

INTERAGENCY TRANSACTIONS: ROLES AND RESPONSIBILITIES
FREQUENTLY ASKED QUESTIONS
March 13, 2008

Various statutes authorize federal agencies to enter into interagency agreements to obtain goods and services. However, the roles and responsibilities of each agency in such transactions are often a subject of confusion, especially if the transactions are not governed by the Economy Act and its explicit requirements. In decisions issued in the summer of 2007, GAO examined several non-Economy Act transactions in which one agency (the performing agency) agreed to act as another agency's (the ordering agency) agent in contracting for needed goods or services.

Defining roles and responsibilities of the agencies in these particular types of transactions is challenging; the performing agency is in essence acting as the ordering agency's agent in contractual dealings with a nongovernment third party. As officials of the government whose actions shape the fiscal liabilities of the United States, officials of both the performing and the ordering agencies have a responsibility to ensure the proper use of federal funds when entering into transactions obligating federal funds. *See* B-308944, July 17, 2007. The ordering agency is obviously responsible for its own appropriations. The performing agency, in procuring goods and services from a third party, also has responsibility because it is entrusted with the ordering agency's appropriations, and its conduct directly affects the scope of the legal liability and the obligational consequences of the burdened appropriation account. *See* B-308969, May 31, 2007.

Below, we discuss some frequently asked questions regarding non-Economy Act interagency transactions where the performing agency enters into a contract on behalf of the ordering agency to procure goods or services for the ordering agency. These questions include not only issues that GAO has resolved in its recent decisions, but also concerns raised by agencies as they confront these types of transactions.

1. When an agency transfers appropriations to a franchise fund, does the agency incur an obligation that it should record against the appropriation account?

An agency may transfer amounts to a franchise fund to have the franchise fund act as its contracting agent to enter into a contract with a third party on its behalf. For funds control purposes, the agency should record that amount as obligated, but should establish that it has a *bona fide* need for the services it is asking the franchise fund to acquire on its behalf before it transfers the funds.

In B-308944, July 17, 2007, GAO addressed the situation where Department of Defense (DOD) components transferred fiscal-year appropriations to a Department of the Interior franchise fund, GovWorks (now known as the Acquisition Services Directorate), even though DOD had not established a *bona fide* need for the use of these funds. GovWorks did not use these funds to enter into contracts on DOD's behalf until after the appropriations had expired. For example, DOD transferred fiscal year 2004

appropriations via several Military Interdepartmental Purchase Requests (MIPR) stating only that DOD sought “equipment through the Pentagon IT Store.” In fiscal year 2005, after these funds had expired, DOD provided specific instructions as to the type of equipment GovWorks should procure for DOD, and GovWorks, using fiscal year 2004 funds, entered into a third-party contract as per these instructions. Although GovWorks used DOD’s fiscal year 2004 appropriation, the facts suggested that DOD had a *bona fide* need in fiscal year 2005 rather than fiscal year 2004. In this instance, DOD failed to ensure that GovWorks obligated its fiscal year 2004 appropriation before it expired. GovWorks, as a steward of the funds DOD entrusted to it, should have known that the funds transferred in 2004 had expired and were no longer available for obligation. As a result of their failures, DOD “parked” fiscal year 2004 appropriations with GovWorks, allowing GovWorks to obligate expired funds.

2. What case law does GAO have that addresses “parking”?

In its July 2007 decision, B-308944, GAO discussed parking. GAO earlier issued two other decisions that are relevant to the issue of parking, although the word parking does not appear in those two decisions. As noted in question 1, in B-308944, GAO found that DOD had parked fixed-year appropriations at GovWorks. In numerous instances, DOD transferred fiscal-year appropriations to GovWorks during the appropriations’ period of availability without specifying how GovWorks was to use the money. GovWorks held these amounts until well after their expiration before using them, at DOD’s direction, to execute contracts with third parties on DOD’s behalf. GAO concluded that by transferring fixed-year amounts to GovWorks and attempting to preserve their availability, DOD had parked funds at GovWorks.

