



PROGRAM LETTER 10-03

TO: All LSC Recipient Executive Directors

FROM: Victor M. Fortuno *VMF*
President

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SUBJ: Third-Party Contracting of TIG Funds

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This Program Letter sets forth guidance regarding the application of certain requirements in the context of third-party contracts made by Technology Initiative Grants (TIG) grantees with LSC TIG funds. Generally TIG funds are subject to the same rules and requirements as all other LSC funds. The guidance set forth herein does not represent any change in current policy, but rather is intended to serve as a reminder to LSC recipients about existing requirements and to provide some additional examples of how these requirements are likely to apply in the TIG context. This is being issued as a general program letter to make this guidance available not only to current TIG grantees, but to all recipients that might be contemplating applying for a TIG in the future.

LSC's Subgrant and Transfer Requirements at 45 CFR Parts 1610 and 1627

When a recipient provides LSC funds to another entity and the provision of funds qualifies as a Part 1627 "subgrant" or a Part 1610 "transfer," then certain conditions and requirements apply.¹ Most notably, subgrants, regardless of their amount, must receive prior approval by LSC and also are subject to certain audit requirements (45 CFR §1627.3). Subgrantees receiving transfers of LSC funds are subject to many of the same restrictions as direct LSC recipients (45 CFR §1610.7).² TIG funds are, like any other LSC grant funds, subject to the rules and requirements of LSC's regulations, including the Subgrant and Transfer rules at Parts 1627 and 1610, respectively. Thus, to the extent that the situations in which TIG funds provided to third parties qualify as "subgrants" or "transfers," those

¹ The definition of a Part 1610 "transfer" mostly tracks the definition of a Part 1627 subgrant and the apparent intent of Part 1610 was that the terms would be interchangeable. See, OLA External Opinion EX-2002-2008. Thus, they are used as such for the purposes of this Program Letter.

² Subgrants or transfers for Private Attorney Involvement purposes or for private attorney fee-for-service arrangements are subject to slightly different requirements not germane for the purposes of this Program Letter.

requirements apply – including prior approval of TIG subgrants, auditing of TIG subgrants, and application of certain substantive LSC restrictions to TIG transferees.

Not every provision of funds to another entity, however, qualifies as a “subgrant.” Rather, a subgrant is limited to transactions in which LSC funds are provided to a third party to “conduct certain activities specified by or supported by the recipient related to the recipient’s programmatic activities.” 45 CFR §1627.2(b)(1). Subgrants do not include third-party contracts for “the provision of goods and 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.” *Id.* Recipient functions may involve related programmatic and non-programmatic activities. Recipients need to look at the entirety of the activities that it contracts with a third party to conduct in order to make determinations as to which activities are programmatic and which are not. The Office of Legal Affairs (OLA) External Opinion 2002-2008 discusses these rules in the context of TIG funded statewide-website activities. This Program Letter sets forth some additional examples and guidance regarding whether or not specific third-party contractor activities that might arise in the course of TIG projects could qualify as “subgrants” or “transfers.”

Of course, the question of whether any particular third-party contract would qualify as a subgrant must be made on a case by case basis, considering all of the facts. If a TIG grantee has questions about a particular contract, the grantee should consult with TIG staff or may request an OLA Advisory Opinion on the matter. Questions regarding the subgrant approval process should be directed to the Office of Compliance and Enforcement (OCE).

Generally, programmatic activities are the types of activities that the recipient engages in to provide legal assistance or that it would otherwise reasonably be expected to carry out itself to directly support the provision of legal assistance. These activities usually involve the substantive application of legal knowledge to legal or tactical issues for individual clients or the general eligible client population. In the TIG context, examples of activities that would likely be “programmatic” activities are:

- Client services – substantive staff review of intake information provided by an applicant for services through an online intake system in order to determine eligibility.
- Content development – the creation of substantive legal information for access through websites, kiosks, etc, by the client community or advocates; drafting of court forms (as opposed to the coding of existing forms into an online format); developing questions to assess legal problems as part of an online “triage” system (as opposed to coding questions created for online access and use)

Generally, non-programmatic activities are the types of activities which are not the provision of legal assistance and which a recipient is not necessarily expected to carry out itself to directly support the provision of legal assistance. In the TIG context, examples of activities that would likely not be “programmatic” activities are:

- Services to develop or modify software.

