

**APPROPRIATIONS LAW FORUM 2010  
YEAR-IN-REVIEW**

**I. AVAILABILITY OF APPROPRIATIONS: PURPOSE**

Food

- *U.S. Army Garrison Ansbach—Use of Appropriated Funds to Purchase Food for Participants in Antiterrorism Exercises*, B-317423, Mar. 9, 2009

GAO concluded in a decision to an accountable officer at an Army garrison in Ansbach, Germany, that appropriated funds may be used to purchase food for federal civilian employees, military personnel, and nonfederal participants such as contractors and host nation first responders at annual antiterrorism exercises. In doing so, GAO overturned a 1993 decision that concluded that appropriations were not available for food for nonfederal participants at a similar training exercise. In the request, the accountable officer explained that host nation participants contribute to the realism of the training, with equipment and personnel deployed and used just as they would be in a real incident. GAO addressed two issues: (1) whether Army may use appropriated funds to purchase food for military personnel and civilian employees, and (2) whether Army may use appropriated funds to purchase food for nonfederal participants.

GAO concluded that the garrison may purchase food for federal civilian employees and military members if the garrison determines that the food is necessary for those employees to obtain the full benefit of the training exercise. While appropriated funds are generally not available to feed government employees at their duty station, decisions applying statutory authority to provide training to civilian and military personnel have permitted the use of appropriations for food where necessary to obtain the full benefit of the training. Here, continuous participation without breaks for lunch is important to simulate an actual event. Further, the garrison may want to practice the act of distributing food as if the exercise were a real event.

GAO also concluded that the garrison may purchase food for nonfederal participants if the attendance of those participants is essential to the training of the federal employees and the provision of food is necessary to ensure the realism of the simulated emergency training exercise. The Army's statutory authorities for training do not apply to nonfederal participants. Therefore, under a necessary expense analysis, the garrison must determine whether providing food to the nonfederal participants is essential to the success of the training. GAO stressed that such determinations must be made on a case-by-case basis. In reaching its conclusion, GAO noted the importance in a real event of a coordinated and seamless response by all sectors, and that the full participation of contractors and host nation first responders is essential to the success of the training. In reaching this conclusion, GAO overturned a 1993 decision that concluded that the Coast Guard may not provide coffee to nonfederal participants at an emergency training

exercise. Importantly, GAO also observed that embarrassment associated with not feeding nonfederal participants is an insufficient justification to provide food.

- *Department of the Army, Military Surface Deployment and Distribution Command—Use of Appropriations for Bottled Water*, B-318588, Sept. 29, 2009

A certifying officer requested a decision on whether the Army may use appropriations to pay for bottled water. Consistent with prior case law, GAO found that the Army had discretion to use its appropriated funds to purchase bottled water for employees working at temporary sites where potable water is not available.

The Army's Military Surface Deployment and Distribution Command (Command) was preparing to carry out missions at two U.S. ports where the Command does not have permanent work sites. During these missions, about a dozen personnel would be working out of leased trailers that have no water hookup. In one location, the nearest building with a sink for government use was approximately 2 miles from the trailer. In the other location, the building on site was owned by a contractor and was not available for government use.

Appropriated funds are generally unavailable for personal expenses, such as bottled water. On the other hand, an agency may use appropriated funds to provide a work site with potable drinking water. For example, bottled water may be purchased for a work site where the water supply poses a health risk if consumed or if potable water is unavailable. Given the circumstances of this case, GAO did not object to the purchase of bottled water. GAO emphasized that the Command should make a determination consistent with relevant Army regulations and policy and the Command's assessment of whether that would be the best way to provide its employees access to potable water.

- *Department of the Navy—Lunch for Volunteer Focus Group*, B-318499, Nov. 19, 2009

This is the second time in recent years that GAO has been asked to determine whether appropriated funds were available to provide food as an incentive for participation in a focus group. Unlike in the prior case, B-304718, Nov. 9, 2005, GAO found here that the agency did not show how the expense would further a particular statutory objective for which its appropriations were available, and thus GAO could not conclude public funds were available for this purpose.