In an earlier decision, B-286929, Apr. 25, 2001, GAO examined an obligation of fiscal year 1997 funds pursuant to an interagency transaction between the U.S. Total Army Personnel Command (PERSCOM) and the General Services Administration’s Federal Systems Integration and Management Center (FEDSIM). PERSCOM and FEDSIM entered into an interagency agreement in fiscal year 1997 in which FEDSIM agreed to assist PERSCOM in designing a declassification information system. The agencies planned to implement the project in three phases for an estimated cost of \$17.5 million. The agreement, however, covered only Phase I. PERSCOM transferred and obligated \$17.5 million against its fiscal year 1997 appropriation upon the agreement’s execution. In fiscal year 1998, FEDSIM completed the work for Phase I for a total cost of \$8.5 million, leaving unexpended \$9 million from PERSCOM’s now expired fiscal year 1997 appropriation. Instead of deobligating this amount, PERSCOM directed FEDSIM to use it for Phase II of the project, to be completed pursuant to a new interagency agreement with FEDSIM.

GAO concluded that the \$9 million was not available for a new agreement. PERSCOM’s fiscal year 1997 appropriation was available to liquidate obligations properly incurred during its period of availability, that is, in fiscal year 1997. When, as was the case with PERSCOM, an agency transfers more funds than needed for a project, the agency should retrieve and deobligate the excess amount at the project’s conclusion. If the agency deobligates within the appropriation’s period of availability, it may incur a new

obligation against those funds. Otherwise, the funds are not available to incur new obligations. When FEDSIM completed its work under the agreement with PERSCOM in fiscal year 1998, PERSCOM's fiscal year 1997 appropriation had expired. PERSCOM could not park the remaining amounts with FEDSIM and permit FEDSIM to apply them to a new interagency agreement.

Another decision relevant to the issue of parking is a decision involving the Library of Congress' FEDLINK revolving fund, a no-year fund providing its customer agencies with access to online databases and other library and information support services from third parties. B-288142, Sept. 6, 2001. FEDLINK's customer agencies make payments in advance based on estimates rather than actual costs, so when FEDLINK completes a customer's order, there may be unused amounts left over. The Library of Congress asked GAO if fixed-year amounts transferred to FEDLINK from customer agencies and unused for a particular order retained their fixed-year identity or assumed the no-year identity of the revolving fund, becoming available to fill customer agencies' needs without fiscal year limitation.

GAO distinguished between amounts transferred to FEDLINK to reimburse for costs of accounting and administrative services and amounts transferred to cover costs of ordered goods and services. As for the amounts to reimburse for accounting and administrative services, FEDLINK "earned" these amounts and could retain and use them without fiscal year limitation. GAO determined, however, that amounts transferred to FEDLINK to cover costs of goods and services were not "earned" and were subject to the same restrictions on purpose, amount and time as the appropriation from which the funds were transferred. Thus, consistent with the *bona fide* needs rule, "unearned" amounts transferred from a fiscal year appropriation to FEDLINK are available only to cover obligations properly incurred during the appropriation's period of availability. Ordering agencies could not park with FEDLINK unused amounts from previous orders and permit FEDLINK to apply those amounts to new orders made after the period of availability had expired.

3. How long does a performing agency have to execute a contract with a third party, consistent with the *bona fide* needs rule?

There is no hard and fast rule in this regard. Rather, GAO uses a "reasonableness" standard when evaluating the timeliness of a performing agency's actions, examining the circumstances surrounding transactions on a case-by-case basis.

GAO applied a reasonableness standard in B-308944, July 17, 2007. GAO examined four interagency transactions between DOD and GovWorks whereby GovWorks entered into contracts with third parties on DOD's behalf. Pursuant to one of the transactions, entered into in April 2004, GovWorks was to procure a certain type of off-the-shelf laser printer on DOD's behalf. DOD transferred fiscal year 2004 funds to GovWorks for the procurement. On August 29, 2005, 17 months after DOD and GovWorks executed the interagency agreement and 11 months after the fiscal year 2004 funds expired, GovWorks entered into a contract to purchase the printers. GAO concluded that it was unreasonable for GovWorks to have waited 17 months to execute a contract for the

purchase of commercially available off-the-shelf printers. It appeared that GovWorks could have purchased the printers with minimal lead time. Rather than fulfilling a need of fiscal year 2004, it was apparent from the circumstances that the contract filled a need of fiscal year 2005.

