



## Decision

**Matter of:** United States Department of Agriculture and General Services Administration—Consistency of Lease Incentives with the Miscellaneous Receipts Statute

**File:** B-334307

**Date:** August 15, 2023

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### DIGEST

The U.S. Department of Agriculture (USDA) relocated the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS) to Kansas City, Missouri. As part of the relocation, the General Services Administration (GSA) executed a lease whose price included “free rent” for the first 24 months of the lease. Under the miscellaneous receipts statute, agencies are required to deposit money received for the government in the general fund of the Treasury, unless otherwise authorized by statute. Neither USDA nor GSA received any funds because of the relocation or because of the lease containing the “free rent.” Rather, the “free rent” is a part of the lease’s fixed price which GSA considered in determining which lessor to select. As a result, neither agency violated the miscellaneous receipts statute.

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### DECISION

This responds to a request for our decision regarding whether the U.S. Department of Agriculture (USDA) violated the miscellaneous receipts statute when it relocated the National Institute of Food and Agriculture (NIFA) and the Economic Research Service (ERS) to Kansas City, Missouri.<sup>1</sup>

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<sup>1</sup> Letter from Representative Jennifer Wexton, Representative Gerald E. Connolly, and Representative Donald S. Beyer, Jr., to Comptroller General (May 6, 2022).

In accordance with our regular practice, we contacted USDA and the General Services Administration (GSA) to seek factual information and the agencies' legal views on this matter.<sup>2</sup> Both USDA and GSA provided responses to our inquiries.<sup>3</sup>

## BACKGROUND

In August 2018, the Secretary of Agriculture announced USDA's intention to relocate NIFA and ERS outside of the Washington, D.C. area.<sup>4</sup> On August 15, 2018, USDA requested Expressions of Interest from potential sites for the new ERS and NIFA headquarters location.<sup>5</sup> The request noted that USDA would consider "[l]ower costs and the potential of incentives to offset costs" when reviewing submissions.<sup>6</sup> USDA received 139 expressions of interest across 35 states.<sup>7</sup> In June 2019, USDA announced the selection of Kansas City as the new location for ERS and NIFA.<sup>8</sup> In

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<sup>2</sup> GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/products/GAO-06-1064SP](http://www.gao.gov/products/GAO-06-1064SP); Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, USDA (June 29, 2022); Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting General Counsel, GSA (June 29, 2022).

<sup>3</sup> Email from Associate General Counsel, Research and Law Division, USDA, to Managing Associate General Counsel, GAO (Apr. 3, 2023) (USDA April Response); Email from Associate General Counsel, Research and Law Division, USDA, to Managing Associate General Counsel, GAO (Mar. 27, 2023) (USDA March Response); Letter from Associate General Counsel, Research and Law Division, USDA, to Assistant General Counsel for Appropriations Law, GAO (Nov. 4, 2022) (USDA November Response); Letter from Associate General Counsel, Real Property Division, GSA, to Assistant General Counsel for Appropriations Law, GAO (Aug. 12, 2022) (GSA Response).

<sup>4</sup> USDA, *USDA to Realign ERS with Chief Economist, Relocate ERS & NIFA Outside DC* (Aug. 9, 2018), available at <https://www.usda.gov/media/press-releases/2018/08/09/usda-realign-ers-chief-economist-relocate-ers-nifa-outside-dc>.

<sup>5</sup> *Notice of Request for Expression of Interest for Potential Sites for Headquarters Office Locations*, 83 Fed. Reg. 40499 (Aug. 15, 2018).

<sup>6</sup> *Id.*

<sup>7</sup> GAO, *Evidence-Based Policy Making: USDA's Decision to Relocate Research Agencies to Kansas City Was Not Fully Consistent with an Evidence-Based Approach*, GAO-22-104540, at 1 (Washington, D.C.: Apr. 19, 2022).

