U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548

Decision

Matter of: *U.S. Department of Transportation—Federal Aviation Administration Reimbursable Work Agreement*

File: B-331090

Date: June 8, 2020

DIGEST

In fiscal year 2019, the Federal Aviation Administration (FAA) entered into a reimbursable work agreement to perform aircraft certification services for an airline. We conclude that FAA obligated available budget authority to provide the services, and therefore did not violate the Antideficiency Act. FAA charged the airline a fee for the services FAA provided without authority to do so. As such, FAA must refund improperly collected amounts to the airline.

DECISION

This responds to a request for a decision regarding a reimbursable work agreement FAA, U.S. Department of Transportation (DOT), entered into with an airline prior to the fiscal year (FY) 2019 lapse in appropriations. Letter from Representative David Price, House Committee on Appropriations, Chairman of the Subcommittee on Transportation, and Housing and Urban Development, and Related Agencies, to Comptroller General (May 22, 2019). The request raises two issues: (1) whether FAA violated the Antideficiency Act when it provided services pursuant to the agreement during the lapse in appropriations; and (2) whether FAA had authority to charge for the services it provided pursuant to the agreement.

As discussed below, FAA obligated its "Operations" appropriation for the services it provided the airline. This appropriation did not expire until September 30, 2019, and had sufficient budget authority to obligate for the services at issue. Therefore, FAA did not violate the Antideficiency Act. While FAA had authority to perform these

services for the airline, FAA lacked authority to charge a fee for the services. Therefore, FAA must reimburse the airline for the improperly collected amount.[1]

In accordance with our regular practice, we contacted DOT to seek factual information 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/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to General Counsel, DOT (June 24, 2019). FAA responded with its explanation of the pertinent facts and its legal analysis. Letter from Deputy Chief Counsel, FAA, to Assistant General Counsel, GAO (July 22, 2019) (Response Letter); Email from Deputy Chief Counsel, FAA, to Senior Staff Attorney, GAO, *Subject: Request for Additional Information: FAA RWA with Southwest Airlines* (Aug. 23, 2019) (Additional Response). FAA also provided copies of the reimbursable work agreement between FAA and the airline and the invoice for services. Non-Federal Reimbursable Agreement between Department of Transportation, Federal Aviation Administration, and Southwest Airlines, Inc. (Dec. 21, 2018) (December Agreement); FAA, *Invoice for Southwest Airlines Aircraft Certification Actions* (June 13, 2019) (June Invoice).

BACKGROUND

On December 21, 2018, FAA entered into a reimbursable work agreement by which FAA agreed to provide an airline with services that allowed the airline to add aircraft to its air carrier operating specifications.[2] Response Letter, at 1, 2. According to FAA, "almost all of the work needed" to add the aircraft to the airline's operating specifications had been completed before FAA entered into the agreement. Additional Response. As a result, the work that FAA performed under the agreement consisted of reviewing documentation to confirm that the necessary steps had been completed. *Id.*

Congress enacted in FY 2018 an Operations appropriation, which was available to FAA for "aviation safety activities," among other things. Pub. L. No. 115-141, div. L, title I, 132 Stat. 348, 976 (Mar. 23, 2018). These amounts were available through

[1] The requester asked whether FAA was permitted to accept payment in arrears. Authority to charge for the services would be a necessary precondition to any authority to accept payment in arrears. Because we conclude that FAA had no authority to charge for the services, we do not reach the question of whether FAA had authority to collect payment in arrears.

[2] Operations specifications are issued to air carriers by FAA and must contain, among other things, the registration markings and serial numbers of each aircraft authorized for use, as well as each airport to be used in the carrier's scheduled operations. 14 C.F.R. § 119.49(a)(4). Air carriers may not operate using any aircraft or airport not listed in the operations specifications. *Id.* Operations specifications may be amended by the Administrator. 14 C.F.R. § 119.51.

September 30, 2019. Pub. L. No. 115-141, 132 Stat. at 976. FAA obligated this appropriation for the services at issue.[3] Response Letter, at 2. According to FAA, this account had available budget authority at the time of obligation. *Id.*

The agreement provided that the airline would pay FAA for the aircraft certification services in arrears.[4] December Agreement, at 2. FAA does not generally charge a fee for approving changes to air carrier operating specifications. Additional Response. The airline paid FAA $1,317.92 for these services on June 13, 2019. *Id*. FAA credited the payment to its FY 2018 Operations account. *Id*.

DISCUSSION

At issue here is whether FAA had available budget authority to perform the aircraft certification services, and whether FAA had authority to collect from the airline a fee for these services.

Application of the Antideficiency Act

The Antideficiency Act is not implicated where an agency permissibly obligates available budget authority, even if other agencies or programs within an agency are concurrently experiencing a lapse in appropriations. B-330720, Feb. 6, 2019, at 2-3. As noted above, Congress in FY 2018 appropriated to FAA amounts for Operations that remained available through September 30, 2019. Pub. L. No 115-141, 132 Stat. at 976. Here, FAA obligated amounts available in its Operations appropriation for the costs FAA incurred while providing services pursuant to the December Agreement. As noted above, this appropriation is available for "aviation safety activities." *Id.* FAA generally uses funds available for aviation safety activities to perform the work required to add aircraft to an airline's operations specifications. Additional Response. Because the appropriation contained sufficient balances to fund the services here, and was available for these particular activities, FAA did not violate the Antideficiency Act when it incurred obligations for services it provided pursuant to the agreement.

FAA's authority to collect reimbursement from the airline

When Congress provides an appropriation for a program or activity, that appropriation establishes the maximum authorized program level which the agency may not exceed. B-300826, Mar. 3, 2005. An agency may not circumvent this

[3] Some of FAA's other appropriations were affected by a funding lapse from December 22, 2018 through January 25, 2019.[3] *See* Response Letter, at 1.

[4] Certain sections of the agreement reference advance payments even though the payment terms specify that payment will be made in arrears. *See* December Agreement, at 4, 5.

limitation by augmenting its appropriations from sources outside the government, unless Congress has so authorized the agency. *Id.*

FAA does have specific statutory authority to charge for some of the services it provides. *See, e.g.,* 49 U.S.C. § 45305 (authorizing FAA to charge fees for a variety of services, including the issuance of airman certificates and the recording of security interests in aircraft); 49 U.S.C. § 45301 (authorizing FAA to charge fees for certain services provided to foreign governments). However, we are not aware of, nor does FAA cite any specific statutory authority for imposing user fees to charge airlines for the work required to add aircraft to their air carrier operating specifications. Therefore, we must assess whether FAA may charge for these services under a more general authority.

Congress has granted agencies general authority to impose user fees under the Independent Offices Appropriation Act (IOAA), also known as the User Charge Statute. 31 U.S.C. § 9701. IOAA allows agencies to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." *Id.* § 9701(b). IOAA was enacted in order to allow the government to recoup costs where the services provided by the agency benefitted "identifiable 'special beneficiaries,'" rather than the general public. *New England Power Co. v. Federal Power Commission,* 467 F.2d 425, 428 (D.C. Cir. 1972) (quoting H.R. Rep. No. 82-384, at 2 (1952)), *aff'd,* 415 U.S. 345 (1974); *see also* 59 Comp. Gen. 294 (1980) (an agency could not augment its appropriations by charging a fee for services that benefitted the general public rather than a particular entity).

In order to establish a charge under IOAA, an agency must first promulgate regulations. B-316796, Sept. 30, 2008; *see also Alyeska Pipeline Service Co. v. United States,* 624 F.2d 1005, 1010 (Ct. Cl. 1980) (holding that fees assessed under IOAA were invalid where the agency had not first promulgated regulations authorizing the fee). The IOAA's grant of charging authority is prospective and only applies where the required regulation has already been issued and is in effect. B-145252-O.M., Nov. 12, 1976. Here, FAA issued no such regulations prior to entering into the arrangement with the airline.

Moreover, since 1998, Congress has enacted a restriction in FAA's annual appropriation which states that "none of the funds in this Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act." *See, e.g.,* Pub. L. No. 115-141, 132 Stat. at 977 (enacting the provision for fiscal year 2018); Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, 111 Stat. 1425, 1429 (Oct. 27, 1997) (enacting a substantively similar prohibition for fiscal year 1998). The prohibition was intended to prevent FAA from "circumvent[ing] the legislative process and avoid[ing] the normal cost controls which apply to other federal agencies." *Id.,* at 41. Here, the prohibition on implementing regulations to establish new aviation user fees precluded FAA from charging the airline under

IOAA. *See* Pub. L. No. 115-141, 132 Stat. at 977; Pub. L. No. 115-245, 132 Stat. at 3123.

FAA asserts that the charge at issue here is authorized because the agency may enter into other transaction agreements "on such terms and conditions as the Administrator considers appropriate." Additional Response (discussing and paraphrasing 49 U.S.C. § 106(l)(6)). FAA believes that this authority is sufficient to allow the agency to collect reimbursement for the services it provided. Additional Response.[5] We disagree.

We will not find a grant of fee-charging authority without explicit statutory terms to that effect. *See* B-300826, Mar. 3, 2005; *see also* B-244345, June 23, 1992 (limiting an agency's fee-charging authority to the specific terms of the statute). FAA's own fee-charging authorities are instructive. Each statute authorizing FAA to impose fees is specific and explicit in its authorization. *See, e.g.,* 49 U.S.C. § 45305 (directing that the Administrator of FAA "shall establish and collect a fee" for specified services). By contrast, FAA's other transaction authority does not mention or explicitly authorize the imposition of fees. Nor did Congress direct FAA to charge for the services at issue here. Therefore, we cannot conclude that Congress intended to grant broad fee-charging authority when it authorized FAA to enter into other transactions.

Furthermore, FAA may not craft agreements to circumvent legislatively enacted restrictions on its authority. Just as an agency cannot use its other transaction authority to skirt procurement contracting requirements, FAA cannot rely on its other transaction authority to implement a user fee that Congress has expressly prohibited. *See* B-310741, Jan. 28, 2008 (noting that other transaction agreements may not be used where a procurement contract is required); Pub. L. No. 115-141, 132 Stat. at 977; Pub. L. No. 115-245, § 102 (prohibiting the use of FAA's appropriations for the implementation of regulations establishing new aviation user fees); *see also* 55 Comp. Gen. 1059, 1061 (1976) ("It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly."). Therefore, FAA could not rely on its other transaction authority to impose this charge. For the reasons stated above, we find that FAA did not have the authority to charge the airline for the services the agency provided under the agreement.

---

[5] FAA also argues that the charge at issue is not a user fee, but a condition of the agreement with the airline. We disagree with FAA's characterization of the charge and find that it meets the definition of a user fee, as it is a charge that has been assessed to an identifiable beneficiary for benefits beyond what is available to the general public. *See Federal Power Commission v. New England Power Co.,* 415 U.S. 345, 349 (1974) (noting that fees relate to "specific charges for specific services to specific individuals or companies").

Remedial action

FAA's annual appropriation authorized the agency to credit its Operations appropriation with funds collected from "private sources." *See* Pub. L. No. 116-6, div. G, title I, 133 Stat. 13, 401 (Feb. 15, 2019); Pub. L. No 115-141, 132 Stat. at 977. However, because FAA collected fees without authority to do so, the agency must refund those amounts to the airline. B-145252-O.M., Nov. 12, 1976; *see also* 49 U.S.C. § 45303(b) (authorizing the Administrator to refund "any fee paid by mistake or any amount paid in excess of that required").

Where an agency improperly relies on the IOAA to assess an unauthorized fee and credits the funds to a particular appropriation, the refund is chargeable to the credited appropriation. *See, e.g.,* 55 Comp. Gen. 625, 627 (1976). Here, we apply the same principle to the funds FAA improperly collected when it relied on its other transaction authority. FAA credited its fiscal year 2018 Operations appropriation, which is available for obligation during fiscal years 2018 and 2019. Response Letter, at 2. Therefore, the refund of the improperly collected amount should be drawn from that appropriation.

CONCLUSION

Because FAA had available budget authority at the time it obligated funds to provide the services at issue, its actions did not violate the Antideficiency Act. While FAA had authority to perform the services at issue, FAA did not have authority to charge a fee for the services it provided. FAA's other transaction authority did not, standing alone, authorize the imposition of a fee in this instance, nor was FAA authorized to impose the fee under the IOAA, as the agency is prohibited from promulgating regulations to establish new aviation user fees. Therefore, FAA must refund any improperly collected amounts to the airline.

Thomas H. Armstrong
General Counsel