4. What are the responsibilities of each agency to ensure that appropriations are properly obligated?

Both the performing agency and the ordering agency have a responsibility to ensure the proper obligation of the ordering agency's appropriation. The responsibilities of the ordering agency should be obvious; after all, the funds being obligated are funds that Congress appropriated to that agency. The responsibilities of the performing agency, however, should also be obvious; after all, the performing agency has made itself available to the ordering agency as a contracting agent, and, in many ways, it has the same responsibility for the ordering agency's appropriation as if it were a contracting officer of the ordering agency.

One needs only to look at the three decisions issued to the Inspector General of the Department of the Interior in the summer of 2007 to see the consequences when the ordering and performing agencies fail to execute their responsibilities. In two decisions, B-308969, May 31, 2007, and B-308944, July 17, 2007, failures of DOD and Interior resulted in Interior using expired appropriations for third party contracts and subjecting DOD, the ordering agency, to violations of the *bona fide* needs rule and possible overobligation of its appropriations. In B-309181, Aug. 17, 2007, the failures of DOD and Interior resulted in an unenforceable, void lease and millions of dollars of improper payments.

5. If the third-party contract violates the Antideficiency Act, which agency reports the violation?

In B-308944, July 17, 2007, GAO mentioned the reporting responsibilities under the Antideficiency Act. If an interagency transaction results in an Antideficiency Act violation, the ordering agency should report that violation in compliance with 31 U.S.C. § 1351.

The fact that the ordering agency should report the violation by no means diminishes the accountability of the performing agency for the conduct leading to the violation. Under the reporting requirements of the Antideficiency Act, agency reports must contain all relevant facts in relation to the violation of law. 31 U.S.C. § 1351. Under guidance of the Office of Management and Budget (OMB), the statement of relevant facts should include: the type of violation, the name and position of the federal officers or employees responsible for the violation, the primary cause of the violation, statements from the officers or employees involved with respect to any extenuating circumstances, and relevant reports from agency counsel or the Inspector General. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 145.7 (July 2, 2007). See also GAO, *Principles of Federal Appropriations Law*, vol. 2, 3rd ed., GAO-06-382SP (Washington, D.C.: Feb. 2006), available at www.gao.gov/legal/redbook.html (last visited Feb. 29, 2008). OMB guidance also requires that, if another agency is involved in the

violation, the agency report should include any statement regarding steps taken to coordinate the report with that other agency. OMB Cir. No. A-11, at § 145.7.



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Expired Funds and Interagency Agreements between GovWorks and the Department of Defense

File: B-308944

Date: July 17, 2007

DIGEST

GovWorks, a Department of the Interior franchise fund, entered into four contracts on behalf of the Department of Defense (DOD). With one exception, the Military Interdepartmental Purchase Requests (MIPRs) used to finance these contracts did not identify the specific items or services that DOD wanted GovWorks to acquire on its behalf. Lacking the necessary specificity as to the items or services ordered, these MIPRs did not properly obligate DOD's appropriation. Accordingly, in fiscal year 2005, when GovWorks used these funds for three of the four contracts, GovWorks improperly used prior year funds.

One MIPR, for laser printers, described the goods DOD sought with enough specificity to create a valid interagency agreement and to properly obligate DOD's appropriation. Although the laser printers ordered are a readily available commercial item, GovWorks did not use the funds to execute a contract on DOD's behalf until 17 months after the date of the MIPR, and 11 months after the funds expired. Because GovWorks did not use the funds within a reasonable time of their receipt, the contract did not fulfill a *bona fide* need arising during the funds' period of availability.

DOD and GovWorks share responsibility for ensuring the proper use of DOD funds transferred to and "parked" at GovWorks. DOD must adjust its appropriations accounts to record obligations for these four contracts against fiscal year 2005 appropriations. If DOD has insufficient unobligated balances in these appropriations, DOD must report violations of the Antideficiency Act.