Specifically, GAO was asked by a certifying officer if the United States Navy Fleet Activities at Okinawa, Japan (Navy Fleet Activities) could have used its appropriations to provide lunch for participants at a focus group. The Navy Inspector General (Navy IG) conducted a number of focus groups to assess readiness and quality of life concerns for Navy activities in Japan. The focus group at issue consisted of volunteer "ombudsmen." (Ombudsmen are not employees of the Navy; generally, they are spouses of active duty command

members and selected reserve command members.) Navy IG hoped to gather information from this focus group regarding the general welfare of Navy personnel, family members, and civilian employees stationed in Japan. Only five ombudsmen chose to participate in the focus group, which was scheduled for noon on a Sunday. The requester suggested that more ombudsmen might have participated if lunch had been provided and asked about the availability of Navy Fleet Activities' Operation & Maintenance (O&M) appropriations for this purpose.

GAO concluded that Navy Fleet Activities' O&M appropriations were not available to provide lunch for attendees of this focus group. Appropriations are not available to pay for food unless specifically authorized, or unless the agency can demonstrate that such expenditures are an essential part of accomplishing a specific statutory objective. Neither of those conditions is present in this case. Navy Fleet Activities did not identify a statutory responsibility of the Command that it aimed to satisfy with this expenditure other than the general responsibility to cooperate with an IG investigation. GAO did note, however, that this conclusion did not "prejudge" the availability of Navy IG appropriations for this purpose had the IG itself felt the need for food as an incentive to encourage participation.

#### Other Personal Expenses

- *National Indian Gaming Commission—Reimbursing Bicyclists as Part of the Agency's Transportation Fringe Benefit Program*, B-318325, Aug. 12, 2009

In this decision, GAO concluded that agencies may extend reimbursements under transportation fringe benefit programs to employees who commute by bicycle.

GAO pointed out that the purpose of the statute permitting agencies to establish a transportation fringe benefit program is to encourage employees to commute by means other than single occupancy motor vehicles in order to improve air quality and reduce traffic congestion. Options listed in the statute as potential components of an agency program are not exclusive, and agencies have discretion regarding implementation of their individual schemes. Bicycles could indeed fit under such a plan. Importantly, however, agencies retain the discretion to determine whether to extend their programs in this manner.

Agency personnel seeking the subsidy pointed to an amendment to the Internal Revenue Code permitting employers to provide benefits to bicyclists. Noting that while the Internal Revenue Code deals with tax consequences of fringe benefit programs, and that the authority to use appropriated funds for employee transportation is contained elsewhere, GAO maintained that the revenue code provision may provide useful guidance to agencies establishing such a plan. Further, GAO reminded NIGC to be mindful of OMB guidance on transit benefit programs for federal employees.

- *U.S. Fish and Wildlife Service —Steller's and Spectacled Eiders Conservation Plan*, B-318386, Aug. 12, 2009

GAO concluded in a decision to the United States Fish and Wildlife Service (FWS) that because of FWS's statutory responsibility to protect threatened and endangered species, and the failure of more traditional forms of educating the public about two threatened species of eiders, FWS may use appropriated funds to purchase baseball caps and other gifts as part of an education plan. Generally, agencies may not purchase personal gifts without statutory authority, and GAO rarely recognizes exceptions to the rule. Exceptions may be warranted when gifts advance legitimate agency goals and policies, rather than simply attracting attention to the agency. GAO only considers exceptions after careful consideration of particular factual circumstances.

The Alaska Regional Director of FWS asked whether the agency may use appropriated funds to purchase and distribute baseball caps, t-shirts, and other items to residents of Alaska's North Slope as part of the agency's steller's and spectacled eider conservation plan. As part of its conservation plan, the agency established an outreach program to educate North Slope residents about eider conservation, particularly on-the-wing identification proficiency. In addition to public meetings convened in North Slope villages, FWS hosted public radio talk shows, submitted articles to local newspapers, distributed pamphlets and fliers, and displayed posters regarding the plight of the ducks, but to little avail. Notwithstanding FWS actions, continued hunting of those species resulted in decreasing populations of the waterfowl. In 2009, the agency implemented a new strategy with a three-pronged approach: law enforcement, monitoring, and outreach, with the third prong comprising a dozen different activities. FWS proposed to distribute baseball caps at outreach meetings, because traditional outreach methods had failed. FWS intends those wearing the caps to become "walking billboards" for eider conservation messages, and a continued reminder about the importance of proper identification when hunting.

