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United States General Accounting Office
Washington, DC 20548

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June 19, 2001

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

Dear Mr. Chairman:

This responds to your letter dated April 26, 2001, requesting our legal opinion on issues related to share-in-savings contract authorities of the National Energy Conservation Policy Act and the Clinger-Cohen Act. You asked five questions. Because the answers to your first two questions are interrelated, we have combined these questions and answer them together. We answer the remaining three questions in turn.

You ask whether 42 U.S.C. § 8287 *et seq.*, the National Energy Conservation Policy Act authority for entering into Energy Savings Performance Contracts (ESPC), allows agencies to keep a share of the savings under the contract and whether there are restrictions on the use of that money. You also ask whether section 625 of Public Law 104-52, the Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 1996, remains in effect, or if, because it was a provision of an appropriations act, it expired at the end of the fiscal year covered by that appropriations act.

As explained below, section 8287, together with section 625, permits an agency contracting under authority of section 8287 to retain an amount equal to 50 percent of the agency's measured energy savings realized from an ESPC (after paying the ESPC contractor), for credit to appropriations that fund energy and water conservation activities at the agency's facilities. This amount is available for specified energy and water conservation projects until expended. The agency must transfer to the General Fund of the Treasury an amount equal to the remaining 50 percent of the agency's savings.

Section 8287 authorizes agencies to enter into contracts for as many as 25 years for the purpose of achieving energy savings and benefits. It requires that the contractor bear the costs of implementing energy savings measures, including energy audits, acquisition and installation of equipment, and training of personnel, and that the

contractor guarantee performance and savings. 42 U.S.C. § 8287(a)(1). It authorizes agencies, in exchange, to guarantee payment to the contractor of an amount equal to a share of any savings directly resulting from the implementation of the contractor's energy savings measures. Id.

Section 8287c defines "energy savings" as a reduction in the agency's cost of energy as compared to a base cost established through a methodology set forth in the contract. The expectation is that the energy conservation measures implemented by the contractor will lower the agency's utility bills, meaning that the agency spends less of its appropriated funds on utilities after the contract than it did before the contract. The "savings" is reflected in the increased availability of the agency's appropriations for obligations and expenditures other than energy costs (i.e., utility bills). In other words, the savings achieved as a result of the contract activity "free up" the appropriation realizing the savings for other uses.

The amount of savings realized is important for two reasons—(1) the amount of the agency's payment to the contractor is tied to that amount; and (2) section 625 defines the future availability to the agency of the remaining amount of savings realized, after paying the contractor.

Section 8287 requires the agency to include in an ESPC a payment schedule reflecting the savings to the agency that the contractor has guaranteed. 42 U.S.C. § 8287(a)(1)(B).¹ While the amount paid the contractor is tied to the amount of savings the agency realizes, section 8287a designates the source of funds the agency may use to pay the contractor, requiring the agency to pay the contractor "from funds appropriated or otherwise made available to the agency . . . for the payment of energy expenses (and related operation and maintenance expenses)." 42 U.S.C. § 8287a.

After the amount paid the contractor is deducted from the amount of savings realized as a result of the ESPC, section 625 permits the agency to retain in the agency's appropriations that otherwise fund the agency's energy and water conservation activities an amount equal to 50 percent of the amount of the savings realized. Pub. L. No. 104-52, § 625, 109 Stat. 468, 502-503 (1995). This amount remains available to the agency until expended, and is available for "additional specific energy efficiency or water conservation projects or activities, including improvements and retrofits, facility surveys, additional or improved utility metering, and employee training and awareness programs." Section 625 requires the agency to transfer an amount equal to the remaining 50 percent from the appropriations that realized the savings to the General Fund of the Treasury.

¹ Aggregate annual payments by the agency to both its utilities and its ESPC contractors may not exceed the amount the agency would have paid for utilities without the ESPC during the period of time covered by the ESPC. 42 U.S.C. § 8287(a)(2)(B).

Despite the fact that section 625 was enacted as part of an appropriations act, it has permanent effect. Ordinarily, provisions enacted in an appropriations act have effect only for that fiscal year covered by the appropriations act. 58 Comp. Gen. 321 (1979); B-118638, Nov. 4, 1974. The presumption that language in an appropriation act has effect only for the duration of the appropriation is overcome if the provision uses language that indicates futurity. 65 Comp. Gen. 588 (1986). Section 625 contains such words of futurity—“[b]eginning in fiscal year 1986 and thereafter.” It therefore is permanent in effect.

Your third question concerns the pilot program established in the Clinger-Cohen Act, 40 U.S.C. § 1491, for certain information technology (IT) contracts. You ask whether an agency contracting under authority of the pilot program is entitled to a share of savings realized through the contract, and, if so, whether there are restrictions on the agency’s use of that amount.

Unlike the National Energy Conservation Policy Act, the Clinger-Cohen Act, while it envisions savings to the government from the section 1491 contract activity, does not define “savings,” or provide for the establishment of a baseline from which the agency computes savings, nor does it specify how an agency may use any savings realized. Section 1491 authorizes the Administrator, Office of Federal Procurement Policy to carry out a pilot program of two agencies to test the feasibility of contracting with a private sector source to provide the government with an information technology solution for improving mission-related and administrative processes. The agency would pay the contractor “an amount equal to a portion of the savings derived” from any improvements in processes resulting from the contract activity. 40 U.S.C. § 1491(a)(2).

