Appropriations Law Year-in-Review

Matter of: Department of Housing and Urban Development—Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012

File: B-325124

Date: June 19, 2014

The Department of Housing and Urban Development (HUD) appropriation remained available to pay the salary of a HUD official, in circumstances where an e-mail sent by the official did not prohibit or prevent, or attempt or threaten to prohibit or prevent, a HUD employee from communicating with Congress. Section 713 of the Financial Services and General Government Appropriation Act, 2012, as carried forward into fiscal year 2013 by the Consolidated and Further Continuing Appropriations Act, 2013, provides a governmentwide prohibition on the use of appropriated funds to pay the salary of an officer or employee who prohibits or prevents, or attempts or threatens to prohibit or prevent, another federal officer or employee from communicating with Congress.

Matter of: Occupational Safety and Health Review Commission—Refreshments for a Combined Federal Campaign Event

File: B-325023

Date: July 11, 2014

Under the current circumstances, Occupational Safety and Health Review Commission's (OSHRC) appropriated funds are not available to pay for food at a Combined Federal Campaign (CFC) kick-off event. Food is a personal expense. Appropriations are not available to pay for food unless specifically authorized, or unless the agency can demonstrate that such expenditures are an essential constituent part of the effective accomplishment of a statutory responsibility. In this case, OSHRC has not presented compelling empirical evidence demonstrating that food will likely generate or increase contributions to the CFC. That refreshments may enhance employee enthusiasm for the campaign, by itself, is not an adequate justification to use appropriations for what is otherwise a personal expense. We are unwilling to extend the availability of appropriations to cover food at CFC fundraising events unless Congress legislates such authority or an agency can make a compelling case that the offering of food at the event demonstrably increases contributions.

Matter of: Department of Defense—Obligation of Bonuses under Military Service Agreements

File: B-325526

Date: July 16, 2014

DOD offers recruiting and retention bonuses to prospective and current servicemembers. DOD offers these bonuses in a written agreement and in exchange for a term of military service. DOD generally pays an initial bonus installment to the individual and then pays subsequent installments on an annual basis. We conclude that DOD incurs an obligation for the full bonus amount when it enters into the agreement. DOD has taken an action that can mature into a legal liability if the servicemember satisfies his or her time commitment. In our view, because DOD cedes control of its fiscal exposure to the servicemember, DOD incurs an obligation for the entire bonus amount when it enters into the agreement. DOD should charge the obligation to an appropriation current at the time of the agreement.

DOD currently records an obligation on an outlay basis, that is, at the time it pays each bonus installment. DOD should change its obligational practices and update its financial management regulations.

Matter of: Denali Commission—Amounts Available for Bulk Fuel Storage Tanks

File: B-323365

Date: Aug. 6, 2014

The Denali Commission (Denali) receives an annual lump-sum appropriation to be used for expenses to carry out its energy-related mission. Denali also receives statutorily directed annual transfers from the Oil Spill Liability Trust Fund (OSLTF) to repair and replace bulk fuel storage tanks, as well as grants from the Rural Utility Service (RUS) to acquire, construct, upgrade, and otherwise improve energy generation, transmission and distribution facilities. The statutorily directed transfers from the OSLTF and grants from the RUS supplement Denali's annual lump-sum appropriation. Where an appropriation is available for a particular purpose and additional amounts are statutorily transferred from other accounts to assist in carrying out that same purpose, the additional amounts are treated as supplementing the agency's appropriation absent language to the contrary.

Matter of: Department of Defense—Compliance with Statutory Notification Requirement

File: B-326013

Date: Aug. 21, 2014

The Department of Defense (DOD) violated section 8111 of the Department of Defense Appropriations Act, 2014 when it transferred five individuals detained at Guantanamo Bay, Cuba, to the nation of Qatar without providing at least 30 days notice to certain congressional committees. Section 8111 prohibits DOD from using appropriated funds to transfer any individuals detained at Guantanamo Bay unless the Secretary of Defense notifies certain congressional committees at least 30 days before the transfer. As a consequence of using its appropriations in a manner specifically prohibited by law, DOD also violated the Antideficiency Act.