Here, GAO did not object to FWS's proposed use of appropriated funds to purchase the caps. The agency has a statutory responsibility to implement conservation plans, and unfortunately, past methods have been unsuccessful. Importantly, FWS implemented a strategic approach designed to reach and educate a particular community of hunters in furtherance of its eider conservation plan. The caps, indeed, may remind North Slope residents of the protected status of the eiders and aid in identifying the threatened species so as to distinguish them from the unprotected variety.

- *Department of Housing and Urban Development, Office of the Inspector General—Reasonable Accommodation*, B-318229, Dec. 22, 2009

In the factual circumstances present in this decision, GAO concluded that the Office of Inspector General (OIG), Department of Housing and Urban Development, did not have the authority to pay for local lodging as a reasonable accommodation under the Rehabilitation Act of 1973. OIG requested a decision on whether it may use appropriated funds to pay these expenses for an employee who suffers from chronic back pain when sitting for long periods, including while driving long distances. The agency had previously granted an accommodation for the employee to work from home 3 days a week. As a function of her job, she is required to travel several days a week to audit sites in Annapolis and Washington, D.C., both of which were within the 50-mile local travel area of her official duty station in Baltimore. The employee requested that OIG pay for lodging expenses when she visits work sites because the drives, requiring her to sit for an extended period of time without a break, exacerbate her pain.

According to federal law and travel regulations, agencies may only pay for lodging when the employee goes outside the local travel area on official business. GAO recognized that agencies can use appropriations for reasonable accommodations under the Rehabilitation Act even where appropriations may not otherwise be available for that purpose, but explained that OIG could provide other accommodations that would not involve circumventing statutory lodging limitations. For instance, the employee could take commuter rail or a bus, or accompany a fellow employee, which would not require her to drive. GAO noted that the employing agency also does not need to provide the exact accommodation the employee requests or prefers; rather, the agency has the discretion to choose among effective accommodations. Finally, agencies are not required to provide accommodations that fall outside the scope of employment, like commuting. Here, the employee's drive is akin to a commute, as she travels from her home to a work site for the day. Because there are other accommodations conducive to the employee's disability, the employee's workload, and statutory lodging restrictions, GAO concluded that appropriated funds are not available to pay for overnight stay expenses in this situation.

### Contest Entry Fees

- *Natural Resources Conservation Service—Use of Appropriated Funds for Contest Entry Fees*, B-317891, May 26, 2009

In this case, GAO concluded that an agency may use appropriated funds to pay for contest entry fees so long as the agency determines that participation in the contest benefits the agency's mission and any contest recognition is awarded to the agency. A certifying officer at the Natural Resources Conservation Service (NRCS) requested a decision regarding the use of appropriations for contest entry fees. An employee sought reimbursement for fees the employee had paid to enter

agency-produced public outreach materials in a marketing and communications contest.

Generally, agencies may use public funds to disseminate information regarding policies and programs. Moreover, NRCS has specific statutory authority to disseminate information and Congress provides the agency with funds to carry out that purpose. GAO recognized that contest feedback could provide valuable information to the agency that might improve its outreach programs. However, GAO also noted that the agency retains the discretion to deny reimbursement.

### Prohibitions

- *Department of Defense—Retired Military Officers as Media Analysts*, B-316443, July 21, 2009

GAO has issued a number of decisions and opinions addressing the application of the governmentwide prohibition on publicity or propaganda. In some of those decisions, for example, GAO found that prepackaged news stories violated the prohibition when they failed to disclose the government as the source of the information. In this case, GAO concluded that the Department of Defense (DOD) did not violate the prohibition when it offered special information and access to retired military officers who serve as media analysts.

Shortly after September 11, 2001, DOD began an aggressive outreach program to selected retired military officers (RMOs) who served as media analysts. DOD held conference calls and roundtable meetings and arranged trips for those RMOs whom DOD believed could ensure broad distribution of information regarding DOD's war on terrorism. Pursuant to a statutory mandate, GAO considered whether DOD's funding of these public affairs activities from 2002 to 2008 constituted covert propaganda.