- Services to upload content to (without development or modification of the content), and/or develop or maintain, websites.
- Programming services to make content usable in an online format (such as the technical software coding for creating automated document assembly systems in which user data can be matched with legal content for creation of pro se forms).
- Computer network server maintenance.
- Translation of content (substantive legal information) into “plain English” or into languages other than English (without substantive development or modification of the content).

In addition, a *product*, such as hardware, off the shelf software or commercially available content, is not an “activity,” so purchases of products are not “programmatic activities.”

As set forth above, the distinction as to whether a particular activity qualifies as a subgrant is related to the nature of the activity being undertaken and the programmatic activities of the recipient, which includes consideration of all LSC funding. The percentage of a TIG that is provided to a third party is not determinative. Subgrants can be in large or small amounts or large or small percentages of grants. As with LSC emergency or special needs grants, some TIGs may fund, in large measure, non-programmatic activities. However, LSC reminds recipients that TIG projects with significant non-programmatic elements may well also have programmatic elements and activities. It is incumbent upon TIG grantees to review all aspects of a TIG project carefully, both in the planning and implementation stages, to ensure that programmatic elements are either undertaken directly by the recipient, or by a third-party subrecipient in accordance with all LSC Part 1627 subgrant and Part 1610 transfer requirements.

Competition and Prior Approval Requirements at 45 CFR Part 1630 and the Property Acquisition and Management Manual for Purchases of Personal Property

Pursuant to LSC’s regulations at 45 CFR §1630.5(b), recipients must obtain prior approval from LSC to charge to LSC funds purchases of leases of equipment, furniture or other personal, non-expendable property, if the current purchase price of any individual item of property exceeds \$10,000. In addition, pursuant to section 3 of the LSC Property Acquisition and Management Manual (PAMM), before using more than \$10,000 of LSC funds to make an acquisition (purchase or lease) of personal property, recipients must obtain and consider competitive quotes from at least three sources.³ Furthermore, the selection of a source has to be based on documented criteria established by the recipient. Acquisitions made on a sole source basis are permitted when circumstances prevent the recipient from obtaining competitive quotes and those circumstances must be documented in writing. The PAMM also reiterates the Part

³ This includes acquisitions of multiple items in a single acquisition with a value in excess of \$10,000, as well as acquisitions of individual items valued at over \$10,000.

1630 prior approval requirements and sets forth in greater detail the information that the prior approval request must contain.⁴

TIG funds are, like any other LSC grant funds, subject to the rules and requirements of LSC's regulations, including the prior approval and competition requirements of 45 CFR Part 1630 and the PAMM. In the TIG context, purchases or leases of equipment using more than \$10,000 worth of TIG funds are subject to these requirements. For example, the purchase with TIG funds of a telephone system consisting of multiple individual items, such as telephones and other related equipment, in one contract totaling over \$10,000 would be subject to these requirements, even though the individual components of the system being purchased each had a value of under \$10,000. Also covered by these requirements would be the purchase with LSC funds for a single item in excess of \$10,000, such as a replacement monitor for an existing video conferencing system.

Please note that these requirements apply only to the expenditure of LSC funds. Thus, even if a purchase is made within the context of a project partially funded by a TIG, if non-LSC funds are used for the entire purchase, these LSC expenditure requirements do not apply. That is, if a TIG grantee uses LSC TIG funds for some aspects of a project, and uses entirely non-LSC funds for an equipment purchase that is also part of that project, the prior approval and competition requirements of Part 1630 and the PAMM would not apply. Of course, the TIG grantee would have to maintain sufficient records to demonstrate that no LSC funds had been used for that purchase.

Should you have questions about this Program Letter, please contact Glenn Rawdon, LSC Program Counsel at 202-295-1552 or grawdon@lsc.gov. Should you wish an Office of Legal Affairs Advisory Opinion about the application of the subgrant or transfer requirements to a particular situation you are encountering, please contact Mark Freedman, LSC Senior Assistant General Counsel at 202-295-1623 or mfreedman@lsc.gov. Should you have questions about the submission and processing of subgrant approval requests or requests for prior approval for purchases of personal property, please contact Lora Rath, Deputy Director, OCE at 202-295-1524 or rathl@lsc.gov.

⁴ The prior approval requirements of Part 1630 and the competition and prior approval provisions of the PAMM do not apply to contracts for services.