To prevent future occurrences of the problems associated with the four contracts, GovWorks should examine its accounts to identify interagency agreements that lack the requisite specificity under the recording statute. For those agreements that do not meet the requirements, GovWorks should return the funds advanced by the

ordering agency. GovWorks also should develop internal controls to ensure that it does not accept nonspecific, indefinite orders nor use expired funds to enter into contracts on behalf of the ordering agency.

DECISION

The Inspector General for the Department of the Interior (Interior) requests our decision under 31 U.S.C. § 3529 regarding issues raised by four contracts that GovWorks, an Interior franchise fund, entered into with private vendors in fiscal year 2005 using Department of Defense (DOD) funds.¹ The Inspector General (IG) is concerned that certain Military Interdepartmental Purchase Requests (MIPRs), used to document DOD's interagency agreements with GovWorks, may not have identified DOD's needs with the specificity required to create an obligation under 31 U.S.C. § 1501(a). Devaney Letter. The IG expressed concern that most of the DOD funds that GovWorks used to finance the four contracts were no longer available to incur obligations when GovWorks executed the contracts in fiscal year 2005. *Id.* The IG believes that DOD improperly "parked" funds with GovWorks. *Id.* This decision examines the four contracts to determine whether they fulfilled a *bona fide* need arising during the period of availability of the funds that GovWorks used to finance the contracts.²

For the reasons discussed below, we conclude that, with one exception, the MIPRs between DOD and GovWorks did not identify the specific items or services that GovWorks was to acquire. As a result, the MIPRs did not properly obligate DOD's funds. It was not until fiscal year 2005 that DOD perfected its orders and established valid interagency agreements by asking GovWorks to acquire specific goods or

¹ Letter from Earl E. Devaney, Inspector General, Office of the Inspector General, Department of the Interior, to David M. Walker, Comptroller General of the United States, Jan. 22, 2007 (Devaney Letter). This request arose out of the Inspector General's report on an audit of transactions between DOD and Interior. U.S. Department of the Interior Office of Inspector General, *FY 2005 Department of the Interior Purchases Made on Behalf of the Department of Defense*, Report No. X-IN-MOA-0018-2005 (Jan. 9, 2007), available at www.doioig.gov/upload/2007-G-0002.txt (last visited July 2, 2007) (Interior IG Report). The Inspector General for the Department of Defense also audited many of these transactions and reported results in U.S. Department of Defense Office of Inspector General, *FY 2005 DOD Purchases Made Through the Department of the Interior*, Report No. D-2007-044 (Jan. 16, 2007), available at www.dodig.osd.mil/Audit/reports/07report.htm (last visited July 2, 2007) (DOD IG Report).

² In response to the IG's request, we issued a decision related to obligation of funds under an indefinite delivery, indefinite quantity contract. B-308969, May 31, 2007. A third decision in response to the IG's request, B-309181, relating to authority to enter into a lease, will be issued in the near future.

services. Consequently, GovWorks improperly used expired funds, transferred by DOD's MIPRs, to finance these three contracts. DOD may not extend the availability of its appropriated funds by "parking" funds at GovWorks. DOD and GovWorks should adjust their appropriations accounts, charging the obligations for these three contracts to fiscal year 2005 DOD funds. If there is an insufficient unobligated balance remaining in DOD's fiscal year 2005 expired appropriation, DOD should report a violation of the Antideficiency Act consistent with Office of Management and Budget Circular A-11.

One MIPR, for laser printers, funding one of the four contracts had the requisite specificity to properly obligate DOD's funds. Because laser printers are a readily available commercial item, GovWorks's use of the transferred funds to acquire laser printers almost 17 months after DOD and GovWorks entered into the interagency agreement and transferred the funds to GovWorks, and 11 months after the funds expired, did not fulfill a *bona fide* need arising during the funds' period of availability. Rather, the contract satisfied a *bona fide* need of the following fiscal year. DOD and GovWorks should adjust their accounts, deobligating the funds from fiscal year 2004 and obligating instead funds from fiscal year 2005.