Unless otherwise authorized by law, an agency may not use appropriations to fund any communication, or to contract with someone else to communicate on behalf of the agency, unless the communication clearly identifies the agency as the source of the communication. Here, while DOD clearly attempted to favorably influence public opinion with respect to the Bush Administration's war policies, GAO found no evidence that DOD attempted to hide from the public its outreach to the RMOs. Further, GAO found no evidence that DOD contracted with or paid RMOs to procure positive commentary or analysis. Accordingly, GAO concluded that DOD's public affairs activities involving RMOs did not violate the publicity or propaganda prohibition.

In closing, GAO noted that while DOD reasonably valued its ties with RMOs, it should consider implementing additional policies and procedures to protect the integrity and ensure transparency of its public affairs efforts. The opinion did not address whether the RMO outreach program resulted in a competitive advantage for RMOs or compromised DOD procurement with RMO-affiliated defense

contractors. The opinion also did not analyze whether RMOs revealed to the viewing public or networks if they had commercial ties to DOD contractors or other possible conflicts of interests. In GAO's view, these questions did not implicate the prohibition on the use of appropriations for publicity or propaganda purposes, and therefore, were outside the scope of the opinion.

- *ACORN v. United States*, 662 F. Supp. 2d 285 (E.D.N.Y. Dec. 11, 2009)

This court case addressed the application of the Constitution's prohibition against bills of attainder to a prohibition enacted in an appropriations act.

ACORN, an advocacy organization, is affiliated with a number of other organizations. Critics of ACORN allege that it commits fraud, tax evasion, and election violations, and that it advocates illegal activities. In response to the allegations, Congress enacted section 163 of the Continuing Appropriations Resolution, 2010, which barred any "funds made available by this joint resolution or any prior Act" from being provided to ACORN or any of its affiliates, subsidiaries, or allied organizations.

ACORN and two of its affiliates filed suit alleging that section 163 is an unconstitutional bill of attainder and moved for a preliminary injunction barring enforcement of section 163. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *ACORN*, 662 F. Supp. 2d at 291. The court applied a three-factor test enunciated by the Second Circuit and held that all three factors indicated that section 163 was unconstitutional. First, the court found that the statute fell within the "historical meaning of legislative punishment" because it barred only ACORN and its affiliates from receiving any federal funding. *Id.* at 293–94. Second, the court found that the statute did not "further[] non-punitive legislative purposes in light of the severity of the burdens the statute imposes." *Id.* at 294–96. The court reasoned that the severity of the ACORN funding ban, coupled with the context in which it occurred, "make it unmistakable that Congress determined ACORN's guilt before defunding it." *Id.* at 294. Third, the court found that statements by lawmakers showed that the Congress intended to punish ACORN. *Id.* at 296–97.

The court found that the plaintiffs likely would succeed on the merits of its case and that plaintiffs were likely to suffer irreparable harm from the government's actions to enforce section 163. *Id.* at 297. Therefore, the court granted a preliminary injunction barring the government from enforcing section 163 during the pendency of the action. *Id.* at 299–300. The government filed an appeal with the Second Circuit on December 16, 2009. Congress enacted a similar prohibition in the Consolidated Appropriations Resolution, 2010, the full-year appropriations act. The plaintiffs have amended their complaint so their lawsuit also encompasses the more recent provision.

## II. AVAILABILITY OF APPROPRIATIONS: AMOUNT

### Reach of the Antideficiency Act

- *Antideficiency Act—Applicability to Statutory Prohibitions on the Use of Appropriations*, B-317450, Mar. 23, 2009

Agencies must consider the effect of all statutory prohibitions, conditions, and limitations in determining whether there is “an amount available in an appropriation” as that phrase is used in the Antideficiency Act.

In several opinions, the Office of Legal Counsel (OLC), Department of Justice, had expressed the view that an agency would not be required to report an Antideficiency Act violation if it incurred an obligation contrary to a statutory prohibition on the use of appropriations unless the prohibition is incorporated “in an appropriation,” that is, in the appropriations act itself.