Matter of: Department of Housing and Urban Development—Anti-Lobbying Provisions

File: B-325248

Date: Sept. 9, 2014

The Department of Housing and Urban Development (HUD) violated section 716 of the Financial Services and General Government Appropriations Act, 2012, as carried forward by the Consolidated and Further Continuing Appropriations Act, 2013, when it obligated and expended appropriated funds to prepare and transmit an e-mail. Specifically, HUD's Deputy Secretary sent an e-mail to members of the public, asking that recipients contact specific senators regarding the Department of Transportation, HUD, and Related Agencies appropriations bill for fiscal year 2014, which was pending in the Senate at the time. Section 716 prohibits an agency from using appropriated funds to appeal to the public to contact Members of Congress in support or in opposition to pending legislation. HUD also violated the Antideficiency Act when it obligated and expended funds for this statutorily prohibited purpose.

Matter of: Department of Health and Human Services—Risk Corridors Program

File: B-325630

Date: Sept. 30, 2014

Section 1342 of the Patient Protection and Affordable Care Act directs the Secretary of the Department of Health and Human Services (HHS) to establish and administer a temporary risk corridors program to limit the losses and gains of qualified health plans participating in the American Health Benefit Exchanges in calendar years 2014, 2015, and 2016. The risk corridors program provides that HHS will make payments to qualified health plans experiencing losses above a set amount; conversely, plans realizing gains above a set amount will make payments to HHS. Section 1342 did not enact an appropriation to make the payments to the qualified health plans. The Program Management (PM) appropriation for fiscal year 2014 for the Centers for Medicare and Medicaid Services (CMS), including amounts collected by CMS from qualified health plans under the program, would have been available for payments to qualified health plans pursuant to section 1342. The CMS PM appropriation for FY 2014 made funds available to CMS to carry out its responsibilities, which, with the enactment of section 1342, include the risk corridors program. Any amounts collected from qualified health plans under the risk corridors program are user fees and also would have been available to CMS, because the CMS PM appropriation for FY 2014 appropriated sums collected from authorized user fees.

Matter of: Department of Commerce—Disposable Cups, Plates, and Cutlery

File: B-326021

Date: Dec. 23, 2014

The Department of Commerce may not use appropriated funds to purchase disposable cups, plates, and cutlery for employee use. An agency may not use appropriated funds to purchase items considered personal expenses without specific statutory authority to do so, unless the agency can demonstrate that the provision of items that would otherwise constitute a personal expense directly advances the agency's statutory mission and the benefit accruing to the agency clearly outweighs the ancillary benefit to the employee. Here, the disposable cups, plates, and cutlery are primarily for the convenience of agency employees and thus constitute a personal expense.

Matter of: U.S. Army Europe—Obligation of Funds for an Interagency Agreement for Severable Services

File: B-323940

Date: Jan. 7, 2015

The U.S. Army Europe (USAREUR) may enter into a one-year contract for severable services that begins in one fiscal year and ends in the next fiscal year under the statutory authority found in 10 U.S.C. § 2410a. USAREUR may also rely on this authority to enter into interagency agreements with the General Services Administration (GSA). An interagency agreement is akin to a contract, and the obligational consequences of an interagency agreement entered into under GSA's revolving fund authority are the same as if it were a contract.

GAO Appropriations Law Decisions and Opinions
(March 2014 to February 2015)

Commodity Futures Trading Commission—Fiscal Year 2013 Transfer Authority
B-325351, Apr. 25, 2014

Department of State—United Nations Peacekeeping Credits
B-325350, Apr. 30, 2014

Department of Housing and Urban Development—Application of Section 713 of the Financial Services and General Government Appropriations Act, 2012
B-325124, June 19, 2014

Occupational Safety and Health Review Commission—Refreshments for a Combined Federal Campaign Event
B-325023, July 11, 2014

Department of Defense—Obligation of Bonuses under Military Service Agreements
B-325526, July 16, 2014

Denali Commission—Amounts Available for Bulk Fuel Storage Tanks
B-323365, Aug. 6, 2014

Department of Defense—Compliance with Statutory Notification Requirement
B-326013, Aug. 21, 2014

Department of Housing and Urban Development—Anti-Lobbying Provisions
B-325248, Sept. 9, 2014

Department of Health and Human Services—Risk Corridors Program
B-325630, Sept. 30, 2014

Department of Commerce—Disposable Cups, Plates, and Cutlery
B-326021, Dec. 23, 2014

