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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: General Services Administration: Real Estate Brokers' Commissions

File: B-291947

Date: August 15, 2003

DIGEST

The General Services Administration (GSA) may enter into proposed contracts with real estate brokers without augmenting its appropriations since the proposed contracts do not contemplate the government receiving funds from the brokers. Services rendered under a formal contract at no cost to the United States do not constitute an acceptance of voluntary services under 31 U.S.C. § 1342.

DECISION

The Associate General Counsel, Office of General Counsel, Real Property Division of the General Services Administration (GSA) requests a decision from this Office regarding GSA's proposal to enter into a contract with real estate brokers to represent GSA's interests in lease acquisition and related services for which GSA would not pay the brokers. Instead, GSA proposes to offer the brokers the right to represent GSA in their respective real estate markets and brokers would receive commissions from owners and landlords of real estate in accordance with industry practice.

As we understand GSA's proposal, we conclude that it may contract with brokers for lease acquisition and related services at no cost to the government without augmenting its appropriations. Also, the services contemplated to be rendered under the brokers' contract at no cost to the government would not constitute an acceptance of voluntary services under 31 U.S.C. § 1342. This decision does not address the soundness of the terms of the contract or advisability of entering into such contracts.

BACKGROUND

The General Services Administration awarded the National Real Estate Services (NRES) contract in 1997. Under that contract, GSA paid real estate brokers a fee from appropriated funds in exchange for their performance of a variety of lease acquisition and other services. The NRES contract prohibited brokers from receiving any compensation for these services from sources other than GSA.

However, GSA explains that this method of paying brokers directly and not allowing brokers to receive commissions from landlords or owners is not common practice in the real estate industry. GSA advises that real estate brokers are customarily considered the agents of sellers and landlords, and while buyers and tenants certainly benefit from brokers' services, sellers and landlords, not buyers and tenants, pay the brokers. The payment is usually in the form of a commission for finding a suitable and willing buyer or tenant for the property in question. The commission is typically a percentage of the value of the lease. The landlords factor the commissions into the rent charged to the tenants. The tenants indirectly pay the commission through their rent payments. Payment of commissions, according to GSA, is typically regulated by State regulatory bodies and governed by various state laws that may require disclaimers to the purchaser.

GSA now proposes to enter into a new contract with brokers to reflect traditional industry practices. Under the proposed terms of this contract, instead of paying brokers directly GSA would grant contract awardees the right to represent GSA in their respective geographic markets in exchange for the brokers' lease acquisition services in these markets. The services the brokers would perform would be at "no cost to the government." The property owners and landlords would pay broker commissions in accordance with common industry practice.

DISCUSSION

The main issue presented is whether GSA will improperly augment its appropriation if it receives the benefit of the brokers' services without paying for that benefit, thus making the appropriated funds that would have been used under the previous arrangement to pay brokers available for other purposes. We conclude that GSA's receipt of services under the proposed contract without financial cost to the government ("no cost contract") would not constitute an improper augmentation of its appropriation.[1]

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[1] The term "no cost contract" is somewhat of a misnomer, since there would be no valid contract without mutual consideration. We note that there is ample consideration to support this arrangement. See T.V. Travel Inc., 65 Comp. Gen. 109, 113 (1985) and 7 Comp. Gen. 810 (1928) (services rendered under a formal contract free of cost to the United States do not cause the contract to be void for lack of

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It is unconstitutional for money to be drawn from the Treasury without an appropriation, U.S. Const. Art. I, § 9, cl. 7. By virtue of the "miscellaneous receipts" statute, 31 U.S.C. § 3302(b), an official or agent of the government receiving money for the government from any source, absent statutory authority to the contrary, must deposit the money into the general fund of the Treasury. As a necessary corollary to these well-established principles, government agencies are prohibited from improperly augmenting their appropriation from outside sources without specific statutory authority. B-286182, Jan. 11, 2001. The proposed NRES contract, however, does not directly implicate these concerns.

First, we have held that agencies may receive the benefit of services without obligating appropriated funds. B-281281, Jan. 21, 1999 (citations omitted). Second, some of our cases have distinguished between the receipt of money and the receipt of services, dealing with the former under the augmentation rule and the latter under the voluntary services prohibition. See B-13378 (November 20, 1940). For example, in 63 Comp. Gen. 459, the Federal Communication Commission accepted donated space and services at an industry trade show. The question was whether the Commission could accept donated space and services rather than using its own appropriations to pay for them. Id. at 460. We concluded that there was no augmentation because the Commission accepted no funds. The Commission's exhibit, we noted, was one of the drawing cards that resulted in increased admission revenues for the promoters. For this reason, it was to the advantage of the promoters to solicit the Commission's participation and to waive the usual fees. In return, the Commission's acceptance of the free space and services afforded it an additional opportunity to inform the public about radio technology at no increased cost to the agency. Id. at 461. Since GSA is receiving services and is not receiving money for the government from the brokers under the proposed NRES contract, the requirements of the miscellaneous receipts statute (to deposit money for the United States into the Treasury) and the corollary rule against augmentation of appropriations are not implicated.

Similarly, we do not believe GSA's proposed contract with brokers would violate the limitation against voluntary services in 31 U.S.C. § 1342. That statute prohibits federal officers and employees from accepting voluntary services except in certain emergencies, and is intended to prevent agencies from forcing the Congress to appropriate funds to pay volunteers who later submit claims for payment. 23 Comp. Gen. 272, 274 (1943). We have held that services received by an agency free of cost pursuant to a formal contract or agreement do not constitute "voluntary services"

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consideration when the contract also contains mutual promises of the contracting parties by which each contracting party obtains a substantial benefit).

within the meaning of section 1342. 7 Comp. Gen. 810, 811 (1928)(services rendered under a formal contract free of cost to the United States do not constitute voluntary services); B-13378, supra (Secretary of Commerce could accept services from private agency rendered under a cooperative agreement which specified that services would be free of cost to the government). It would be difficult to characterize the services contemplated from the brokers in the NRES contract as "voluntary," since the brokers' services would be rendered under a formal contract that would presumably specify the no-cost nature of the contract and contain mutually binding rights and obligations in the parties including the exact services to be delivered thereunder in return for the right to represent GSA in their respective markets. Thus, any potential future claims for payment from the brokers would be defined by the scope of the contractual agreement.

CONCLUSION

As we understand the proposal, GSA may enter into proposed contracts with real estate brokers without augmenting its appropriations since the contract does not contemplate the government receiving funds from the brokers. Furthermore, services rendered under a formal contract at no cost to the United States would not constitute an acceptance of voluntary services under 31 U.S.C. § 1342.[2]

/signed/

Anthony Gamboa
General Counsel

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[2] As noted earlier, this decision does not address the soundness of the terms of the contract or advisability of entering into such contracts. Also, GSA's submission indicates a possible issue of conflict of interest between the government getting the best value and the brokers' interest in getting the highest commission. Given the present request, we leave these matters to GSA to resolve.