GAO discussed the century-old history and evolution of the Antideficiency Act, the purpose of the act, and prior federal court and GAO opinions and decisions, and concluded that “the reach of the Antideficiency Act extends to all provisions of law that implicate the use of agency appropriations.” Therefore, “[d]etermining what amount, if any, is available for a particular obligation or expenditure[] begins with examining the language in the agency’s appropriations act, but it does not end there: agencies must consider the effect of all laws that address the availability of appropriations for the expenditure.” If there are no funds available in an appropriation because of a statutory prohibition or restriction—whether enacted as part of the appropriations act or in another law—any obligation or expenditure would be in excess of the amount available for obligation or expenditure.

### Settlement v. Ratification

- *National Science Foundation—Potential Antideficiency Act Violation by the National Science Board Office*, B-317413, Apr. 24, 2009

This decision reiterated that agencies must pay the costs of a settlement using appropriations current at the time of the settlement.

The National Science Board Office (NSBO), a part of the National Science Foundation (NSF), entered into a service contract in September 2003 with a 1-year base contract and three 1-year options. During February and March 2006, an NSBO senior scientist directed the contractor to change the order of deliverables under a particular task order, thereby increasing the cost of the service. The senior scientist had no authority to enter into or to amend contracts. The contractor in 2007 submitted a Request for Equitable Adjustment/Certified Claim pursuant to the Contract Disputes Act, requesting compensation for the additional costs. NSF agreed to settle the claim.



GAO concluded that NSBO's fiscal year 2006 appropriation was not available to fund the settlement. Generally, costs of a settlement are to be paid using appropriations current at the time of the settlement. NSBO became liable for the settlement only at the point when it agreed to pay the contractor in fiscal year 2007. Thus, NSBO should instead have used fiscal year 2007 funds for this purpose.

NSBO could have used fiscal year 2006 funds to pay the contractor if an authorized contracting officer had ratified the senior scientist's unauthorized fiscal year 2006 action. Ratification "relates back" to the time of the unauthorized action. Because NSF settled the Request for Equitable Adjustment and did not ratify the unauthorized action, NSBO should correct the improper recording of fiscal year 2006 funds by deobligating the amounts that were improperly charged to the fiscal year 2006 appropriations and charging these amounts to the fiscal year 2007 appropriation. If, after NSBO adjusts its accounts, it has insufficient funds in its fiscal year 2007 appropriation to cover the obligation, it should report an Antideficiency Act violation in accordance with 31 U.S.C. § 1351.

#### Availability of amounts for specific purposes

- *Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Services Contract*, B-317139, June 1, 2009

A provision in an annual appropriations act stating that a portion of a lump-sum amount "shall be available for" a specific project does not preclude the use of other available appropriations for the project. Congress appropriated for the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury about \$73 million for salaries and expenses in fiscal year 2005, "of which \$7,500,000 shall be available" for a particular project. FinCEN obligated \$7.5 million from its fiscal year 2005 appropriation for the project, and it also obligated additional amounts from its fiscal years 2003 and 2004 appropriations, each of which was available through fiscal year 2005. Nothing in the language of the fiscal year 2005 appropriation or its legislative history suggested that Congress intended to restrict the availability of the fiscal years 2003 or 2004 appropriations. Therefore, GAO concluded that the appropriation in fiscal year 2005 of \$7.5 million specifically for the project did not preclude FinCEN from also using available unobligated balances from prior appropriations to fund the project.

### **III. AVAILABILITY OF APPROPRIATIONS: TIME**

#### Severable Services Contracting Authority

- *Severable Services Contracts*, B-317636, Apr. 21, 2009

Agencies that receive multiple year or no-year appropriations are allowed, unless otherwise provided by law, to contract for performance of severable services over

periods lasting longer than one fiscal year—up to the full period of availability established in the appropriations act.

Congressional requesters asked GAO whether 10 U.S.C. § 2410a and 41 U.S.C. § 253I restrict federal agencies that use multiple year or no-year appropriations to contracts for periods of performance no longer than 1 year. Ordinarily, a severable services contract that crosses from one fiscal year to the next and is funded by the initial fiscal year's appropriations would violate the *bona fide* needs rule and the so-called time statute, 31 U.S.C. § 1502(a). With regard to services to be rendered in the next fiscal year, the agency would be obligating its appropriation for the needs of a future year. Sections 2410a and 253I permit agencies with fiscal year appropriations to enter into severable services contracts for up to 1 year, even if the contract crosses fiscal years, and obligate the appropriations current at the time the agency enters into the contract.

