LEGAL OPINIONS

OF THE

OFFICE OF GENERAL COUNSEL

OF THE

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
UNITED STATES DEPARTMENT OF JUSTICE

JANUARY 1 TO JUNE 30, 1974

WASHINGTON : 1974

Law Enforcement Assistance Administration - Legal Opinions of the Office of General Counsel, January 1 - June 30, 1974

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NOTE TO READER

Each year the Office of General Counsel issues hundreds of opinions. Only those opinions of general interest and applicability are printed in this volume. These opinions are printed for the benefit of the public and the criminal justice community. The printing of these opinions conforms not only with the letter of the Freedom of Information Act, which requires that in certain instances opinions affecting governmental agency actions be made available to the public, but also with the spirit of that law which calls for a more open government and greater access of the public to information affecting actions of Government agencies.

A Legal Opinion of the Office of General Counsel is generated by a request from within the Law Enforcement Assistance Administration (LEAA) central office, an LEAA Regional Office, a State Criminal Justice Planning Agency, or some other appropriate source. No Legal Opinions are generated by the Office of General Counsel itself, acting on its own initiative. Each of these Legal Opinions, therefore, responds to a request from a particular party and is based upon a particular and unique set of facts.

The principles and conclusions enunciated in these Legal Opinions, unless otherwise stated, are based on legislation in effect at the time that the Legal Opinion was released. All Legal Opinions issued after August 6, 1973, are based on the Crime Control Act of 1973 (Public Law 93-83). The reader is advised to cross-check the date of a particular Legal Opinion with the language of the legislation that was effective on that date.

The Legal Opinions contained in this volume have been edited for format, for syntax, and for clarity, but otherwise appear in all respects as they did when promulgated by the Office of General Counsel.

Any person intending to rely in any way on a position adopted or an interpretation expressed in these Legal Opinions is advised to take into consideration the conditions and qualifications presented in this Note to Reader. If any such person has a question about a particular Legal Opinion or any other point, the person should communicate with the nearest LEAA Regional Office or with the Office of General Counsel, LEAA, Room 1268, 633 Indiana Avenue, N.W., Washington, D.C. 20530.

Legal Opinions in This Publication

Legislation Establishing LEAA Cited in This Volume

Note on Sectional Changes

1. The Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) was the original legislation that established LEAA.
2. The 1970 amendments to that act were contained in the Omnibus Crime Control Act of 1970 (Public Law 91-644). The amendments redesignated Parts E and F of the 1968 act as Parts F and G and added a new Part E, entitled "Grants for Correctional Institutions and Facilities."
3. The 1973 amendments to the legislation were contained in the Crime Control Act of 1973 (Public Law 93-83). Those amendments redesignated Section 408 as Section 407 and incorporated the former Section 407 into Section 402(b)(6).

Crime Control Act of 1973

Acts of Congress Cited in This Volume

United States Code Cited in This Volume

Office of Management and Budget Circulars Cited in This Volume

Code of Federal Regulations Cited in This Volume

Decisions of the Comptroller General of the United States Cited in This Volume

Legal Opinion No. 74-50—The Relationship Between Preapplication Conferences and the Receipt of an Application by an SPA - Effect on the 90 Day Period for Approval or Disapproval of Applications—January 8, 1974

TO: LEAA Regional Administrator
Region V - Chicago

This is written in response to a letter of December 11, 1973, from William F. Lacy, executive director of the Chicago-Cook County Criminal Justice Commission, in which he requested clarification of Section 303(a)(15) of the Crime Control Act of 1973 (Public Law 93-83). This section of the act provides that grant applications by units of local government must be approved or disapproved "no later than ninety days after receipt by the State planning agency."

The Illinois Law Enforcement Commission, which is the State Criminal Justice Planning Agency (SPA) for that State, has proposed procedures for submission of applications that involve participation of the SPA staff in preapplication conferences and has assigned a member of its staff to the Chicago-Cook County Criminal Justice Commission (regional planning unit or RPU).

The issue requiring clarification is whether the involvement of an SPA staff member in the RPU preapplication procedures constitutes constructive receipt of an application by the SPA and begins the 90 day period during which an application must be approved or disapproved. The answer to this depends on both the authority of the SPA staff member and the nature of the procedures.

Preapplication Procedures

Guidance from SPA's to units of local government is not only permitted but encouraged by the act. Section 303(a)(15)(C) says that "the reasons for disapproval of such application or any part thereof, in order to be effective for the purposes of this section, shall contain a detailed explanation of the reasons for which such application or any part thereof was disapproved, *or an explanation of what supporting material is necessary for the State planning agency to evaluate such application.*" [Emphasis added.]

The Illinois SPA requires discussion of the project with an on-the-spot State representative whose presence would appear to speed up rather than impede the processing of applications. The Illinois SPA insists that every application certify that a "work force analysis" is completed and that there has been compliance with the Illinois SPA's Equal Employment Opportunity Guidelines. Neither of these requirements would appear to delay processing of applications but rather appear to be designed to let the RPU know in advance what supporting documentation must be available before an application is submitted. Neither of these requirements on its face is contrary to the act.

Authority of the SPA Staff Member

If the SPA staff representative at the RPU has the power to approve or to disapprove an application or to keep an application from being submitted to the SPA, then submission to him would constitute submission of an application to the SPA.

However, if—and this seems to be the case in the Illinois SPA procedures—only a discussion with a representative is required and the SPA staff member can neither approve nor disapprove grant applications, then no submission of an application has taken place simply because a project has been discussed.

Conclusion

Involvement of an SPA in preapplication procedures in an advisory capacity without the power to approve, disapprove, or forestall submission does not constitute constructive receipt of a grant application by the SPA. Therefore, it does not begin the 90 day period in which an application must be approved or disapproved under the provisions of Section 303(a)(15) of the act.

Legal Opinion No. 74-51—Use of LEAA Funds for Breathalyzer Training—January 2, 1974

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to the request of the West Virginia State Criminal Justice Planning Agency (SPA) for an opinion as to the allowability of LEAA funding for "breathalyzer" training for local police. Breathalyzers are instruments that can be used to measure the alcoholic intake of an individual. If funded by LEAA, they would be used by West Virginia police to determine if motor vehicle operators are driving their vehicles while under the influence of alcohol in violation of State law.

Prior interpretations of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) have consistently rejected the funding of traffic-related projects including equipment purchases for traffic enforcement activity. The import of the funding provisions of Section 301(b)(1) of the act goes to the strengthening of law enforcement through "methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places." The entire tenor of the act and its legislative history make it clear that LEAA funds should not be used for traffic matters.[1] This is true even though they are enforced or adjudicated

[1]The general rule followed by LEAA is that agencies that are not primarily engaged in the general enforcement of criminal law but have as a primary purpose and function the implementation and enforcement of specialized areas of law, such as traffic laws, are not law enforcement and criminal justice agencies for general funding eligibility purposes. Legal Opinions No. 74-46 (Nov. 28, 1973), No. 74-56 (Feb. 1, 1974), and No. 74-57 (Feb. 6, 1974).

by the same law enforcement and criminal justice agencies that have jurisdiction over the type of crime to which the act is directed.

Because the breathalyzer functions primarily as a technique for gathering evidence of the commission of a traffic offense, it falls within the category of traffic enforcement and cannot be funded.

The breathalyzer has some relation to alcoholism and some types of alcoholism programs are fundable. Alcoholism treatment programs are provided for in Part E, Section 453(9) of the act. This provision, however, relates only to treatment of persons who are within the corrections system. In an earlier opinion (Legal Opinion No. 74-41, dated November 13, 1973) it was also held that Part C funds could be used for alcohol abuse programs designed to transfer such activities from the criminal justice system. Breathalyzer testing of traffic offenders is not related to treatment in the corrections system or transfer of alcohol abuse activities from the criminal justice system, but only to traffic enforcement.

Legal Opinion No. 74-52—(Superseded by administrative action.)

Legal Opinion No. 74-53—Request for an Opinion on the Meaning of Section 403 of the Crime Control Act of 1973—January 17, 1974

TO: LEAA Regional Administrator
Region II - New York

This is in response to a request for a legal interpretation of the meaning and application of Section 403 of the Crime Control Act of 1973 (Public Law 93-83), which provides as follows:

> A grant authorized under this part may be up to 100 per centum of the total cost of each project for which such grant is made. The Administration or the Institute shall require, whenever feasible, as a condition of approval of a grant under this part, that the recipient contribute money, facilities, or services to carry out the purposes for which the grant is sought.

There is no legislative history that interprets the meaning of Section 403 and establishes detailed standards for determining when contributions should be required. However, it is clear from the language of Section 403 that the "whenever feasible" contribution requirement for funding is left to the discretion of LEAA. There is no specific dollar amount or percentage of the grant award or contribution of facilities that could be deemed an acceptable contribution in every grant. Each grant application must be assessed on its own merits.

It is an axiom of administrative law that discretionary agency decisions must be made on a reasoned basis and may not be arbitrary and capricious. Accordingly, a judgment should be made as to the ability of a grantee to make

a cash or service contribution to a grant. This can be weighed against other programs or projects vying for grant funds. The standard to be applied in making this judgment is one of "feasibility" as Section 403 specifies that the Administration or the Institute shall require contributions "whenever feasible."

In order to insure compliance with Section 403 of the act, it will be sufficient to show that a reasoned assessment was made to determine when a grantee could or could not contribute to the project prior to award, and therefore, there was not an automatic 100 percent grant of funds to the grantee. This assessment should be made part of the grant file.

Legal Opinion No. 74-54—"Goals and Timetables" Relationship to Section 518(b)—January 21, 1974

TO: Deputy Administrator for Administration, LEAA

This is in response to your request for an opinion on the legality of a proposal by the Office of Civil Rights Compliance to impose affirmative action employment goals and timetables on recipients of LEAA funds. You ask if the imposition of goals and timetables is inconsistent with Section 518(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), which provides as follows:

> (b) Notwithstanding any other provision of law nothing contained in this title shall be construed to authorize the Administration (1) to require, or condition the availability or amount of a grant upon, the adoption by an applicant or grantee under this title of a percentage ratio, quota system, or other program to achieve racial balance or to eliminate racial imbalance in any law enforcement agency, or (2) to deny or discontinue a grant because of the refusal of an applicant or grantee under this title to adopt such a ratio, system, or other program.

Section 518(b) of the act establishes a prohibition on racial quotas or other programs designed to achieve racial balance. The purpose of goals and timetables is to assure equal employment opportunities and not to achieve racial balance. This distinction is well established and is reflected in LEAA's equal employment opportunity regulations, which expressly authorize LEAA to require a recipient agency found to be engaging in discriminatory employment practices "to cease such discriminatory practices and to take such action as may be appropriate to eliminate present discrimination, to correct the effects of past discrimination, and to prevent such discrimination in the future." (28 C.F.R. §42.206(b).)

A memorandum from the Office of Legal Counsel of the U.S. Department of Justice, in commenting on an LEAA guideline to establish affirmative action goals where there was a sufficient disparity between the minority composition of LEAA State criminal justice planning agency supervisory boards and the minority population of the State, stated the following with regard to Section 518(b):

> Section 518(b) of the Safe Streets Act (42 U.S.C. 3766) prohibits LEAA from conditioning grants upon adoption of "a percentage ratio, quota system or other

program or achieve racial balance." Although the question may be close, we do not read the "significant disparity" feature of the proposed guideline as violative of this provision. Rather, the guideline seems to be essentially similar to the "Philadelphia Plan" program. Like a Philadelphia Plan, the proposed guideline would require law enforcement agencies to work toward specific percentages of minority employment goals. Presumably, however, the failure to achieve such goals would not automatically result in grant terminations. Instead, the grantee would have an opportunity to explain "significant disparities" to LEAA's satisfaction. Attorney General Mitchell ruled in 1969 that an essentially similar scheme embodied in the Philadelphia Plan did not violate Title VII. 42 Op. A.G. No. 37. Title VII contains a prohibition of quota requirements somewhat similar to Section 518(b) of the Safe Streets Act. See 42 U.S.C. 2000e-2(j).

The imposition of affirmative goals and timetables is not prohibited by Section 518(b), is consistent with Presidential policy,[1] and may in some instances be required under the provision of 518(b) of the act that requires LEAA to assure that no one "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" under any LEAA-funded program "on the ground of race, color, national origin or sex."

Legal Opinion No. 74-55—Potential Conflict of Interest by Supervisory Board Members—January 24, 1974

TO: LEAA Regional Administrator
Region IX - San Francisco

This is in response to a memorandum dated January 9, 1974, requesting a legal opinion related to a State Criminal Justice Planning Agency (SPA) supervisory board member who has been offered a teaching assignment in an LEAA-funded program under a grant approved by the relevant SPA governing board, of which he is a member.

The memorandum asks if it is a violation of LEAA conflict of interest prohibitions for the supervisory board member to accept the teaching assignment. This would be new employment for the board member.

[1] See, for example, Memorandum for U.S. Attorneys and others from Robert Hampton, Chairman, U.S. Civil Service Commission; Stanley Pottinger, Assistant Attorney General, Civil Rights Division; William Brown, Chairman, Equal Employment Opportunity Commission; and Philip Davis, Acting Director, Office of Federal Contract Compliance, Department of Labor, dated March 23, 1973, Subject: Federal Policy on Remedies Concerning Equal Employment Opportunity in State and Local Government Personnel Systems. Reprinted in "Equal Employment Opportunity Program Development Manual," U.S. Department of Justice, Law Enforcement Assistance Administration, Office of Civil Rights Compliance (1974), an attachment to the Memorandum, entitled "Permissible Goals and Timetables in State and Local Government Employment Practices," makes the following statement:

> This Administration has, since September 1969, recognized that goals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunities through affirmative action programs. On the other hand, the concepts of quotas and preferential treatment based on race, color, national origin, religion and sex are contrary to the principles of our laws, and have been expressly rejected by this Administration.

While the Crime Control Act of 1973 (Public Law 93-83) does not contain a specific provision on conflict of interest in grant programs,[1] Section 501 of the act does authorize the establishment of reasonable and necessary guidelines and regulations. Guidelines have been adopted under this provision to address this particular problem. The present problem is a violation of the LEAA conflict of interest guidelines, as set forth in Chapter 1, paragraph 4, of the Guideline Manual M 7100.1A on "Financial Management of Planning and Action Grants." The guideline provides as follows:

> a. *No official or employee* of a State or unit of local government or of non-government grantees shall participate personally through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise in any proceeding, application, request for a ruling or other determination, contract, grant, claim, controversy, or other particular matter in which LEAA funds are used, where to his knowledge he or his immediate family, partners, organization other than a public agency in which he is serving as officer, director, trustee, partner, or employee or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

Under these guidelines, there is an impermissible conflict where a supervisory board member participates in the approving of a grant to an organization in which he has a financial interest. There is also conflict where the grant is given to an organization in which the board member has an arrangement concerning prospective employment. If the board member knew of a possible offer of employment, these provisions would bar him from participating in the grant process.

In addition, the guidelines prohibit action that might create the appearance of a person's using his position for private gain or losing his impartiality. Where the board member serves as an instructor in the grant program, such an appearance may be created.

From the standpoint of appearances, the present case is similar to that of a board member who promises favorable action on a grant application in return for employment with the applicant. Regardless of whether the member anticipated the offer, the fact that the employment stems directly from the grant creates the appearance of impropriety. For this reason, the board member should forgo working on the project.

While a closer case would be presented if the board member had a permanent ongoing relationship with the institution independent of the LEAA grant, the facts as presented in the request for an opinion do not support this view. Thus, the situation of a representative of a criminal justice agency who votes on a grant to that agency is not presented.[2]

[1] See, for example, 15 U.S.C. §1355.

