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Comptroller General
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United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: *U.S. Small Business Administration—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum*

File: B-321640

Date: September 19, 2011

DIGEST

A valid obligation must reflect a *bona fide* need at the time the obligation is incurred. Thus, an agency must have a *bona fide* need for the guaranteed minimum of an indefinite-delivery indefinite-quantity contract (IDIQ). The U.S. Small Business Administration (SBA) violated the *bona fide* needs rule where it did not have a *bona fide* need for the guaranteed minimum quantities specified in an IDIQ contract at the end of fiscal years 2009 and 2010. SBA reported that it has adjusted its accounts to correct its *bona fide* needs violation.

DECISION

The Office of Inspector General (OIG) for the U.S. Small Business Administration (SBA) has requested our decision under 31 U.S.C. § 3529 regarding two issues raised during its audit of transactions under contract number SBAHQ-09-D-0009 (SBA IDIQ Contract), an indefinite-delivery indefinite-quantity (IDIQ) firm fixed-price contract for the procurement of computer hardware and software. Letter from Deputy Inspector General, SBA OIG, to General Counsel, GAO (Feb. 25, 2011) (Request Letter). This decision addresses (1) when an agency has to establish a *bona fide* need for the guaranteed minimum obligated for an IDIQ contract; and (2) whether SBA had a *bona fide* need for fiscal year 2009 amounts obligated in September 2009 and for fiscal year 2010 amounts obligated in September 2010. As explained below, we conclude that the guaranteed minimum under an IDIQ contract must reflect the *bona fide* needs of the agency at the time the obligation is recorded. Further, SBA failed to demonstrate a *bona fide* need sufficient to justify the fiscal year 2009 amounts obligated in September 2009 or the fiscal year 2010 amounts obligated in September 2010. SBA reported that it has adjusted its accounts to correct its *bona fide* needs violation.

Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies in order to establish a factual record and the agencies' legal positions on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. The record in this case consists of the Request Letter, the SBA IDIQ Contract, SBA Office of Inspector General Report Number 11-14 (June 2, 2011) (SBA OIG Report), and the legal views of the SBA. *See* Letter from Deputy General Counsel, SBA, to Assistant General Counsel for Appropriations Law, GAO (June 10, 2011) (SBA Response). We also received information via teleconference from SBA OIG staff in March 2011.

BACKGROUND

The SBA IDIQ Contract provides for one base year and four one-year options and includes a list of computer hardware and software that SBA intended to purchase, as necessary, by the issuance of task orders. SBA IDIQ Contract, at 5 and 33–44. When initially executed on September 21, 2009, the SBA IDIQ Contract provided for a $290,000 guaranteed minimum for the base year. SBA IDIQ Contract, at 5. Of this amount, SBA obligated $266,000 against its fiscal year 2009 appropriation for salaries and expenses and obligated the remaining $24,000 against SBA's no-year appropriation for salaries and expenses.[1] Request Letter, at 2. Seven days later, on September 28, SBA unilaterally executed a contract modification that increased the base year minimum from $290,000 to $1,315,000.[2] SBA IDIQ Contract Modification 1 (Sept. 28. 2009). SBA obligated the additional $1,025,000 in the guaranteed minimum against its fiscal year 2009 appropriation. Request Letter, at 2. Thus, in September 2009, SBA had obligated $1,291,000 of the $1,315,000 guaranteed minimum against its fiscal year 2009 appropriations.

In September 2010, SBA exercised option year one and modified the SBA IDIQ Contract on three separate occasions during a span of two weeks. *See* Request Letter, at 3; SBA IDIQ Contract Modification 4 (Sept. 9, 2010), SBA IDIQ Contract Modification 5 (Sept. 22, 2010) and SBA IDIQ Contract Modification 6 (Sept. 24, 2010). As a result of these contract modifications, SBA obligated an aggregate of $1,860,000 in fiscal year 2010 funds in September 2010.[3]

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[1] A no-year appropriation is available for obligation without fiscal year limitation.

[2] While the SBA IDIQ Contract does not provide for unilateral modification, there is no indication that the contractor objected to the modification. *See* SBA Response, at 3.