<sup>8</sup> USDA, *Secretary Perdue Announces Kansas City Region as Location for ERS and NIFA* (June 13, 2019), available at <https://www.usda.gov/media/press-releases/2019/06/13/usda-announces-kansas-city-region-as-location-for-ers-and-nifa>.

its announcement, USDA highlighted \$26 million in incentives that state and local entities offered.<sup>9</sup>

To support the relocation, GSA sought to lease office space for USDA's use and issued a Request for Lease Proposals that closed August 7, 2019.<sup>10</sup> The advertisement stated:

The U.S. General Services Administration is not involved with, or a party to, any concessions or other incentives offered by state or local municipalities. Offerors shall coordinate any such concessions or other incentives with the local jurisdiction(s), as applicable, and price their rental rates accordingly in order for the Government to benefit from all economic incentives offered by state and/or local municipalities.<sup>11</sup>

The Request for Lease Proposals also directed offerors to include rent concessions in their offers and explained that the gross annual price would be adjusted to reflect "free rent."<sup>12</sup>

On October 31, 2019, GSA signed a contract for the lease of office space.<sup>13</sup> The lease provided "free rent" for the first twenty-four months of the lease, resulting in no

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[releases/2019/06/13/secretary-perdue-announces-kansas-city-region-location-ers-and-nifa \(hereinafter USDA Announcement\)](#). For more information regarding the process USDA used to select the Kansas City region for the relocation, see GAO-22-104540, at 1.

<sup>9</sup> USDA Announcement.

<sup>10</sup> GSA Response, at 3; GSA, *Lease of Office Space within Region 6 RLP #19-REG06 – OFFICE SPACE* (GSA Ad).

<sup>11</sup> GSA Response, at 3; GSA Ad.

<sup>12</sup> GSA Response, at 3; GSA, *Request for Lease Proposals No. 19-REG06 Heartland Region*, at 3.04 (GSA RLP). GSA notes that under "well-known commercial practice . . . lessors offer 'free' rent at the beginning of a lease term to attract potential tenants" and that, in its letter to us, it "referred to the lease's provision that GSA need not pay rent for the first 24 months of the lease as 'free' rent. However, 'free' rent is more appropriately viewed as one of a number of various incentives that a landlord may offer to prospective tenants." GSA Response, at 6. We make similar references to "free" rent throughout this decision.

<sup>13</sup> GSA, Lease No. GS-06P-LMO00314 (Oct. 31, 2019) (GSA Lease).

cost to the government for two years.<sup>14</sup> GSA subsequently signed occupancy agreements with NIFA and ERS for use of the leased space.<sup>15</sup>

On November 13, 2019, a USDA official signed a Memorandum of Agreement (MOA) with the State of Missouri and other state and local entities, memorializing the incentives that state and local entities offered to support the relocation.<sup>16</sup> The MOA notes that the incentives “are based on an assumed 253 employees for [ERS] . . . and 315 employees for [NIFA].”<sup>17</sup> The incentives generally fell into three categories: benefits accruing to USDA; benefits accruing to USDA employees; and benefits that would accrue to the lessor of space leased for USDA’s use.<sup>18</sup>

Regarding the first category of incentives, according to USDA, the agency has not accepted any funds under the MOA.<sup>19</sup> Nor has GSA accepted any incentives.<sup>20</sup> For benefits accruing to USDA employees, USDA employees were instructed not to accept any incentives unless the incentives were available to all federal employees, and USDA is unaware of any employees accepting incentives in contravention of that advice.<sup>21</sup> As a result, this decision does not address whether incentives offered to USDA employees would violate the miscellaneous receipts statute.

## DISCUSSION

At issue here is whether USDA and GSA violated the miscellaneous receipts statute. We first consider whether either agency received funds, as such funds may be miscellaneous receipts. We then consider whether the lease and the MOA require a

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<sup>14</sup> *Id.* at 1.03(C).

<sup>15</sup> GSA, *Occupancy Agreement #AMO06191* (Mar. 9, 2021) (NIFA Occupancy Agreement); GSA, *Occupancy Agreement #AMO06190* (Oct. 10, 2019) (ERS Occupancy Agreement).

<sup>16</sup> Memorandum of Agreement between United States Department of Agriculture and the State of Missouri (Nov. 13, 2019) (hereinafter USDA MOA).

<sup>17</sup> USDA MOA, Art. II(A).

<sup>18</sup> USDA Response, at 2; USDA MOA, Art. II(B).

<sup>19</sup> USDA April Response.

