

March 1, 2018

Dispute Decision Official Decision—Appeal of Bay Journal Media

Summary

On September 20, 2017, the EPA Action Official (“AO”)¹ declined to provide \$325,000 in incremental funding to Bay Journal Media (“BJM”² or “recipient”). The AO determined that under terms of EPA Cooperative Agreement CB-96342701 (“Cooperative Agreement”) a change in EPA priorities allowed the Agency to decline to provide the incremental funding. On November 20, 2017, BJM appealed (“Appeal”) the AO’s September 20, 2017 determination. In my capacity as EPA’s Dispute Decision Official (“DDO”) under 2 CFR 1500.16(b) I was prepared to render a decision that the AO’s determination was proper.³ However, the Agency’s management has informed me of another change in priorities after consideration of the Fiscal Year 2019 President’s budget request. The Agency will provide BJM with the \$325,000 incremental funding at issue in this appeal. This renders the appeal moot.

Background

On June 18, 2015 EPA issued Request for Proposals Number EPA-R3-CBP-15-06, “Chesapeake Bay Program Office Fiscal Year 2015 Request for Proposals for *Bay Journal* Support” (RFP). Appeal Tab 1. The *Bay Journal* is a monthly publication that informs the public about issues and events involving the Chesapeake Bay. In the RFP, EPA’s Chesapeake Bay Program Office (“CBPO”) sought “. . . proposals from eligible applicants to provide the content for publication of the *Bay Journal* as well as the electronic news service and *Bay Journal* website to raise public awareness of issues surrounding the Chesapeake Bay.” RFP p. 1. The RFP stated:

This RFP will cover the project period up to and including six years from an expected start date of February 1, 2016. CBPO plans to award one grant to carry out all activities under this RFP. The total estimated funding for six years is approximately \$1,800,000 to \$2,100,000, with an estimated \$300,000 to \$350,000 available for the first year and each additional year. There is no guarantee of funding throughout this period or beyond.

RFP p. 2. (Emphasis added).

The RFP also stated that funding would be provided “depending on funding availability, satisfactory performance, and other applicable considerations.” RFP p. 7. (Emphasis added). Further, the RFP warned applicants that “[t]he expected project period for the grant is six years, with funding provided on an annual basis. No commitment of funding can be made beyond the first year.” RFP p. 8 (Emphasis added).

¹ The AO is Diana Esher, EPA Region 3’s Assistant Regional Administrator for Policy and Management.

² BJM submitted the proposal as Chesapeake Media Service, Inc. (CMS). CMS subsequently changed its name to Bay Journal Media. Throughout this Appeal I will refer to the recipient as “BJM” since Bay Journal Media is the name the recipient used in the Appeal documents.

³ On September 19, 2017 the Acting Regional Administrator for EPA Region 3 designated me as DDO pursuant to 2 CFR 1500.13(e)(2).

On January 20, 2016, EPA awarded BJM \$350,000 of initial funding for the Cooperative Agreement. Appeal Tab 2. Administrative Condition 5, Incremental Funding on Competitive Awards, for the Cooperative Agreement (“the Incremental Funding Condition”) stated:

EPA is partially funding this budget period and will consider funding the balance of the budget request contingent upon satisfactory progress, as certified by the EPA Project Officer, the availability of funds, and EPA priorities. It is understood that the scope of work will be renegotiated to reflect the amount awarded, if additional funds are not available.

(Emphasis added).

The Notice of Award advised BJM that it could either accept the terms of the Cooperative Agreement by drawing down funds within 21 days of the January 27, 2016 mailing date or file a notice of disagreement with the award terms within this same period. On February 19, 2016 BJM accepted EPA’s award of the Cooperative Agreement by drawing down \$12,468.76 in EPA funds.⁴ BJM did not object to the Incremental Funding Condition.

In July 2017, EPA advised BJM that EPA was considering providing the recipient with \$325,000 in additional incremental funding based on the recipient’s expectation for funding for the annual funding period beginning in February 2018. However, on August 23, 2017, the AO advised BJM that “[D]ue to a shift in priorities, EPA has decided not to provide funds for [the *Bay Journal*] project.” Appeal Tab 7. In a subsequent communication on September 20, 2017, the AO explained that EPA’s decision not to provide incremental funding was based on a change in priorities as authorized by the Incremental Funding Condition of the Cooperative Agreement. Appeal Tab 8.

