



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Senator Kitchel, Chair of Senate Appropriations
Representative Johnson, Chair of House Appropriations

From: Rebecca Wasserman

Date: January 12, 2016

Subject: Grant Acceptance for the Vermont Commission on Women

1. Introduction

On September 29, 2015, the Vermont Commission on Women (the “**Commission**”), a State agency, was awarded a grant in the amount of \$173,794.00 (“the **Grant**”)¹ from the U.S. Department of Labor (the “**DOL**”) to perform a feasibility study (the “**Study**”) of a paid family and medical leave program for the State of Vermont (the “**State**”). Related to the grant acceptance process² for the Grant, you have asked whether the Commission may use any portion of the Grant to subcontract with a lobbying firm to perform research for the Study. This memorandum provides (i) the legal framework for the Commission’s use of Grant funds; and (ii) an analysis of whether Grant funds may be used to subcontract with a lobbying firm.

2. Summary of Findings

Under State law, the Commission may only subcontract with a lobbyist, as defined under State law, if that lobbyist does not engage in legislative advocacy while performing research for the Study, unless express approval is granted by the General Assembly. In addition, Federal law prohibits the Commission from using any of the Grant funds to subcontract with a lobbying firm that attempts to influence the enactment of any State legislation, appropriation, regulation, administrative action, or Executive Order while performing research for the Study.

¹ The period of the grant is October 1, 2015 through September 30, 2016, with an anticipated \$137,794.00 used in FY 2016 and the remaining \$36,000.00 used in FY 2017.

² See 32 V.S.A. § 5 for State grant acceptance requirements.

3. Legal Framework

The legal framework for the Commission's use of Grant funds is derived from a combination of State and federal laws and regulations. Set forth below is a summary of the relevant laws.

3.1. Applicable Vermont Laws

In 2001, the Commission was codified as “an independent agency of the government of Vermont”.³ The Commission was created to “conduct studies of matters concerning women,”⁴ and in this capacity it is authorized to subcontract to obtain research and support services.⁵

While Vermont law does not include a general prohibition on a State agency's use of any State appropriated funds to pay a lobbying firm, there is an express restriction in statute with respect to the Commission. Notwithstanding the Commission's authority to contract for services, it is prohibited from using any appropriations from the General Assembly for legislative advocacy without express authorization.⁶ Legislative advocacy is defined in this context to mean the employment of a “lobbyist,” as defined in State law,⁷ if that lobbyist's primary function “is to influence legislators or state officials with respect to pending legislation or regulations.”⁸ With respect to this prohibition, the Commission is directed to review any existing contracts or grants and make any necessary amendments to ensure it is in compliance with this requirement.⁹

3.2. Applicable Federal Law

3.2.1. Lobbying Restrictions

Under the terms of the Grant, recipients must comply with certain federal laws and regulations. With respect to restrictions on lobbying, the DOL has adopted regulations implementing the so-called “Byrd Amendment,” which prohibits the use of federal funds for lobbying any federal agency, Member of Congress, officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any federal grant.¹⁰ In addition, applicants for a federal grant exceeding \$100,000.00 must file a certification with

³ 3 V.S.A. § 22(a).

⁴ 3 V.S.A. § 22(g).

⁵ The Commission is authorized “to acquire on a contractual or other basis such necessary legal, technical or research expertise and support services as it may require for the discharge of its duties.” 3 V.S.A. § 22(h)(4).

⁶ 3 V.S.A. § 22(i).

⁷ See 2 V.S.A. chapter 11.

⁸ *Id.*

⁹ 3 V.S.A. § 22.

¹⁰ See 31 U.S.C.A. § 1352(a); 29 C.F.R. pt. 93, App. A.

the granting agency stating that no federal funds have been or will be used to pay for lobbying activities.¹¹ Each party at each tier of the grant, including the contractor, subcontractor, and grantee, must complete this certification.¹²

2.2.2 Federal Appropriations Law Restrictions

In addition to the Byrd Amendment, the FY 2016 federal Appropriations Act¹³ also includes language imposing lobbying restrictions on the use of funds appropriated in that Act. First, there is a general restriction on the use of appropriated funds to “support or defeat the enactment of legislation.”¹⁴ In addition, no appropriation to a grant recipient may be used for “any activity designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before the Congress or any State government, State legislature or local legislature or legislative body, other than for normal and recognized executive-legislative relationships or participation by an agency or officer of a State, local or tribal government in policymaking and administrative processes within the executive branch of that government.”¹⁵

4. Authority of the Commission to Subcontract with a Lobbying Firm

4.1. Authority Under State Law

Under State law requirements, the Commission would be restricted from receiving an appropriation from the General Assembly and using those funds to subcontract with a lobbying firm that is engaging in legislative advocacy. Although the Grant is provided by the federal government, the General Assembly will have to appropriate those funds to the Commission in the State’s FY 17 Appropriations Act. Accordingly, the State’s restrictions on the Commission would apply here.

As a result, under State law, the Commission may only use Grant funds to subcontract with a lobbying firm, as defined under State law, to perform research for the Study if the lobbying firm is not engaging in legislative advocacy, or if the lobbying firm is engaging in legislative advocacy and this advocacy is expressly authorized by the General Assembly. The Commission is required to amend any existing grants to comply with these requirements, so it would have to ensure that if any subcontractor it hires meets the definition of a lobbyist

¹¹ See 31 U.S.C.A. § 1352(b)(1)(a), (2)(B); 29 C.F.R. Pt. 95, App. A(7); 29 C.F.R. Pt. 93, App. A(1).

¹² 31 U.S.C.A. § 1352(b)(5). In accordance with this certification requirement, the DOL has set out the specific certifying language to be provided in the award documents for all subawards at all tiers. 29 C.F.R. Pt. 93, App. A(3).

¹³ This language was also included in the FY 2012-2016 Appropriations Acts.

¹⁴ Pub. L. 113-235, Division G, Title V, Sec. 503(a), (Dec. 15, 2015).

¹⁵ Id., at Sec. 503(b).

under State law, that subcontractor would not be engaging in legislative advocacy while performing research for the Study, unless General Assembly approval is granted.

4.2. Authority Under Federal Law

Federal law restrictions would also apply to the Commission's use of Grant funds since these restrictions are required under the terms of the Grant, and the funding for the Grant was appropriated from the federal Appropriations Act. First, under the Byrd Amendment, and the DOL's implementing regulations, the Commission is prohibited from using Grant funds to subcontract with a lobbying firm if that firm is influencing or attempting to influence a federal employee, employee of a Member of Congress, or a Member of Congress. With respect to the Grant, no facts suggest that the Commission would be subcontracting with a lobbying firm to influence a federal employee or Member of Congress.

Second and more relevant to the Grant is the restriction included in the federal Appropriations Act. Assuming the Grant funds were appropriated in the FY 2016 Appropriations Act, the additional restrictions would apply. The Commission would not be permitted to use any of the Grant funds if those funds would be used to hire a lobbying firm that attempts to influence the enactment of any State legislation, appropriation, regulation, administrative action, or Executive Order while performing research for the Study. There is an exception to this prohibition for certain Executive-Legislative relationships or participation in a State's Executive Branch policymaking and administrative processes. However, more facts would be required to determine whether the Commission's Study would fall under this exception.