As with ESPCs, any savings resulting from the contract activity (that is, the improvements in the agency’s processes) are reflected in the agency’s appropriations. Ideally, an IT improvement to an agency process will mean that the agency’s execution and maintenance of that process will cost less after the contract than before. In this regard, then, the “savings” resulting from the contract activity are nothing more than an increased availability of the agency’s appropriations for other uses. Because section 1491, unlike section 8287, does not otherwise specify how an agency may use savings realized, the amount of the agency’s appropriations “freed up” in this manner are available to the agency subject to any purpose and time restrictions imposed on that appropriation by the Congress at the time it enacted the appropriation.

To the extent that the appropriation that realized the savings differs from the appropriation that the agency used to pay the contractor, the appropriation realizing the savings realizes the full amount of the savings, without deduction for amounts paid the contractor. While section 1491, like section 8287, ties the amount of the contractor’s payment to the amount of savings realized, section 1491, unlike section 8287a, does not designate a source of funds the agency must use to pay the contractor. Consequently, an agency would be expected to pay the contractor using

appropriations that are available to it otherwise for IT acquisitions. On occasion, the appropriation realizing savings as a result of the contract activity may differ from the appropriation available to pay the contractor. On such occasion, because section 1491 does not otherwise define the availability of amounts of savings realized, the appropriation realizing the savings realizes the full amount of the savings, without deduction for amounts paid the contractor.

Recently, you introduced S. 803, to be known as the “E-Government Act of 2001,” that would address, specifically, the availability to the agency of amounts of savings realized as a result of section 1491 contracting. S. 803 would permit the agency to retain, until expended, an amount equal to half of the amount of savings realized, after paying the contractor, for use for information technology expenditure as specified in the bill. To the extent the agency’s savings are realized in an appropriation not otherwise available for information technology acquisition, S. 803 would require the agency to transfer an amount equal to the amount of the savings from the appropriation that realized the savings to any agency appropriation that is available for information technology acquisition. The bill does not address the other half of the amount of savings realized. By operation of law, then, that amount would remain in the appropriation that realized the savings, and would be available to the agency in accordance with the purpose and time restrictions the Congress had imposed when it enacted the appropriation.

In your fourth question, you ask if we are aware of programs similar to the ESPC and the IT programs. In response, we electronically surveyed the U.S. Code to identify statutes that encourage agencies to enter into contracts for the purpose of achieving cost savings to the government by extending the availability of appropriations freed up as a result of the savings realized. Our survey identified two somewhat similar Department of Defense (DOD) programs—one dealing with energy savings and the other with water conservation at military installations.²

The Secretary of Defense was required to establish an energy performance goal for the Defense Department for the years 1991 through 2000. 10 U.S.C. § 2865(a)(1). To achieve the goal, the Secretary was to develop a plan to identify and implement such energy conservation measures as the repair and replacement of lighting, heating and cooling equipment and systems with cost-effective, energy-saving technology. 10 U.S.C. § 2865(a)(2)-(4). As part of that effort, the Secretary was directed to “develop a simplified method of contracting for shared energy savings contract services.” 10 U.S.C. § 2865(c)(1). Where the Department realized savings as a result of the contract services, the Secretary was permitted to retain in the appropriation

² While DOD’s participation in both programs permit it to extend the availability of appropriations realizing savings, in neither program, unlike the ESPC and IT programs, was the amount of payment to the contractor tied to the amount of savings realized as a result of the contract activity.

that realized the savings an amount equal to two-thirds of the amount of the savings through the end of the fiscal year following the fiscal year for which the funds had been appropriated, for use for certain specified purposes. 10 U.S.C. § 2865(b)(1), (2).

The Secretary of Defense has similar authority to extend the availability of appropriations as a result of water cost savings. The Secretary may authorize the military departments to enter into agreements with utility companies to design and implement programs and activities to manage and conserve water use at military installations. 10 U.S.C. § 2866(a)(3). As with energy savings, the Secretary is permitted to retain in the appropriation realizing water cost savings an amount equal to two-thirds of the amount of the savings through the end of the fiscal year following the fiscal year for which the funds had been appropriated, for use for certain specified purposes. 10 U.S.C. § 2866(b)(2).

Your fifth question asks what mechanisms are available through the appropriations process to encourage agencies to use contracting tools such as the ESPC and IT contracting authorities.

There are likely to be opportunities available in the appropriations process to encourage agencies to use the authorities provided in sections 8287 and 1491. How best to leverage the appropriations process to this end, however, depends on reasons given by agencies for not using section 8287 and section 1491. We did not undertake, as part of this effort, to survey agencies regarding their use of these authorities.

S. 803 offers an example of how the Congress might influence agencies' contracting choices. S. 803, as we noted earlier, would permit an agency exercising the Clinger-Cohen Act IT contracting authority, as amended by S. 803, to retain until expended half of the amount of savings realized from the contract activity. If the appropriation that realized the savings were a fixed period appropriation (either fiscal year or multiple year), this would allow the agency to convert, in effect, an amount of that fixed period appropriation into a no-year appropriation. S. 803 would require the agency to target that amount to specified IT activities, and if the appropriation realizing the savings were not available otherwise for IT acquisition, to transfer the amount into an appropriation that is available for that purpose, thereby permitting the agency, legally, to supplement that appropriation. Further, S. 803, unlike the requirements imposed on agencies' use of the ESPC authority, would permit the agency to retain in the appropriation realizing the savings the other half of the amount of savings, and use that amount consistent with the purpose and time conditions the Congress had imposed on that appropriation when enacted. When using ESPC contracting authority, agencies must transfer a portion of the amount of savings realized from the appropriation realizing the savings into the General Fund of the Treasury. Pub. L. No. 104-52, § 625, 109 Stat. at 503.

We trust that this letter responds to your five questions. Should you have further questions, please contact Tom Armstrong, an Assistant General Counsel on my staff. You can reach him at 202-512-8257.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel