Vedrusko 1/14/97

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Incremental Funding of Multiyear Contracts

File: B-241415

Date: June 8, 1992

DIGEST

Contracts that cannot be separated for performance by fiscal year may not be funded on an incremental basis without statutory authority. Such contracts, as "entire" or "nonseverable" under the bona fide need rule, are chargeable to the appropriation current at execution rather than funds current at the time goods or services are rendered.

DECISION

The Deputy Administrator Management, Food and Nutrition Service (FNS), United States Department of Agriculture (USDA), asks whether FNS may incrementally fund nonseverable contracts for expert or consulting services or whether FNS must fully obligate funds at the time of contract award to cover the estimated cost of such contracts. For the reasons discussed below, we conclude that the cost of such nonseverable contracts must be recorded as an obligation and fully covered by currently available funds at the time of contract award.

BACKGROUND

The Deputy Administrator asks whether FNS may incrementally fund projects falling under one of the categories stated in the Federal Acquisition Regulation (FAR), 48 C.F.R. 32.703-3 (1991), namely, contracts for expert or consultant services crossing fiscal years. The FNS contracting officer has concluded that the incremental funding technique may be used for cost reimbursement contracts for consulting services, research and development, and other types of nonpersonal services, such as studies, surveys, and demonstration projects. However, the USDA Office of General Counsel has advised that since the proposed FNS contracts appear to be executed in whole and cannot be separated into discrete phases, the entire contract must be funded from

appropriations available when the contract is first executed.[1]

In his request for our decision, the Deputy Administrator maintains that FNS may incrementally fund contracts for projects of multiple year duration citing FAR 32.703-3 as authority therefor. He asserts that such contracts would not offend the Antideficiency Act, 31 U.S.C. 1341 (since the FAR "Limitations of Funds" clause is included), or the bona fide needs statute, 31 U.S.C. 1502, so long as FNS complies with subpart 32.7 of the FAR. Thus, such contracts would be for projects "fall[ing] under one of the categories stated in FAR 32.703-3 as exempt from the prohibition against crossing fiscal years," and representing a valid need in the year in which the contracts are awarded and the succeeding fiscal years of the projects duration. The Deputy Administrator further maintains that the Comptroller General and the Attorney General have specifically approved the use of incremental funding.

OPINION

As a general rule, service contracts are typically viewed as chargeable to the appropriation current at the time the services are rendered. See 60 Comp. Gen. 219 (1981)(contracts for technical or management services to small businesses); 61 Comp. Gen. 184 (1981) (contract modification for payroll and operational services). However, a need may arise in one fiscal year for services which, by their nature, cannot be separated for performance in separate fiscal years. See, e.g., B-141839-O.M., May 2, 1960 (contract for cancer research services viewed as nonseverable entire job). We have held that the question whether to charge the appropriation current on the date of contract award or to charge the appropriation current on the date services are rendered turns on whether the services are "severable" or "entire". See 65 Comp. Gen. 741, 743-744 (1986); 64 Comp. Gen. 359, 364-365 (1985).

The determining factor for whether services are severable or entire is whether they represent a single undertaking designed to meet an immediate need of the agency. Contract type does not control the issue; rather the nature of the

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[1]The USDA Office of General Counsel contrasted incremental funding with options, stating that "a better and more legally defensible approach [than incremental funding] would be to design phases which have value in and of themselves and which could be set out as unilateral options . . . ." An option requires future agency execution of the option part of the contract. See Federal Acquisition Regulation, 48 C.F.R. § 17.202 (1991).

work being performed should be the initial focus of the analysis. B-235678, July 30, 1990.

Our decision in 65 Comp. Gen. 741 (1986) illustrates the application of these principles. In that decision, the Department of Veterans Affairs (formerly Veterans Administration) (VA) asked which appropriation to charge for a statutorily mandated study of Vietnam veterans. The issue was whether VA should finance the contract for the expert services required to perform the study from appropriations current when the services were rendered or entirely from the fiscal year 1984 appropriations current at the time of contract award.

We concluded that "the entire contract was a bona fide need of fiscal year 1984", and that the "entire original contract amount was properly charged to fiscal year 1984 monies." Id. at 743-744. Although interim reports were to be provided during the progress of the study, such reports were merely informational and not independent, stand-alone work products. The service or work product envisioned by the contract was the statutorily mandated study and final report, nothing less. Thus, the contract was entire, and could only be funded from the 1984 appropriation, current at the time of contract award.

