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Inside this Issue

HAS THE PROHIBITION ON IN-PERSON MEETINGS EXPIRED? NO

On March 24, 2020, Governor Jay Inslee issued a proclamation stating that governing bodies (1) may not have in-person meetings and (2) may only discuss matters that are "necessary and routine" or necessary to combat Covid-19.[1] This has led various agencies to conduct virtual meetings via Zoom or other platforms. This has also led agencies to not discuss certain "new initiatives" such as whether to hire a new chief or respond to a grievance (i.e. matters that may be "necessary" but are not necessarily "routine"). In other words, this order has hindered public agencies from getting much accomplished other than approving vouchers and tax resolutions. Consequently, the question has arisen: Has that order expired? The answer is no, for at least two reasons:

1. The proclamation has some conflicting language that may need to be resolved by the Governor's office. Some provisions were suspended until April 23, 2020, but

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[1] https://www.governor.wa.gov/sites/default/files/proclamations/20-28%20-%20COVID-19%20Open%20Govt%20Laws%20Waivers%20%28tmp%29.pdf?utm_medium=email&utm_source=govdelivery

the prohibition on in-person meetings contains no such expiration date[2];

2. The proclamation may be superseded by the Governor's Stay-at-Home order that is set to expire on May 4 but will likely be extended to May 30. Since the order of March 24th was only an amendment to the Stay-at-Home order in the first place, probably any sunset provisions in the March 24th order are overridden by the provisions in the main order. And of course, with the stay-at-home order still in place, the "necessary and routine" restriction would still apply because normal (in-person) public participation in these open meetings is not possible until the Stay-at-Home order is lifted[3]; and

3. **Perhaps most importantly,** Governor Inslee has extended the April 23, 2020 expiration date to May 4, 2020, as per Proclamation 20-28.1.[4]

WHAT DOES MY AGENCY DO WITH FEDERAL GRANT MONEY?

The purpose of this article is to discuss the implications of your agency receiving funds or other equipment, facilities and supplies, i.e. grants, from the federal government[5] during the Covid-19 Pandemic. In summary, the questions answered by this article are:

(1) What should we do with money that we receive as a grant?

(2) When and why would we have to return this money to the federal government?

(3) Will our receipt of a grant from a federal agency that is *not* the Federal Emergency Management Agency (hereinafter "FEMA") affect grants we receive from FEMA? (no, if you follow the right procedures)

[2] Directly from the proclamation: "Any public agency, subject to RCW 42.30, is prohibited from conducting any meeting, subject to RCW 42.30 **unless** (a) the meeting is **not conducted in-person** and instead provides an option(s) for the public to attend the proceedings through, at minimum, telephonic access, and may also include other electronic, internet or other means of remote access, and (b) provides the ability for all persons attending the meeting to hear each other at the same time." (emphasis added).

[3] Directly from the proclamation: "Subject to the conditions for conducting any meeting as required above, agencies are further prohibited from taking "action," as defined in RCW 42.30.020, unless those matters are necessary and routine matters or are matters necessary to respond to the COVID-19 outbreak and the current public health emergency, until such time as **regular public participation** under the Open Public Meetings Act is possible." (emphasis added).

[4] https://www.governor.wa.gov/sites/default/files/20-28.1%20-%20COVID-19%20Open%20Govt%20Waiver%20Extension%20%28tmp%29.pdf

[5] Money or supplies received by Washington State through the federal government and allocated to your agency are subject to the same laws as money or supplies received directly from the federal government, because the State would be acting as a "Pass-Through Entity."

Ultimately, how a grant is spent or used by your agency depends just as much on the "Strings" attached to the grant as the laws impacting grants. In other words, read your grant agreement, while considering this article as a general outline of the laws applicable to your situation.

Applicable Law

Title 2 of the Code of Federal Regulations (hereinafter "2 CFR") applies to all grants received by a public agency, with very limited exceptions not discussed herein. 2 CFR § 200.101. A grant under 2 CFR, encapsulated by a "Grant Agreement," is "anything of value" provided by a Federal Awarding Agency—such as FEMA—to carry out a "public purpose" of a *federal law*; grants exclude certain financial instruments, such as loans,[6] but what is *not* considered a grant will *not* be discussed herein. 2 CFR § 200.51 (a).