[2] This situation may resemble that of a criminal justice agency representative. However, it may be distinguished from that situation. First, actions of an agency representative must be considered in light of the Section 203 requirement that such persons serve on the board of State planning agencies. Second, there is a substantial difference between mere agency employment and the taking of a job that would not exist but for a grant. In the latter case, financial gain to the board member is directly attributable to the approval of the grant.

Legal Opinion No. 74-56—Hard Match Requirement for Impact Cities—February 1, 1974

TO: LEAA Regional Administrator
Region II - New York

In your memorandum dated December 10, 1973, you raised two legal questions for resolution. Specifically, your memorandum was addressed to the Newark, N.J., LEAA Impact Cities program and you asked if overmatch in one fiscal year for the Newark Impact Cities program funded under Part C, Section 306(a)(2) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83) can be applied to match LEAA funds for the same program in a subsequent fiscal year. You also asked if an overmatch in the Newark appropriation for a Part C project in an Impact Cities program can be applied to match Part E funds granted under Section 455 of the act for the same Impact program. The overmatch involved funds appropriated to match an Impact Cities grant for the renovation of a police station.

Fiscal Year Limitation

The appropriation, spending, and accounting of Federal funds must be done on a fiscal year basis. (See 31 U.S.C. §702.) Ordinarily, statutory requirements attached to the funds would be met on this annual basis. The matching requirement in this case is that the funds be matched by "money appropriated in the aggregate . . . for the purpose of the shared funding of such programs or projects" as provided in Section 301(c) of the act.

Because of the fiscal year basis of Federal appropriations, a program or project ordinarily is defined as a funded activity involving the appropriation of funds of 1 fiscal year. If funds of the following fiscal year are allocated to the same activity (usually referred to as "firm and carry-forward") such an allocation constitutes another program for purposes of plan development. However, in terms of actual activity there is no such distinction. For example, the 12-month budget cycle often is not the natural period of time for the ordinary criminal justice project. In addition, activities do not necessarily start or stop in conjunction with artificial fiscal year cycles. It is possible for an Impact City project to constitute a single fiscal year activity, but a grant from another fiscal year fund source that continues the project may be considered part of the same program or project.

Where matching funds are appropriated and spent in the first fiscal year of an Impact program, overmatch may be applied to a subsequent fiscal year grant. In this situation, it is clear that a potential for the impairment of future Federal statutory requirements does not exist as there can be no harm to the Government when there is preassurance that a statutory requirement related to the same program and unchanged from the prior year has been met. The date of the appropriation is a mere formality that may be overcome if the contribution is actually made (if the funds are in fact spent) in pursuance of the project's goals.

In other words, each LEAA grant from funds of a certain fiscal year requires match at some point during the approved project period in which the funds are spent. If match is neither appropriated nor spent during the life of a grant of Federal funds of a particular program or project, the statutory requirements are not met.

In the Newark situation, the result is that cash match from the 1973 appropriation may be counted as match for FY 1974 funds if the funds are in fact spent for the program purposes. This applies to whatever portion of the overmatch is so spent.

However, it is noted that because of the difficulties in accounting for the statutory requirement (the need to cross-reference all financial reports and grantee accounting entries) it is required in the context of the LEAA recordkeeping requirements set out in Section 521(a) of the act that use of this mechanism be limited to situations where the grantee is bound by State statute or local ordinance to utilize funds by set dates. LEAA prior approval must be obtained in each situation. This prior approval should be granted only when the grantor can be assured that the financial system of the grantee is capable of handling the burden. The actual mechanism should be treated as an exception to normal accounting practices. It is also noted that the grantee runs risks in utilization of this procedure in that the priorities or levels of future activity may change. In such a situation, the grantee would have no recourse against LEAA for additional future funds.

Part C Overmatch Applied to Part E

To address the question of whether overmatch on a project funded under one part of the act can be counted as match for funds from another part, the legislative history of the match provisions must be reviewed. The 1968 act contained provisions setting rates of match for funds from Part B and for funds for various purposes under Part C. The four sentences in the act that set the rates of match were worded similarly; generally, a grant authorized or made under the particular part or subsection would not exceed a certain percentage of the cost of the program or project for which it was made. (See Sections 204 and 301(c).)

These sentences were retained in the 1971 amendments (Public Law 91-644), with one of the percentages changed from 60 to 75. In addition, a provision was added to require that part of the match for a Part C grant had to be hard (cash) match. This requirement was expressed in the Senate bill as follows:

> . . . At least 50 per centum of the non-Federal funding of the cost of any program or project to be funded by a grant under this section shall be of money appropriated for the purpose of the shared funding of such programs or projects. (S. Rep. No. 1253, 91st Cong., 2d Sess. 2 (1970).)

This was amended during Senate debate to insert the words "in the aggregate, by State or individual unit of government," after the word "appropriated."

"In the aggregate" was interpreted by LEAA as allowing match on a "program-wide" basis rather than requiring match on each individual

"project." The remarks on this amendment in the legislative history indicate this broader intent. Indeed, the wording of the original hard match provision itself, as quoted above, allows match on a program basis, because program and project are listed in the disjunctive form. The cash match may be 50 percent of either a program or a project.

To be of any significance, the phrase "in the aggregate" must go beyond this. A statute should be construed so that no part of it is inoperative or superfluous. (Sutherland, *Statutory Construction* (1971 Supplement) §4705.) The change effected by the amendment was explained by Senator William B. Spong, Jr., as follows:

> . . . to clarify the intent of existing language to assure that a single appropriation at the State level and at the individual local government level will meet the requirements of the new matching rules of H.R. 17825.
>
> . . . What is needed is a commitment of new moneys to crime control programs in the aggregate, not to specific programs. (Cong. Rec. S 17549 (daily ed. Oct. 8, 1970).)

Thus, the change expanded the flexibility of the new cash match requirement beyond the limits of both project and program, to a single match that satisfied all match requirements of Part C (only) when funding was within the confines of a program or project.

In 1973 the sentences setting the rates of match were again retained with some of the percentages amended. In addition, hard match was added to the requirements of Parts B and E. The language "in the aggregate" was retained in Part C and added in Parts B and E. (Sections 204, 455.) The purpose of retaining this language was to retain the policy of allowing one appropriation to projects chosen by the unit of government to satisfy all the cash match requirements of each part of the act.

Unless the State or local government indicates otherwise through one general appropriation of funds for matching all LEAA programs, the aggregation ordinarily cannot go beyond each part of the act because each section dealing with match limits the Federal share of projects funded under that section to 90 percent of the cost and because each part contains authority for different funding activities.

In Part E, for instance, Section 455 provides that a grant "made from funds available under this part may be up to 90 per centum of the cost of the program or project for which such grant is made." If the word "program" includes Impact Cities, this sentence would allow Part E funds to pay for up to 90 per centum of an Impact program. Since Part E funds can be spent only on corrections, this is impossible. A program for which a Part E grant is made must be a corrections program. Part E funds can only account for 90 percent of a Part E (corrections) program.

In Part C, an identical provision limits the percentage of Federal funds that may pay for a project funded under Sections 301(c) and 306(a) as it relates to the Impact program grant. But Part C does not have such a narrow limitation on the use of its funds. The limit on aggregation of match is that imposed by the purposes for which funds of each part of the act may be spent (supplemented by the limitation to programs and projects). Since Part C purposes overlap Part E, money spent on corrections projects within an Impact Cities program may be counted as match for either part if LEAA funds from

the same program (block or discretionary) are going to that activity. Match on Part C projects that would qualify for Part C funding may thus be counted as Part E match.

In Part B, Section 204 provides that a Part B grant shall not exceed 90 percent of the costs incurred under that part. Thus, 10 percent of the Part B projects funded in a State must be paid from non-Federal appropriations. For example, money spent on a Part C project could not be used as Part B match because Federal funds cannot pay 100 percent of the expenses of Part B activities.

The result is that the phrase "in the aggregate" loosens match requirements within the parts of the act but not between parts, except in the case of overlapping purposes or a general appropriation. The phrase was added to expand the flexibility of the match requirement beyond the program level, but not to allow funds from one part of the act to be spent for the purposes of another part. If overmatch on Part C were counted toward Part B, for example, Part C funds would be spent for Part B purposes, a different purpose from that for which they were appropriated by Congress. In summary, for the situation at issue, this means that the Part C project overmatch can be used to match Part E funds if the match originated in a correctional program under Part C.

Precondition on the Uses of Appropriations to Meet the Cash Match Requirements

Cash match under the Safe Streets Act means State or local funds that must be devoted to program purposes. Program purposes must receive LEAA approval as an integral part of the Federal funding effort. The financial rules applicable to State or local grants under OMB Circular No. A-87 provide that the same criteria apply to match funds as apply to Federal funds. In the material presented, it appears that the appropriation for the "renovation of the police station" would not be an integral part of the Impact program.

Under LEAA guidelines, the original construction efforts were not to be a part of any Impact program. Consequently, unless it can be shown that the guidelines were waived and renovation of the police station was authorized and directly related to some aspect of the Impact Cities program, this office fails to see its relevance and allowability.

Congress in the 1973 amendments meant to do away with the fiction that State or local commitment was present in the federally assisted project by the use of "soft match." It did not expect that the soft match elimination would be replaced by a fictional allocation of cash match, which subverts the statutory hard match requirements as set out in this opinion.

Legal Opinion No. 74-57—Funding of Evaluation Activities with Part C Funds—February 7, 1974

TO: LEAA Regional Administrator
Region III - Philadelphia

This is directed to a letter from E. Drexel Godfrey, Jr., Executive Director, Governor's Justice Commission, Pennsylvania Department of Justice, in which he requests a legal opinion on proposed solutions regarding the funding of evaluation activities, as provided under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). Specifically, he asked for an opinion on the requirement to provide matching funds for evaluation grants, on the use of local government funds for evaluation, and on the use of reallocated local government funds for evaluation.

Match for Evaluation Funds

The actual costs of all program and project evaluations may be funded from Part C action funds. Funds used for such purposes do not necessarily require matching funds on a project basis as long as the required match is present in the aggregate.

The key to the resolution of this question is the definition of the term "in the aggregate." For fiscal year 1973 this term was defined in Chapter 4, paragraph 19 of the Financial Guide (M 7100.1A). The statutory changes affecting fiscal year 1974 and future funds have required a slight change that, in effect, broadens the options a State Criminal Justice Planning Agency (SPA) has to "aggregate" matching funds. The approved Financial Guide changes (Chapter 4, paragraph 20) read as follows:

> (3) *For FY 1974 block action grants* - it [hard match] must be applied on one of the following [bases]:
> (a) A unit of government basis, i.e., by city county, or by State Agency.
> (b) On a program-by-program or project-by-project basis if the State Supervisory Board adopts this more restrictive procedure as a formula.
> (c) On a combination of the above if the State Supervisory Board adopts this more restrictive procedure as a formula AND with prior approval of the Regional Office.

The term "in the aggregate" cannot be read to apply to the entire State grant or to the term suggested by the Pennsylvania SPA, i.e., "category." "Category" has a specific meaning that has been used consistently for the past 5 years in LEAA guidelines. Application of the hard match requirement to the "categories" set out in approved comprehensive plans is a broader interpretation than is permissible under the statute and is clearly not allowable.

Use of "Local Funds" for Evaluations

The Pennsylvania SPA proposed to retain a certain percentage (2 percent to 4 percent) of the funds designated for local units of government to evaluate local projects and would like to consider these retained funds as part of the portion "made available to local units of government." The SPA would like to dispense with waivers because they raise the "issue of coercion," because the SPA finds them "administratively burdensome," and because Pennsylvania's fiscal machinery "finds it difficult to accommodate this waiver process."

LEAA has no authority to permit a waiver of this statutory provision (Section 303(a)(2)) and consequently cannot dispense with waivers. The rights to the "local available" funds belong to the local units of government and only those units may "waive" these rights.

LEAA does feel that coercion would be present in an across-the-board percentage to be retained automatically by the SPA. Where there is a provision that local units of government waive their right to money to be retained by the SPA for evaluation purposes, notice must be given and written consent must be received. In addition, a set percentage would indicate that every project or program of units of local government was being evaluated in proportion to its dollar value. But cost of the program or project should not alone determine the amount to be spent on its evaluation. Evaluation costs do not always bear a direct relation to project or program costs.

It is important to bear in mind that not all evaluation is done with Part C funds.[1] The SPA's administrative burdens and Pennsylvania's fiscal difficulties may be resolved by using additional Part B funds to develop overall evaluation strategies and work plans. Such action is clearly in line with congressional intent: Congress acted on LEAA's budget submission for fiscal year 1973 and its request for an "increase in planning and implementation grants to State Planning Agencies," because it was "necessary in part to permit these agencies to administer the workload generated by Part C grants." (Hearings on H.R. 14989 before the Senate Committee on Appropriations, 92d Cong., 2d Sess., at 994 (1972).)

Section 303 of the act provides as follows:

> Any portion of the per centum to be made available pursuant to paragraph (2) of this section in any State in any fiscal year not required for the purposes set forth in such paragraph (2) shall be available for expenditures by such State agency from time to time on dates during such year as the Administration may fix, for the development and implementation of programs and projects for the improvement of law enforcement and criminal justice and in conformity with the State plan.

This provision has been explained previously in a letter from this office dated May 17, 1972, to the Pennsylvania SPA. The explanation from this letter said:

> Under the appropriate circumstances budgeted funds which were not applied for by local government units may be used to fund projects for State agencies. Such funds may not be used to directly fund private agencies.

[1] See LEAA Office of General Counsel Legal Opinion No. 74-43, Nov. 19, 1973, on this question generally.

For the Governor's Justice Commission and LEAA to fulfill its obligation under the Act we must insure that the following conditions are met:

(1) Ensure that the program areas for which funds are allocated adequately take into account the needs and requests of the units of general local government.

(2) Ensure that local units are provided adequate notice and an opportunity to apply for funds (at least 6 months after the LEAA block grant award).

(3) Reprogram within the limits of 15 percent or with the approval of the Regional Office in accordance with the needs and requests of the local units.

(4) Provide notice to the local units of funds available that are unclaimed prior to use by the State.

These general criteria may vary in individual instances where other facts are brought out.

In regard to the consideration of a grant application, on a first-come, first-serve basis, after "cut-off date" we cannot concur. Local units of government must always be given priority in the allocation of these funds if the application is meritorious and there is sufficient time to process and compile the grant prior to the lapse of the funds.

In summary, the Pennsylvania SPA is advised that there are some options for use of additional Part C funds for State-provided evaluation services, with respect to aggregation and use of funds on a reallocation basis following appropriate procedures to insure "local availability" requirements. The planning for evaluation activities should proceed accordingly.

Legal Opinion No. 74-58—Interpretation of the Assumption of Cost Provisions—January 30, 1974

TO: Acting Assistant Administrator
Office of Regional Operations, LEAA

This office has received two requests from the Regions for interpretation of Section 303(a)(9) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). This section states:

> Each such (comprehensive plan shall -
> (9) demonstrate the willingness of the State and units of general local government to assume the costs of improvements funded under this part after a reasonable period of Federal assistance.