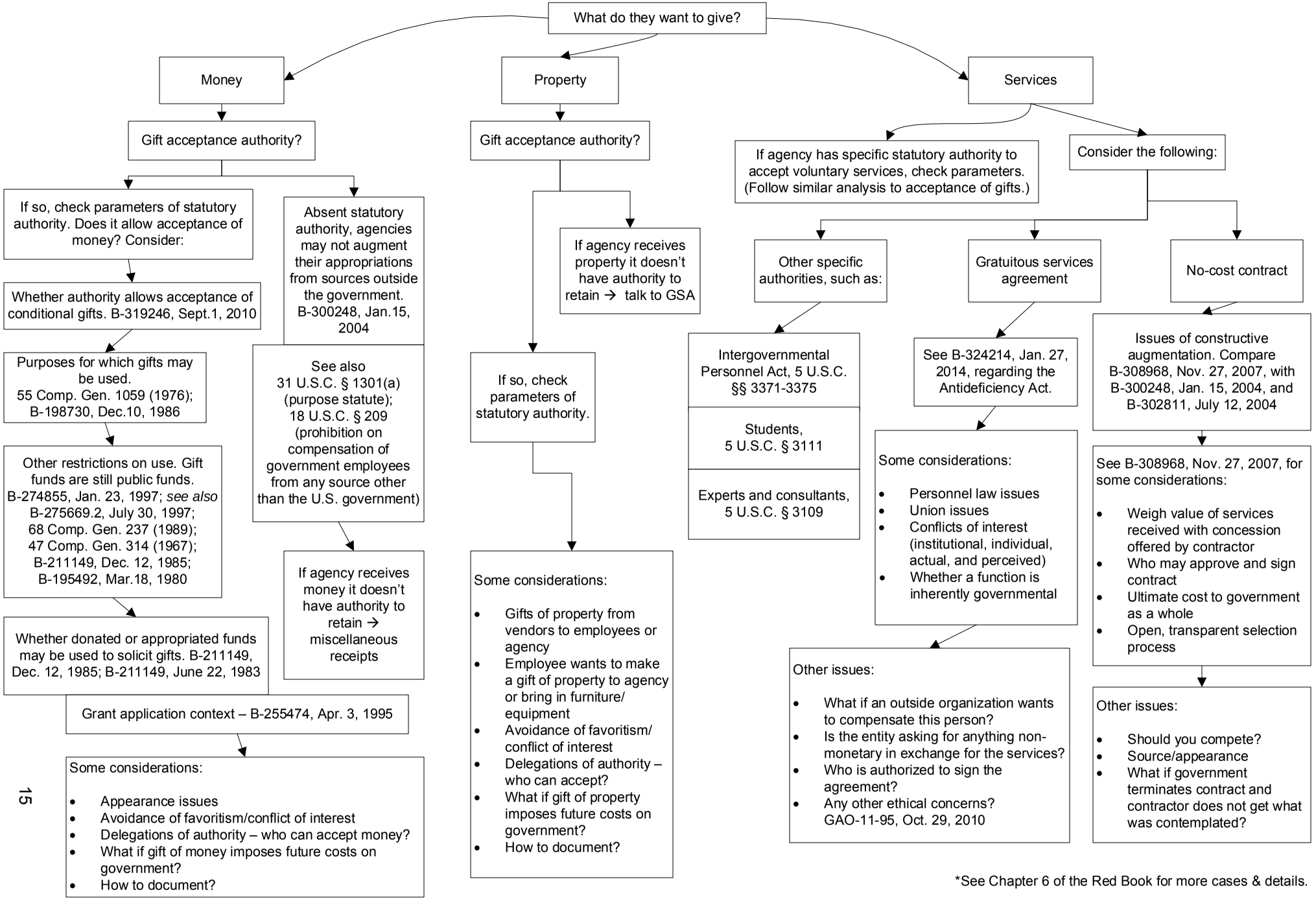
U.S. Army Europe—Obligation of Funds for an Interagency Agreement for Severable Services
B-323940, Jan. 7, 2015

Agency Perspectives:
Donations, Gifts, and Free Services

Donations, Gifts, and Free Services

Money received for the government must be deposited in Treasury as miscellaneous receipts. 31 U.S.C. § 3302(b)

The Antideficiency Act prohibits the acceptance of voluntary services. 31 U.S.C. § 1342



*See Chapter 6 of the Red Book for more cases & details.