Your agency is responsible for carrying out the conditions of a particular grant in accordance with the terms set forth in a grant agreement. 2 CFR § 200.300 (b). In other words, each grant is treated separately, on its own terms.

Your agency may obtain grant funds via reimbursement—i.e. after money is spent or supplies are used, in accordance with the terms of the particular grant—or via advance payment, i.e. before money is spent or supplies are used. 2 CFR § 200.305. Your agency may only seek reimbursement or advance payment (1) for costs incurred during the "period of performance" set forth in the grant agreement and/or (2) for costs incurred prior to the award of the grant, if permitted by the terms and conditions of the grant. 2 CFR § 200.309.

The key regulation for your general consideration is 2 CFR § 200.302 (hereinafter "302.") The 302 regulation sets forth the general outline of the requirements you must meet when accepting grants. These requirements include the following: (1) Identification of all grants received; (2) reporting the use of grant money or equipment; (3) establishing effective internal controls; (4) comparing grant budgets versus grant expenditures; (5) adopting written procedures to establish how your agency would accept payment of grant money; and (6) enumerating the allowable costs for a particular grant, i.e. procedures to establish the proper expenditure of grant funds in accordance with the terms and conditions of the grant—see 2 CFR § 200.403.[7]

If your agency fails to spend the grant money in accordance with the terms of the grant, the federal entity that provided the grant may take the money back, and may initiate debarment proceedings, which may preclude your agency from receiving

[6] The question of what to do with *loans* will become relevant if your agency seeks loans from the federal government to address fallout from the Covid-19 crisis, pursuant to the Stafford Act or other federal law.

[7] To be clear, there are also federal *procurement* standards that your agency must meet if you are spending federal grant money to purchase equipment, materials or supplies, services or public works. That is not the subject of this article but this is important for you to know. *See* 2 CFR § 200.318.

grants, perpetually or for a specific period of time. 2 CFR § 200.338.

This raises many interesting questions; one is: Where does your agency put this grant money when you receive it? This depends on the laws that govern your particular agency. Under Washington law, a fire district or regional fire authority must maintain the following funds, pursuant to RCW 52.16.020: (1) Expense fund, (2) reserve fund, (3) local improvement district fund (if your department has formed an LID), (4) the general obligation bond fund, and (5) "such other funds as the board of commissioners of the district may establish."

Pertinent Facts

Various public agencies have received grant money by electronic transfer pursuant to the coronavirus relief packages being offered through the federal government. As an example, one client may have received grant money from the Department of Health and Human Services ("HHS"). With that money came the "Strings" (conditions) that are normally attached to Grants. Those "Strings" included but are not limited to the following:

> "The Recipient (the agency receiving the award) certifies that it will not use the Payment to reimburse expenses or losses that *have been* reimbursed from other sources or that other sources are *obligated to* reimburse…The Recipient certifies that the Payment will only be used to prevent, prepare for, and respond to coronavirus, and shall reimburse the Recipient only for health care related expenses or lost revenues that are *attributable to coronavirus*."

(emphasis added).[8]

Application of the Law to the Facts and Recommendation

When receiving such grants, various fire departments are asking the following questions:

(1) What should we do with this money? **Answer:** Based on the above regulations, you can either **spend the money or return the money.** If you accept and retain the money, we advise that your Board of Commissioners create a separate fund specifically for grant money, to prevent that money from being commingled with other agency funds. As set forth above, RCW 52.16.020 specifically permits the commissioners to create a new Grant Fund. Within that Grant Fund, your agency should segregate funds by grant, and establish a budget for each grant, as is required under 302. That way, your agency can track how the money is spent, so as to ensure that the costs you incur are "allowable costs." If your agency is able to establish allowable costs under each grant, it will be easier for

[8] Based on the language from this grant, we must reiterate that individual grants have separate requirements, and you should consult an attorney if you have questions about specific conditions in a grant.

your agency to ensure that you are not seeking reimbursement or advance payment for the same expenses from more than one agency, i.e. double-dipping.

For example, under the terms and conditions of the HHS Grant above, your agency cannot be reimbursed for expenses that have *already been* reimbursed by another agency, and you may not seek reimbursement for expenses that another agency is *obligated* to reimburse. If your agency tracks a budget for each grant, it will be easier for you to discern (1) whether you have already been reimbursed—or received advance payment—for the expense, and (2) whether there is some other agency that actually has an affirmative obligation[9] to reimburse you. Of utmost importance is your understanding of the "Strings" attached to each grant, which is determined on a case-by-case basis that cannot be captured in this general opinion. And we are not CPAs. Consult the State Auditor for guidance on establishing your Grant Fund.