This provision is implemented in the Guideline Manual for State Planning Agency Grants (M 4100.1B, Chapter 1, page 17) as follows:

> J. State Assumption of Cost.
> (1) *Provision.* The Act provides that State plans demonstrate the willingness of the State and units of general local government to assume the costs of improvements funded under the Act after a reasonable period of Federal assistance.
> (2) *Application Requirement.* INDICATE THE PERIOD OF TIME THE STATE WILL GENERALLY CONTINUE FUNDING A PROJECT. WHAT IS THE PERCENTAGE OF CONTINUATION FUNDING COMMITTED FOR EACH FISCAL YEAR GRANT AWARD. INDICATE HOW NEW ELEMENTS AND SYSTEMS INITIALLY FUNDED WITH FEDERAL FUNDS MAY ULTIMATELY BE ABSORBED INTO REGULAR BUDGETING OF STATE AND LOCAL ENFORCEMENT SYSTEMS.

This office has researched the legislative history of Section 303(a)(9) of the act and has found no explanation of the meaning of the language of the statute. In addition, there is a lack of precedent from other sources on the meaning of "assumption of cost."

The standard set out in Section 303(a)(9) is that the plan, required under that section, "demonstrate the willingness of the State and units of local government to assume the costs." Long-range or future commitments by State legislatures or local funding bodies cannot be predicted with certainty by State agency planners. What is required, therefore, under the standard in Section 303(a)(9) is a "good faith" intent or attempt to obtain partial or full support of continuation projects. Such good faith intent can be shown in part by budget requests for State or local matching funds concurrent with Federal grant requests, grant conditions that limit the Federal funding to a reasonable number of years, or provisions for funding that provide the Federal share will decline by fixed amounts in future years.

Section 303(a)(9) also requires the State or units of local government to demonstrate some willingness to assume the costs after a "reasonable" time. As to what constitutes a reasonable period of time, this office suggests that program considerations related to the innovative aspects of a particular project, the size of the program or project being funded, or the reticence or acceptability of the community to changing concepts in criminal justice may be factors that would justify a longer period of time. Simple operational support projects such as equipment purchases would obviously dictate a shorter period for cost assumption. An appropriate length of time might be 3 or 4 years as the maximum limits.

Legal Opinion No. 74-59—Replacement of Block Funds with Discretionary Funds for a National Scope Project—January 31, 1974

TO: Acting Director
Office of National Scope Programs, LEAA

This opinion is in response to a request dated January 17, 1974, that stated that block grant funds are currently being used to fund two projects at the California Specialized Training Institute and that discretionary funds are now requested by the Institute for a 1-year continuation of the projects. The Institute maintains that the California projects have changed character and are now fundable as National Scope Programs.

This question is presented as follows: If a project funded under a block grant has changed so as to affect the Nation as a whole rather than merely individual States, cities, or regions, may its funding source be changed from State block grant to direct discretionary fund support, i.e., from Section 301(b) to Section 306(a)(2) of the Crime Control Act of 1973 (Public Law 93-83)?

The first issue that must be addressed is the assumption of cost provision of Section 303(a)(9) of the act. This section directs that every plan approved by LEAA:

> . . . demonstrate the willingness of the State and units of general local government to assume the costs of improvements funded under this part after a reasonable period of Federal assistance.

The provision does not affect the ability of LEAA to continue, from discretionary fund sources [Section 306(a)(2) of the act], an otherwise fundable project. It would require the projects that were of a single State nature and that received either block subgrant funds under Section 301(b) or discretionary funds (when otherwise appropriate) under Section 306(a)(2) to continue to show the "willingness" to assume costs funded from either of the two Part C fund sources. This "willingness" would be a condition of eligibility for any future funding.[1]

The more basic issue deals with the use of discretionary funds. While the authority for Section 306(a)(2) discretionary grants has relatively few legal distinctions from those fundable from the Part C block grant sources, Congress recognized that discretionary grant funding was more appropriate for some projects. Thus, Congress stated that:

> Many important programs relating to law enforcement and criminal justice involve more than one State or locality or are national in scope. Such programs cannot be appropriately funded by a single State. [H.R. Rep. No. 249, 93rd Cong., 1st Sess. 7 (1973)]

Congress also observed that discretionary funds should be used for these purposes.

Thus, National Scope projects such as grants for multi-State or regional projects or grants where some nationwide purpose is being served can clearly be funded with discretionary funds; and if a project has changed its character from local to national scope, it may be funded under the section of the act that is appropriate to its present character.

Legal Opinion No. 74-60—Overall Match for Part C Block and Discretionary Funds—May 21, 1974

TO: Comptroller, LEAA

This is in response to your request of January 18, 1974, concerning an LEAA Region IV query on match for the Florida Comprehensive Data Systems projects. The question presented is whether match may be computed on an overall basis by aggregating State or local matching funds to meet Part C block and Part C discretionary grants.

[1] A discussion of what constitutes a "willingness" within the meaning of Section 303(a)(9) is contained in Legal Opinion No. 74-58.

Under Section 306 of the Omnibus Crime Control and Safe Streets Act, funds appropriated for action grants under Part C of the act are required to be allocated on a percentage basis with 85 percent allocated for so-called block grants and 15 percent allocated for "discretionary" grants. When the Omnibus Crime Control and Safe Streets Act of 1968 was amended in 1971 (Public Law 91-644), a hard match requirement was added to both the block grant and discretionary portions of Part C. The hard match requirement means that a certain percentage of cash must be appropriated "in the aggregate" by State and local governments to match Part C funds granted by LEAA. [See Sections 301(c) and 306(a), Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).] The language "in the aggregate" was added as an amendment and explained by Senator William B. Spong, Jr., of Virginia, in the Senate floor debate. Senator Spong stated that under the amended clause each State or local matching fund appropriation was to be "a commitment of new monies to crime control programs in the aggregate, not to specific programs" and not "on a line basis for each project." (Cong. Rec. S 17549 (daily ed. October 8, 1970).)

Clearly the intent of the word "aggregate" was to expand the flexibility of the cash match requirement beyond the limits of individual projects or so-called budgetary line items. It is also consistent to infer that the intent was to allow aggregation of block and discretionary fund hard match since Senator Spong also stated that the words "in the aggregate" were added "to assure that a single appropriation at the State level and at the individual government level will meet the requirements of the new matching rules of H.R. 17825." (Cong. Rec. S 17549 (daily ed. October 8, 1970).)

The 85/15 percentage allocation of appropriated Part C funds between block and discretionary fund uses is not violated by aggregating match between the two categories. Each portion is still distributed in accordance with the statutory formula regardless of how much in matching funds is later required.

Finally, aggregation of Part C matching requirements does not conflict with the language of Sections 301 and 306(a), which provides that a grant of block or discretionary fund money cannot exceed 90 percent of the cost of the program or project. These are not spending limitations on the grant but are addressed only to the amount of a grant program or project relative to the amount of matching funds applied by States or units of local government.

If the 90 percent limits were read as spending limitations, this would require that block grant funds could not be expended to cover more than 90 percent of a project or program, and that discretionary grant funds likewise could not be so used. Aggregating match over all of Part C would not violate these identical provisions. Aggregating match would result in block grant matching funds being spent on discretionary projects, or vice versa, but the money would still be spent for its appropriated purpose (Section 301(b)), disbursed according to the 85/15 percentage breakdown (Section 306(a)) and within an approved program or project that may, in appropriate situations, be part of a larger grouping of similar governmental activities or part of a single governmental unit's overall approved criminal justice plan. It is important to the use of this concept of aggregation to emphasize this latter point. LEAA

program personnel must verify that the aggregated projects do in fact constitute a program.

Where individual cities or counties have provided cash match for a program that has been developed and approved to utilize both block and discretionary funds, this is also a clearly warranted situation for application of the aggregation principles set forth in this opinion. What must be avoided is a fictional grouping designed to validate the failure of a State or local government to commit matching funds to an activity by grouping such an activity with approved programs that bear no relation to the activity in question but have excess matching funds available.

It is recognized that use of this procedure may provide difficulties in accountability. This office has reviewed Chapters 2 and 4 of the LEAA Financial Guide (M 7100.1A) and finds that while the Guide is not inconsistent with the use of aggregation, it is written with the expectation that block and discretionary fund match requirements would be separately met. This would ordinarily be the case and, in fact, preparation of financial reports will still require designation of the source and a showing of expenditure of matching funds. However, in such instances, this may be done by cross-reference and use of offset procedures on appropriate report forms.

In summary, aggregation of match over all of Part C is permitted by the phrase "in the aggregate" and is not barred by any other provision of the act. In the material submitted by Florida, a procedure for aggregation appears to be appropriate. However, the Regional Office should make a final determination on this issue in line with the principles set forth in this opinion.

Legal Opinion No. 74-61—Use of Discretionary Funds for Curriculum Development—February 15, 1974

TO: Assistant Administrator
Office of Regional Operations, LEAA

This is in response to a request for a legal opinion on the propriety of using discretionary funds for curriculum development programs under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). The unavailability of both 406(e) curriculum development funds and 515(c) technical assistance funds, which are currently the sources of this allocation, has necessitated this inquiry.

The opinion of this office is that discretionary funds are not available for the specialized purpose of curriculum development and relevant authority strongly corroborates this position. It is an established rule of statutory construction that "when the specific appropriation to which an expense is chargeable is exhausted, the general appropriation cannot be used for that purpose." 36 Comp. Gen. 526 at 528 (1957); in accord, 42 Comp. Gen. 226 (1962). However, it appears that exceptions will be made when the purpose of the general appropriation is expressed to incorporate the specific. The

reasoning underlying the rule is indeed sound. An agency places substantially different priorities on certain goals and allocates the funds accordingly. To allow intrusion into the general appropriation after exhaustion of funds for a specific purpose might jeopardize more fundamental program goals.

Application of this rule to the Law Enforcement Assistance Administration would preclude the award of discretionary funds in the instant situation. Funds under Sections 406(e) and 515(c) of the act that provide for curriculum development have been appropriated. The limited funds were allocated to achieve the greatest impact in producing criminal justice personnel for teaching and research at the doctoral level.

Section 306 permits LEAA at its discretion to make grants for purposes it deems appropriate and consistent with the act. Curriculum development is not mentioned in the general provision for discretionary funding nor does it fit into any of the purposes for which Part C funds are authorized. Expenditures for programs that are provided for specifically elsewhere in the act may threaten fundamental goals and objectives.

Part C block grant funds are available for specific assistance programs under limited circumstances, as the SPA, and not LEAA, is the academic awarding organization. This situation, however, is so clearly distinguishable that reliance upon it for supporting the present request is not justified.

Section 301 provides that LEAA is authorized to make grants to States for "the training of personnel in law enforcement and criminal justice." Clearly academic assistance programs serve this purpose by encouraging study in the field of law enforcement and criminal justice with individuals already working for a law enforcement agency or those who are potentially interested in working for one. The same connection or nexus between curriculum development and authorized Part C objectives is lacking.

Furthermore, the block grant funds are exclusively in the hands of the States. Because the act recognizes crime as essentially a local problem, the States can allocate the funds in a manner they consider the most efficacious for accomplishing program objectives. Accordingly, allocations to academic assistance programs may indeed be proper. Discretionary funds, on the other hand, are retained by LEAA and must be dispensed in accordance with established priorities and consistent with general rules of statutory construction.

Legal Opinion No. 74-62—Application of the Nonsupplanting Requirement—General Revenue Sharing Funds—March 27, 1974

TO: Mayor, City of Los Angeles
Los Angeles, Calif.

This is in response to your letter of March 14, 1974, in which you requested information on whether Federal revenue sharing funds are to be characterized as Federal or State funds for the purpose of determining the nonsupplanting requirement (Section 303(a)(11)) of the Crime Control Act of 1973 (Public Law 93-83).

This Agency has raised this question with the Office of Revenue Sharing of the U.S. Department of Treasury. In the attached letter, the chief counsel of that Office makes clear that revenue sharing funds are viewed and characterized as "local funds." Therefore, this Agency advises that for the purposes of determining Federal expenditures for law enforcement, revenue sharing funds must be excluded.

The LEAA Financial Guide is being amended to reflect this position.

It should be noted that the nonsupplanting requirement is separate and distinct from the requirement that the Federal funds under the LEAA act are to be matched by State and local funds. There is a specific prohibition in the State and Local Fiscal Assistance Act of 1972 (Public Law 92-512, 31 U.S.C. §1221 et seq.) that prohibits revenue sharing funds from being used as match for a Federal grant. Therefore, while revenue sharing funds may be characterized as local funds for the purpose of the nonsupplanting requirement, these funds may not be used to make up the State or local match requirements.

Attachment to Legal Opinion No. 74-62

Dear Mr. Madden:

This is in response to your letter of January 22, 1974, in which you inquire whether revenue sharing funds are "Federal funds or local funds when in the hands of State and local governments." Your letter indicates that such a determination is necessary to the administration of the Crime Control Act of 1973.

Revenue sharing funds may be characterized as "Federal funds" only to the extent that they are appropriated by the Congress and distributed by the Department of the Treasury to a recipient government which is required to expend the funds in accordance with the several prohibitions and restrictions contained in the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. Supp. II, §1221). As you point out in your letter, the revenue sharing funds cannot be used by a recipient government, either directly or indirectly, to obtain Federal matching grant funds. However, that provision of the Act (Section 104) is not to prevent the use of revenue sharing funds to supplement other Federal grant funds.

In our judgment, except for the Congressionally-imposed restrictions and prohibitions in the Act, revenue sharing funds should be viewed and characterized as "local funds". In fact, the purpose of the State and Local Fiscal Assistance Act is to finance governments—not projects or activities. Revenue sharing funds are characterized under Section 102 of the Act as "entitlements". The recipient government must create a "trust fund" to facilitate proper auditing of its entitlements (Act, Section 123(a)(1); it must provide for the expenditure of revenue sharing funds only in accordance with the laws and procedures applicable to the expenditure of its own funds (Act, Section 123(a)(4)). This latter provision is to assure that the expenditure of revenue sharing funds is provided for not only by the executive but also by the legislative branch of the recipient government. Whatever a recipient government may do with its own revenues, it may do with its revenue sharing

funds—as long as it does not violate the several restrictions and prohibitions of the Act, namely, priority expenditures (Section 103); anti-matching (Section 104); nondiscrimination (Section 122); Davis-Bacon and other wage requirements (Section 123(a)(6)(7)).

It has been our consistent position in the Department of the Treasury that other Federal acts, unless specifically referenced in the State and Local Fiscal Assistance Act of 1972, have no applicability to the expenditure of revenue sharing funds by a recipient government. From this position it should appear fairly evident that we consider the revenue sharing entitlement, once distributed to the recipient government, to constitute local funds rather than Federal financial assistance to a particular project or activity.

If there are further questions on this particular matter or if there is anything that I failed to make clear, please do not hesitate to advise me.

Very sincerely yours,

William H. Sager
Chief Counsel
Office of Revenue Sharing
Department of the Treasury

Legal Opinion No. 74-63—(Number not used.)

Legal Opinion No. 74-64—Statutory Compliance of the State of North Carolina Application Processing Procedures—June 12, 1974

TO: LEAA Acting Regional Administrator
Region IV - Atlanta

This is in response to your inquiry concerning the validity of the procedures established by the North Carolina Department of Natural and Economic Resources (the North Carolina State Criminal Justice Planning Agency or SPA) in a policy document titled Memorandum 1-1974 to implement Section 303(a)(15) of the Crime Control Act of 1973.[1]

This section of the act was added by the Crime Control Act of 1973 (Public Law 93-83) to require that each State adopt a procedure to insure that ". . . all applications by units of general local government or combinations thereof to the State planning agency for assistance shall be approved or disapproved, in whole or in part, no later than ninety days after receipt by the State planning agency . . ."

The North Carolina procedure provides that project applications will be officially received only on the first working day of every second month. Applications received on the official dates will be processed within 90 days in conformity with Section 303(a)(15) of the Crime Control Act of 1973.