<sup>20</sup> GSA Response, at 4.

<sup>21</sup> USDA April Response.

third party to bear the government's legal liabilities in contravention of the miscellaneous receipts statute.

Under the miscellaneous receipts statute, an official receiving "money for the Government" must deposit the money in the Treasury. 31 U.S.C. § 3302(b). This requirement advances the primary purpose of the statute, which is to ensure that Congress retains control of the public purse, thereby protecting Congress's constitutional power to appropriate public money. B-327830, Feb. 8, 2017; B-325396, Feb. 23, 2015. Funds constitute "money for the Government" if they are to be used to bear the expenses of the government or to pay its obligations. B-325396, Feb. 23, 2015. Here, neither USDA nor GSA has received any funds as a result of the relocation.<sup>22</sup>

However, agencies cannot circumvent the miscellaneous receipts statute's requirements by structuring a transaction so that no agency employee ever receives the money. B-327830, Feb. 8, 2017 (A third-party could not pay an agency's legal liabilities.); *Motor Coach Industries v. Dole*, 725 F.2d 958 (4<sup>th</sup> Cir. 1984) (fee receipts were "money for the Government" even where no agency employee received the fees). The key factor in determining whether a third party's receipt of funds implicates the miscellaneous receipts statute is whether those funds reduce or eliminate a legal liability that would otherwise be borne by the agency.

We have addressed this issue in numerous cases, including ones involving contracts where an agency is legally obligated to make payments but has another party make the payments directly to the contractor. For example, among the functions of the

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<sup>22</sup> USDA April Response; GSA Response, at 4. In its response to us, USDA asserted that it is authorized to accept incentives under the MOA pursuant to its gift acceptance authority, even though it has not done so. USDA's gift acceptance authority provides that the Secretary of Agriculture may accept gifts of real and personal property for the benefit of the United States Department of Agriculture or for the carrying out of any of its functions. 7 U.S.C. § 2269. Gifts are "gratuitous conveyances or transfers of ownership in property without any consideration." B-286182, Jan. 11, 2001.

A receipt that does not meet this definition does not become a gift merely because the agency characterizes it as one. See, e.g., 25 Comp. Gen. 637 (1946). The MOA offers incentives "based on an assumed 253 employees for [ERS] with an average wage of \$120,000, and 315 employees for [NIFA] with an average wage of \$116,000." USDA MOA, Art. II(A). In addition, USDA agreed to complete applications and contracts, submit reports, and pay applicable application fees to receive some of the incentives offered under the MOA. USDA should consider whether these promises, and the very fact of USDA's relocation, constitute consideration offered in exchange for the incentives before turning to its gift acceptance authority.

Small Business Administration (SBA) was oversight of lenders who made SBA-guaranteed loans. B-300248, Jan. 15, 2004. SBA used a contractor to assist with this oversight function. *Id.* Rather than paying the contractor from its appropriations, SBA required the lenders to pay a fee directly to the contractor. *Id.* Because these fees satisfied a government obligation arising from a contract, funds used to pay these contractors were “money for the Government” under the miscellaneous receipts statute. *Id.*

In another example, the Commodity Futures Trading Commission (CFTC) violated the miscellaneous receipts statute when it arranged for its landlords to pay CFTC’s legal liabilities. B-327830, Feb. 8, 2017. CFTC incurred obligations to make payments to third-party contractors, representing legal liabilities for the government. CFTC’s lease agreements required the landlords, rather than CFTC, to make the payments to the third-parties. *Id.* As a result, the landlords would discharge a legal liability of the government, and CFTC would avoid using its own appropriations to make the payments. These arrangements violated the miscellaneous receipts statute. *See also* B-265727, July 19, 1996 (Securities and Exchange Commission (SEC) violated the miscellaneous receipts statute when it arranged for a sub-lessee to make payments to satisfy SEC’s obligation to pay rent.).

