

Whistleblower Comments to Agency Report

Re: OSC File No. DI-25-000006

Introduction

The Department of Agriculture (USDA)'s agency report regarding its cooperative agreement authority in 7 U.S. Code (USC) 2204b.(b)(4) raises significant concerns over government oversight, transparency, and accountability. Given the USDA's critical role in rural development, the integrity of its funding mechanisms has wide-reaching implications for public trust and effective governance. The public expects institutions to be transparent and objective in its use of taxpayer dollars. The following discussion reviews the history of cooperative agreements and congressional intent, acknowledgement of the report, concerning patterns against appropriations law and misuse of authority, lack of reportability to members of Congress, further context beyond the initial referral, and USDA's responsibilities for appropriate financial reporting and accountability in its cooperative agreements authority. There are the significant shortcomings in USDA's use of cooperative agreements, and key concerns over oversight, transparency, and accountability.

Background

During the 1970s, concerns arose in Congress regarding the misuse of assistance agreements, which were being used to bypass competition and procurement regulations. To address these issues and ensure consistency in federal agency practices, Congress enacted the Federal Grant and Cooperative Agreement Act (FGCAA) in 1977.

The FGCAA establishes criteria for determining the appropriate legal instrument for funding activities outside the federal government. It clearly distinguishes between procurement (contracts) and assistance (grants and cooperative agreements) based on the primary purpose of the relationship between the parties involved.

Tasked by Congress, the Office of Management and Budget (OMB) has issued interpretative guidelines under the Uniform Grants Guidance (UGG), which is codified in 2 CFR Part 200 and other provisions in Title 2. OMB's guidance is supported by statutory authorities such as 31 U.S.C. 503, 31 U.S.C. 1111, and 31 U.S.C. 6307, which empower OMB to enforce consistent financial management practices across federal agencies. Further, under 2 CFR 1.231, "if any provision is determined to be

wholly invalid and unenforceable, it should be severed from the remaining provisions of this subtitle, which should remain in effect.” These guidelines provide a common framework for the award and administration of federal financial assistance, including cooperative agreements. When a federal agency establishes a program authorized by Congress, it creates all new grant and agreement programs based on these principles. No matter the law authorizing the program, agencies are guided by these common rules, setting programmatic regulations for popular program authorities ranging from USDA’s Value-Added Producer Grants (Pub. L. 106-224) to the Indigenous Animals Harvesting and Meat Processing Grant Program (Pub. L. No. 117-2). The intent of Congress to streamline federal assistance has been actively pursued throughout the Executive Branch through these actions and programs.

This work continues. In April 2024, OMB released a revision to the Uniform Grants Guidance, clarifying several aspects related to program evaluation and the use of federal funds for evaluation activities. The updated guidance emphasizes that federal agencies should consider available evidence and evaluation results when designing and planning assistance programs. It also allows recipients to use a portion of award funding for evaluation activities related to the award. Further, in October 2024, the USDA issued new guidelines under 2 CFR Part 400 under its 5 USC 301 authority, reinforcing prior requirements for competition for all grants and agreements.

Analysis

The USDA cites that the authority provided to the Secretary is notwithstanding 31 USC 63, which includes the FGCAA. This allows the Secretary of Agriculture to enter into cooperative agreements even if there are conflicting provisions in the FGCAA. The USDA argues that the intent of the authorizing act for 7 USC 2204b.(b)(4) was to provide greater flexibility for the Secretary of Agriculture to engage in partnership opportunities.

While both points may have implicit merit, particularly as a Secretary of Agriculture may engage in much-needed technical assistance for rural program outreach purposes, this does not lend itself to transparency or oversight by the public. However, it's important to note that this doesn't mean the FGCAA regulations are entirely disregarded; rather, the specific authority granted under 7 U.S.C. 2204b(b)(4) allows for cooperative agreements in a way that might not strictly adhere to all FGCAA criteria. It stands to flout general principles of appropriations law and the obligation of Federal Financial Assistance.

