



United States General Accounting Office
Washington, DC 20548

B-290005

July 1, 2002

The Honorable Dan Burton
Chairman, Committee on
Government Reform
House of Representatives

Subject: Unauthorized Legal Services Contracts Improperly Charged to Resource
Management Appropriation

Dear Mr. Chairman:

The purpose of this letter is to advise you of contracts for legal services that the Fish and Wildlife Service (Service) entered into without authority and that the Service improperly charged to its resource management appropriation. During the course of GAO's review of the Service's implementation of the endangered species program,¹ we learned that the Service had entered into contracts with a law firm and with an attorney for assistance with various personnel issues, labor law matters, and allegations of discrimination. As of April 9, 2002, the Service had paid over \$155,000 for these legal services, using funds from its fiscal year 2001 resource management appropriation. For the reasons explained below, the Service has no authority to acquire legal services, and payments the Service made under the contracts were improper. In addition, the Service's resource management appropriation is not available for the purchase of legal services. Accordingly, the Service has violated the Antideficiency Act and should report the violation to the Congress and the President in accordance with the provisions of Office of Management and Budget (OMB) Circular A-34, (2000).

¹ U.S. General Accounting Office, *Endangered Species Program: Information on How Funds Are Allocated and What Activities Are Being Emphasized*, GAO-02-581 (Washington, D.C.; June 25, 2002).

BACKGROUND

During our review of the Service's implementation of the endangered species program, we discovered that the Service's California/Nevada Operations office in Sacramento, California (CNO) had contracted with the law firm Powell, Goldstein, Frazer & Murphy of Atlanta, Georgia, for advice on employment problems, assistance in negotiating labor agreements, and review of draft responses to discrimination charges and related matters.² The Service paid Powell, Goldstein, Frazer & Murphy over \$65,000 out of its resource management appropriation for itemized services provided under the contract, including research on labor relations issues, review and revision of management bargaining proposals, and preparation and review of letters to a union.

The Service's CNO and the Portland Oregon Regional Office both contracted with Mr. Samuel A. Vitaro, an attorney who performs mediation, arbitration, and fact-finding services. In total, the CNO and Portland offices paid over \$90,000 for Mr. Vitaro's services. The CNO office contracted with Mr. Vitaro to provide consultation services on August 15, 2001.³ The Portland Oregon Service office contracted with Mr. Vitaro to conduct administrative fact-finding at the Western Washington Office in Lacey, Washington, and to provide a written report containing findings and recommendations to Service management.⁴ Both offices made the payments out of the Service's resource management appropriation.

DISCUSSION

The Solicitor of the Department of Interior is solely responsible for the legal work of the Department of the Interior, including the Fish and Wildlife Service: "the legal work of the Department of the Interior shall be performed under the supervision and direction of the Solicitor of the Department of the Interior." 43 U.S.C. § 1455. Therefore, to the extent that the Service, or any of its offices identifies a need for legal services, the Service should engage the offices of the Solicitor and the Solicitor's staff. Interior's Departmental Manual emphasizes that the Solicitor is responsible for "all of the legal work of the Department," including "providing legal advice to . . . the heads of the offices and bureaus of the Department and all other officers and employees of the Department" and "providing legal services for all programs, operations and activities of the Department." 109 Departmental Manual 3.1, 3.2.

² Blanket Purchase Agreement number 101811A006.

³ Purchase Order No. 10101-1-M103A.

⁴ Purchase Order No. 101811M093.

Despite this exclusive assignment of responsibility to the Solicitor's Office, most, if not all, of the services acquired by the Service under these contracts appear to be for legal work. When we learned of these contracts, we brought this matter to the Solicitor's attention. GAO letter to the Solicitor, December 28, 2001. In a letter dated February 1, 2002, the Solicitor confirmed that his Office has exclusive responsibility for legal matters. In addition, the Solicitor stated that "[t]he term 'legal work' as used in 43 U.S.C. § 1455 and in the [Departmental Manual] encompasses a wide range of activities". The nature of activities constituting the legal work of the Solicitor is broadly described as including the "interpretation and application of all legal authority affecting actions proposed or taken under the Department's programs and operations." 109 Departmental Manual 3.4C. The subject areas over which the Solicitor's Office is responsible includes matters related to equal employment opportunity internal (EEO) complaints, personnel and EEO litigation, and labor relations. Solicitor's Manual, Appendix 1(A)(3).

The work that the Service acquired under the contract with Powell, Goldstein, Frazer & Murphy, falls within the scope of the Solicitor's responsibilities as described in the Departmental and Solicitor's Manuals. The firm's efforts included the interpretation and application of labor relations laws. While not as straightforward, the contracts with Samuel Vitaro also appear to be for legal work, especially to the extent that Mr. Vitaro may have provided advice with regard to an EEO complaint.⁵ The Solicitor, while agreeing that the Service did not have authority to enter into these contracts, stated that the Service had not obtained the necessary Solicitor approval for the contracts at issue here, nor had the Solicitor's office exercised any supervisory control over the contractors.

The Service paid for these services out of its resource management appropriation. The resource management appropriation was not available for legal services.⁶ To the extent that the contracts entered into were for legal services, the Service's use of the resource management appropriation was improper.

⁵ The Solicitor acknowledged that the contract with Powell, Goldstein, Frazer & Murphy appeared to be for legal services and that the anecdotal evidence suggested that the contracts with Samuel Vitaro were also for legal services. To resolve any uncertainty concerning the contracts with Samuel Vitaro, the Department should pursue sufficient fact-finding to determine whether these contracts were, in fact, for legal services.