[1] Public Law 93-83, 87 Stat. 197 (Aug. 6, 1973), amending 42 U.S.C. §3733(a).

However, applications received on other than the official dates will be recognized as officially received as of the next first working day of an even-numbered calendar month.

This latter procedure has the potential effect of expanding the processing time beyond the 90 days required by the Crime Control Act of 1973 by differentiating between the actual date and the official date of receipt of applications from units of general local government (subgrantees). Two questions are raised by this procedure. The first is whether an SPA may differentiate between the actual and official dates of receipt of applications. Second, it must be determined whether an SPA may establish application deadlines for subgrantees.

In reference to the first question, Section 303(a)(15) contains the term "receipt," which is not defined by the Crime Control Act of 1973. In determining at what point in time the receipt of a document becomes effective, general commercial practice, as reflected by Section 1-201(27) of the Uniform Commercial Code, offers instructive guidance. Under U.C.C. §1-201(27), the term "organization" includes Government or governmental subdivision or agency.[2] U.C.C. §1-201(27) provides, in part, that:

> Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routine for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines.

Under U.C.C. §1-201(27), the date of actual receipt is the last point in time that a document can become effective. A document may become effective at a time earlier than the date of actual receipt in cases where it should have been received if due diligence had been exercised. An effective date subsequent to the date of actual receipt is not provided for in U.C.C. §1-201(27).

The legislative history of the Crime Control Act of 1973 supports the interpretation that the term "receipt" must be construed as actual receipt. A review of the legislative history resulting in the enactment of Section 303(a)(15) is presented below.

Amendments to the 1968 Omnibus Crime Control and Safe Streets Act were introduced into the House of Representatives in the form of H.R. 8152.[3] After considering this bill, the House Committee on the Judiciary recommended that the following procedure be added to H.R. 8152: all applications by subgrantees to an SPA be approved or disapproved, in whole or in part, no later than 60 days after receipt.[4]

The purpose of this amendment was to "...ensure that all fund applications by localities to State planning agencies be expedited ..." and

[2]U.C.C. §1-201(28).
[3]119 Cong. Rec. H 4880-86 (daily ed. June 18, 1973).
[4]*Ibid.* at H 4887.

"...to assure that units of general local government receive their monies promptly in accordance with procedures established by the administration."[5]

In explaining the purpose the proposed 60 day limitation would serve, Representative Peter Rodino noted:[6]

> [N]ew provisions–while assuring appropriate time for meaningful consideration–address the serious problems that have delayed the disbursement of these moneys to the State and localities in the past. LEAA is mandated to review State plans within 90 days of submission, and in turn the States are directed to insure the establishment of procedures that will expedite the flow of their funds to the units of general local government.
>
> It is in these latter regards that I believe this legislation will most greatly enhance the fight against crime. Too often in the past, the Congress has appropriated these desperately needed moneys only to have the States and localities experience frustrating delays in receiving their funds from both the Federal and State levels. In many cases, these delays have left funds undisbursed to the units of general local government over a period of 2 or more fiscal years. Diligent enforcement of the new provisions should result in a faster fund flow, more consistent with the real needs in these areas.

Representative Barbara Jordan offered the following additional explanation:[7]

> I would also like to call your attention to the time limits this bill places on the grant-making process for both the Federal-State block grants and the State-local project grants. A major portion of the testimony presented during the committee's hearings was directed at the deplorable delay and inefficiency in putting LEAA funds to work by a cumbersome bureaucracy. Local governments often wait 6 months to a year after submitting applications for LEAA funds to State agencies before the applications are approved and the grants made. The Committee also wanted to assure that the strengthened requirements for LEAA prior approval of State plans did not result in further delays in allocating funds to State planning agencies. Consequently, a time limit of 90 days for the approval of State plans and a limit of 60 days for the approval of grant applications to State planning agencies by local units of government have been added to the bills.

Representative Robert Drinan stated that the proposed time limitations "...should speed up the process of providing LEAA funds at the local level and reduce the uncertainties of grant applications that have deterred some law enforcement agencies from seeking LEAA funds."[8] Representative Elizabeth Holtzman noted that "[o]ne of the major problems under the existing legislation is that localities often have to wait as long as a year to receive funds from the State."[9] H.R. 8152 with the 60 day limitation amendment was passed by the House on June 18, 1973.[10]

In the Senate, the Subcommittee on Criminal Laws and Procedures of the Judiciary Committee recommended that "...all fund applications by localities to State planning agencies be approved or disapproved within 90 days, thus expediting the flow of money from the State to its units of local

[5]House Committee on the Judiciary, Law Enforcement Assistance Amendments, H.R. Rep. No. 93-249, 93rd Cong., 1st Sess. 5 (1973).
[6]119 Cong. Rec. H 4743 (daily ed, June 14, 1973).
[7]119 Cong. Rec. H 4871 (daily ed. June 18, 1973).
[8]*Ibid.* at H 4877.
[9]*Ibid.* at H 4880.
[10]*Ibid.* at H 4904.

government."[11] In the floor debate, Senator John L. McClellan commented that compliance with the proposed 90 day requirement imposed upon LEAA and the State planning agencies ". . . should not be overly difficult for either LEAA or the State planning agencies and should help to speed up fund flow."[12]

The Senate passed H.R. 8152 modified by the 90 day requirement on June 28, 1973.[13] The conflict between the House 60 day and the Senate 90 day requirements was resolved by conference in favor of the Senate requirement.[14] No explanation of why the 90 day requirement was selected in lieu of the 60 day requirement was offered in the conference report.

This review of the legislative history demonstrates that Congress was concerned with the failure of subgrantees to receive funds promptly. By enacting the Section 303(a)(15) requirement, Congress intended to expedite the delivery of funds to units of general local government. To implement this intent, an SPA must begin processing applications without delay. This requires that the statutory period must start from the date of actual receipt. An inconsistency would arise between the congressional intent and actual implementation of Section 303(a)(15) if an SPA were allowed to postpone after actual receipt the starting date of the statutory 90 day period. Hence, the North Carolina procedure of differentiating between the actual date and official date of receipt of applications is invalid.

At least one court decision provides general support for this conclusion. The district court in *Kane* v. *United States*, 154 F. Supp. 95, 98 (S.D.N.Y. 1957), *aff'd on other grounds*, 254 F.2d 824 (2d Cir. 1958), invalidated a Veterans Administration Regulation that accelerated the statutory time for, and condition of, nonautomatic application of dividends to insurance premiums. A Federal statute provided that "receipt" by the Veterans Administration would be the effective date of a written notice. The invalidated Veterans Administration Regulation modified the statutory requirement by making the postmark date of the mailed notice the effective date.

In regard to the second question, there is support in the legislative history of the 1973 Crime Control Act to allow an SPA to set deadlines for the receipt of applications. In expressing concern that the House-proposed 60 day requirement would impose an unreasonable burden upon the SPA's, Representative Edward Hutchinson noted:[15]

> The amendment would require that the States adopt procedures to pass on applications by local government within 60 days. In committee, it was asked whether this would impose an unreasonable burden on the State since not all applications are simultaneously submitted and thus it would not be possible for the States to fulfill their mandate to establish priorities and formulate plans. It was then determined that the "procedures" the State could adopt would embrace the establishment of a deadline for the submission of applications and from which the 60 days would run. This should be emphasized because it means to me that the "60 days" may be much longer than 60 days on the calendar.

[11] 119 Cong. Rec. S 11746-47 (daily ed. June 22, 1973).
[12] 119 Cong. Rec. S 12415 (daily ed. June 28, 1973).
[13] *Ibid.* at S 12451.
[14] Conference Report No. 93-349, p. 28.
[15] 119 Cong. Rec. H 4745 (daily ed. June 14, 1973).

In considering the statement offered by Representative Hutchinson, a distinction must be made between the use of deadlines as a management tool and the use of deadlines to expand the 90 day requirement. The use of application deadlines as a management tool is permissible as indicated by Representative Hutchinson. For example, an SPA may require that applications be submitted on a designated date. Used in this manner, a deadline can have the effect of providing for the orderly flow of work and for the competitive consideration of all applications or it can be an integral part of the State's planning process.

However, where deadlines are used to expand the statutory processing time, the effect is to impede the flow of funds. Where this result is anticipated, the formulation of such application deadlines must be considered within the context of the overriding congressional concern for prompt delivery of funds to local units of government.

The question arises as to whether Representative Hutchinson's statement ". . . the '60 days' may be much longer than 60 days on the calendar" may be used as an aid to construe that the 90 day requirement can be longer than 90 calendar days. In resolving this question, consideration must be given to rules of statutory construction as summarized in *United States* v. *American Trucking Ass'n., Inc.*, 310 U.S. 534, 543-44 (1940):

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." [Footnotes omitted.]

The *American Trucking Ass'n., Inc.* case provides for three instances where legislative history is used to interpret the meaning of statutory words. The first is where the plain meaning of the statutory terms leads to absurd or futile results. The second instance is where the plain meaning produces an unreasonable result plainly at variance with the policy of the legislation as a whole. In the third instance, where an aid to construction is available, the aid must be used notwithstanding the apparent meaning of the words.

These tests raise the inquiry as to what purpose an aid to construction may be used. In *Railroad Commission of Wisconsin* v. *Chicago B. & Q. Railroad Co.*, 257 U.S. 563, 589 (1922), the Court stated that ". . . aids are only admissible to solve doubt and not to create it." The Court in *National Labor Relations Board* v. *Plasterers' Local Union No. 79, Operative Plasterers' & Cement Masons' International Ass'n, AFL-CIO*, 404 U.S. 116, 129 (1971), noted that:

> In construing a statute, the Court has ruled that legislative materials, if "without probative value, or contradictory, or ambiguous," should not be permitted to control the customary meaning of words. *United States* v. *Dickerson*, 310, U.S. 554, 562, 60 S. Ct. 1034, 1038, 87 L. Ed. 1356 (1940). See also *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260, 65 S. Ct. 605, 614, 89 L. Ed. 921 (1945).

The use of Representative Hutchinson's statements to support the position that 90 days is longer than 90 calendar days must be examined within the three tests provided by the Supreme Court in the *American Trucking Ass'n., Inc.* case. Construing the term "90 days" to mean 90 calendar days and no more as the plain meaning of the term does not lead to absurd or futile results. Such a construction does not produce an unreasonable result plainly at variance with the policy consideration that result in the enactment of the Section 303(a)(15) amendment. This policy consideration to expedite the flow of funds to subgrantees is reflected by the above quoted statements by Representatives Rodino, Drinan, Jordan, and Holtzman. An interpretation that the 90 day requirement means 90 calendar days is a reasonable implementation of the concern expressed by these members of the House Committee on the Judiciary.

Finally, the use of Representative Hutchinson's statements as an aid to construction, notwithstanding the plain meaning of the statutory term "90 days," would be permissible where his statements are neither contradictory nor ambiguous. The statements offered by Representative Hutchinson are instructive in reflecting the concern that the House Committee on the Judiciary had in not imposing an unreasonable burden upon the States. However, where the 90 day requirement results in an unreasonable burden upon the States, Representative Hutchinson would allow the States to adopt procedures that would embrace the establishment of a deadline that could be used to expand the statutory processing time.

Representative Hutchinson's statements cannot be controlling legislative history because the statements are inconsistent with the primary policy consideration underlying Section 303(a)(15). Congress enacted Section 303(a)(15) with the intent of expediting the flow of funds to subgrantees by specifying a definite time period. The purpose of enacting a definite time period was to insure timely processing of applications by SPA's. The effect of the 90 day requirement is to prevent the SPA's from adopting procedures that will delay the processing beyond this timeframe.

Under an interpretation supported by Representative Hutchinson's statements, an SPA may expand the processing time beyond the required 90 days whenever the SPA determines that the 90 day requirement creates an unreasonable burden upon the SPA. What constitutes an "unreasonable" burden is not defined. Rather, this definition is to be determined by the SPA. In addition, no limitation is placed on the amount of time an SPA may delay processing to alleviate the SPA-determined unreasonable burden. In sum, the effect of this interpretation would be to allow the SPA to expand the 90 day requirement at its discretion without limit. Such an interpretation is contradictory to the policy underlying the 90 day requirement and is not a controlling aid to construing the statutory term "90 days."

Another observation must be made in regard to Representative Hutchinson's statements. His concern focused upon the unreasonable burden that could be created by a 60 day requirement and not 90 days. As noted earlier, the Senate added 30 days to the House-proposed requirement and this certainly must diminish the concern of imposing an unreasonable burden upon the States. In regard to the 90 day requirement, Senator McClellan said in the statement

quoted earlier that this requirement would not be overly difficult for the SPA's to meet.

Another consideration in construing Representative Hutchinson's statements and in determining if deadlines may be used to expand the statutory period is whether the 90 day requirement is mandatory or directory. A statement of the distinction between mandatory and directory provisions may be found in *French* v. *Edwards*, 80 U.S. 506, 511 (1871):

> There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise.

Ordinarily, statutory time provisions are construed as directory as noted in *Diamond Match Company* v. *United States*, 181 F. Supp. 952, 958-59 (Cust. Ct. 1960):

> As a general rule, a statute which provides a time for the performance of an official duty will be construed as directory so far as time of performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure. Where a mandatory construction might do great injury to persons not at fault, where there is no substantial reason why the thing required by statute might not as well be done after the time prescribed as before, where there is nothing to indicate that the legislature did not so intend, the courts will deem the statute directory merely. Statutes fixing the time for the performance of acts will ordinarily be held directory where there are no negative words restraining the doing of the act after the time specified and no penalty is imposed for delay. [Citations omitted.]

Although there are cases that hold that a statutory time period is directory only,[16] the 90 day requirement contained in Section 303(a)(15) must be construed as mandatory. As noted in the *Diamond Match Company* case at page 959, statutory time provisions are ordinarily held to be directory only when a penalty is not imposed for delay.[17] A penalty for failure to act within the 90 day requirement is provided in Section 303(a)(15). As a result, the 90 day requirement is mandatory, and the use of any procedure such as the North Carolina procedure to increase the statutory period beyond 90 calendar days is invalid.

Although an SPA may not increase the 90 day requirement, an SPA is given discretion under Section 304 of the Crime Control Act of 1973 in defining

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[16] *United States* v. *Morris*, 252 F. 2d 643, 649 (5th Cir. 1958), *Antonopulos* v. *Aerojet - General Corporation*, 295 F. Supp. 1390, 1395 (E.D. Cal. 1968).

[17] See also *Fort Worth National Corporation* v. *Federal Savings and Loan Insurance Corporation*, 469 F.2d 47, 58 (5th Cir. 1972).

what constitutes a conforming subgrantee application. SPA procedures may thus require use of a designated form, sign-off by responsible city or county officials, inclusion of OMB Circular A-95 clearance actions, and finalization of environmental impact considerations. But, once a conforming application is received, Section 303(a)(15) requires that the application be approved or disapproved within 90 days after actual receipt.

In conclusion, after reviewing the implementation of Section 303(a)(15) by the North Carolina Department of Natural and Economic Resources, this Office concludes that the North Carolina procedure is not consistent with Section 303(a)(15). In particular, the North Carolina procedure of differentiating between the actual and official dates of receipt resulting in an expansion of the processing period beyond the statutorily required 90 calendar days is in contradiction with the plain meaning, legislative intent, and policy of Congress in enacting Section 303(a)(15).