Appropriations Law and Reports to Congress

Grant and agreement programs that utilize discretionary spending as this one would are typically awarded through a competitive process. And for discretionary spending, program authority is generally provided through two-steps: legislation to establish or continue a program enacted first and legislation that provides funding for these purposes afterward (CRS Report No. R47928). This was not the case for the authority used by the USDA for these transactions.

The authorized provision for 2204b.(b)(4) is not explicitly appropriated by Congress. In the appropriations language for USDA Rural Development, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act (Pub. L. No. 118-42), Congress provides a line item for operational support for Rural Development agencies “for necessary expenses for carrying out the administration and implementation of Rural Development programs, including activities with institutions concerning the development and operation of agricultural cooperatives; and for cooperative agreements...” Grant and agreement funding can be distributed by setting criteria in the program authorization for the federal agency to select recipients and determine award amounts. This can be done through a formula grant structure where Congress specifies criteria or amounts for calculation, or a competitive grant structure where recipients are selected through a competitive process and award amounts are based on the requested funding in successful applications. Neither of these were provided in the appropriations language for the use of 7 USC 2204b.(b)(4) authority. Overall, the USDA's use of cooperative agreements to substitute the use of authorized program authorities and augment program appropriations may not align with the specific purposes for which funds were appropriated by Congress.

The USDA's unwillingness to publicly announce investments and make them available for congressional review could be seen as a violation of the Antideficiency Act, which requires transparency and accountability in the use of federal funds. Unlike other obligations for appropriated funds by the USDA, these investments were not publicly announced or made available for congressional appropriators' review. For instance, a member of Congress would expect to be notified of a new telecommunications project or investment in a rural hospital in their district, congressional offices were not given notice of these investments after they were awarded.

Pattern of Misuse of Authority

Though this referral was based on a substantial likelihood of wrongdoing regarding the cooperative agreement based on the one for which the OSC had the most evidence, this is only a single transaction in a pattern of unmitigated use of authority. The referral letter to the Secretary of Agriculture indicates that there were multiple cooperative agreements solicited by the USDA that were not competed or independently reviewed, and any additional or related subjects should be included in the investigation. The USDA did not deny any of these allegations. Rather it entrenched its standing by stating that it had the authority to do so under 7 USC 2204b.(b)(4), as amended by the Federal Agriculture Improvement and Reform Act of 1996.

In August 2024, a consistent pattern developed in the USDA's use of cooperative agreements to subrogate the use of authorized program authorities and augment program appropriations. USDA facilitated at least *seventeen* intentionally solicited agreements in coordination with its Rural Development State Director cohort. When questioned about the process and legality of these agreements by staff, administrators silenced discussion and found staff who were willing to follow their demands. And the lack of clear guidelines and oversight mechanisms for the use of cooperative agreements by the USDA under this authority indicates a failure to maintain accountability and transparency in its financial transactions.

Report Deficiencies

Unfortunately, USDA did not use this investigation as an opportunity to study its financial obligations and use of its authority, instead stating its intent to use the authority with abandon. The USDA does not provide regulation or guidance that it uses to determine the eligibility of applicants, merits of proposed projects for federal funding, documentation of compliance with other statutes, or provide transparency in application processes. This may lead to arbitrary and potentially biased funding decisions directly by administrators. Furthermore, it failed to acknowledge how it is essentially running a program of Federal financial assistance without such a structure, and that it obligated \$6.1 million dollars in salaries and expenses/administrative funds under Fiscal Year 2024 appropriations on the last day of that fiscal year.

Conclusion

Generally, federal assistance programs are defined through the principles of transparency, competition, and accountability to ensure the proper use of federal funds and public trust. Considering the concerns raised by the referral, it is imperative that the USDA reevaluate its use of cooperative agreements to ensure compliance with federal regulations, promote transparency, and uphold accountability. The USDA must provide clear guidelines and oversight mechanisms to prevent misuse of authority and ensure that federal funds are used effectively and ethically.