Discussion

EPA’s authorization to operate the Chesapeake Bay Program is contained in Section 117 of the Clean Water Act, 33 U.S.C. 1267. The statute provides EPA with various authorities to carry out this responsibility but does not specify that EPA must fund the *Bay Journal*. Rather, under 33 U.S.C. 1267(d)(1), EPA “may provide . . . assistance grants, to nonprofit organizations . . . subject to such terms and conditions as [EPA] considers appropriate”. (Emphasis added). The statute does not require that EPA award an assistance agreement to any particular organization and expressly authorizes EPA to determine the conditions under which agreements will be made. EPA, therefore, has the discretion to both establish the terms of the Incremental Funding Condition and invoke that provision to decline to award additional funding to BJM.

Conditions in an assistance agreement are contractual in nature and binding once the recipient accepts the Federal funds. Government Accountability Office, *Principles of Federal Appropriations Law*, p. 10-6 (2006). The Supreme Court has a long history of upholding the Federal government’s power to attach terms and conditions to the receipt of grant funds. See, e.g., Oklahoma v. U.S. Civil Service Commission, 330 U.S. 127 (1947). In considering whether

⁴ The record in this matter includes financial information for the Cooperative Agreement as of November 27, 2017 from EPA’s “Compass Data Warehouse”. A copy of this information is attached to this DDO Decision.

to uphold grant terms and conditions, Courts often look to “whether the grantee was sufficiently aware of the condition to constitute acceptance of it.” Government Accountability Office, *Principles of Federal Appropriations Law*, p. 10-7 (2006) citing Jackson v. Birmingham Board of Education, 125 S. Ct. 1497 (2005); Davis v. Monroe County Board of Education, 526 U.S. 629 (1999); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981).

The RFP and the Cooperative Agreement placed BJM on notice that additional funding beyond the \$350,000 EPA initially awarded under the Cooperative Agreement was not guaranteed. The RFP, like the Incremental Funding Condition, indicated that EPA may discontinue funding after the initial year. BJM was on notice that satisfactory performance and “other applicable considerations” would be taken into account when EPA decided whether to provide incremental funding. The Incremental Funding Condition specifies that agency priorities are such an applicable consideration.

By accepting the terms of the Cooperative Agreement, BJM consented to termination of the Cooperative Agreement if EPA invoked the Incremental Funding Condition. Moreover, the Incremental Funding Condition clearly establishes that agency priorities are a factor EPA may consider in deciding whether to provide additional funds to BJM. It is not unusual for Agency funding priorities to shift, particularly as a consequence of a change in administrations. The Administration decided that funding the Bay Journal was no longer a priority for EPA and their decision not to provide additional funding is expressly authorized by the Incremental Funding Condition.

Based on the Appeal record before me, the EPA’s decision was consistent with the Clean Water Act and the Incremental Funding Condition contained in the Cooperative Agreement. After evaluating the matter, I was prepared to uphold the AO’s determination.

However, the Agency’s management has informed me of a second change in priorities. Consistent with Administrator Pruitt’s testimony before the Senate Environment and Public Works Committee, the Agency has reconsidered the AO determination. The Agency decision to decline to provide \$325,000 in incremental funding to BJM was consistent with the administration priorities as outlined in the FY 2018 President’s budget, which proposed eliminating funding for specific regional efforts such as the Chesapeake Bay. Notably, the FY 2019 President’s budget message indicates that the administration has reprioritized funding for America’s significant watersheds, including the Chesapeake Bay. Among other priorities, the FY 2019 Budget proposes funding for activities related to promoting the health of the Chesapeake Bay, including coordination and collaboration among numerous States, Tribes, and local governments. Consequently, the Agency will provide BJM with the \$325,000 increment of funding at issue in this appeal. The decision to provide BJM the \$325,000 of incremental funding renders this appeal moot.

Conclusion

As provided at 2 CFR 1500.16(b), this DDO Decision constitutes final EPA action on the agency’s decision not to provide \$325,000 of incremental funding to BJM unless the recipient submits a request for review under 2 CFR 1500.17. Instructions for requesting a review are contained in the cover letter for this DDO Decision.

With kind regards,

A handwritten signature in blue ink, appearing to read "Kerry K. Neal", with a large, stylized flourish at the end.

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