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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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| **ASSISTANCE DISPUTE OF**<br><br>**LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, KENTUCKY**<br><br>**DOCKET NO. 04-93-AD01** | **DECISION of the ASSISTANT ADMINISTRATOR** |

## DIGEST NOTES

GRL-960-740-000 REGULATIONS

Each award of grant funds or other substantive government action is governed by the regulations which were in effect on the date of that award or action.

GRL-040-000-000 ALLOWABILITY OF COSTS

A State may not restrict the allowability of costs which the applicable regulations define as allowable.

GRL-120-600-300 ERRORS

When additional work is needed because of omissions from a project's plans and specifications, and the omissions resulted from the requirements of EPA or a delegated State, the allowable cost of the additional work is not limited to the cost which would have been incurred if the additional work had been included in the plans and specifications on which bids were based.

GRL-040-900-000 SCOPE OF PROJECT

Work which is not described in the approved plans and specifications may be within the scope of the project if the work is necessary to complete the project described in those plans and specifications.

GRL-960-690-000 REBUILDING AND OTHER DUPLICATE COSTS

Work which consists solely of additions to the existing construction, involving no repairs to or rework of the existing construction, does not constitute rebuilding.

GRL-960-520-000 INNOVATIVE AND ALTERNATIVE TECHNOLOGY

When process units have not received designation as an innovative/alternative technology, the correction of deficiencies in those units cannot be funded under a modification/replacement grant.

GRL-120-275-000 DEOBLIGATION OF FUNDS

Funds which represent the Federal share of allowable costs expected to be incurred within the scope of the grant may not be deobligated.

## PETITION FOR REVIEW

By letter dated October 20, 1993, the Lexington-Fayette Urban County Government, Kentucky (the County) requested that I review a decision by Patrick M. Tobin, then Acting Regional Administrator of Region IV. Mr. Tobin's decision, dated September 27, 1993, denied the County's request for EPA funding of modifications to the existing wastewater treatment facilities. My staff met with representatives of the County on September 29, 1994, at which time the County presented further information in support of its petition. The County submitted additional supporting documentation by letters dated October 18 and November 9, 1994.

## BACKGROUND

On September 28, 1984, Region IV awarded a $3,750,000 Step 3 grant (C-210333-04) to the County for the upgrade and expansion of the Town Branch Wastewater Treatment Plant. This grant award represented only the initial award of funds, since the funding of the treatment works was segmented *pursuant to 40* CFR 35.2108.[1] Grant increases to fund subsequent segments of the treatment works were awarded on January 27 and March 10, 1986; March 5 and December 23, 1987; and February 16, March 11, and September 22, 1988. A grant decrease of $1,034,678 was processed by Region IV on November 20, 1992, to deobligate

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[1] The substantive regulatory provisions which apply to each grant award are those in effect on the date of grant award. Therefore, unless otherwise noted, regulatory citations are to the construction grant regulations published on February 17,1984; the general grant regulations published on September 30, 1983; the State delegation regulations published on August 19, 1983; and the procurement regulations published on March 28, 1983.

Federal funds in excess of the Federal share of the allowable costs which had been incurred by the County up to that time.

On December 12, 1984, the Kentucky Department for Environmental Protection (the State) issued Water Policy Memorandum 84-04, which described the State's Value Improvement Program (VIP). All grantees were notified of the VIP and asked to implement it voluntarily, prior to its adoption by regulation. The VIP was subsequently adopted by State regulation. 401 KAR 5:200, Section 4 (March 11, 1985). One provision of the VIP states that "Plain 12-inch painted concrete block single wall (i.e., no cavity) construction with loose fill type insulation shall be eligible. Additional cost attributable to other types of wall construction will not be eligible." In compliance with this provision, the County designed eleven process buildings with single-wythe walls.[2]

High moisture conditions within these process buildings caused the single-wythe walls to absorb relatively high quantities of water, leaving the walls continually saturated. The moisture in the walls caused the paint to delaminate and the concrete block and mortar to deteriorate as a result of numerous freeze/thaw cycles. To correct this condition, the County requested State approval for EPA funding (from grant funds previously awarded to the County for the completion of the project) of the addition of an outer facing to the single-wythe walls on the eleven process buildings. The County contended that this outer facing would create a chimney effect, allowing moisture from the walls to escape and eliminating the existing moisture problems. The State denied this request on September 30, 1991, citing the VIP provisions regarding double-wythe walls.

The County subsequently requested review of the State's decision. On December 2, 1992, a final determination letter (FDL) was issued by Region IV pursuant to 40 CFR 35.3030, since the State's review was not determined to be comparable to an EPA dispute decision official's review. The FDL upheld the State's decision to deny the County's request for EPA funding of the additional outer facing. The County subsequently requested review of the FDL by the Regional Administrator. Region IV held an informal conference with the County's representatives on August 10, 1993. The Regional Administrator upheld the FDL in a decision dated September 27, 1993.