Our practice when rendering decisions is to obtain the views of the relevant federal agencies. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal.htm. In this regard, Interior and DOD responded to questions from our office about the four contracts. Letter from David L. Bernhardt, Solicitor, Department of the Interior, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Apr. 20, 2007 (Bernhardt Letter); Letter from Roger F. Pitkin, Acting Deputy General Counsel (Fiscal), DOD, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, June 6, 2007 (Pitkin Letter). Interior provided requested information but declined to provide its legal views in response to the questions we asked. Bernhardt Letter.

BACKGROUND

GovWorks is a franchise fund originally established as a pilot program in 1996. Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 104-208, div. A, title I, § 113, 110 Stat. 3009, 3009-200 (Sept. 30, 1996). Congress has reauthorized GovWorks through fiscal year 2007. Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, § 2, 121 Stat. 8, 57 (Feb. 15, 2007).

As a franchise fund, GovWorks is a revolving fund designed to provide common administrative services to Interior and other agencies on a competitive basis. Government Management Reform Act of 1994, Pub. L. No. 103-356, title IV, § 403, 108 Stat. 3410, 3413 (Oct. 13, 1994) (authorizing franchise fund pilot programs). GovWorks is "a full service acquisition center" that procures goods and services from vendors on behalf of federal agencies. GovWorks, *Frequently Asked Questions, General Questions*, ¶ 1, available at www.govworks.gov/home/faqs.asp (last visited July 2, 2007).

An agency wishing to acquire products or services through GovWorks tells GovWorks the goods or services the agency would like GovWorks to acquire on its behalf. GovWorks, *Getting Started Details*, available at www.govworks.gov/home/getting_started_details.asp (last visited July 2, 2007) (*Getting Started Details*). The ordering agency then transfers funds from its appropriation to GovWorks for acquisition of the goods or services sought. *Id.* DOD uses MIPRs both to identify its needs and to transfer funds to GovWorks. Pitkin Letter; Robert McNamara, Acting Deputy Chief Financial Officer, Office of the Under Secretary of Defense, Comptroller, Memorandum for the Secretaries of the Military Departments, *et al.*, *Non-Economy Act Orders*, Oct. 16, 2006. If GovWorks believes it can procure the goods or services sought by DOD as specified in the MIPR, GovWorks replies to DOD with an “Acceptance of MIPR.” Bernhardt Letter at tab 1A. Upon GovWorks’s acceptance of the MIPR, GovWorks and DOD have cemented an interagency agreement, and DOD records an obligation in the amount it transferred to GovWorks. Pitkin Letter. GovWorks then locates a vendor who can provide the goods or services DOD seeks and enters into a contract with the vendor for the goods or services using the funds transferred by DOD. *See Getting Started Details*. GovWorks charges ordering agencies a service fee of 4 percent of the contract award. *Id.* These fees, once earned, are available to GovWorks without fiscal year limitation to cover GovWorks’s administrative costs. Pub. L. No. 104-208, § 113.

In January 2007, the Interior IG reported its audit of the GovWorks transactions made using DOD funds in fiscal year 2005, including contracts made with vendors on behalf of DOD. Interior IG Report. The Interior IG determined that in many cases GovWorks had accepted MIPRs from DOD that did not indicate the goods or services sought with the level of specificity necessary to incur an obligation against DOD’s funds. *Id.* at 4. In addition, GovWorks had entered into contracts with vendors using DOD funds whose period of availability for obligations had expired.³ *Id.*

The Interior IG is concerned that these practices may have violated fiscal law and may indicate that DOD “parked” funds at GovWorks. *See Devaney Letter* at 1–2. To address these concerns, the Interior IG asked that we examine four contracts that GovWorks entered into in fiscal year 2005 using DOD funds. *Id.*

Contract 44435 for Laser Printers

On April 9, 2004, DOD transferred \$40,283.46 of fiscal year 2004 Operation and Maintenance Army funds to GovWorks for the purchase of “XEROX 3400 Printers.” MIPR 4GINTMM054, Apr. 9, 2004. Sixteen months later, DOD sent an e-mail to GovWorks requesting that GovWorks use these funds to acquire 20 HP 1300 laser printers and 20 HP 4350n network printers, or printers of equal specifications and

³ The DOD Inspector General reached conclusions similar to those of the Interior IG. DOD IG Report.

value, to be delivered to the Pentagon within 30 days of contract award. E-mail from Georgette Sumpter, DOD, to Donald Clifton, GovWorks, *Subject: Project Number 5229-0002 Printers*, Aug. 17, 2005. Using these funds, GovWorks entered into Contract 44435 with CounterTrade Products, Inc. on August 29, 2005, for 40 HP laserjet printers at a cost of \$37,643.10. Contract 44435, Aug. 29, 2005. The funds GovWorks used to finance this contract expired 11 months before GovWorks entered into the contract and were only available to liquidate obligations properly incurred during fiscal year 2004.