The time statute and *bona fide* needs rule were designed to reinforce the time limitations built into appropriations. By definition, neither the *bona fide* needs rule nor the time statute applies to no-year funds because the time availability for no-year funds is not limited. Similarly, while a multiple year appropriation is available only for a definite period of time, its very terms make it available for the *bona fide* needs of the agency arising during the entire length of that multiple year period.

The language and legislative history of sections 2410a and 253I demonstrate that they were intended to provide agencies some relief from the constraints of the *bona fide* needs rule and the time statute so that agencies might use fiscal year appropriations to contract across fiscal years for severable services. These sections do not evidence any intent to restrict contracting flexibility with no-year or multiple year appropriations.

### Definitizing Interagency Orders

- *Natural Resources Conservation Service—Obligating Orders with GSA's AutoChoice Summer Program*, B-317249, July 1, 2009

To establish an obligation and charge it against an appropriation, an agency must have documentary evidence of a binding agreement for specific goods to be delivered or work to be provided.

This decision considered whether agencies may properly obligate current year appropriations to buy next year model motor vehicles through the General Services Administration's AutoChoice Summer Program. Agencies that need new cars are required to buy them, "wherever practical," through GSA's car buying programs. From June through September, however, no new cars were available for purchase through GSA's programs. During this period, GSA directed agencies to submit their car purchase requests to GSA's AutoChoice Summer Program. GSA advised agencies that by placing requests through its summer program,

agencies could “obligate current year funds to purchase new model year vehicle(s) in the fall.” In October, after GSA received next year model car pricing and specifications from car manufacturers, it required the agencies to “re-configure and re-submit each vehicle order based on the new . . . model year pricing, equipment options and colors.” Only then would GSA award the order to a vendor and obtain a delivery order number.

Under the so-called Recording Statute, 31 U.S.C. § 1501(a)(1), in order to establish an obligation and charge it against an appropriation, an agency must have documentary evidence of a binding agreement for “specific goods to be delivered . . . or work . . . to be provided.” Orders placed under the AutoChoice Summer Program could not satisfy this statute. Those orders were tentative and incomplete for the very reason that the ordering agencies could not, and did not, finalize their orders until October when the next year model car information first became available.

- *Chemical Safety and Hazard Investigation Board—Interagency Agreement with the General Services Administration*, B-318425, Dec. 8, 2009

GAO advised the Chemical Safety and Hazard Board that a proposed interagency agreement exposed the Board to an open-ended obligation and to a liability properly chargeable to future fiscal years, because the draft agreement did not specify a period of performance or a price for the services to be provided.

Under the proposed agreement, GSA would help the Board to provide for the Board’s employees and contractors identification cards and related maintenance services that conformed to the mandatory, governmentwide, HSPD-12 standard for secure and reliable identification credentials. The services to be provided included both annual and daily maintenance activities and the updating of existing cards, as well as identity proofing, card registration, security certificate infrastructure, card usage, card maintenance, and card termination.

Under the proposed agreement, the Board would reimburse GSA in accordance with GSA prices “current” at the time of performance. Another provision in the agreement asserted that the Board’s *bona fide* need for the cards and related services at the time of the agreement formed the basis for recording an obligation that would “likely remain in force across fiscal year boundaries until the specified services are delivered.” In other words, this provision required the Board to obligate its fiscal year appropriation current at the signing of the agreement to reimburse for services across future fiscal years for the life of the agreement. The Board was especially troubled by this provision because the services appeared to be severable in nature, the prices the Board would have to pay for those services could not be ascertained at the time of signing, and the agreement did not specify a period of performance for the agreement or for the services under it.