[3] In SBA IDIQ Contract Modification 4, SBA exercised option year one and funded the contract for $235,000. The parties executed SBA IDIQ Contract Modification 5 in order for SBA to "add additional funds . . . in the amount of $45,000." Finally, SBA IDIQ Contract Modification 6 was executed in order to "add incremental funding . . . in the amount of $1,580,000."

Commencing in fiscal year 2010, and prior to terminating the SBA IDIQ Contract in fiscal year 2011, SBA issued multiple task orders under the SBA IDIQ Contract, funded with a mix of fiscal years 2009 and 2010 funds, no-year funds, and American Recovery and Reinvestment Act of 2009 multi-year funds that were available for obligation in fiscal years 2009 and 2010. Request Letter, at Tab H (Task Order Analysis); SBA Response, at 1. This decision concerns the propriety of SBA's obligation of fiscal year 2009 and fiscal year 2010 appropriations for the SBA IDIQ Contract.

DISCUSSION

IDIQ Contract Guaranteed Minimum Amount

The first issue is whether an agency must have a *bona fide* need for the guaranteed minimum quantity in an IDIQ contract at the time the agency signs the contract.

While an agency may exercise its discretion in setting the guaranteed minimum in an IDIQ contract, this discretion is not unlimited. B-318046, Jul. 7, 2009, at 4. An agency must consider both the Federal Acquisition Regulation (FAR) and appropriations law principles when determining its guaranteed minimum quantity.

The FAR provides that an IDIQ contract must require the government to order, and the contractor to furnish, a stated minimum quantity of supplies or services. 48 C.F.R. § 16.504(a)(1). The stated minimum quantity forms the consideration for the contract. *See Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923) (holding that a contract without a minimum quantity is unenforceable for "lack of consideration and mutuality"); *see also* B-318046, at 1. In order to ensure that an IDIQ contract is binding, the FAR requires that the minimum quantity be more than a nominal quantity; however, in order to avoid an unjustified commitment of agency funds, the stated minimum should not exceed the amount the government is fairly certain to order. 48 C.F.R. § 16.504(a)(2).

From an appropriations law standpoint, the recording statute, 31 U.S.C. § 1501(a), requires an agency to record an obligation against its appropriation at the time that it incurs a legal liability, such as when the agency signs a contract committing the government to purchase a specified amount of goods or services. As noted above, an IDIQ contract must include a guaranteed minimum in order to create a binding contract. Therefore, upon execution of an IDIQ contract, the agency must record an obligation in the amount of the guaranteed minimum at the time the contract is executed because, at that point, the government has committed itself to a fixed liability for the minimum amount. B-318046, at 3 (citations omitted); *see also* B-308969, May 31, 2007; B-302358, Dec. 27, 2004. Further, the *bona fide* needs rule establishes that an agency may obligate its fiscal year appropriation only to meet a legitimate, or *bona fide*, need arising in the fiscal year for which the appropriation was made. *See*, *e.g.*, B-317139, June 1, 2009;

B-257977, Nov. 15, 1995. This bedrock principle of appropriations law is known as the *bona fide* needs rule.[4] Accordingly, the guaranteed minimum amount in an IDIQ contract must not only constitute sufficient consideration to make the contract binding, but also reflect the *bona fide* needs of the agency at the time of execution of the contract. B-318046, July 7, 2009.

Bona Fide Need for Obligations Recorded in September 2009 and September 2010

The second issue is whether SBA had a *bona fide* need in fiscal year 2009 for the amounts obligated in September 2009 and in fiscal year 2010 for the amounts obligated in September 2010.

As explained above, under the *bona fide* needs rule, an appropriation is available for obligation only to fulfill a genuine *bona fide* need of the period of availability for which it is made. B-289801, Dec. 30, 2002, at 4; 73 Comp. Gen. 77, 79 (1994). An agency's compliance with the *bona fide* needs rule is measured at the time the agency incurs an obligation. B-289801. Determination of what constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of the particular case. 70 Comp. Gen. 469, 470 (1991).