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[2] These buildings were the return activated sludge/waste activated sludge pumping station, non-potable water pumping station, scum detention, screw pump, flammable storage, primary sludge pumping station, solids processing, headworks, chlorination/dechlorination, engine blower, and gravity thickener buildings.

## DISCUSSION

### 1. Applicable Regulations

In its petition, the County claimed that the VIP did not apply to this project, since the VIP was adopted after the date of the initial grant award. We disagree.

None of the eleven buildings which are at issue in this dispute were constructed under the initial grant award. The return activated sludge/waste activated sludge pumping station and the non-potable water pumping station were constructed under Amendment 1; the scum detention, screw pump, flammable storage, and primary sludge pumping station were constructed under Amendment 3; and the solids processing, headworks, chlorination/dechlorination, engine blower, and gravity thickener were constructed under Amendment 6.

The award of grant funds or other substantive government action is governed by the regulations which were in effect on the date of that award or action. Bennett v. New Jersey, 470 U.S. 632, 638 (1985). The VIP was adopted by State regulation on March 11, 1985, and therefore was in effect when Amendment 1 was awarded on January 27, 1986; when Amendment 3 was awarded on March 5, 1987; and when Amendment 6 was awarded on March 11, 1988.[3] Accordingly, these awards were subject to the VIP. However, as discussed below, the provisions of the VIP which deny the allowability of the cost of double-wythe walls are inconsistent with our determination that this cost is allowable.

### 2. Allowable Costs

The County asserted that costs incurred in the construction of the double-wythe walls would be reasonable, necessary for completion of the project, consistent with the Federal cost principles, and within the scope of the project, and thus should be allowable under the grant. The County also asserted that the Region had incorrectly concluded that the County's use of a particular paint and concrete block had a significant impact on its maintenance costs. We agree.

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[3] The VIP was also in effect when the State priority system certification was made for these three amendments on December 12, 1985, March 3, 1987, and March 8, 1988, respectively.

While the County's use of a particular paint and concrete block may have aggravated the potential moisture problems and accelerated the deterioration process, moisture problems and the related deterioration process would have resulted from the use of single-wythe walls, regardless of the type of paint and concrete block used in construction.

Moisture problems result when condensation occurs and the water is not removed from the walls. "Condensation will occur if the air/vapor mixture is cooled to its dew-point... The relative amounts of water deposited in a wall cannot be calculated with certainty... Walls and roofs should be designed so that any water that enters can be removed... by ventilation or drainage." Fundamentals, American Society of Heating, Refrigeration, and Air-Conditioning Engineers (Atlanta, 1993) at 21.4. "To reduce this problem, the structural frame should be inside and separate from the exterior wall." Fundamentals, supra, at 21.8. Exterior cladding and an interior wythe of masonry would provide this separation. Ibid. This information was available in reference documents published prior to the implementation of the State's VIP. See "Moisture in Building Construction" in Fundamentals, American Society of Heating, Refrigeration, and Air-Conditioning Engineers (New York, 1981).

The technical references cited above clearly indicate the need for double-wythe walls in buildings subject to high moisture conditions. such as those presented here. Furthermore, according to the County, the use of double-wythe walls has been the standard for wastewater treatment plant construction throughout the Southeastern United States. The county also asserted that the use of double-wythe walls is more cost-effective then the use of buildings with single-wythe painted concrete block walls that require frequent maintenance.

Allowable project costs are those costs that are: eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles; and approved by EPA in the assistance agreement. 40 CFR 30.200. While substantial discretion is given to the States to determine how to spend their construction grant allotments, EPA retains overall responsibility for the program and retains the authority to make final determinations on the allowabilty of grant project costs. Town of Cohasset, Massachusetts, 01-84-AD06 (June 18, 1985). In the situation presented here, double-wythe walls, rather than single-wythe walls, should have been constructed. Construction of double-wythe walls is necessary to complete the project, and should have been included in the original building design.

The cost of additional work is allowable if the additional work is necessary due to an omission from the design drawings included in the original contract documents, since that cost would have been included in the contractor's bid based on defect-free drawings. 40 CFR Part 35, Subpart I, Appendix A, paragraph A.1.g(2)(i); Handbook of Procedures, Construction Grants Program for Municipal Wastewater Treatment Works, October 1, 1984, at 931-933. Since the cost of the double-wythe walls

would have been allowable under EPA regulations if they had been included in the original design, the cost of adding facing to create double-wythe walls would be allowable under paragraph A.1.g(2)(i).