Congressional Perspectives: Department of Defense—Obligation of Bonuses under Military Service Agreements

United States Government Accountability Office
Washington, DC 20548

B-325526

July 16, 2014

The Honorable Hal Rogers
Chairman
The Honorable Nita Lowey
Ranking Member
Committee on Appropriations
House of Representatives

Subject: *Department of Defense—Obligation of Bonuses under Military Service Agreements*

This responds to your request for our opinion regarding the Department of Defense's (DOD) obligational practice for certain recruiting and retention bonuses.[1] DOD components offer these bonuses in various agreements with individuals in exchange for terms of military service. DOD generally pays the bonuses in installments over a number of years. As we explain in further detail below, we conclude that DOD incurs an obligation for the entire bonus amount when it enters into these agreements. DOD should charge the obligation to an appropriation current at the time of agreement.

In accordance with our regular practice, we contacted DOD to obtain relevant facts and its legal views on this matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/lawresources/resources.html. DOD provided us with a letter containing that information. Letter from Deputy General Counsel (Fiscal), DOD, to Assistant General Counsel for Appropriations Law, GAO, *Subject: Department of*

[1] H.R. Rep. No. 113-113, at 17–18 (2013) ("The Committee directs the Comptroller General to issue a legal opinion not later than 180 days after the enactment of this Act assessing the obligation of military personnel multi-year bonuses to determine if the Department of Defense obligation practices comply with fiscal law."). The committee report was later incorporated by reference into the joint explanatory statement accompanying the Consolidated Appropriations Act, 2014. 160 Cong. Rec. H533 (daily ed. Jan. 15, 2014); Pub. L. No. 113-76, § 4, 128 Stat. 5, 7 (Jan. 17, 2014).

Defense Obligation of Military Personnel Bonuses – GAO Project B-325526 (May 12, 2014) (DOD Letter).

BACKGROUND

DOD offers bonuses to recruits and current servicemembers when it is "necessary to attain recruiting and retention objectives." *Id.,* at 1. DOD is authorized to pay various bonuses under title 37 of the U.S. Code. *Id.,* at 1–2. For instance, the Secretary of Defense may pay a bonus to an individual who enlists in an armed force; enlists in or affiliates with a reserve component of an armed force; reenlists or voluntarily extends an enlistment; or transfers from a regular component of an armed force to a reserve component or vice versa. 37 U.S.C. § 331(a). The Secretary may also pay a bonus to an individual who accepts a commission or appointment as an officer in a uniformed service, affiliates with a reserve component of a uniformed service; agrees to remain on active duty for a specific period of time; or transfers from a regular component of an armed force to a reserve component or vice versa. *Id.* § 332(a).

DOD offers these bonuses to individuals via a written agreement. *Id.* §§ 331(d), 332(d). *See, e.g.,* DOD Letter, Attachment 6 (sample agreement with the Army), Attachment 7 (sample agreement with the Army National Guard); Attachment 8 (sample agreement with the Navy Reserve), Attachment 9 (sample agreement with the Air Force Medical Corps). These agreements generally specify the amount of the bonus, the term of obligated military service (typically no more than six years), and the conditions of service (such as completing certain training programs). 37 U.S.C. §§ 331(d), 332(d). *See, e.g.,* DOD Letter, Attachments 6–9. The agreements also specify whether the bonus will be paid as a lump sum or in installments. 37 U.S.C. §§ 331(d)(2), 332(d)(2). If the bonus is paid in installments, then DOD often pays an initial bonus installment to the servicemember and then pays subsequent installments on the anniversary of the agreement. DOD Letter, at 3.

For example, DOD offers retention bonuses to certain medical officers. *Id.*, Attachment 9. The medical officer agrees to "remain on active duty in the Air Force Medical Service (AFMS) Medical Corps (MC) for a minimum of one, two, three, or four consecutive years" and to "possess a current and valid license . . . for the duration of the contract." *Id.*, at 1 (emphasis omitted). In exchange, the medical officer receives a defined bonus "paid annually upon execution of this contract and its subsequent anniversary dates as applicable and specified in the current pay plan." *Id.*

DOD does not record an obligation when the agreement is executed. *Id*. Rather, DOD records an obligation for the initial installment and subsequent installments in the months they become payable to the servicemember. *Id.*; Department of Defense

Financial Management Regulation 7000.14-R, vol. 3, ch. 8, para. 080901, *Personal Services and Benefits* (Sept. 2009).[2]

DISCUSSION

The issues presented here are: (1) when does DOD incur an obligation for a bonus under the agreements described above; and (2) in what amount does DOD incur an obligation.