In contrast, the receipt of services for a discounted price does not implicate the miscellaneous receipts statute, so long as the discount is not the result of a third party making payments the government would otherwise be legally required to make. For example, GSA entered into a no-cost contract for real estate brokerage services that did not violate the miscellaneous receipts statute. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. Under the proposed contract, brokers would provide lease acquisition and related services to federal agencies without cost to the government, with the brokers’ compensation taking the form of commissions paid by lessors. The distinguishing feature of this arrangement was that GSA would have no financial liability to brokers, and the brokers would have no expectation of payment from GSA. B-302811, July 12, 2004. If a lessor failed to pay a broker, the broker would have no claim against GSA. *Id.* *See also* B-327830, Feb. 08, 2017 (negotiated reductions in monthly rent were legally permissible); 48 Comp. Gen. 497 (1969) (a rental contract with monthly rental credits applied during the final months of the rental period is acceptable).

Here, the incentives the lessor may receive as a result of USDA’s relocation do not violate the miscellaneous receipts statute. As a threshold matter, the federal government would not receive any incentive payments that a state or local entity may make to the lessor. Even so, we must consider whether these incentive payments reduce or eliminate a legal liability of the government.

To determine the extent of the government’s legal liability here, we look to the terms of the lease. The lease constitutes the entire agreement of the parties, so we need not consult other agreements to determine the amount of the government’s legal

liability.<sup>23</sup> The lease requires the government to pay rent at a fixed price.<sup>24</sup> The lease does not incorporate the MOA between USDA and state and local entities or the incentives themselves.<sup>25</sup> The extent of the government's legal liability, then, is the fixed price outlined in the lease.

Next, we consider whether the lessor incentives reduce or eliminate the government's legal liability. Importantly, the lease does not make the fixed price contingent upon the lessor's receipt of incentives from state and local entities and provides no concessions if such incentives fail to materialize.<sup>26</sup> This arrangement is akin to GSA's real estate brokerage agreement, where GSA bore no financial responsibility if a lessor failed to pay a commission. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. Similarly, here, the lessor bears the risk, and the government's legal liability does not change, if the offered incentives do not materialize. Therefore, incentives paid to the lessor are not a third-party payment made to reduce or eliminate the government's legal liability.

Nor does the lease contemplate or require any third-party payments on GSA's behalf. Similarly, we are unaware of any other agreements between GSA and third parties that would require the third party to make GSA's rental payments. This distinguishes GSA's lease from the agreements entered into by SBA and CFTC, which required third parties to bear costs that the government would otherwise have borne. See B-300248, Jan. 15, 2004; B-327830, Feb. 8, 2017.

Instead, the finalized lease provides for 24 months of "free rent," resulting in no cost to the government for the first two years of the lease.<sup>27</sup> This "free rent" is a part of the lease's fixed price which GSA considered in determining which lessor to select. GSA accounted for offers of "free rent" in its assessment of bids by adjusting the gross annual price and selected a lessor based on these adjusted prices.<sup>28</sup> In this way, the "free rent" is similar to other concessions or discounts an offeror might

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<sup>23</sup> GSA Lease, at Ex. C.

<sup>24</sup> GSA Lease, at 4.

<sup>25</sup> In fact, GSA made clear that it was not a party to any incentives offered by state and local entities. GSA Response, at 3; GSA Ad.

<sup>26</sup> See GSA Lease; GSA Response, at n.17. In their responses to us, USDA and GSA both explained they had no knowledge of whether the lessor has actually received any incentives. USDA April Response; GSA Response, at 1.

<sup>27</sup> GSA Lease, at 4, 5.

<sup>28</sup> GSA Response, at 6.

propose to win a government contract.<sup>29</sup> GSA and the lessor incorporated the “free rent” into their agreement, and the “free rent” does not represent an amount that a third party will pay to the lessor to reduce the government’s legal liability. Therefore, GSA’s lease does not violate the miscellaneous receipts statute.

## CONCLUSION

Neither USDA nor GSA violated the miscellaneous receipts statute when USDA relocated NIFA and ERS to the Kansas City region. Neither agency received any funds due to the relocation, and no third party is making payments to reduce or eliminate the government’s legal liabilities.



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<sup>29</sup> See, e.g., B-327830, Feb. 08, 2017 (negotiated reductions in monthly rent were legally permissible); 48 Comp. Gen. 497 (a rental contract with monthly rental credits applied during the final months of the rental period is acceptable).