Paragraph A.1.g(2)(i) defines the allowability of change order costs resulting from "defects in the plans... and specifications," and specifies that allowable costs for such change orders are limited to the costs that "would have been incurred if the subagreement documents on which the bids were based had been free of...defects." This restriction is based on the regulatory requirement that allowable costs include only costs that were "not caused by the grantee's mismanagement," and "not caused by the grantee's vicarious liability for the improper actions of others." 40 CFR Part 35, Subpart I, Appendix A, paragraph A.1.g(1)(ii) and (iii). In the case of defects which resulted from the requirements of EPA or a delegated State, the costs would not have been caused by grantee mismanagement or the grantee's vicarious liability. In this case, the defects resulted from the State's requirements. Therefore, the allowable cost of the addition of facing to the existing single-wythe walls is not to be limited to the cost which would have been incurred if double-wythe walls had been included in the plans and specifications on which bids were based.

Since all engineering and construction contracts for this project have been completed, the additional work must be procured through new procurement actions, rather than by change order. Since this Decision and Order provides for the restoration of previously-awarded grant funds, the new procurement actions must comply with the EPA procurement requirements which were in effect on the date the funds were originally awarded.[4] Bennett v. New Jersey, supra.

3. Scope of Project

In its petition, the County contended that the construction of double-wythe walls for the eleven buildings would be within the scope of the existing grant, since the scope of the grant was not changed by the implementation of the VIP. We agree.

The scope of a project is defined in general terms by the project description in the grant agreement, and in more specific terms by the plans and specifications approved for the project. EPA has consistently disallowed costs incurred by a grantee for costs outside the scope of the project. Fort Pierce Utilities Authority,

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[4] If the County chooses to use its own employees to perform any of the additional work, it must follow the "force account" requirements which were in effect on the date that the funds were originally awarded. See Handbook of Procedures, supra, at 638-639.

Florida, 04-90-AD08 (August 18, 1992; Assistant Administrator decision issued August 3, 1994).

However, work which is not described in the approved plans and specifications may be within the scope of the project if the work is necessary to complete the project described in those plans and specifications. This commonly occurs in the case of differing site conditions, where additional work is needed for the project to be completed and to operate as intended throughout its useful life. 40 CFR 33.1030, Clause 4. Similarly, in the case of the eleven buildings, double-wythe walls are needed to ensure that these buildings function as intended for the remainder of their useful lives. Accordingly, the double-wythe walls are within the scope of the project.

4. Repairs and Rework

The County also contended that it was requesting funding only for the completion of the double-wythe walls, and not for any repairs or rework, since the failing paint on the existing walls was not funded under the EPA grant, and the concrete block in the existing walls was not defective. We agree.

The cost of repairs or rework is not allowable. 40 CFR Part 35, Subpart I, Appendix A, paragraph A.1.g(2)(i). In this case, however, the County has proposed adding facing to the existing walls to create double-wythe walls, thus avoiding any repairs to or rework of the existing walls. Accordingly, the proposed work does not constitute rebuilding.

5. Innovative/Alternative Technology

The Region correctly determined that the single-wythe walls *did not constitute* an innovative/alternative (I/A) technology, because the County had not requested such a designation; the project did not receive additional grant funds for use of an I/A technology; and the single-wythe walls do not qualify as an I/A technology under the criteria set forth at 40 CFR 35.2032. Accordingly, the addition of panels to create double-wythe walls cannot be funded under a modification/replacement grant.

6. Deobligation of Funds

At the time of the deobligation of funds on November 20, 1992, the County had concluded that it would be necessary to add an outer facing to the single-wythe walls, in order to properly complete the construction of the eleven process buildings. As indicated above, we have determined that the cost of the double-wythe walls is allowable, and is within the scope of the project.

A State has no authority to limit the costs expected to be incurred by a grantee within the approved project scope and budget. Once a grant has been awarded, the grantee is to be paid the Federal share of allowable costs which are necessary for the completion of the project and are incurred within the scope of the grant, up to the amount approved in the grant agreement. 40 CFR 30.200 and 30.400(a). The Clean Water Act and its implementing regulations give no authority to the State to restrict the allowability of any costs which the regulations define as allowable. Camden County Municipal Utilities Authority, New Jersey, 02-87-AD09, and Cape May County Municipal Utilities Authority, New Jersey, 02-87-AD07 and 02-88-AD15 (March 23, 1988, and January 11, 1989; combined Assistant Administrator decision issued May 29, 1992). Accordingly, grant funds which represent the Federal share of allowable costs expected to be incurred within the scope of the project should not have been deobligated.

## DECISION AND ORDER

I have reviewed the Regional Administrator's decision, and make the following determination:

The decision of the Region IV Regional Administrator is reversed, and the Region is to restore to the County's grant the Federal share of the allowable costs which are necessary to complete the project by adding an outer facing to the single-wythe walls of the eleven process buildings.

3-30-95
Date

Bob Perciasepe
Robert Perciasepe
Assistant Administrator