Legal Services Corporation

Memo

To: Interested LSC Programs

From: Glenn Rawdon GR

Date: 04/28/00

Re: Contracts or subgrants in technology initiatives

A number of questions have been raised about providing LSC funds to non-LSC funded organizations as part of technology activities. For example, some recipients are working with local bar associations on coordinated web sites that would enable people looking for legal assistance to use one site to find out about the entire range of available resources. In this example, the LSC recipient might want to provide some LSC funds to the local bar program for developing or maintaining such a web site. Any provision of LSC funds to a non-LSC recipient requires reviewing the requirements of 45 CFR Section 1610; Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity; and 45 CFR Section 1627; Subgrants and Membership Fees or Dues.

I have consulted with the Office of Legal Affairs ("OLA") for guidance on this matter. They have advised me that:

> Some recipients might work with non-LSC funded programs on developing and maintaining integrated technology resources for both these programs and the recipients. Provision of LSC funds to non-LSC funded programs for such activities are not necessarily section 1627 subgrants or section 1610 transfers, nor do they necessarily breach the section 1610 program integrity standards. In order to maintain program integrity and independence from organizations that engage in restricted activities, each situation must be evaluated individually to determine if the activities funded constitute programmatic activities, subsidies, or otherwise implicate program integrity issues.

Generally Sections 1610 and 1627 distinguish between outside work that is 'related to programmatic activities' and work that involves 'goods and services' such as accountants, office equipment, maintenance, etc. The latter group can be paid for using LSC funds without making the payee subject to the LSC restrictions. Section 1610.8 requires that recipients must

maintain "objective integrity and independence from any organization that engages in restricted activities." In addition to the transfer provisions, this requires that the recipient not subsidize restricted activities and is physically and financially separate from the organization involved in such activities (which must be a legally separate entity).

Attached are the text of Sections 1610.2(g) defining 'transfer', 1610.8 addressing program integrity, and 1627.2(b)(1) defining 'subrecipient.' Formatting has been added to better parse the requirements of these regulations. The preamble to 1610, available at http://www.lsc.gov/pressr/regulati/1610.htm, has additional information on the term 'subsidize.' OLA cannot currently offer any additional guidance regarding terms such as "related to the recipient's programmatic activities" or "provide direct support to a recipients legal assistance activities." They have advised that, as with all recipient activities, they cannot offer general guidance beyond the language of the regulations, but they can look into specific situations.

OLA offered the following pointers for consideration in designing technology activities in which LSC funds would be transferred to non-LSC funded organizations.

1) Are the activities 'related to the recipient's programmatic activities.'

Providing funds for "conducting programmatic activities that are normally conducted by the recipient, such as . . . [providing] direct support to the recipient's legal assistance activities" would constitute a Section 1610 transfer. Similarly, providing funds for activities "related to the recipient's programmatic activities" such as those that "provide direct support to a recipient's legal assistance activities or such activities as client involvement, training or state support activities" could constitute a Section 1627 subgrant. These determinations must be made on a case by case basis, but payments for goods or services in the normal course of business are ordinarily not covered transfers or subgrants. Non-technology dependant activities that might be analogous include directory services, management consultants, referral services or shared library resources.

2) Maintaining Program Integrity *vis a vis* Organizations Engaging in Restricted Activities

In addition to determining if a provision of LSC funds to another organization qualifies as a Section 1627 subgrant or a Section 1610 transfer, the recipient involved must make sure that it maintains Section 1610 objective integrity and independence from any organization that engages in restricted activities. This requires examining the activities involved to make sure that the recipient gets a benefit proportional to its provision of LSC funds so as to not subsidize any restricted activities. Generally Section 1610(a)(3) discusses maintaining physical and financial

separation between recipients and organizations engaged in restricted activities. While the separation examples therein involve traditional physical distinctions (such as separate facilities and signage), recipients should maintain similar technology barriers so that they do not appear to nor actually integrate with such other organizations. Thus, just as an in-office client should be able to differentiate between a recipient and a non-recipient (engaging in restricted activities), even when they share some office space, a web surfer should be able to differentiate between recipient the web materials of such a recipient and a non-recipient. Also, shared technology resources, like a web server, should be handled similarly to shared physical resources such as a library or a copy machine.