Legal Opinion No. 74-65—The Method of Computation to be Used in the Determination of Audit Refunds—June 5, 1974

TO: Comptroller, LEAA

This is written in response to your request for a legal opinion on the method by which a grantee must account for costs incurred under a grant. You specifically asked if refunds to LEAA for improper expenditures under a grant must be made on a total cost basis.

Expenditures under grants must be accounted for on the basis of the total "cost concept" for individual projects. Total cost as applied to individual projects is defined in OMB Circular A-87 as the "allowable direct cost incident to its performance, plus its allowable portion of allowable indirect costs, less applicable credits." Total costs under the circular include Federal funds and any State and local funds applied to the project to match Federal funds.

The principles of OMB Circular A-87 apply to all Federal grants and form the basis on which allowable costs are determined. As OMB Circular A-87 applies the total cost concept to federally funded grant projects, one must examine the Federal, State, and local shares in determining respective liabilities.

In the memorandum from your office, advice is asked on two hypothetical examples. In the first example, a grantee received $90,000 in Federal funds and contributed $10,000 of its own funds. It also contributed $50,000 above the minimum matching requirements. When the project was completed, $10,000 was not expended. The question you raise by this example is: What must be the disposition of the $10,000? Under the total cost concept, the project would have expended $140,000. In the instant case, under the total cost concept the money would ordinarily be returned in proportion to the Federal/State ratio of contributions. Because the Federal Government had contributed $90,000, it paid for 60 percent of the project costs. As the State had contributed $60,000, it contributed 40 percent of the project costs. Using

this formula, $6,000 would be returned to LEAA and the State would keep $4,000. The main rationale for this approach is that grantees in accounting for grant funds ordinarily segregate Federal funds from State and local funds for accountability purposes; and to be consistent and fair, the total cost concept must be applied.

In the second example, the Federal share of a grant project was $90,000, the non-Federal share was $10,000, and the State contributed an additional $50,000. In this case all $150,000 was spent, but the audit found $20,000 in unallowable costs. The question asked is if the $20,000 can be accounted for totally from the $50,000 State funds, which were applied above the required match. The answer is no, because that approach would violate the total cost concept. The funds should be accounted for on the same 60-40 ratio, which would mean that $12,000 must be returned to LEAA and the State should make up the $8,000 due in any appropriate manner.

It is implied in the memorandum that the total cost concept penalizes the State, but it should be noted that this total cost concept may work to the State's advantage. Using the last example, if the State did not overmatch, it would be liable to the Federal Government on the 90-10 ratio resulting in an $18,000 liability. But where the State had put up an extra $50,000, which changed the ratio requirements, its liability would be $12,000.

Further, any method of accounting other than the total cost concept would be contrary to OMB Circular A-87 principles and would leave the burden of any misspent funds on the Federal portion of the grant. This is made even more confusing when soft match is involved, as it is often difficult to assess cash value of soft match.

This opinion does not mean to imply that LEAA cannot, if it so chooses, reduce the amount of State match contribution if minimum legal requirements are met. In summary, therefore, it is the opinion of this office that consistent with OMB guidelines and good accounting procedures, the total cost concept should continue to be applied.

Legal Opinion No. 74-66—Application of the Illinois Law Enforcement Commission Review Procedures to Commission Action Removing DuPage County as a Regional Planning Unit—June 27, 1974

TO: LEAA Acting Regional Administrator
Region V - Chicago

This memorandum is in response to your request for guidance in the appeal of DuPage County, Ill., to overturn the removal of DuPage County's Regional Planning Unit (RPU) status.

Background

DuPage County has sought to "appeal to LEAA" a decision by the Illinois Law Enforcement Commission (the State Criminal Justice Planning Agency or

SPA) that the county should no longer be funded as a regional planning unit but should instead be a part of the Northeastern Illinois Planning Commission (NIPC), a six-county multipurpose planning unit established by State standards. DuPage contends that it is sufficiently large and unique so that it should be a regional unit and that it was not accorded adequate remedies in its appeal before the SPA.

The Illinois SPA consists of the Illinois Law Enforcement Council (ILEC), made up of a supervisory board and an administrative staff to run the commission. The staff is headed by an executive director selected by the supervisory board. Under Illinois procedures, the chairman of the supervisory board selects the members of an appeals board, which hears appeals from actions taken by the supervisory board and renders advisory opinions on such actions. An executive committee of the supervisory board hears appeals of actions taken by the commission staff.

Before LEAA can take any action, Section 504 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), requires that DuPage must show noncompliance on the part of the SPA with that act, LEAA regulations, or a plan or application submitted by the SPA.

County Planning Status

The substantive question of the county's planning status involves the discretion of the SPA in establishing regional planning units. The SPA's are encouraged to incorporate criminal justice planning into multijurisdictional organizations established in accordance with the Intergovernmental Cooperation Act of 1968 (Public Law 90-577) and Office of Management and Budget Circular No. A-95. This is outlined in LEAA Guideline Manual M 4100.1B at pages 19 and 25. The six-county Northeastern Illinois Planning Commission meets the requirements of OMB Circular A-95.

Where planning regions vary from general regions established by the State, a clear justification for such variance must be provided in accordance with the provisions of Guideline Manual M 4100.1B, page 25. Thus, if DuPage County were excluded from NIPC, the Illinois SPA would have had to establish an adequate basis for exempting it from regional criminal justice planning. The fact that the SPA made Cook County, Ill., for example, a separate RPU required justification for the variance.

Procedural Grounds for Appeal

The procedural complaints raised by DuPage fall into three categories:

1. The validity of an initial grant application denial by the executive director of the SPA.
2. The propriety of a March 22, 1974, meeting in which the commission accepted the recommendation of the executive committee and denied DuPage's appeal.
3. The overall adequacy of the appeal procedure.

In the first complaint, DuPage County claims that the executive director's action did not meet the open meeting requirements of Section 203(d) of the

Safe Streets Act and that he could not be delegated the power of grant denial by the supervisory board of the Illinois SPA. The open meeting requirements do not apply because his denial was a staff action, not a meeting at which the supervisory board made a final decision. The action taken by the director was in the form of an initial denial. This action was later examined and assessed by the full board in an open public session. As to the delegation of denial authority, there is nothing in the Safe Streets Act or LEAA guidelines prohibiting subdelegation at the State level and a particular delegation therefore cannot be considered in noncompliance with the act.

A related question was that the executive director did not include notice of the availability of an appeal. Failure to include information on appeal procedures as required, Guideline Manual M 4100.1B, page 14, cannot be considered to be of any consequence where the applicant has actual notice of appeal procedures. Here, the procedures were contained in the SPA bylaws, and the DuPage board was fully aware of these bylaws.

As to the second complaint, Section 203(d) of the Safe Streets Act does apply to the meeting at which the commission passed on the DuPage appeal. However, a March 16, 1974, press release by the supervisory board announced the meeting and prominently mentioned that the executive committee's report on the DuPage appeal would be heard. The regional office has forwarded a newspaper article based on the release, which noted that "ILEC is expected to act on the recommendation, Friday." Thus, the meeting was open and there was public notice of the time, place, and nature of business to be transacted, as required by Section 203(d).

Concerning the adequacy of appeal from the SPA's action, the last complaint, LEAA guidelines do not at this time require any specific procedures for appeal. Instead, the requirements of Section 303(a)(8) of the act that the State plan provide for "appropriate review" of SPA actions is restated without elaboration in Guideline Manual M 4100.1B, page 15. In the absence of more specific guidelines, the appeals board as established by the Illinois SPA would appear to meet minimum "due process" requirements. This review procedure is required by Section 303(a)(8) of the act to be included in the comprehensive plan and was approved by LEAA. Unless these procedures were not followed or unless they were clearly in violation of the act, there is no basis for a noncompliance hearing.

In the DuPage County matter, the route of appeal set forth in the SPA procedures was followed. The variance alleged by DuPage is that the "entire record" was not reviewed, but the supervisory board procedures do not address the question of the content of the record. The procedures merely require that the commission render a decision on a written advisory opinion issued by the executive committee. DuPage has not shown that this procedure was not followed.

The procedures also are consistent with the act, as they do provide for review by the executive committee and then by the full ILEC of actions taken. This fulfills the review requirement of Section 303(a)(8).

Thus, the substantive complaint raised by DuPage is a matter committed to the discretion of the SPA, and the procedural complaints do not warrant a compliance hearing by LEAA.

Legal Opinion No. 74-67—Funding Eligibility of Private Security—June 6, 1974

TO: Director
Program Development and Evaluation, LEAA

This is in response to your memorandum of April 16, 1974, in which you request an opinion on whether LEAA can fund programs for the improvement of private security. Private security encompasses a broad range of activities carried out by private, nongovernmental agencies designed to protect the property of private organizations from criminal activity or to protect the lives of employees of private organizations from criminal acts committed against the organization.

The question of what, if any, private security activities LEAA can fund is best answered by looking to the declarations and purposes section of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). This section of the act provides that law enforcement is to be improved "at all levels of government" and crime "must be dealt with by State and local governments." The policy of Congress is "to assist State and local governments." Of the three enumerated standards set out in this section of the act, the only one that does not expressly apply to State and local governments is the third, which deals with research and development for improvement and new methods of law enforcement.

The purpose of the act is to assist States and localities in fighting crime and generally precludes funding of programs that are analogous to private security. Private security activities differ from public agencies in regard to both funding and public authority.

It is clear that better design of private residences may help to reduce crime, but mere payments to private parties to enable them to construct buildings incorporating security features are not allowable. Similarly, support of private security guards or police may reduce crime, but such payments would not be consistent with the purposes of the act. Indirect benefit to public law enforcement is not a sufficient basis for funding.

It is possible that private security activities may be funded when particular circumstances indicate that there will be an unusually great benefit accruing to public criminal justice because of a special relationship between the private program and general law enforcement and where such activities are related to governmental, and not private, purposes.

Once this test, based on the activity to be funded, is met, a private security program must also be scrutinized in light of the private status of the applicant, in view of the purpose of the act. It should be noted, for example, that only nonprofit private organizations are eligible for direct grants of discretionary funds (Section 306(a)) and that private status is less important in the case of Part D funding, where contracts to private organizations are specifically authorized (Section 402(b)(1)). Both of these considerations, activity and status, must be strictly applied to any private security application.

Legal Opinion No. 74-68—National Flood Insurance Program—May 2, 1974

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to your request for a legal opinion as to the applicability of Public Law 93-234, Flood Disaster Protection Act of 1973, to the LEAA program.

Specifically, the Flood Protection Disaster Act requires that flood insurance must be purchased by property owners who acquire, through Federal assistance programs, land or facilities located in areas identified as having special flood hazards. On its face, this would appear to be applicable to all LEAA-funded programs. However, Section 3(a)(3) of this act, in defining "financial assistance," exempts general and special revenue sharing and formula grants to the States. Block grants are made under Part C of the Safe Streets Act on a formula basis. That is, the amount of annual block grants for each State is computed on the basis of a population formula. Therefore, the Flood Protection Act is not applicable to the block grants made to the States under Part C of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83). However, any discretionary funding would require LEAA to comply with this act. Accordingly, under Section 202(a) of the Flood Disaster Protection Act of 1973:

> No Federal officer or agency shall approve any financial assistance for acquisition or construction purposes on and after July 1, 1975, for use in any area that has been identified by the Secretary as an area having special flood hazards unless the community in which such area is situated is then participating in the national flood insurance program.

All discretionary fund applications after July 1, 1975, will contain an assurance of compliance with this act.

Legal Opinion No. 74-69—Division of the Office of General Counsel Investigative Responsibility—June 30, 1974

TO: Acting Inspector General, LEAA

This is in response to your inquiry as to the proper allocation of responsibility for investigations conducted under the LEAA Administrative Review Procedure Regulations, 28 C.F.R. §18.31 (1973). Specifically, you asked for an opinion detailing the roles your office and my office should perform in the investigation of matters arising under the LEAA Administrative Review Procedure Regulations.

Procedures for hearing appeals from actions taken by LEAA on grants of LEAA funds are governed by the LEAA Administrative Review Procedure Regulations (ARPR), 28 C.F.R. §18 (1973), and the Administrative Procedure

Act (APA), 5 U.S.C. §§551-59. The ARPR establishes procedures for investigation, hearings, and rehearings. Overlying LEAA's ARPR is the APA. The APA, at 5 U.S.C. §559, gives each agency the authority to comply with the requirements of the APA through the issuance of its own rules. The APA provisions do not limit or repeal additional requirements imposed by LEAA's statute or otherwise recognized by law.

A threshold question is whether any legal restraints exist to limit participation by the Office of General Counsel (OGC) staff members in investigations. An examination of the LEAA ARPR, APA, and relevant caselaw disclosed no restriction on OGC staff members from fully participating in investigations. This conclusion was reached notwithstanding the restriction contained in 5 U.S.C. §554(d), which provides, in part, that:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply–
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> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency.

The various functions provided for in 5 U.S.C. §554(d) are as follows:

- Investigation,
- Prosecution,
- Decisionmaking,
- Advising in decisionmaking,
- Agency review,
- Advising in agency review,
- Acting as witness in public proceedings, and
- Acting as counsel in public proceedings.

The functions of decisionmaking, advising in decisionmaking, agency review, and advising in agency review are judging functions under 5 U.S.C. §557. The judging functions refer to determinations made by a presiding employee at a hearing or agency review subsequent to the initial decision of the presiding employee. (5 U.S.C. §557(b).)

There is nothing to prohibit a person who has performed investigatory duties from participating in an agency review prior to a hearing. This position finds support in *City of San Antonio* v. *Civil Aeronautics Board,* 374 F.2d 326 (D.C. Cir. 1967), which involved an allegation that the Civil Aeronautics Board's (CAB) findings on which a consolidation order was based were inadequate in that they did not comply with an APA provision. The court noted that this allegation is predicated on the assumption that consolidation orders must contain detailed findings and conclusions similar to those required for adjudicatory decisions on the merits. In rejecting this assumption, the court at page 331 stated that:

> The only section of new Title 5, U.S.C.A. §§551-576, 701-706 . . . that may have some bearing on preliminary rulings such as consolidation orders is Section 555(e), which requires "a brief statement of the gounds for denial" when "a written application, petition, or other request of an interested person made in connection with any agency proceeding" is denied.

This statement coupled with 5 U.S.C. §557(b) is adequate authority to support the position that 5 U.S.C. §554(d) does not prohibit a person who has performed investigatory duties from participating in an agency review prior to a hearing. This is based upon the view that investigation and prehearing review determinations are preliminary rulings analogous to consolidation orders issued prior to CAB hearings.

Although an OGC staff member is not statutorily precluded from participating in both of the above functions, the OGC has determined that equity requires the adoption of an internal separation of functions in regard to reviewing requests for rehearing initiated under 28 C.F.R. §18.41 (1973). However, this will not preclude OGC staff members from participating in investigations that are initiated in response to a request or complaint for a hearing under 28 C.F.R. §§18.41, 18.42 (1973).

The exception contained in 5 U.S.C. §554(d) allows a person who has performed an investigation or prosecution function also to act as witness or counsel in public proceedings. Under this exception, an OGC staff member may participate in an investigation and subsequently represent LEAA in a hearing.

This position is supported by Davis in the *Administrative Law Treatise* (1958 ed.) at §13.06:

> The only combinations the Act seeks to prevent are the combinations of prosecuting and judging, and investigating and judging. Advocating in cases which are not prosecutions may be combined with judging without violating the Act. Those who determine that proceedings should be instituted may participate in judging. The same individual may attempt to negotiate a settlement and later serve as a judge. And nothing in the Act prevents a combination of judging and testifying.