Determining the Obligation Event

It is at the point of obligation that we determine compliance with various fiscal laws such as the Antideficiency Act. B-300480.2, June 6, 2003; B-300480, Apr. 9, 2003. Under that act, an agency may not incur an obligation in excess of the amount available in its appropriation. 31 U.S.C. § 1341(a)(1)(A). Accordingly, in order to ensure compliance with the Antideficiency Act, agencies must properly record their obligations and track available budget authority.

Thus, the federal government generally operates on an obligational basis. B-300480.2; B-300480; B-316915, Sept. 25, 2008. In other words, the government takes some action that "obligates" it to pay, and then the actual disbursement of funds usually follows at some later time. *Id.* An obligation is defined as a "definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-06-734SP (Washington, D.C.: Sept. 2005), at 70. *See also* B-322147, July 6, 2011.

Here, DOD enters into various agreements providing for a bonus if an individual fulfills a required term of service—that is, DOD offers a monetary incentive for a time commitment. DOD Letter, at 5. We already addressed this type of agreement in a 2003 opinion, B-300480. In that case, the Corporation for National and Community Service (CNCS) executed binding agreements authorizing grantees to enroll up to a certain number of new participants in AmeriCorps, a national community service program. *Id.* At the time of agreement, CNCS was statutorily committed to fund education benefits for all participants who completed a fixed term of service. *Id*. CNCS, like DOD, had been recording obligations for the education benefits on an outlay basis, that is, at the time the grantee drew down funds to make payments to

[2] DOD obligates bonus installments against the military personnel appropriation for the applicable service. DOD Letter, at 3. DOD generally receives one-year appropriations for the pay, benefits, incentives, allowances, housing, sustenance, travel, and training of servicemembers. *See, e.g.,* Pub. L. No. 113-76, div. C, title 1, 128 Stat. at 86–88.

AmeriCorps participants who fulfilled their terms of service. *Id*. We concluded that CNCS should have recorded an obligation for the education benefits when it signed the grant agreement. *Id*. It was at that time that CNCS incurred a legal duty to pay; it was at that time that CNCS authorized grantees to enroll a certain number of new participants; it was at that time CNCS relinquished control of the extent of the government's liability to the grantee. *Id.*

DOD's obligational practice, like CNCS's practice, fails to recognize that when DOD enters into the agreement, it has taken an action that can mature into a legal liability if the servicemember upholds his or her end of the agreement. DOD, like CNCS, has entered into an agreement to incentivize an individual to accept a time commitment. DOD has accepted a fiscal liability, which is fully payable should the servicemember satisfy the time commitment. In our view, because DOD has ceded control of its fiscal exposure to the servicemember, DOD incurs an obligation for the bonus at the time it signs the agreement.

DOD argues that bonuses are statutorily defined as "military pay compensation" in title 37 of the U.S. Code. DOD Letter, at 4. DOD believes it cannot record an obligation for a bonus installment until it has "evidence of employment during the required period of obligated service." *Id.* DOD points to section 20.5(b) of OMB Circular No. A-11, which states that personnel compensation and benefits should generally be recorded as obligations "as the amounts are earned during the reporting period." OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 1, § 20.5(b) (Nov. 5, 2013).

We disagree with DOD's position. The fact is that generally all amounts an employer pays to an employee have a nexus to the employee's service to the employer—for example, performance bonuses, spot awards, and student loan repayments. That does not mean that an agency should obligate all amounts as it does basic pay, which is done on a pay period basis. 24 Comp. Gen. 676, 678 (1945). Here, DOD has entered into an agreement for a time commitment from the servicemember. DOD will pay the servicemember his or her basic pay regardless of whether the servicemember satisfies the time commitment. *See* 37 U.S.C. § 331(e) ("A bonus paid to a person or member under this section is in addition to any other pay and allowance to which the person or member is entitled.").

