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The Honorable Joseph I. Lieberman
Chairman, Committee on
Homeland Security and Governmental Affairs
United States Senate

The Honorable Susan M. Collins
Ranking Minority Member, Committee on
Homeland Security and Governmental Affairs
United States Senate

Subject: *Severable Services Contracts*

This responds to your request for our legal opinion on whether 10 U.S.C. § 2410a and 41 U.S.C. § 2531 restrict a federal agency using multiple year or no-year appropriations to contracts for periods of performance no longer than 1 year. Both of these provisions permit agencies to enter into severable services contracts that cross fiscal years for up to 1 year and obligate the appropriations current at the time the agencies enter into the contract. In our opinion, these statutory provisions do not restrict to 1 year the contract periods of severable services contracts funded by no-year appropriations or by multiple year appropriations.¹

BACKGROUND

The two statutes at issue in this opinion authorize agencies to enter into severable services contracts that begin in one fiscal year and end no more than 12 months later, in the next fiscal year. The first, 10 U.S.C. § 2410a (hereafter section 2410a) applies to severable services contracts entered into by the Departments of Defense and Homeland Security, and the Coast Guard in certain circumstances. Section 2410a originated as a permanent provision in the General Provisions section of the 1986 Department of Defense Appropriations Act. Pub. L. No. 99-190, § 8005, 99 Stat. 1185,

¹ Our general practice when issuing opinions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html. In this case, we did not solicit any agency's views because the request involves the interpretation of two statutory provisions that have general applicability, not particular applicability or relevance to any one agency.

1203 (Dec. 19, 1988).² In 1997, Congress amended section 2410a, broadening its scope and enacting it in its current form. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 801, 111 Stat. 1629, 1831 (Nov. 18, 1997). It provides as follows:

“(a) Authority.—(1) The Secretary of Defense, the Secretary of a military department, or the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may enter into a contract for a purpose described in paragraph (2) for a period *that begins in one fiscal year and ends in the next fiscal year if* (without regard to any option to extend the period of the contract) *the contract period does not exceed one year.*

(2) The purpose of a contract described in this paragraph is as follows:

(A) The procurement of severable services.

(B) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.

(b) Obligation of funds.—Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a).”

(Emphasis added.)

The second statute, 41 U.S.C. § 253I (hereafter section 253I), applies to severable services contracts entered into by civilian executive agencies. Congress enacted section 253I in the Federal Acquisition Streamlining Act of 1994 (FASA). Pub. L. No. 103-355, title I, § 1073, 108 Stat. 3243, 3271 (Oct. 13, 1994). It provides:

“(a) Authority

The head of an executive agency may enter into a contract for procurement of severable services for a period *that begins in one fiscal year and ends in the next fiscal year if* (without regard to any option to extend the period of the contract) *the contract period does not exceed one year.*

² It was codified in 1988 as part of legislation that codified a number of permanent freestanding provisions of law related to the Department of Defense. Pub. L. No. 100-370, § 1, 102 Stat. 840, 847 (July 19, 1988).

(b) Obligation of funds

Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a) of this section.”

(Emphasis added.)

The language of sections 2410a and 2531 is identical for purposes of the question presented. In both statutes, subsection (a) authorizes agencies to enter into severable services contracts that do not exceed 1 year, and subsection (b) permits agencies with fiscal year funds to obligate the total amount of such contracts to the fiscal year appropriation notwithstanding that contract performance extends into the next fiscal year. You indicated that some agencies interpret subsection (a) of sections 2410a and 2531 to restrict all severable services contracts to periods of no more than one year, even if the contract is funded by a multiple year or no-year appropriation.

DISCUSSION

Sections 2410a and 2531 establish a statutory exception to the constraints of the so-called *bona fide* needs rule. See B-308026, Sept. 14, 2006; B-259274, May 22, 1996. The *bona fide* needs rule provides that an appropriation limited to obligation for a definite period may be obligated only to meet a legitimate or *bona fide* need arising during the period of availability of the appropriation. 31 U.S.C. § 1502(a); B-289801, Dec. 30, 2002. Since a severable service contract addresses a recurring or continuing need, such as a maintenance contract, 35 Comp. Gen. 319 (1955), the cost of addressing such needs are charged under the *bona fide* needs rule to the appropriation current at the time services are provided. 71 Comp. Gen. 428, 430 (1992). Thus, as a general proposition, a severable services contract that crosses from one fiscal year to the next which is funded by the initial fiscal year’s appropriations violates the *bona fide* needs rule because the agency, with regard to services to be rendered in the next fiscal year, is obligating the appropriation for a future year’s need.

Accordingly, sections 2410a and 2531 are statutory exceptions to the *bona fide* needs rule to provide funding flexibility to an agency contracting for severable services. B-259274, May 22, 1996. They do so by permitting an agency to obligate an appropriation that otherwise would be available only for the needs of one fiscal year to meet the needs of a second fiscal year. An agency using multiple year or no-year appropriations does not need to refer to section 2410a or 2531 to achieve this same flexibility.

The *bona fide* needs rule is derived from the so-called time statute, 31 U.S.C. § 1502(a). B-308010, Apr. 20, 2007. Section 1502(a) provides that—

“an appropriation . . . limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability However, the appropriation . . . is not available for expenditure for a period beyond the period otherwise authorized by law.”