GAO concluded that the Board’s current fiscal year appropriation was not available to fund the proposed agreement, as drafted. Under 31 U.S.C. § 1502(a),

fiscal year appropriations are available to fulfill the *bona fide* needs arising during the period of availability for which the appropriation was enacted. The daily and annual maintenance services were severable services that would be performed on a periodic, recurring basis. Severable services represent *bona fide* needs of the fiscal year in which the service is rendered. Since the proposed agreement did not specify a period of performance or the price for products and services to be provided under the agreement, the proposed agreement would constitute an open-ended obligation that would expose the Board to an unknown and unlimited liability in violation of the Antideficiency Act, 31 U.S.C. § 1341.

#### IV. OBLIGATIONS

##### Cost Reimbursement Contract

- *Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Services Contract*, B-317139, June 1, 2009

For cost-reimbursement contracts, under the *bona fide* needs rule an agency must charge an obligation in the amount of the cost ceiling to appropriations available at the time of contract award.

In 2004, the Financial Crimes Enforcement Network (FinCEN) of the Department of the Treasury entered into a cost-reimbursement contract for the design, development, and deployment of a computer system. The contract included a cost ceiling of \$8.9 million for the estimated cost and fixed fee. However, the contract also stated that the “[t]otal funds currently available for payment and allotted to this contract are \$2,000,000” and that the contract was “subject to incremental funding,” and “no legal liability on the part of the Government for payment of money in excess of \$2,000,000 shall arise, unless and until additional funds are made available by the Contracting Officer through a modification of the contract.” FinCEN obligated \$2 million to the contract at the time it was signed in fiscal year 2004. Subsequently, in fiscal year 2005, FinCEN obligated additional funds to reach the ceiling of \$8.9 million.

GAO concluded that FinCEN violated the *bona fide* needs rule when it did not obligate the entire \$8.9 million for the contract (the cost ceiling) when it entered into the contract. The Federal Acquisition Regulation requires that cost-reimbursement contracts “establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed . . .” FAR § 16.301-1. In this case, the contract included the \$8.9 million ceiling. This ceiling established the government’s total liability, and FinCEN was required to charge this obligation to appropriations available at the time of contract award.

During fiscal year 2005, FinCEN made a number of modifications to the contract that increased its cost beyond the initial \$8.9 million ceiling established in the contract. Although FinCEN charged most of these modifications to its fiscal year 2005 appropriations, it charged two of the modifications to its fiscal year 2006

appropriations. Noting that agencies should charge modifications that increase the original ceiling to an appropriation current at the time of the modification, GAO concluded that FinCEN should have recorded the obligations against its 2005 appropriations, not its 2006 appropriations.

### Indefinite-Delivery, Indefinite-Quantity Contract

- *Library of Congress—Obligation of Guaranteed Minimums for Indefinite-Delivery, Indefinite-Quantity Contracts under the FEDLINK Program, B-318046, July 7, 2009*

GAO had no objection to an agency's use of \$500 as a guaranteed minimum quantity for an indefinite-delivery, indefinite-quantity (IDIQ) contract in light of the lack of availability of historical information due to the nature of the program.

The Library of Congress uses indefinite-delivery, indefinite-quantity (IDIQ) contracts, against which agencies place orders for library and information products and services, in support of its Federal Library and Information Network (FEDLINK). FEDLINK is a cooperative procurement, accounting, and training program designed to provide agencies throughout the government with discounted access to online databases, periodical subscriptions, and other information products and services from commercial suppliers. The Federal Acquisition Regulation (FAR) requires that IDIQ contracts state a guaranteed minimum quantity of supplies to be ordered under the contract.

Because the guaranteed minimum establishes the consideration for the contract, FAR requires that it be more than a nominal amount. However, FEDLINK is a voluntary program, and the Library is sometimes unable to accurately anticipate the ultimate size of orders that will be placed through the contract. Also, because the Library records obligations for the FEDLINK IDIQ contract minimums against the administrative reserves in the FEDLINK revolving fund, the Library finds itself in the difficult position of having to establish IDIQ contract minimums that meet the legal requirements without accumulating excessive obligations that might jeopardize the program's financial stability.

An agency must 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. In the case 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 a fixed liability for the minimum amount to which it committed itself. In setting guaranteed minimums, the Library should evaluate the historical data for each category of items or services purchased, and take into consideration any other factors for estimating the next year's usage. In light of the Library's difficulty in relying on historical data due to the nature of the FEDLINK program, GAO had no objection to the Library's use of \$500 as a guaranteed minimum amount in the absence of reliable historical data.

## V. RELIEF OF ACCOUNTABLE OFFICERS

### Certification of Erroneous Duplicate Payments

- *Relief of Accountable Officer – American Embassy, Managua, B-317390, Feb. 20, 2009*

GAO granted relief from liability to an accountable officer for an improper payment. This improper payment occurred because senior Embassy officials, who misunderstood department policy, directed the certifying officer to take an action contrary to her own understanding of policy that resulted in a duplicate payment.

In this case, GAO considered a request to grant relief from liability to a certifying officer at the American Embassy in Managua for a \$4,549.37 overpayment. Under 31 U.S.C. § 3528(b)(1)(A), GAO may relieve a certifying officer of liability for an improper payment of public money when GAO finds that the certification was based on official records and the certifying officer did not know, and by reasonable diligence and inquiry could not have discovered, the correct information.

The record showed that after the Embassy terminated the employment of one of its staff, a duplicate payment of retirement benefits was made to the former employee. At that time, the State Department had recently changed its policy for processing such payments. The new policy directed that those payments be made by a State Department office located in South Carolina. Under the old policy, an Embassy certifying official would have made the payment. In this case, however, some Embassy personnel mistakenly followed the old process while others followed the new process. This resulted in the simultaneous processing of duplicate payments in both the South Carolina office and the Embassy.

The Embassy certifying officer had declined to certify this payment, pointing out that department policies had changed. In response, several senior Embassy officials repeatedly assured the certifying officer that the Embassy had decided to revert to the old process for these types of payments and directed her to comply with their instructions. Neither she nor these officials learned until much later of the separate payment processed by the South Carolina office. Attempts to recover the duplicate payment have failed and the department has taken steps since then that it hopes will avert such errors in the future.

GAO observed that “[c]learly, confusion reigned in the Embassy at this time.” To suggest, in hindsight, that the accountable officer should not have relied on the steadfast instructions of those officials but, instead, should have continued to refuse to certify the voucher, would impose an unreasonably high standard and put an undue burden on certifying officers.

## VI. REQUEST FOR RECONSIDERATION OF GAO DECISION

- *Request for Reconsideration of B-306666, June 5, 2006, B-306666.2, Mar. 20, 2009*

GAO decisions and opinions are issued under statutory authority and serve to protect Congress's constitutional power of the purse. Consistent with GAO's *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at [www.gao.gov/legal/resources.html](http://www.gao.gov/legal/resources.html)*, GAO will entertain and respond to timely requests for reconsideration of prior decisions and opinions if a requestor or entity with a stake in the matter believes that GAO made a mistake of fact or law or that GAO would have resolved the matter differently if it had had the benefit of relevant and material information not reasonably available at the time of the original decision or opinion.

This request concerned a previous GAO decision, *Forest Service—Surface Water Management Fees*, B-306666, June 5, 2006. In that decision, GAO concluded that the Forest Service, as an agency of the U.S. Government, was constitutionally immune from paying a “surface water management fee” assessed by King County, Washington. At that time, GAO examined the nature of the charge and considered relevant federal legislation waiving sovereign immunity from certain state and local environmental regulations. GAO concluded that while it was denominated a “service charge” or “fee,” King County’s assessment was, in fact, an unconstitutional tax.

In 2009, an official of King County asked GAO to reconsider the matter. According to the requester, the federal government, in a recent consent decree, had agreed to pay a “surface water management fee” assessed by another local jurisdiction. The requester also pointed out that a recent ruling of the Washington State Pollution Control Hearing Board had underscored the need for King County to have a comprehensive storm water management program. The law does not authorize GAO to entertain requests from private citizens or nonfederal entities. For this reason, GAO could not issue a decision to this requester. Nevertheless, GAO advised the requester that the two developments he cited would not have caused GAO to reverse its prior decision in this matter. With regard to the first, GAO observed that consent decrees have no value as precedent since there is no finding of facts or law. The recent decree even stipulated that the parties were not admitting any issue of fact or law. Regarding the requester’s second point, the material submitted did not reveal any changes to the operative provisions of the King County code upon which GAO based its 2006 determination that the assessment constituted a tax.