A problem could arise if the General Counsel were to assume the role of a hearing examiner while at the same time supervising the attorneys who have conducted the investigation and review of requests and complaints for a hearing. However, the possibility of any objections being raised about this situation will be averted because the General Counsel will not preside over LEAA hearings.[1]

Even though the General Counsel will not act in the capacity of a hearing examiner, another question is whether he is prohibited from advising the LEAA Administrator on a question of law because he supervises the investigators and reviewers. Davis in the *Administrative Law Treatise* (1958 ed.), at §13.07, has posed a similar question in reference to investigators and prosecutors. His response is that:

> Questions of this type probably can reasonably be answered either way, and the decision may well depend largely on special circumstances in particular agencies. The

[1] Under 28 C.F.R. §18.52(a) (1973), any duly qualified hearing examiner or any authorized member of LEAA may preside over a LEAA hearing. Where a member of LEAA has been authorized to preside over a hearing the policy of LEAA has been to designate someone other than the General Counsel as the presiding officer. No change in this policy is foreseen.

major purpose is to prevent contamination of judging with either investigating or prosecuting. Even a small contamination may defeat that purpose.

This issue was also raised in *International Paper Company* v. *Federal Power Commission*, 438 F.2d 1349, 1351 (2d Cir. 1971), *cert. denied*, 404 U.S. 827 (1971). The plaintiff claimed that:

> The Commission's order in this proceeding was unlawful, because certain legal staff members had violated 5 U.S.C. §554(d), by participating in both the investigatorial and prosecutorial functions of the Commission against International and had in addition advised the Commission in reaching its ultimate decision.

The court dismissed this issue on the grounds that the plaintiff had condoned and waived this point. This conclusion was based upon the facts:

- That plaintiff's counsel was a prior member of the Commission's general counsel staff and was, therefore, aware of the Commission's administrative procedures;
- That a timely challenge was not made as objection was made initially at the time of rehearing when correction became impossible;
- That the practice was not called to the Commission's attention at the time the parties agreed to the stipulation of facts.

In *Pinkus* v. *Reilly*, 157 F. Supp. 548 (D.N.J. 1957), a violation of 5 U.S.C. §554(d) was noted where the General Counsel for the Post Office Department was given the sole adjudicating authority in a proceeding against a defendant for use of the mail to defraud and where he also continued to have supervisory power over his assistant who was delegated the prosecuting function. This case focuses upon combining the prosecuting and judging functions in one person. In this regard, a distinction must be made between an investigation preceding a prosecution hearing such as in the *Pinkus* case and an investigation preceding a LEAA hearing. In the former, the investigators are charged with building a case against the defendant. They are acting in an advocacy position. In the latter, the investigators are evaluating a request or complaint for a hearing. In conducting such evaluations the investigators are neutral fact-finders and as such will not contaminate the judging function.

This distinction has been expanded upon by Davis in §13.07 of his treatise:

> Advocacy is easily confused with other functions somewhat resembling it, and the Act should not be read to prohibit participation in judging by those who are neither investigators nor advocates. An advocate is one who tries to win a case by presenting evidence or arguments. The identifying badge is the will to win. Judicial equilibrium gives way to partisanship. Materials on one side are maximized and those on the other are minimized. The advocate who purposely allows himself to develop a sincere belief in the justice of his cause may be the most likely to succeed; this is why the advocate should be barred from judging.
>
> One who calls or examines witnesses is not necessarily an advocate . . . . In the administrative process an officer may be appointed to assist the examiner in assuring that the case is fully developed on both sides. If such an officer has no will to win for either side, if he honestly tries to assure a full development, letting the chips fall where they may, he is not an advocate.

The court in the *Pinkus* case raised the following question, which it reserved for future consideration:

> It is a further interesting question whether the Administrative Procedure Act as adopted prevents all such harmful commingling of the functions of adjudication and prosecution or only certain harmful commingling, leaving certain commingling of prosecuting and adjudicating authority still lawful.[2]

Until more definite guidance is offered by Congress or the Supreme Court, it is not considered to be a contamination of the judging function where the General Counsel, while supervising investigators and reviewers acting in a neutral fact-finding capacity, advises the LEAA Administrator on a question of law.

As no restrictions could be found to limit OGC staff members from participating in investigations, any division of responsibilities in the conduct of such investigations is an administrative decision. Because of the wide range of issues that can arise, such a decision should be made on a case-by-case basis. To facilitate this decisionmaking and to insure that the Office of Inspector General and OGC are able to give full consideration to investigative requirements, the OGC will implement procedures to inform the Office of Inspector General of all requests for ARPR investigations and the issues involved. At that point, a decision can be made on the division of investigative responsibilities, if required, in view of issues and available manpower.

Legal Opinion No. 74-70—Part C Buy-In Requirement—May 23, 1974

TO: Assistant Administrator
Office of Regional Operations, LEAA

This is in response to two separate requests for an interpretation of Section 303(a)(2) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83).

These requests originated in the Chicago and Dallas Regional Offices and relate to questions raised by Hennepin County, Minn., and New Orleans, La. In addition, the requests have been supplemented by written position papers of the National League of Cities—U. S. Conference of Mayors and the St. Paul-Ramsey County (Minn.) Criminal Justice Advisory Committee.

Issue Presented

Section 303(a)(2) is sometimes referred to as the "buy-in" provision of Part C because it requires the State to buy-in to local programs funded by the State from Part C funds. Under this provision, the State must pay for a portion of

[2] 157 F. Supp. 548, 552 (D. N.J. 1957).

the required non-Federal share of these local programs. The issue presented for resolution by the two requests for opinions is whether the funds required to be provided by the State under Section 303(a)(2) for programs funded from LEAA Part C block grants to units of local government—the so-called buy-in funds—must increase when the local share of the cost of an individual project increases.

It is the conclusion of this Office, based on a review of the statute, the legislative history of the 1971 and 1973 amendments, the LEAA Financial Guidelines, and the submitted correspondence, that buy-in must be calculated against the total Part C pass-through, not against the local fund share, which may vary from grant project to grant project because of voluntary adjustment to the projects' sizes or State supervisory board requirements.

The issue first arose in the context of a policy adopted by the Minnesota Governor's Commission on Crime Prevention and Control (the State Criminal Justice Planning Agency or SPA) for the award to local governments of LEAA Part C block grant funds. The policy began in this fiscal year and states:

> Funding support provided by the Governor's Commission on Crime Prevention and Control will be for a maximum of three years of project duration for any one grant project. In order to encourage progressively increasing support of projects by grantee agencies, the Governor's Crime Commission will provide decreasing support for grant projects in their second and third years. A grant for the first year of a project may be for up to 90 percent of the total cost of the project for that year. No grant for the second year of any project will be for more than two-thirds of the total cost of the project for that year. No grant for the third year of any project will be for more than one-third of the total cost of the project for that year. Exceptions will be possible, but in making any exception, the Commission will look to what effort has been made by the grantee to obtain permanent funding from non-LEAA sources and what successes have resulted.
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> In addition to adopting this policy at its September 6, 1973, meeting, the Commission also adopted a "buy-in" policy that states:
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> > State buy-in for action funds awarded to local units of government is set at one-half of the minimum ten percent match requirement, regardless of project year.
> >
> > The state will provide one-half of the ten percent match whether or not the actual amount of the non-federal funding is more than the minimum required by LEAA.
> >
> > Matching funds for construction projects remain at 50 percent to 50 percent, however, with the state buy-in amounting to one-half of the 50 percent or 25 percent.

On April 19, the commission, reacting to an appeal from the local governments, modified the policy to provide that the first 2 years of the grant could be funded to up to 90 percent of the cost of the project and the third to up to 60 percent of the cost. The buy-in policy remained the same.

In Louisiana, the issue arose out of a proposed policy of a similar nature. The executive committee of the Louisiana Commission on Law Enforcement and Administration of Criminal Justice (SPA) recommended the policy on February 27, 1974, and the Louisiana commission approved it for projects starting in 1976.

Discussion

Section 303(a)(2) of the act states:

> Sec. 303(a) The Administration shall make grants under this title to a State planning agency if such agency has on file with the Administration an approved comprehensive State plan . . . Each such plan shall—
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> * * * * * *
>
> (2) provide that at least the per centum of Federal assistance granted to the State planning agency under this part for any fiscal year which corresponds to the per centum of the State and local law enforcement expenditures funded and expended in the immediately preceding fiscal year by units of general local government will be made available to such units or combinations of such units in the immediately following fiscal year for the development and implementation of programs and projects for the improvement of law enforcement and criminal justice, and *that with respect to such programs or projects the State will provide in the aggregate not less than one-half of the non-Federal funding.* Per centum determinations under this paragraph for law enforcement funding and expenditures for such immediately preceding fiscal year shall be based upon the most accurate and complete data available for such fiscal year or for the last fiscal year for which such data are available. The Administration shall have the authority to approve such determinations and to review the accuracy and completeness of such data. [Emphasis added.]

As originally enacted in 1968, the act permitted LEAA to pay up to 60 percent of the costs of most LEAA-funded projects and required the States and cities to provide the remaining 40 percent. This non-Federal contribution could be in cash or in services, facilities, or other "in-kind" match. The State did not have to provide any of the non-Federal contribution for programs funded by units of local government. In practice, if a State sponsored a project, the State provided the full 40 percent match, and, if a unit of local government funded the project, the State generally required the unit of local government to provide the full 40 percent match.

In the Omnibus Crime Control Act of 1970 (Public Law 91-644), Congress amended the 1968 act by reducing the required State and local matching share to 25 percent of the total project costs, and—acting on a longstanding recommendation of the Advisory Commission on Intergovernmental Relations (ACIR)[1]—required the States to buy-in on local LEAA projects by providing in the aggregate one-fourth of the non-Federal share of the costs of such projects. This buy-in provision was written into the Omnibus Crime Control Act by the House Committee on the Judiciary after eliciting extensive testimony from the mayors of a number of large cities concerning their inability to provide the non-Federal share of the costs of LEAA projects and the unwillingness of the States to assist them. The House provision would have required the States to buy-in on all local projects.

Subsequently, on the basis of testimony by the Attorney General before the Senate Judiciary Committee, the buy-in provision was deleted from the Senate version of the Omnibus Crime Control Act. The Senate Judiciary Committee

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[1] Report of the Advisory Committee on Intergovernmental Relations, *Impact of Federal Urban Development on Local Government Organization and Planning,* (1964).

Report, reflecting the Attorney General's testimony, stated that the committee did not wish to see an "inflexible standard" included in the act that might "have the effect of requiring some States to withdraw from the program because of inability to meet matching requirements." In the conference committee convened to resolve the differences between the House and Senate versions of the legislation, the buy-in provision was accepted by the Senate conferees, but with modifications that postponed the effective date until fiscal year 1973 and allowed the States to buy-in on an aggregate basis rather than on a project-by-project basis. This compromise provision ultimately became law.

In the 1973 amendments (Public Law 93-83) to the act, the buy-in provision was not altered in concept, although it was extended to Part B planning grants and was changed to require the States to pay 50 percent of the required non-Federal share of local programs.

Since it is clear from a reading of the act and legislative history that Congress never specifically considered the question addressed in this opinion, the structural placement and formulization in Section 303(a)(2) of the matching requirements and appropriated fund language is significant.

The specific language of Section 303(a)(2) that is at issue is the statement that: "the State will provide in the aggregate not less than one-half (previously one-fourth) of the non-Federal funding." Two terms in this sentence are significant for purposes of this opinion: (1) "in the aggregate" and (2) "non-Federal funding."

The term "in the aggregate" is used in numerous sections of the statute. For example, Section 301(c) provides that ". . . The non-Federal funding of the cost of any program or project to be funded by a grant under this section shall be of money appropriated in the aggregate, by State or individual units of government, for the purpose of the shared funding of such programs or projects." This is the requirement that provides that matching funds for LEAA grants awarded under Part C be in cash, and it is clear that Congress by using the term "in the aggregate" authorized States to account for matching funds on a program or project level. The terms "program" and "project" both had well-settled meanings when this amendment was passed in 1971.

By comparison, the term "in the aggregate" in Section 303(a)(2) does not have such limiting language. The term "in the aggregate" relates to the specific figure the State is required to pass through to local government and must be read in that context. That this was intended was affirmed by Representative Richard H. Poff, a member of the Conference Committee. In the presentation of the conference report,[2] Representative Poff stated in part:

> Under present law, a State when it receives a block grant from LEAA must pass through 75 percent of the funds to units of general local government. Present law does not indicate whether the local government or the State government is obligated to supply the non-Federal match with regard to the Federal dollars that are passed through to units of general local government. Experience has indicated that only five or six States assumed part of the non-Federal expense of these programs. The House bill required that the State provide at least one-fourth of the non-Federal funding required for federally assisted local programs. The major criticism of the House provision was not philosophical but pragmatic. Such criticism, while recognizing the merits of the so-called buy-in provision, was based upon the present financial problems confronting the States. To ease the practical impact of this provision while honoring its purpose, the conference did four things:
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> * * * * *
>
> Third, it relaxed the requirement as of fiscal year 1973 that each State pass through 75 percent of its block grant funds. It substituted a formula which would allow a State to pass through to local governments a portion of the block grant commensurate with the proportionate performance of local governments. This flexible pass-through provision would mean that 45 of 50 States could pass through less than 75 percent of the block grant funds, as is now required. And, of course, the less passed through, the smaller the impact of the buy-in requirement.
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> Fourth, whereas the House bill would have required that the State buy into each local program, the conference agreed that the State may buy in on an aggregate basis. The conference was particularly impressed with the example provided by the State of Illinois which is now buying in on an aggregate basis.

[2] 116 Cong. Rec. H11891 (daily ed. Dec. 17, 1970).

The term "non-Federal funding" also is used throughout the statute. However, it is significant to note that it is never used to denote the matching share but rather to denote that appropriated money is required. For example, in Section 204, the requirement for matching funds is spelled out by language that the "grant authorized under this part shall not exceed 90 per centum of the expenses incurred . . ." In Section 301(c) the matching requirement is set out by language that the "grant . . . may be up to 90 per centum of the cost . . ." In Section 306(a) the language reads, "any grant . . . may be up to 90 per centum of the cost . . ." Section 406(e) specifies that any "grant or contract may be up to 75 per centum of the total cost . . ." Likewise Section 455(a)(2) contains the similar formula language, i.e., "Any grant . . . may be up to 90 per centum of the cost."

Meaning of Buy-In

As previously stated, the buy-in amendment originated in the House Committee on the Judiciary. The general principle that States should make a contribution to local government programs had originated with the Advisory Committee on Intergovernmental Relations. In its report,[3] the ACIR recommended that the States assume some responsibility for urban development when Federal grants are channeled through a State administrative structure and require significant financial contributions. The ACIR felt that an appropriate share would be from 20 to 50 percent of the non-Federal match. For any one program the criteria to determine the share were to include such factors as the amount and size of the program, the overall project cost, the State interest in the program elements, and the local tax basis. In the 1971 amendments the share was set at 25 percent and increased to 50 percent in the 1973 amendments. This figure would place the requirement at the maximum level of the ACIR recommendation with respect to the statutory share of required Federal matching funds.

[3] *Supra*, note 1.