SBA periodically replaces or upgrades the computer hardware and software for approximately 3,000 agency personnel and contractors. SBA Response, at 1. Most hardware and software are replaced on a three-year cycle, which means that during any fiscal year, SBA has a need to acquire replacement stock. *Id.* The agency also keeps on hand a minimal supply of computer equipment to ensure service needs are uninterrupted.[5] *Id.* Thus, according to SBA, the agency had a need for computer and hardware equipment in fiscal years 2009 and 2010. SBA Response, at 2. However, as explained below, the totality of the facts and circumstances here suggest that a *bona fide* need in the amount of $1,295,000 did not exist at the end of fiscal year 2009, nor did a *bona fide* need in the amount of $1,860,000 exist at the end of fiscal year 2010. SBA agrees, and has adjusted its fiscal years 2009 and 2010 appropriations accounts to correct the *bona fide* needs violation.

Although SBA entered into the SBA IDIQ Contract and obligated the guaranteed minimum in September 2009, SBA did not issue its first task order until fiscal year

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[4] The *bona fide* needs rule is derived from 31 U.S.C. § 1502(a), which provides that "an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability."

[5] While SBA noted that it generally maintains a minimal supply of computer equipment to ensure its provision of uninterrupted service, it did not advance the existence of a need to replenish inventory as a justification for the amounts obligated in September 2009 and September 2010. *See generally* 73 Comp. Gen. 259 (1994).

2010. In fact, SBA expended $1,109,899.90 in fiscal year 2009 funds for task orders issued in fiscal year 2010. In addition to substantial performance and payment occurring in fiscal year 2010, on various occasions SBA issued multiple task orders on a single day in fiscal year 2010 and funded those task orders with both fiscal year 2009 and fiscal year 2010 appropriations. Request Letter, at Tab H (Task Order Analysis). When asked to explain this practice, SBA responded that "it is not clear from the contract file the reasons why FY 2009 funds were charged for task orders issued in FY 2010." SBA Response, at 4. SBA further noted that its contracting personnel believed that "once funds were obligated to an IDIQ contract, those funds were available for the life of the contract and did not expire until the contract was terminated." SBA OIG Report, at 5, *cited in* SBA Response, at 4.

The $1,860,000 in fiscal year 2010 funds obligated in September 2010 also does not appear to reflect a *bona fide* need of SBA for fiscal year 2010. *See* Request Letter, at 2–3. While SBA did expend some of these funds in fiscal year 2010, the majority of these funds were expended on task orders issued in fiscal year 2011.[6] In sum, SBA's actions indicate that it did not have a *bona fide* need for the guaranteed minimum quantities specified in the SBA IDIQ Contract in September 2009 and September 2010.

While SBA maintains that a *bona fide* need existed in fiscal years 2009 and 2010, but that it simply did not fulfill those needs during the relevant fiscal year, SBA also concedes that "[t]he failure to issue task orders to fulfill the agency computer needs identified during the availability of the funds is not consistent with the *bona fide* needs statute." SBA Response, at 2. Therefore, according to SBA, it has adjusted its fiscal year 2009 and fiscal year 2010 appropriations to ensure that all task orders for computer and hardware purchased under the SBA IDIQ Contract were obligated and paid with funds from the fiscal year available for obligation when the task orders were issued. *Id.*

While we approve of SBA's remedial actions, SBA's actions reflect a misunderstanding of the *bona fide* needs rule as it applies to the guaranteed minimum amount in an IDIQ contract. While it is true that task orders must be funded with appropriations available at the time of the issuance of the task order, it is also true that a *bona fide* need must exist for the amounts obligated as the guaranteed minimum. The pattern of SBA's acquisition of computer hardware and software indicates that a *bona fide* need did not, in fact, exist to support the guaranteed minimum amounts obligated in September 2009 and September 2010. SBA should take action, as necessary, to ensure that all appropriate staff understand and comply with the *bona fide* needs rule.

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[6] From September 9, 2010, through the termination of the SBA IDIQ Contract in fiscal year 2011, SBA issued task orders in fiscal year 2010 totaling $108,379 and task orders in fiscal year 2011 totaling $245,313. *See* Request Letter, at Tab H (Task Order Analysis).

CONCLUSION

The guaranteed minimum amount in IDIQ contracts must not only constitute sufficient consideration to make the contract binding, but also reflect the *bona fide* needs of the agency at the time of execution of the contract. SBA violated the *bona fide* needs rule when it obligated fiscal year 2009 appropriations in September 2009, and again when it obligated fiscal year 2010 appropriations in September 2010. SBA reported that it has adjusted its accounts to correct its violation of the *bona fide* needs rule.

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