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Certificate of Need Regulation (cost overruns)

JOSEPH E. BRENNAN
ATTORNEY GENERAL



RICHARD S. COHEN
JOHN M. R. PATERSON
DONALD G. ALEXANDER
DEPUTY ATTORNEYS GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

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TO: Carl V. O'Donnell, Director, Div. of Health Planning & Development
FROM: David A. Williams, Assistant Attorney General *DAW*
SUBJECT: Review of cost overruns: §1122 vs. CON

You have asked whether a cost overrun which the division received notice of subsequent to September 1, 1978 (the date that the CON Act became enforceable), but which was an overrun of a project for which an application had been filed prior to March 30, 1978, needed to be reviewed under either §1122 or CON or both.

Section 1122: There is no doubt that the cost overrun is reviewable under §1122 of the Social Security Act. 42 CFR 100.103 (a)(2)(v) states that "any change in a proposed capital expenditure which itself meets the criteria set forth in this paragraph, shall for the purposes of [these regulations] be deemed a capital expenditure." A capital expenditure is further defined as an expenditure which (1) exceeds \$100,000, or (2) changes the bed capacity of the facility, or (3) substantially changes the services of the facility. According to all of these criteria then, there is no doubt that the expenditure is reviewable under §1122.

CON Act: The more difficult question is whether the overrun is reviewable under the Certificate of Need Act. In the Federal regulations governing CON Acts, there is no counterpart to §100.103 (a)(2)(v) cited above. However, there is a regulation contained in the Maine procedures manual entitled "changes covered" which says that: "any change in a proposed activity (prior to following receipt of a Certificate of Need) which itself meets the criteria [for a new health service] shall require a Certificate of Need." Thus if there is involved here:

1. The construction or development of a new health facility;
2. An expenditure in excess of a \$150,000;
3. Any increase, decrease, redistribution or relocation in the existing number of beds of the facility; or
4. The offering of a new health service.

the regulations would require that a Certificate of Need be obtained.

However, the Act itself contains an exemption to the CON requirements in §316(2) for "any construction...subject to this Act which has been reviewed and has received approval pursuant to section 1122 under the Federal Social Security Act from appropriate agencies prior to the effective date of this Act." Since this project has indeed received that permission, in this case requirements of the CON Act should not apply. Therefore, the project is reviewable under §1122 alone.

While reserving my right to revise the following additional opinion, it would seem to me that had this project not received §1122 approval and been exempted under the CON Act, then the cost overrun would have been reviewable provided that the overrun occurred after the enforceable date of the Act, September 1, 1978.

DAW:bw