The House Judiciary Committee Report[4] stated that "the committee concludes that the States should be required to assist units of general local government in contributing toward the non-Federal share . . . ." The committee stated that "if the block grant approach is to work effectively, the States must assume a greater financial responsibility than at present." This purpose basically carried through to enactment of the buy-in provision. However, there was considerable concern that the States retain flexibility and not be driven out of the LEAA program.[5]

Senate consideration of the buy-in requirement subsequently resulted in a modification of the requirement. The Senate Judiciary Committee expressed agreement with the proposition that States increase their financial commitments to local law enforcement. However, the committee expressed concern with any inflexible modification.[6]

The conference agreement reflected the greatest concern with the amendment. As stated in the report, "the major criticism of the House provision was not philosophical but was pragmatic." Financial problems facing the States at this time were of great concern at the presentation of H.R. 17825 and in later floor debate in the House.[7]

Legislative history on the buy-in amendments in 1973 reflects this same concern.[8]

While flexibility was stressed and concern for the effects of the requirement existed, the entire legislative history is set in the context of the statutory matching requirements. The 1971 amendments reduced the general matching requirements from a 40 percent State and local share to 25 percent. The debate and enactment of the buy-in requirement took place in the context of a well-known and thoroughly considered statutory match requirement at each stage of the proceedings. This was also true in 1973 when the requirements again were reduced from 25 percent to 10 percent. In all its actions, Congress considered the buy-in requirement only as it related to the statutory matching share.

It is also significant to the overall policy of the legislation that the hearings, debate, and subsequent enactment took place within the context of Section 303(a)(9). This section provides that the State plan must:

> . . . demonstrate the willingness of the State and units of general local government to assume the costs of improvements funded under this part after a reasonable period of Federal assistance.

It was part of the original act and was reconsidered in the 1973 amendments where it was retained in conference following deletion in the House bill.[9]

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[4] H. Rep. No. 91-1174, 91st Cong., 9.
[5] 116 Cong. Rec. H 6205 (daily ed. June 30, 1970).
[6] S. Rep. No. 91-1253, 91st Cong., 32; 116 Cong. Rec. S. 17532 (daily ed. Oct. 8, 1970).
[7] 116 Cong. Rec. H 11891 (daily ed. Dec. 17, 1970).
[8] Senate floor debate, 119 Cong. Rec. S 11747 (daily ed. June 22, 1973).
[9] See the Joint Explanatory Statement of the Committee of Conference, S. Rep. No. 93-349, 93rd Cong., 28.

This provision is implemented in the Guideline Manual for State Planning Agency Grants (M 4100.1B, Chapter 1, p. 17) as follows:

> J. State Assumption of Cost
> (1) *Provision.* The Act provides that State plans demonstrate the willingness of the State and units of general local government to assume the costs of improvement funded under the Act after a reasonable period of Federal assistance.
> (2) *Application Requirements.* INDICATE THE PERIOD OF TIME THE STATE WILL GENERALLY CONTINUE FUNDING A PROJECT. WHAT IS THE PERCENTAGE OF CONTINUATION FUNDING COMMITTED FOR EACH FISCAL YEAR GRANT AWARD. INDICATE HOW NEW ELEMENTS AND SYSTEMS INITIALLY FUNDED WITH FEDERAL FUNDS MAY ULTIMATELY BE ABSORBED INTO REGULAR BUDGETING OF STATE AND LOCAL ENFORCEMENT SYSTEMS.

A requirement that a State plan indicate such an intent is consistent with State and local appropriations processes. Long-range or future commitments of the State legislatures or local funding bodies cannot be predicted with certainty by State agency planners. What is required is a "good faith" intent or attempt to obtain partial or full support of continuation projects. Such good faith intent can be shown by budget requests for State or local matching funds concurrent with Federal grant requests, grant conditions that limit the Federal funding to a reasonable number of years, or provisions for funding that provide that the Federal share will decline by fixed amounts in future years.[10]

The assumption of cost provision is legitimately implemented by the Minnesota policy. The policy is specifically designed to implement this provision of the act and LEAA guidelines. The effect of application of the minimum buy-in percentage to each local subgrant project, even as the local share increases, may create difficulties for local government assumption of costs. However, it reflects a policy by the State to set a fixed level for local project cost sharing. In addition, it cannot be read into the overall policy of the legislation that the intent was for the State level to subsidize local law enforcement to any greater extent. In fact, a contrary position is clearly reflected in the legislation as the buy-in need only be provided "in the aggregate" and no individual local unit of government or project has any claim on even the minimal percentage. If the State need not supply any buy-in to a local governmental unit, it cannot be argued that the State must supply a larger amount when it does meet the minimal provision.

Guideline Manual M 7100.1A, Financial Management for Planning and Action Grants, contains the appropriate implementation of the legislative intent behind the buy-in requirement. Chapter 4, paragraph 18 provides:

> This provision is applied to the total aggregate dollar figure . . . which the State is required to pass-through to local units of government.

This guideline accurately reflects that the buy-in is a fixed figure. It is calculated on the date of award or the date on which the variable pass-through

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[10] See LEAA Legal Opinion No. 74-58—Interpretation of the Assumption of Cost Provisions.

data are available from the Census Bureau. To require otherwise would lead the States into an untenable situation where necessary State appropriation requirements would not be known until as much as 2 years after the fact. The legislation and the legislative history's concerned that the buy-in requirement not drive States out of the program or create unreasonable burdens demands a fixed figure calculable against the LEAA award and pass-through requirement. This can only be accompanied if the statutory matching requirement is the base figure and changing requirements—due to variable local matching input (voluntary or policy—oriented) data with varying start and end dates and levels of expenditure in variance with budgeted data—are required as part of the input to the calculation.

In summary, it is the conclusion of this office that the Minnesota policy is in compliance with the act. The State buy-in is applicable to the required pass-through of the statutory share of non-Federal funds as required in the act. This figure is fixed and need not vary due to voluntary or State-policy-mandated matching provisions.

Legal Opinion No. 74-71—Excess Motor Vehicles - Loan to Grantees—May 31, 1974

TO: Acting Director
Administrative Services Division, LEAA

This is in response to a request for an opinion on several issues involving the transfer to LEAA grantees of motor vehicles that are declared to be excess Federal property by the General Services Administration and carried on GSA's excess property schedule.[1] Questions specifically addressed are the propriety of LEAA's taking title to such vehicles, potential tort liability for the loan of these vehicles to State grantees, and whether official Department of Justice license tags must be maintained on such vehicles:

Title to Vehicles

It is provided in 31 USC §638a.(a) that:

> Unless specifically authorized by the appropriation concerned or other law, no appropriation shall be expended to purchase or hire passenger motor vehicles for any

[1] The Federal Property and Administrative Services Act of 1949, Ch. 288, 63 Stat. 377 (codified in scattered sections of 40, 41, 44, 50 Ap. U.S.C.), establishes a scheme for disposing of Federal property. The act requires each Federal agency to inventory its property and to determine what property, if any, is owned in excess of agency needs. Implementing regulations at Title 40 of the Code of Federal Regulations require each Federal agency to report on a regular basis to GSA property that is excess to its needs. GSA then compiles a list and circulates that among Federal agencies that are authorized under the Federal Property Act to fill any outstanding needs from the excess property list. After the list has been circulated and Government agency needs have been fulfilled, GSA is then authorized to declare property surplus and either donate it or offer it for sale to the public in accordance with provisions of the Federal Property Act.

> branch of the government other than those for the use of the President of the United States, the secretaries to the President or the heads of executive departments enumerated in Section 101 of Title 5.

Subsection (e) of Section 638a. makes this restriction applicable to the acquisition of passenger motor vehicles by transfer from another Federal agency, as such a transfer is defined as a purchase within the meaning of the section. Transfer includes the acquiring of a vehicle by a Federal agency from the excess property schedule.

LEAA does not have the specific authorization in its appropriation to purchase passenger motor vehicles and it is therefore prohibited by 31 U.S.C. §638a. from acquiring such vehicles from the GSA excess property schedule. However, this Office has been informed by the Office of General Counsel, General Services, that this provision is applicable only to passenger motor vehicles. Other vehicles—such as buses, trucks, and ambulances—are not to be governed by the same statutory provision.

Vehicles other than passenger vehicles can be transferred as excess property if they so qualify. Provision is made at 41 CFR § 101-43.315-1 for the transfer of excess property among Federal agencies. The applicable Code of Federal Regulations provisions and Standard Form 122 (Transfer Order Excess Personal Property) indicate that the transfer involves a passage of title with the transferor agency retaining no control over the property so transferred.

It is further provided in 41 CFR § 101-43.320 that in a transfer of excess property between Federal agencies, the receiving agency may furnish the property to its grantee but title does remain with the Federal Government. Thus LEAA can acquire vehicles other than passenger vehicles from other Federal agencies and lend them to the States to assist the grantee in fulfilling his mission.

Tort Liability

The furnishing of the vehicle to the State does make LEAA potentially liable in a tort action. To evaluate liability and proper operating procedure, it is helpful to look at another Federal agency that has dealt with a similar situation. The Manpower Administration of the Department of Labor, for example, does furnish automobiles to its contractors and grantees and has published certain guidelines to be followed for the loan of motor vehicles.

It is provided in section 3219 of the Property Handbook for Manpower Administration Contractors that:

> Prior to the operation and utilization of a motor vehicle, the contractor must obtain liability and property damage insurance on each said government-owned vehicle in his possession. The Manpower Administration requires insurance coverage with minimum financial responsibility limits of $100,000 per person and $300,000 per accident for bodily injury and $5,000 per accident for property damage. The contractor must provide a copy of insurance certification to the RCPO in his area or in the case of national contracts to the national MA property officer.

By utilizing a similar provision, LEAA can avoid many of the day-to-day tort problems arising out of the normal use of automobiles by grantees. And as a condition precedent to the furnishing of an excess vehicle to a grantee, LEAA

should consider following the example of the Manpower Administration and require that the grantee secure insurance. This would not completely absolve the Federal Government, however, of potential liability in a suit as the retention of ownership by the Federal Government may facilitate its being joined as a party defendant. This has occurred on several occasions in the administration of the Manpower Administration program.

License Tags

Title 41 of the Code of Federal Regulations in Section 101-38.301 provides that official Government license tags shall be used on Government-owned or -leased motor vehicles. It is acknowledged that the display of Federal tags on loaned vehicles might possibly have an adverse or counterproductive effect in sensitive local programs such as drug rehabilitation or halfway houses. However, 41 CFR §101-38.602(f) makes provision for only limited exemptions from the requirement on the use of official U.S. Government tags. The Department of Justice may specifically exempt:

> All motor vehicles operated by the Bureau of Narcotics and Dangerous Drugs, the Federal Bureau of Investigation, the Border Patrol, and those vehicles operated in undercover law enforcement activities or investigative work by the Immigration and Naturalization Service, by the Bureau of Prisons and Jail Inspectors, and by the U. S. Marshals.

Section 101-38.605 of Title 41 of the Code of Federal Regulations provides for additional exemptions authorized by the head of the agency if conspicuous identification would interfere with the discharge of investigative, law enforcement, or intelligence duties. Accordingly, if LEAA furnishes the vehicle for one of the purposes set forth above, the requirement of official Government tags may be waived. Otherwise, the authority does indicate that Federal tags must be maintained.

Legal Opinion No. 74-72—(Number not used.)

Legal Opinion No. 74-73—The Use of Appropriated Executive Department Funds to Defray Interdepartmental Juvenile Delinquency Council Expenses—June 30, 1974

TO: Administrator, LEAA

This is in response to your request to define what limitations, if any, are placed upon the use of appropriated funds under the control of executive departments to defray expenses incurred by the Interdepartmental Council to coordinate all Federal Juvenile Delinquency Programs.

A statutory authority to permit the use of appropriated funds under the control of executive departments to defray the Council's expenses is provided at 31 U.S.C. §691:

> Appropriations of the executive departments and independent establishments of the Government shall be available for the expenses of committees, boards, or other interagency groups engaged in authorized activities of common interest to such departments and establishments and composed in whole or in part of representatives thereof who receive no additional compensation by virtue of such membership: *Provided*, That employees of such departments and establishments rendering service for such committees, boards, or other groups, other than as representatives, shall receive no additional compensation by virtue of such service. (May 3, 1945, C. 106, Title II, §214, 59 Stat. 134.)

The authorization provided in 31 U.S.C. §691 is limited by Title VI, Section 608 of the Treasury, Postal Service, and General Government Appropriation Act of 1974, Public Law 93-143, which provides as follows:

> No part of any appropriation contained in this or any other Act, shall be available to finance interdepartmental boards, commissions, councils, committees, or similar groups under section 214 of the Independent Offices Appropriations Act, 1946 (31 U.S.C. 691) which do not have prior and specific congressional approval of such method of financial support.

Under 31 U.S.C. §74, the Comptroller General of the United States is authorized to approve or disapprove disbursements of Federal funds and to render decisions upon the questions involving disbursements:

> Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

Under this statutory authority, the Comptroller General has provided guidance for the application of 31 U.S.C. §691 and the limitation contained in Public Law 93-143. In 26 Comp. Gen. 354 (November 22, 1946), the Comptroller General determined that currently appropriated funds may properly be used under 31 U.S.C. §691 by an agency to furnish an interagency group with personnel and office equipment as expenses incident to participation in the interagency group where participation is essential to the agency's authorized function.

In determining the types of expenses for which appropriations of executive departments are available for interagency groups such as the Juvenile Delinquency Council, the Comptroller General in 28 Comp. Gen. 365, 366 (December 15, 1948), in stating that the funds must be expended solely for the purposes for which they originally were made available, made the following observation:

> . . . while this Office has sanctioned the use of a working fund to defray certain expenses of interagency commissions because such an account presents a feasible and expedient accounting method for handling the financial transactions of interagency commissions, funds made available to such commissions by virtue of the provisions of

[31 U.S.C. §691] must be expended and obligated in accordance with the statutes appropriating such funds and are to be regarded as available only during the period of availability of the original appropriation.

In 49 Comp. Gen. 305, 306 (November 13, 1969), the question was raised whether a proposed interagency contract, the cost of which was to be shared by the participants, was precluded by Section 307 of Public Law 90-550, which is virtually equivalent to Section 608 of Public Law 93-143 and which the Comptroller General noted:

> . . . prohibits the use of monies appropriated by that act for financing Interdepartmental Boards, Commissions, Councils, Committees or similar groups under section 214 of the Interdepartmental Offices Appropriation Act of 1946, 31 U.S.C. 691, which do not have prior specific congressional approval for such method of financial support.

The Comptroller General determined at page 307 that the general effect of Section 307 was:

> . . . to preclude with certain exceptions, not here pertinent, the financing from funds appropriated by Public Law 90-550 of "interdepartmental boards, commissions, councils, committees, or similar groups" engaged in any of the "authorized activities" which otherwise might have been financed by such interagency groups under 31 U.S.C. 691 unless specific congressional authorization has been given for such method of financing.

In distinguishing between 26 Comp. Gen. 354, *supra,* and 49 Comp. Gen. 305, *supra,* the former refers to expenses incident to participation, and the latter focuses upon the financing of an interagency group engaged in authorized activities. The use of appropriated funds by executive departments to defray expenses incident to participation is permissible. The use of appropriated funds to finance an interagency group engaged in authorized activities is not permitted without prior specific congressional authorization. As construed in 49 Comp. Gen. 305, *supra,* this is interpreted to mean appropriated funds cannot be used to finance an interagency group's authorized activities without prior specific congressional authorization.