As noted earlier, the FNS in effect concedes that the contracts it proposes to incrementally fund would be entire in nature. Consequently, the appropriation current at the time the contract is executed should be charged an amount adequate to cover the estimated cost of the contract, rather than the appropriation(s) current at the time services are rendered being charged an amount reflecting work or services performed during that fiscal year. Unless FNS has a need for only part of the services, and such parts have independent value, we would not view the contracts or increments thereof as severable. Incremental funding of entire contracts, as illustrated by such decisions as 65 Comp. Gen. 741 (1986), runs contrary to well established bona fide needs principles.

The Deputy Administrator's reliance on Subpart 32.7 of the FAR to support incremental funding is misplaced. More specifically, we do not read FAR 32.703-3 [2], on which FNS relies, as inconsistent with established bona fide needs

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[2]FAR 32.703-3 (1990) provides that a contract "funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization . . . or when the contract calls for an end product that cannot feasibly be subdivided for separate performance in each fiscal year (e.g., contracts for expert or consultant services)."

analysis. Clearly, for funding purposes, a severable service contract financed from annual appropriations in the year of award cannot cross fiscal years since, by definition, the services address the needs of the fiscal years in which provided, and hence are chargeable to appropriations available in the year the services are rendered.[3] Certainly, Congress can alter this rule where it deems it appropriate. See, in this regard, 10 U.S.C. § 2352; 31 U.S.C. § 1308; and 42 U.S.C. § 2459a. Moreover, the second "except" provision of FAR 32.703-3 says no more or less than our holding in 65 Comp. Gen. 741 (1986), namely, that a contract for services, entire in nature (i.e., "that cannot feasibly be subdivided for separate performance in each fiscal year") may not be funded in increments across fiscal years.

The Deputy Administrator, FNS, further suggests that the inclusion of the Limitation of Funds clause, FAR 48 C.F.R. 52-232-22 (1991), provides a basis for incremental funding while preventing an Antideficiency Act violation. The FAR prescribes the use of the Limitation of Funds Clause where an agency enters into a cost-reimbursement or cost-sharing contract that it proposes to fund incrementally. Paragraph (b) of the clause provides that, while the parties to the contract or agreement contemplate that the government will allot additional funds incrementally up to the full estimated cost of performance as specified in the contract, the contractor's costs of performance shall not exceed the amount so far allotted by the government. As provided in the clause, the government is not obligated to reimburse the contractor for any costs incurred in excess of the amount allotted; nor is the contractor required to incur costs in excess of the amount allotted.

We agree that the inclusion of the Limitation of Funds clause in a contract would prevent an Antideficiency Act violation. The difficulty, however, is that although such a clause limits the obligation initially incurred, it does not remedy the bona fide needs problems that necessarily arises when an agency attempts to charge subsequent year(s) appropriations for the needs of a prior year. Further, use of the clause will not free an agency from the future-year dilemma of either abandoning a partially completed project or completing the project at the cost of not funding other priority activities.

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[3]See United States v. Leiter, 271 U.S. 204 (1925), holding that a long term lease was void to the extent it purported to bind the agency beyond the year for which the agency had available appropriation. See also 29 Comp. Gen. 451 (1950); 29 Comp. Gen. 91 (1949); B-116427, Sept. 27, 1955.

The decisions cited by the Food and Nutrition Service to support incremental funding do not in fact do so. In 2 Comp. Gen. 477 (1923), the agency wanted to contract in full for improving a harbor even though only partial funding was available. We held that there appeared to be authority to enter into such a contract because of specific congressional authorization to do so. See also 56 Comp. Gen. 437 (1977). No similar express statutory authority for continuing contracts exists for the Food and Nutrition Service. In the second cited decision, B-171798, Aug. 18, 1971, the contract involved a 1-year lease with options, and should not be read to support the use of contracts funded on an incremental basis. Finally, in 36 Op. Atty. Gen. 484 (Dec. 2, 1931), the Attorney General held that a 10-year lease for property to operate a veterans' camp did not violate the Antideficiency Act. The lease was similar to a year-to-year lease, and thus severable, because the United States had the option to decide each year whether to continue operations at the camp with no other liability attached. The United States incurred no obligation beyond the first year because if it failed to operate the camp, the camp would simply revert to the state from which it was leased. Thus, the Attorney General's opinion also cannot be used to support incremental funding of nonseverable contracts. Neither the Comptroller General nor the Attorney General has specifically approved the use of incremental funding as the Food and Nutrition Service claims.

Accordingly, for the foregoing reasons, FNS may not incrementally fund entire service contracts without statutory authority.

Milton J. Socolar

for Comptroller General
of the United States