county purchased a tract of land as a match to obtain a federal grant to build T-hangars on the property?

OPINION

This Office is unable to provide an authoritative opinion on federal law. Assuming the fair market value of the land is $120,000 or more, the $120,000 cash donation from the property owner appears to qualify as a federal match. This conclusion is based on our review of applicable federal statutes and regulations governing the block grant program and discussions with state officials. Any other arrangements with the property owner involving the project, such as a construction contract or lease, should be negotiated on an arms' length basis and be let in accordance with applicable statutes and ordinances. The documents evidencing these arrangements should include all the terms requested by federal officials supervising the grant. Of course, the county must comply with all other conditions governing the grant, including applicable federal regulations. Our advice is not binding on any federal officials who may review or audit the grant in the future.

ANALYSIS

This opinion concerns matching funds under a grant from the Tennessee Department of Transportation ("TDOT"). The Department has approved grants totaling $2,136,667 to the Fayette County Airport. The funds will be used to purchase land and fuel tanks, construct T-hangars, and expand the existing apron and taxiway connector. The funds come from state and federal sources, including the State Block Grant Program administered by TDOT's Aeronautics Division. This opinion concerns the federal grant. As proposed, the State will grant the county $120,000 to purchase land to build a 10-bay T-hangar. The county will then purchase the land from the owner, who owns most of the land surrounding the airport in addition to the property he will sell the county. The owner will immediately donate the $120,000 purchase price back to the county. This cash donation is to serve as the county's match to obtain a $667,000 grant from the federal block grant

program to build the T-hangar. Once the hangar is built, the county will advertise for bids for a lease of the entire structure. The lease will be for twenty years. The bid will include an annual land lease, with an escalation clause requiring recalculation every five years. The entire lease for the hangar will be payable at the start of the lease period, with land rent due annually. The county intends to use the initial cash payments under the lease as a match for other federal grants.

The issue is whether the $120,000 donated by the owner of the property purchased by the county meets the requirements for matching funds under the federal grant program that will finance construction of the hangars. TDOT is generally authorized to accept and administer federal grant funds for local airport improvements. Tenn. Code Ann. § 42-2-203(c); *see also* Tenn. Code Ann. §§ 42-2-223, 42-3-114 & 42-5-119 (TDOT as agent for municipalities receiving federal grant funds). The federal block grant program that will provide the grant is established under 49 U.S.C. § 47128. Under this statute, the United States Secretary of Transportation designates ten qualified states to administer airport grants. The statute provides:

> Applications and Selection. — A State wishing to participate in the program must submit an application to the Secretary. The Secretary shall select a State on the basis of its application only after —
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> (1) deciding the State has an organization capable of effectively administering a block grant made under this section;
> (2) deciding the State uses a satisfactory airport system planning process;
> (3) deciding the State uses a programming process acceptable to the Secretary;
> (4) finding that the State has agreed to comply with United States Government standard requirements for administering the block grant; and
> (5) finding that the State has agreed to provide the Secretary with program information the Secretary requires.

49 U.S.C. § 47128(b). Regulations governing states administering the block grant program appear at 14 C.F.R. §§ 156.1, *et seq.* These regulations require a state that wishes to administer the program to submit an application to the Federal Aviation Administration ("FAA"). The form includes a series of state assurances, including the State's agreement to comply with federal procedural and other standard requirements for administering the block grant. Grant recipients, including airport sponsors and planning agency sponsors, are required to comply with applicable assurances issued by the FAA. States administering the program must comply with the terms of a state block grant agreement issued by the Associate Administrator for Airports. 14 C.F.R. § 156.3. The State must also ensure that each person or entity to which it distributes block grant funds complies with the agreement. 14 C.F.R. § 156.6. Generally, these federal grants finance no more than ninety percent of a project. 49 U.S.C. § 47109(a)(2). The remaining ten percent of project costs must come from some other source.

The FAA is part of the United States Department of Transportation. That department has promulgated general regulations regarding grants at 49 C.F.R. §§ 18.01, *et seq.* 49 C.F.R. § 18.24(a) provides:

> (a) Basic rule: Costs and contributions acceptable. With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:
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> (1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by other cash donations from non-Federal third parties.
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> (2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

Generally, a cost sharing or matching requirement may not be met by costs borne by another federal grant. 49 C.F.R. § 18.24(b)(1). Federal regulations allow a grantee to use a non-federal grant as a match. Under policies adopted by the Tennessee Aeronautics Commission, however, a grant recipient may not use a state grant as a match for a federal grant. The county, therefore, may not use the state grant itself for the purchase of the land as its matching contribution for the federal loan. Similarly, if the fair market value of the land is less than the $120,000 purchase price (which derives from a state grant and which the landowner will immediately give back to the county), the county may be deemed to have used state grant funds as a federal match to the extent of the difference, in violation of the aforementioned Tennessee Aeronautics Commission policies.

The United States Department of Transportation regulation includes three other exceptions that may be relevant.

> (3) Cost or contributions counted towards other Federal cost-sharing requirements. Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.
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> (4) Costs financed by program income. Costs financed by program income, as defined in § 18.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 18.25(g).)
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> (5) Services or property financed by income earned by contractors. Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying

> a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

49 C.F.R. § 18.24(b)(3) — (5).

We assume the $120,000 donation and the lease payments will not be used as a match more than once for federal grants. The question then becomes whether the limitations on the use of program income are applicable to this arrangement. 49 C.F.R. § 18.25 addresses program income. The regulation provides:

> (a) General. Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, *from the use or rental of real or personal property acquired with grant funds,* from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans may with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.
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> (b) Definition of program income. Program income means 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. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

Generally, unless the grant agreement provides otherwise, program income is deducted from costs that may be paid by grant funds. 49 C.F.R. § 18.25(g). When authorized, program income may be added to the funds committed to the grant agreement by the federal agency and the grantee. The program income must be used for the purposes and under the conditions of the grant agreement. 49 C.F.R. § 18.25(g)(2). When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. 49 C.F.R. § 18.25(g)(3). Based on the facts presented, it appears that the lease payments may be "program income" subject to these limitations. Any grant agreement using these payments as a match, therefore, should expressly permit this use.

In sum, the $120,000 cash donation from the landowner appears to qualify as a federal match, assuming the fair market value of the land is $120,000 or more. Any other arrangements with the landowner involving the project, such as a construction contract or lease, should be negotiated on an arms' length basis. The lease should also contain all the terms requested by state and federal aeronautics officials. Of course, the county must comply with all other conditions governing the grant, including applicable federal regulations.

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