DOD also makes an alternative argument. DOD states that it does not incur an obligation at the time of agreement because "payments remain under the control of the military department." DOD Letter, at 1. DOD explains that it retains control because "military departments can and do routinely and unilaterally discharge service members before bonus installments are earned and without having incurred any legal obligation to make such payments." *Id*. However, the fact that DOD may unilaterally terminate or modify the agreement does not negate the nature or scope of the obligation incurred at the time of agreement. Were it otherwise, every agreement permitting the government to terminate an agreement for convenience or to modify the agreement would not be deemed an obligation at the time of

agreement. B-300480. As we have previously explained, in a long-standing practice, both Congress and the accounting officers of the government have rejected such a view. *Id.*

DOD, like CNCS, appears to be confusing its commitment to record an obligation with the liquidation of the obligation. DOD is legally required to record an obligation at the time it signs such an agreement with a servicemember. 31 U.S.C. § 1501(a). However, should a servicemember not uphold his or her end of the agreement, DOD may have a basis for not liquidating the obligation. We discuss this in more detail below.

Amount of the Obligation

An agency should record its total obligation against funds available at the time the agreement was executed. B-322160; OMB Cir. No. A-11, at § 20.5(c). If the amount of the obligation is outside of the control of the government, then the government should obligate funds to cover its maximum amount of its liability. B-300480. As explained above, in this case, it is the servicemember who controls the extent of DOD's liability. Therefore, DOD must record an obligation to cover the total bonus against an appropriation current at the time of agreement. 31 U.S.C. § 1502(a). The amount of the bonus will be determinable from the terms of the agreement. 37 U.S.C. §§ 331(c)(2), 332(c)(2). *See, e.g.,* DOD Letter, Attachments 6–9.

In the CNCS case, we recognized that ultimately, CNCS may not have to pay educational benefits to every AmeriCorps enrollee. Not every enrollee will fulfill his or her service commitment and become entitled to the payment. Alternatively, grantees could lose their authority to enroll participants in the AmeriCorps program or CNCS itself could have modified the grantees' authority. If those situations arose, we explained that CNCS should deobligate previously obligated amounts to reflect the change in its legal exposure. B-300480.

Similarly, here, DOD may not have to pay out the entire bonus amount under these agreements.[3] Servicemembers may lose their entitlement to a bonus if they

[3] We recognize that DOD will likely disburse some or all of the bonus amounts later in the year or in future fiscal years. DOD states that "[n]o components currently make bonus installment payments . . . later than the fifth anniversary of payment of an initial installment." DOD Letter, at 3. DOD must ensure that it makes all payments in accordance with the account closing law. 31 U.S.C. §§ 1551–1553. Under the law, an appropriation available for a fixed period of time, such as a military personnel appropriation, expires at midnight on the last day of its period of availability. The expired appropriation remains available for a period of five fiscal years to record, adjust, and liquidate obligations properly chargeable to the appropriation. *Id.* § 1553(a). After five years, the expired appropriation is closed

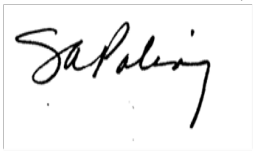
separate from the Armed Forces or otherwise fail to meet the terms of service. DOD Letter, at 2. If DOD determines that a servicemember has not fully performed under the agreement, then DOD may not make additional bonus payments and may choose to recoup previously disbursed bonus payments. 37 U.S.C. § 373; DOD-FMR 7000.14-R, vol. 7A, ch. 2, table 2-1. As in the CNCS case, we would advise DOD to deobligate previously obligated amounts to reflect the change in its legal exposure. B-300480.

We note that the result in this case is really no different from the obligational rule regarding a simple fixed-price contract. There, the government incurs an obligation to pay a specific amount, provided that the contractor fully performs under the agreement. B-255831, July 7, 1995; 62 Comp. Gen. 143, 146 (1983); 48 Comp. Gen. 497, 502 (1969). The possibility that the contractor may not perform up to the level or under the conditions defined in the agreement does not provide a basis for recording less than the full contract price.

CONCLUSION

Under the recording statute and the Antideficiency Act, DOD must record an obligation reflecting the full bonus amount when it executes military service agreements. DOD should change its obligational practices in accordance with these requirements and update its financial management regulations.

If you have any questions, please contact Edda Emmanuelli Perez, Associate General Counsel, at (202) 512-2853.



Susan A. Poling
General Counsel

and all balances are canceled. *Id.* § 1552(a). Canceled balances are unavailable to pay any obligation even though properly incurred prior to the expiration of the appropriation. Instead, an obligation that would have been properly chargeable to the canceled appropriation must be paid from a current appropriation available for the same purpose. *Id.* § 1553(b).