(2) When and why would we have to return this money to the federal government? **Answer:** Again, under 2 CFR § 200.338, if your agency does not spend the money in accordance with the terms and conditions of the grant, the awarding agency may ask (or require) you to pay back the money. As stated above, the terms and conditions of a particular grant are determined on a case-by-case basis. Therefore, your agency should master the "Strings" of each grant and have a continuing understanding of the budget for each grant, in order that you avoid "double-dipping," which can lead to debarment and return of the funds (otherwise known as "recoupment"). If your agency adheres to the terms of the grant, the odds of recoupment (and audit findings) are low.

(3) Will our receipt of a grant from a federal agency that is *not* FEMA affect grants we receive from FEMA? **Answer:** No, if you follow the proper procedures. As discussed above, your agency is required under 302—and under each grant you receive—to account for what grant monies are spent toward "allowable costs." If your Grant Fund (1) segregates grants, (2) establishes budgets for each grant, and (3) documents the equipment or other items (or services) purchased with grant money, then you should not have an issue when you buy ten units of "Equipment A" under "Grant A" and ten units of "Equipment A" under "Grant B," so long as you account for that (and remember that procurement laws may apply as well).

[9] Whether a separate federal agency is under a specific obligation to reimburse you for certain expenses depends on the statutes and regulations governing that agency, but review the terms of your Grants.

To address what to do with grant funds and equipment, your agency should adopt appropriate policies. We have drafted master policies on federal grants in order to comply with 302.

IS THE PUBLIC DUTY DOCTRINE ALIVE AND WELL IN WASHIINGTON STATE?

Recently, the Washington State Supreme Court decided *Ehrhart v. King County*, No. 96464-5 (2020), which may have reinvigorated the public duty doctrine in Washington State.[10] As a preliminary matter, we have written extensively on the public duty doctrine and will not expend too much time discussing its history. Suffice it to say that the public duty doctrine is a principle of non-liability for public agencies, with limited exceptions.[11] Those exceptions appeared to be on the brink of nullification under the *Beltran-Serrano* case that came down in 2019.[12]

In *Beltran-Serrano,* the Washington Supreme Court noted that generally there are four exceptions to the principle of non-liability known as the public duty doctrine. But instead of strictly applying any of those exceptions, the Court ultimately applied the common law duty of care to a police officer and extended that duty of care to his or her public employer (the City of Tacoma). In doing so, the Court found that "every individual owes a duty of reasonable care to refrain from causing foreseeable harm in interactions with others," and that duty may be extended to the employers of those individuals, irrespective of the principle of non-liability known as the public duty doctrine.

The plaintiff in *Ehrhart* argued that WAC 246-101-505, which requires King County to "[r]eview and determine appropriate action" whenever it receives reports of certain serious conditions, created a duty that King County breached, by failing to issue a health advisory. The plaintiff was the estate of an individual who had died of a particular virus. The Court found that the word "appropriate" in the applicable WAC did not create a specific and individualized duty to the person who died of the virus. The Court indeed cited to *Beltran-Serrano* for the proposition that the public duty doctrine "comes into play when *special governmental obligations* are imposed by statute or ordinance."

Utilizing that concept and case law, however, the Court could not find a specific regulatory obligation that applied to the deceased person as opposed to the public at large, and therefore found no individualized duty to the plaintiff Was the public duty doctrine thus "revitalized"

10 http://www.courts.wa.gov/opinions/pdf/964645.pdf

11 https://firehouselawyer.com/NewsletterResults.aspx?Topic=Civil+Actions&Subtopic=Public+Duty+Doctrine

12 https://firehouselawyer.com/Newsletters/December2019FINAL.pdf

by the Supreme Court? What does this mean for your agency?

We predict that the public duty doctrine will remain alive for many years and that eventually the *Beltran-Serrano* case will be seen as an exceptional case, where the court did not really explain why it was not applying the doctrine or fitting within one of the exceptions.

As far as agency conduct is concerned, we think that public agencies still need to try to avoid negligent actions and still need to train staff who interact with the public in any way as to the risks of their jobs to avoid liability or at least manage those risks.