In discussing this with OLA, three criteria seemed to me to be very important. I would like to share these using the example of a common web site. The first two are inextricably linked: identify and segregate. Be sure that when a user is browsing the site, it is clear what program's area they are in. This does not mean you have to maintain separate servers, but you should strive to maintain each program's identity. If a user is in a section maintained by an LSC funded program, be sure they can tell it is the program's area. If a user is in a area for a program that does restricted work, be sure the user knows this area is maintained by that program and not affiliated with any recipients. Separation in a virtual world is just as essential as in the physical world.

The third area is content. If you contract or subgrant with the non-LSC funded entity to provide content for you, you are clearly asking them to engage in "programmatic activities" and the restrictions will apply. I am not talking about the "delivery" of content, but producing the content itself. The common web site will help you deliver content to the users, but be sure you are the producer of the content.

This does not mean that the non-LSC funded entity cannot post content on the web site, so long as you do not fund it and it is clearly identified as their area. For example, if the statewide web site is hosted by the state bar, the state bar can have pro se material on the web site, so long as the LSC program does not pay to develop the content and it is identified as being provided by the state bar.

I am not suggesting that this is the only way to comply with the regulations, or even the best way. I give you this example to illustrate the types of concerns you need to address in drafting your contracts or subgrants. I realize there will still be questions remaining. This is a new area, one that does not fit neatly into the regulations written before our new "virtual world" of legal services. As I said earlier, OLC is willing to look into specific situations as the requests arise.

1610.2(g) "Transfer" means a payment of LSC funds by a recipient to a person or entity

> for the purpose of conducting programmatic activities that are normally conducted by the recipient,
>
> > such as the representation of eligible clients,
>
> or that provide direct support to the recipient's legal assistance activities.

Transfer does not include any payment of LSC funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business.

The Supplementary Information to the final rule provides, at 62 FR 27695, 27696 (May 21, 1997), that:

> Changes have been made to the definition of ``transfer" to help clarify the meaning of the term and to reflect the deletion of the provisions on transfers of non-LSC funds. Minor changes were made to the first sentence of the definition to clarify that a ``transfer"
>
> > includes payments of LSC funds by a recipient to a person or entity
> >
> > > for programmatic activities normally conducted by the recipient,
> > >
> > > > such as the representation of eligible clients.
>
> A second sentence is added to clarify what is not included in the term. The additional language provides that a ``transfer" does not include
>
> > payments of LSC funds to vendors, accountants or other providers of goods and services in the normal course of business.
>
> The term is now found in the section on program integrity as well as in the section on transfers of LSC funds.

LEGAL SERVICES CORPORATION
45 CFR Part 1610
Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity

Sec. 1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds [as defined in §1610.2(g)], and LSC funds do not subsidize restricted activities [see note below]; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;
(ii) The existence of separate accounting and timekeeping records;
(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

**The Supplemental Information for the Final Rule discusses 'subsidies' as follows:

"Subsidize" includes a payment of LSC funds to support, in whole or in part, a restricted activity conducted by another entity, or payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a fair market price for such use. Thus, if a recipient makes an in-kind contribution, such as donated LSC-funded space or telephone services, to another organization, the donation would be a subsidy. However, this example is not intended to mean that a recipient may share

resources as long as the recipient receives a fair payment. A recipient must also maintain an actual physical and financial separation as set out in paragraph (a)(3) of this section.

62 FR 27695, 27698 (May 21, 1997) (45 CFR Part 1610, Final Rule, Supplementary Information)

LEGAL SERVICES CORPORATION
45 CFR Part 1627
Subgrants and Membership Fees or Dues

1627.2(b)(1) "Subrecipient" shall mean

any entity that accepts Corporation funds from a recipient

under a grant contract, or agreement to conduct certain activities specified by or supported by the recipient

related to the recipient's programmatic activities.

Such activities would normally include

those that might otherwise be expected to be conducted directly by the recipient itself,

such as representation of eligible clients,

or which provide direct support to a recipient's legal assistance activities

or such activities as client involvement, training or state support activities.

Such activities would not normally include

those that are covered by a fee-for-service arrangement,

such as those provided by a private law firm or attorney representing a recipient's clients on a contract or judicare basis,

except that any such arrangement involving more than $25,000 shall be included.

Subrecipient activities would normally also not include

the provision of goods or services by vendors or consultants in the normal course of business

if such goods or services would not be expected to be provided directly by the recipient itself,

such as auditing or business machine purchase and/or maintenance.

A single entity could be a subrecipient with respect to some activities it conducts for a recipient while not being a subrecipient with respect to other activities it conducts for a recipient.