In applying the guidance provided by the Comptroller General to the Interdepartmental Juvenile Delinquency Council, appropriated funds under the control of executive departments may be used to defray expenses incident to participation. (26 Comp. Gen. 354, *supra.*) Where funds may be used to defray an interagency group's expenses under 31 U.S.C. §691, a working fund may be used as a feasible and expedient accounting method for handling the financial transactions of an interagency group. (35 Comp. Gen. 201, 202 (October 11, 1955). However, funds made available under 31 U.S.C. §691 must be expended and obligated in accordance with the statutes appropriating such funds and are to be regarded as available only during the period of availability of the original appropriation. (28 Comp. Gen. 365, 366, *supra.*)

In 26 Comp. Gen. 354, *supra,* an administrative determination had to be made as to whether participation was essential to the agency's authorized functions. This determination is not required in regard to the Council since

participation is statutorily required by the Juvenile Delinquency Prevention and Control Act Amendments of 1971, Public Law 92-31 at Section 4:

> (a) There shall be established an Interdepartmental Council whose function shall be to coordinate all Federal juvenile delinquency programs.
> (b) The Council shall be composed of the Attorney General, the Secretary of Health, Education, and Welfare, or their respective designees, and representatives of such other agencies as the President shall designate.
> (c) The Chairman of the Council shall be appointed by the President, and its first meeting shall occur not later than thirty days after the enactment of this legislation.
> (d) The Council shall meet a minimum of six times per year and the activities of the Council shall be included in the annual report as required by section 408(4) of this title.

Legal Opinion No. 74-74—Eligibility of Maine Warden Service to Receive LEAA Assistance—June 30, 1974

TO: LEAA Regional Administrator
Region I - Boston

This is in response to an inquiry on whether the Warden Service of the Maine Department of Inland Fisheries and Game is eligible to participate in and receive Federal grant fund assistance from the Law Enforcement Assistance Administration.

The Maine Attorney General has taken the position in a memorandum, dated January 23, 1974, to the Commissioner of the Maine Department of Inland Fisheries and Game that the Maine Warden Service is engaged in "law enforcement." Based upon this determination, the Maine Attorney General concluded that the Warden Service is eligible to participate in and receive Federal grant fund assistance from LEAA.

The Maine Attorney General's determination was based upon the following description of the powers and duties of the Department of Inland Fisheries and Game Wardens:

> It shall be the duty of the inland fish and game wardens to enforce all laws relating to inland fisheries and game and all rules and regulations pertaining thereto, Title 7, Chapter 707 and sections 3601, 3602, Title 17, section 2794, Title 32, Chapter 65; all regulations of the Federal Migratory Bird Treaty Act, Act of Congress approved July 3, 1918, as amended; all rules relating to hunting, fishing and trapping; all rules and regulations promulgated in accordance with Title 38, section 323 and all rules and regulations promulgated by authority of Chapter 206, to arrest all violators thereof, and to prosecute all offenses against the same.
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> In addition to their specified duties and powers, the wardens are vested with the same powers and duties throughout the several counties of the State as Sheriffs have in their respective counties.
>
> The wardens shall have the authority to serve criminal processes on offenders of the law, and to arrest and prosecute camp trespassers or persons committing larceny from any cottage, camp or other building, and, except before the District Court, shall be allowed the same fees as sheriffs and their deputies for like services, all such fees to be paid to the commissioner. The wardens shall have the same rights as sheriffs to require

aid in executing the duties of their office. They may serve all processes pertaining to the enforcement of any provision of chapters 301 to 335.

The wardens shall have the authority to arrest any person who assaults or in any manner willfully obstructs any inland fish and game warden while in the lawful discharge of his duties.

The Maine Attorney General's determination that the Maine Warden Service is eligible to participate in and receive Federal grant fund assistance from LEAA is inconsistent with the LEAA interpretation of eligibility requirements. Under Section 301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and Public Law 93-83) LEAA is authorized to make grants to States "... to carry out programs and projects to improve and strengthen law enforcement and criminal justice." The term "law enforcement and criminal justice" is defined at Section 601(a) of the act to mean:

> ... any activity pertaining to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to, police efforts to prevent, control, or reduce crime or to apprehend criminals, activities of courts having criminal jurisdiction and related agencies (including prosecutorial and defender services), activities of corrections, probation, or parole authorities, and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction.

To be eligible, an agency must have law enforcement and criminal justice responsibilities. Hence, in interpreting the above sections, LEAA has determined that agencies that are not primarily engaged in the general enforcement of criminal law but rather have, as their principal purpose and function, the implementation and enforcement of specialized areas of the law such as civil, regulatory, or administrative law are not "law enforcement and criminal justice" agencies for general funding eligibility purposes. However, such agencies are not totally precluded from participating in or receiving Federal grant fund assistance from LEAA. Such agencies are eligible to receive LEAA grant assistance where the applicant is able to show that a specific proposed grant will accomplish a clear "law enforcement and criminal justice" purpose in accord with the funding provisions of Section 301(b) of the act.

The Maine Attorney General's determination that the Maine Warden Service is eligible for general funding assistance from LEAA is an improper determination since the Maine Warden Service is not primarily engaged in the general enforcement of criminal law. Rather, the Maine Warden Service is primarily engaged in the enforcement of a specialized area of law. As a result, it does not qualify for eligibility for general funding assistance.

In addition to its primary responsibility of enforcing all laws relating to inland fisheries and game, the Maine Warden Service, as noted above, is vested with some general law enforcement authority and in fulfilling any general law enforcement responsibilities, the Maine Warden Service is eligible to receive specific grant assistance where a proposed grant is shown to accomplish a clear "law enforcement and criminal justice" purpose.

In sum, after reviewing the duties and powers of the Maine Warden Service as represented by the Maine Attorney General, this office concludes that the Maine Warden Service is not eligible to receive general grant assistance from LEAA. The Warden Service is eligible to receive specific grant assistance from LEAA only upon a showing that a proposed grant will accomplish a clear "law enforcement and criminal justice" purpose.

Legal Opinion No. 74-75—Illinois Senate Bill 1668—June 21, 1974

TO: LEAA Acting Regional Administrator
Region V - Chicago

This is in response to your memorandum of June 19, 1974, in which you requested that this office review Illinois Senate Bill 1668.

The purpose of this bill is to enact statutorily a Criminal and Juvenile Justice Commission. This commission would supersede the existing Illinois Law Enforcement Commission, the State Criminal Justice Planning Agency (SPA), created by executive order to administer the LEAA program in Illinois.

The Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), requires under Section 203(a) that the SPA "shall be created or designated by the Chief Executive of the State and shall be subject to his jurisdiction." This requires that the agency as established must be clearly subject to the Governor's jurisdiction.

This section of the statute is addressed in LEAA Guideline Manual M 4100.1B, page 6, which states:

> 12. PLANNING AGENCY STANDARDS–GUBERNATORIAL DESIGNATION AND JURISDICTION. The Act requires that State Planning Agencies be "created or designated by the chief executive of the State" and be "subject to his jurisdiction." [Refer to Section 203(a) of the Act.] These requirements can be met whether the agency is established by legislative enactment, executive order, or a combination of the two. It is not inconsistent with gubernatorial creation or designation for the State legislature to prescribe the size, composition, or other characteristics of the agency provided the State governor's responsibility for establishing the agency and his jurisdiction over it are clear and the agency board meets the representative character requirements as set out below.

Review by this office of the Illinois Senate Bill 1668 indicates that the bill is consistent with LEAA legislative and guideline requirements provided that the Governor designates this statutorily established commission as the SPA. However, it should be emphasized that it is the Governor's ultimate decision, through veto or otherwise, whether to "designate" the commission as the SPA to receive and disburse grant funds allocated under the LEAA act to Illinois.

Even if thereafter the legislature overrode a veto, the commission could not receive LEAA funds because it would not be the agency "designated" by the Governor. A similar situation occurred in Louisiana in 1968/69 and LEAA

determined that only the agency designated by the Governor could be the legally authorized agency to administer the LEAA program and that the statutorily established agency was in nonconformity with the LEAA act.

Legal Opinion No. 74-76—Use of LEEP Funds for Remedial Courses—June 30, 1974

TO: Assistant Administrator
Office of Regional Operations, LEAA

This is in response to your request for a legal opinion on the proposed elimination of paragraph 24 from LEAA Guidelines on the Law Enforcement Education Program M 5200.1A (February 15, 1974). Paragraph 24 provides that "[r]emedial courses cannot be supported with LEEP funds."

The Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644 and by Public Law 93-83), provides in Section 406(b) that LEEP loans can be made only to persons:

> . . . enrolled on a full-time basis in undergraduate or graduate programs . . . leading to degrees or certificates . . . .

LEEP grants are restricted by Section 406(c) of the statute to those inservice applicants who are:

> . . . enrolled on a full-time or part-time basis in courses included in an undergraduate or graduate program . . . which leads to a degree or certificate . . . .

The legislative history of Section 406 makes clear that its purpose is to help law enforcement officers attain 2 years of college work for officers and a bachelor's degree for administrative and supervisory personnel.

Relying on the plain wording of Public Law 93-83 and Section 406(b) and (c) (42 U.S.C. §3746(b) and (c)), this Office concludes that, if a LEEP applicant is already enrolled in an approved academic program that requires remedial courses, those courses can be paid for out of the LEEP loan or grant. However, if the applicant is not yet so enrolled, a LEEP loan or grant cannot be made for remedial courses on the presumption that such applicant will later enroll in a college-level course.

It should be noted that Congress has never intended that LEEP loans or grants always be in amounts sufficient to pay the entire cost of the academic programs in which the recipients are enrolled.

Appendix

The following decision of the Comptroller General of the United States is included in this volume because of its general interest to persons concerned with the operation of the LEAA program.

Decision—The Comptroller General of the United States—May 3, 1974

File: B-179797

Matter of: Computer Communications, Incorporated

Digest:

1. Since determination by Federal grantee in connection with award under grant that offeror was nonresponsible because of inadequate financial resources is supported by record showing marginal financial condition and pending bankruptcy proceedings, GAO has no basis to object to agency's (grantor) approval of grantee's award.
2. Where proposal was properly rejected on basis of offeror's nonresponsibility, GAO deems it unnecessary to consider other issues raised by protester as to validity of rejection action.

Decision

In order to provide for more effective communications between jurisdictions concerning criminal justice matters, the Law Enforcement Assistance Administration (LEAA) of the United States Department of Justice, on June 29, 1973, (through the National Criminal Justice Information and Statistics Service) awarded a grant to the National Law Enforcement Teletype System, Incorporated (NLETS), a nonprofit organization incorporated under the laws of Delaware in 1964. While NLETS has maintained a nationwide communications facility for the interchange of operational and administrative information concerning effective law enforcement, LEAA determined that this system was operating in an inadequate manner to provide it proper service. Therefore, in order to upgrade the National Law Enforcement Teletype System to an acceptable level, LEAA awarded this grant (to run from June 29, 1973 to December 28, 1974) to NLETS as phase one of the upgrading project. If successful, the project will be considered for the nucleus of the important follow-on system to be developed. While the project completion dates were considered somewhat accelerated, this was deemed to be justified in view of the very considerable interest in such a system by almost all levels of law enforcement, including LEAA.

Pursuant to its authority under the grant, on August 21, 1973, NLETS issued a request for proposals for the computer software and hardware for the system, and the RFP provided that the offeror selected would be required to install a system capable of providing message switching services nationwide.

The schedule provided that proposals were to be submitted by September 7, 1973, and that a prospective contractor would be selected by September 18, 1973. In view of the essential nature of the computer/switcher to NLETS, the system was to be installed and operational no later than December 24, 1973. Pursuant to the conditions of the grant, which required that such procurement transactions be conducted in a manner so as to provide maximum open and free competition, the RFP provided that a prospective contractor's financial capability to fulfill NLETS' requirements throughout the contract period would be considered by the evaluation team along with the technical adequacy of the proposal itself. In addition, the grant provided for approval by LEAA of any contract awarded pursuant thereto. Although five firms submitted proposals, the offers of IBM (Data Processing Division) and Computer Communications, Incorporated (CCI), were considered inadequate and were rejected without negotiation. Following negotiations with the three remaining offerors, NLETS selected Action Communication Systems, Incorporated, to provide the system. After being advised that its offer was rejected for technical reasons and because of its marginal financial position, CCI filed a protest with this office.

Initially, it should be noted that while the Federal Government is not a party to the contract awarded, it is the responsibility of LEAA to determine whether the above referenced conditions of the grant were met. Thus, our role in this case is limited to a review of the facts and circumstances to determine if LEAA properly approved the award as provided in the grant. 52 Comp. Gen. 874 (1973).

In its report to this Office, LEAA states that the grantee properly rejected the offer of CCI on the grounds that the offer was technically inadequate, CCI was financially nonresponsible, and CCI did not submit a bid bond as required.

We note that as a condition of the grant NLETS was required to insure that the contractor it selected not only met the RFP's technical requirements but was also responsible, that is, possessed the capability, including financial resources, to successfully perform the contract. In compliance with this requirement, the RFP contained the following provision:

> 2.18 Financial Stability
>
> Each vendor shall submit a copy of the latest certified financial statement issued by his company. The financial stability and growth data presented on this statement shall be used by the evaluation team to assist in determining the vendor's financial capability of fulfilling the requirements of NLETS throughout the contract period.

We have consistently held that the question of a prospective contractor's responsibility, including financial capability, is a matter for determination by the agency involved and that since such determination involves a considerable range of discretion, we will not substitute our judgment for that of the administrative agency unless it is shown by clear and convincing evidence that the finding of nonresponsibility was unreasonable or not based upon substantial evidence. 53 Comp. Gen. _____ (B-178841, November 15, 1973).

A review of the LEAA report, including the attached Dun and Bradstreet report, provides a history of the financial position of CCI forming the basis of the negative determination with respect to financial responsibility. It appears that on August 8, 1973, a committee representing CCI creditors was formed and agreed to recommend to the creditors an exchange of their indebtedness for CCI equity, and that, on August 27, 1973, CCI filed a petition under Chapter XI of the Bankruptcy Act (11 U.S.C. 701 *et seq.*) in the Federal District Court for the Central District of California, and expected that its proposed reorganization plan would be completed by October 31, 1973.

An analysis of the financial position of CCI indicates that, at the time of the evaluation on September 17, 1973, by NLETS of its financial responsibility, CCI's ability to satisfy its current liabilities was limited, with a substantial working capital deficit and a current ratio of assets to liabilities of approximately .55. While CCI had tentatively reached agreement with another firm whereby CCI would be able to increase its working capital, the record indicates that this arrangement was not approved by either the creditors as a whole or by the court having jurisdiction of the bankruptcy proceedings prior to NLETS selection of a contractor. Moreover, there is no indication that at the time of evaluation and rejection of CCI's proposal a reorganization plan had either been filed with the court or approved. While pendency of Chapter XI proceedings is not a basis, *per se*, for finding an offeror financially nonresponsible, B-153478, January 18, 1965, it can be considered as a factor in such a determination. 52 Comp. Gen. 372, 376-77(1972). NLETS and LEAA were also entitled to consider CCI's substantial deficit in working capital and its net worth position. B-158420, August 1, 1966.

In determining CCI's financial ability to perform, in addition to its marginal financial position, there was for consideration the accelerated time constraints of the contract, the essential requirement of having the computer/switcher installed and operational by December 24, 1973, as a basis upon which to further update the rest of the system, and the fact that CCI's reorganization plan would not be completed until at least October 31, 1973, well into the period of contract performance. Based on these considerations, we cannot conclude that the determination by NLETS and LEAA that CCI was not financially responsible to perform the contract was unreasonable or not based upon substantial evidence. 39 Comp. Gen. 895 (1960); B-172126, June 23, 1971.

Since the record supports the determination that CCI was not financially capable of fulfilling the requirements of this procurement and, therefore, rejection of its proposal was proper, we do not believe it necessary to consider the issues concerning the technical evaluation and the bid bond requirement.

Accordingly, the protest is denied.

/s/ Deputy Comptroller General
of the United States

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