⁶ While the Solicitor concurs that these contracts were improper, he did not address the propriety of the Service's use of its resource management appropriation to pay for legal services.

For fiscal year 2001, the Service resource management appropriation provided for "necessary expenses of the . . . Service, for scientific and economic studies, conservation, management, investigations, protection, and utilization of fishery and wildlife resources . . . and for the performance of other authorized functions related to such resources . . ." Pub. L. No. 106-291, 114 Stat. 922, 926 (2000). It is well settled that even an expenditure which may be reasonably related to a general appropriation may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation. See, e.g., 63 Comp. Gen. 422, 427-28, 432 (1984); B-289209, May 31, 2002; and B-139510, May 13, 1959.

Of the appropriations available to the Department of the Interior, there is such a specific appropriation. The Office of the Solicitor, which is solely responsible for the provision of legal services, receives an appropriation each year to fund the legal work of the Department. For fiscal year 2001, the Office of the Solicitor received a salaries and expenses appropriation "[f]or necessary expenses of the Office of the Solicitor." Pub. L. No. 106-291, 114 Stat. 922, 939 (2000). Since the Solicitor, by law, is solely responsible for the legal work of the Department, and since the Solicitor receives an appropriation "for necessary expenses" of the Solicitor's Office, we view the Solicitor's appropriation as specifically available for the legal work of the Department. Cf. B-256172, April 8, 1997 (Department of Agriculture's Office of the General Counsel appropriation is the only appropriation available to cover the cost of providing legal services to the Forest Service). The Service's resource management appropriation, therefore, is not available for legal work. Accordingly, the Service's use of its resource management appropriation to pay for the contract expenses described above violated the purpose statute, 31 U.S.C. § 1301(a), which prohibits the use of appropriations for purposes other than those for which they were appropriated.

The Solicitor's Office advised us that the Acting Director of the Service was directed to terminate the subject contracts immediately and it is our understanding that the contracts have been terminated. Nevertheless, because the Service had no appropriation available for legal work, the Service incurred obligations and made payments of \$155,000 in excess of available appropriations. The Antideficiency Act, 31 U.S.C. § 1341(a), prohibits officers and employees of the United States from incurring obligations in excess or advance of appropriations. 63 Comp. Gen. 422, 424 (1984). Agencies must report violations of the Antideficiency Act immediately to the President and Congress in accordance with OMB Circular A-34. 31 U.S.C. § 1351. Such reports must include a statement of all relevant facts and of actions taken to address and correct the Antideficiency Act violation. Id.; OMB Circular A-34, 133-34 (2000).

There are a number of ways the Department can correct the Service's Antideficiency Act violations. The Department could ask the Congress to provide a deficiency appropriation of the budget authority needed to cover amounts the Service paid to these contractors.⁷ Absent such an appropriation, the Solicitor could ratify the contracts and cover their costs out of unobligated balances of the applicable fiscal year appropriation to the Solicitor.⁸ The Solicitor, also, may agree to pay these contractors on a quantum meruit basis.⁹ Finally, we are not unmindful of the budgetary and related administrative consequences that flow from our holding that the Office of the Solicitor's appropriation is the exclusive source of funding "all of the legal work of the Department." 109 Departmental Manual 3.1, 3.2, above. One consequence is reduced flexibility in responding to significant and unanticipated demands for legal work. If the Department concludes that such budgetary flexibility is needed, the Department may want to ask Congress to provide the Office of the Solicitor with specific, limited authority to transfer funds from the appropriation accounts of the Department's various bureaus and offices to meet such needs.

CONCLUSION

By entering into unauthorized contracts for the provision of legal services and charging the expenditures to its resource management appropriation, the Service violated 31 U.S.C. § 1301(a) and the Antideficiency Act, 31 U.S.C. § 1341. The Service must report the Antideficiency Act violation to the Congress and the President in accordance with the provisions of OMB Circular A-34 (2000).

⁷ Our review suggests that it is possible that funds, in addition to the \$155,000 out of fiscal year 2001, were obligated and expended for the contract services at issue. If this is the case, the Department should ensure that the full extent of the Service's unauthorized contracting and improper payments is reported and that corrective action is also taken.

⁸ Federal Acquisition Regulations § 1.602-3(c). If the Solicitor chooses to ratify these contracts, the Solicitor must determine whether sufficient unobligated funds remain in the Solicitor's appropriation for fiscal year 2001. See B-208730, January 6, 1983 (ratifying official must assure that sufficient funds from the proper appropriation remain unobligated to assume the cost of the contracts).

⁹ Payment under this authority is appropriate where there is no enforceable contractual obligation on the part of the government but where the government has received a benefit not prohibited by law conferred in good faith. See 70 Comp. Gen. 644, (1991) and 40 Comp. Gen. 447, 451 (1961). As with ratification, the Solicitor may not agree to quantum meruit payments unless sufficient unobligated amounts remain in the Solicitor's fiscal year 2001 appropriations.

Should you have any questions, please contact Ms. Susan Poling at (202) 512-2667. We are sending copies of this letter to the Secretary of the Interior, the Ranking Member, House Committee on Government Reform, and other interested congressional committees. The letter will also be available on GAO's home page at <http://www.gao.gov>.

Sincerely yours,

Anthony H. Gamboa
General Counsel