Section 1502(a) applies to appropriations limited to a definite period, and no-year funds are not so limited. Thus, neither it, nor the *bona fide* needs rule derived from it, applies to no-year funds. While a multiple year appropriation is available for a definite period of time, it is available by its very terms for the *bona fide* needs of the agency arising during that multiple year period. As stated above, severable services are considered a *bona fide* need of the appropriation current at the time rendered. Consequently, an agency using a multiple year appropriation would not violate the *bona fide* needs rule if it enters into a severable services contract for more than 1 year as long as the period of contract performance does not exceed the period of availability of the multiple year appropriation.

It is in this context that we conclude that subsection (a) of sections 2410a or 2531 does not limit all severable services contracts to 1 year. It is a basic canon of statutory construction that “[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section as to produce a harmonious whole.” 2A Sutherland, *Statutes & Statutory Construction*, 46:05 at 154 (6th ed. 2000). *See also United States v. Cleveland Indians Baseball Company*, 532 U.S. 200, 217–18 (2001). When subsections (a) and (b) of sections 2410a and 2531 are read together, it is clear that they were intended to provide contracting flexibility in the use of fiscal year funds. Each subsection (a) contains the grant of authority to agencies to contract for severable services across fiscal years for up to 1 year. Each subsection (b) authorizes agencies to obligate their funds for the contracts authorized by subsection (a) in a manner that constitutes an exception to the *bona fide* needs rule. The reference in subsection (b) to “[f]unds made available for a fiscal year” as the kind of funds that may be so obligated clearly indicates that the sections cover contracts funded by annual funds. There is nothing to indicate that these provisions were intended to introduce new restrictions on agencies’ authority to use multiple year or no-year appropriations to fund severable services contracts lasting more than 1 year.

This view of sections 2410a and 2531 is consistent with the legislative history, the stated purpose of the statutes and the implementing provisions in the Federal Acquisition Regulation (FAR). As noted above, section 2531 was enacted as part of FASA. The Administrator of General Services, testifying in support of section 2531, described the inefficiency that results when an agency’s contracting flexibility is constrained by a fiscal year appropriation:

“Another problem with current law is the prohibition against contracts for service contracts that cross fiscal years (e.g., trash collection and lawn maintenance). Technically, all such on-going service contracts

must end on September 30. This rule creates an enormous paperwork burden for contracting officials. At the end of each fiscal year, contracting officials must modify every federal contract to address funding for the new fiscal year contract period.”

Federal Acquisition Streamlining Act of 1993: Joint Hearings Before the Committee on Governmental Affairs and the Committee on Armed Services, United States Senate, 103rd Cong. 177, 178 (1994) (statement by Roger Johnson, Administrator of General Services).

A Department of Defense submission for the record described the problem civilian agencies have when they—

“use *annual appropriations* to enter into contracts for severable services with a period of performance that crosses fiscal years.

“Currently, agencies are precluded from contracting for severable services (e.g. services which are performed on a regular basis over a period of time like janitorial, guard service, etc.) for periods which extend beyond the fiscal year unless they have specific statutory authority to do so.”

Federal Acquisition Streamlining Act of 1993: Joint Hearings Before the Committee on Governmental Affairs and the Committee on Armed Services, United States Senate, 103rd Cong. 316 (1994) (Department of Defense Submission for the Record) (emphasis added).

The Department then suggested that Congress—

“amend the Federal Property and Administrative Services Act in order to authorize civilian agencies to use *annual appropriations* to enter into contracts for severable services with a period of performance that crosses fiscal years so long as the term does not exceed one year unless the contract is a multiyear contract specifically authorized by statute.”

Id. at 316–17 (emphasis added).

Our interpretation of sections 2410a and 2531 is also consistent with the stated purpose of the FASA, which was to “revise and streamline the acquisition laws of the federal government in order to reduce paperwork burdens . . . and improve efficiency and effectiveness of the laws governing the manner in which the government obtains goods and services.” S. Rep. No. 103-259, at 1 (1994). To interpret sections 2410a and 2531 as limiting severable services contracts funded by multiple year or no-year appropriations that cross fiscal years to 1 year would require us to conclude that Congress, while remedying one burden, intended to create a restriction on agency severable services contracting in FASA that agencies had not been subject to before.

Furthermore, our interpretation of sections 2410a and 253I is consistent with the FAR provisions that implement these two sections. They expressly state that they apply only to contracts funded by annual appropriations. FAR section 37.106, entitled *Funding and term of service contracts*, states:

“When contracts for services *are funded by annual appropriations*, the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see paragraph (b) of this section . . .).”

48 C.F.R. § 37.106(a) (emphasis added). Paragraph (b) refers to sections 2410a and 253I. Similarly, section 32.703-3 of the FAR, entitled *Contracts crossing fiscal years*, states:

“A contract that is *funded by annual appropriations* may not cross fiscal years, except in accordance with . . . paragraph (b). . . .”

48 C.F.R. § 32.703-3(a) (emphasis added). Again, paragraph (b) refers to sections 2410a and 253I. The FAR’s implementation of the provisions thus reflects an understanding that they apply only to contracts funded with annual appropriations.

CONCLUSION

Sections 2410a and 253I provide agencies relief from the constraints of the *bona fide* needs rule so that they may use fiscal year appropriations to contract across fiscal years for severable services. The 1-year contract period limitations in the two provisions do not apply to contracts funded by multiple year or no-year appropriations. Hence, federal agencies may use multiple year or no-year funds to enter into contracts for severable services for a period of performance longer than 1 year and an agency using multiple year or no-year funds is free to contract for the full period of availability the statute appropriating those funds allows.

Sincerely yours,



Gary L. Keplinger
General Counsel