Contract 43270 for Body Armor

On March 24, 2004, DOD transferred \$1.1 million of 3-year Other Procurement Navy funds, which were available for fiscal years 2002--2004, to GovWorks for "the procurement and fielding of AT/FP shipboard equipment utilized for the protection of Navy afloat assets." MIPR N6553804MP00018, Mar. 24, 2004. Almost 14 months later, DOD sent an e-mail to GovWorks requesting that GovWorks place an order with Point Blank Body Armor, Inc., for 50 sets of T1 Special Body Armor and 100 Gamma Plates.⁴ E-mail from Eugene M. DuCom, John J. McMullen Associates (JJMA), to Donald Clifton, GovWorks, *Subject: HSV-X1 Body Armor PKG Point Blank Justification*, May 16, 2005 (DuCom E-mail 1).⁵ On May 18, 2005, DOD e-mailed GovWorks with instructions to use the funds transferred by the March 24, 2004, MIPR for this purchase. E-mail from Eugene M. DuCom, JJMA, to Donald Clifton, GovWorks, *Subject: Re: FW: Quote with shipping*, May 18, 2005 (DuCom E-mail 2). Using these funds, GovWorks entered into Contract 43270 with Point Blank Body Armor, Inc., on May 20, 2005, in the amount of \$61,112 to purchase body armor and gamma plates. Contract 43270, May 20, 2005. The funds GovWorks used to finance this contract expired over 6 months before GovWorks entered into the contract and were only available to liquidate obligations properly incurred during fiscal years 2002--2004.

Contract 41181 for Computer Hardware

DOD made the following funds transfers to GovWorks:

- \$50,000 of 2001 Operation and Maintenance Army funds, "for the acquisition of toner cartridges." MIPR 1JDIT0N046, July 10, 2001.
- \$70,000 of 2001 Operation and Maintenance Army funds, "for the acquisition of [automated data processing] and supply." MIPR 1KINTWS058, July 24,

⁴ We understand that body armor is used to protect personnel on board ships. Each set of body armor is fitted, front and back, with gamma plates, ceramic plates manufactured to protect personnel from projectiles.

⁵ These instructions did not come from DOD directly, but from John J. McMullen Associates, a private contractor working on DOD's behalf.

2001.

- \$40,783 of 2001 Operation and Maintenance Army funds, “for the acquisition of [automated data processing] and supplies.” MIPR 1MINTPR070, Sept. 14, 2001.
- \$1.8 million of 2004 Operation and Maintenance Army funds, “for equipment through the Pentagon IT Store.” MIPR 4MINTMM125, Sept. 17, 2004.

On November 9, 2004, DOD sent GovWorks an e-mail requesting that GovWorks acquire 160 items of various computer hardware using the funds transferred via the September 17, 2004 MIPR. E-mail from Michael Bucceroni, DOD, to Andrew Carrington, GovWorks, *Subject: FW: Project Number 4303-0002 Decision Agent Network Equipment*, Nov. 9, 2004 (Bucceroni E-mail). On December 21, 2004, GovWorks entered into Contract 41181 with Norseman, Inc. for “Decision Agent Network Equipment”⁶ in the amount of \$108,196. Contract 41181, Dec. 21, 2004. To finance this contract, GovWorks, at DOD’s direction, used a portion of the funds DOD transferred on September 17, 2004. *See* Bucceroni E-mail. GovWorks also used, apparently on its own initiative, funds from the three other MIPRs listed above. Contract 41181.

On January 18, 2005, GovWorks modified Contract 41181 to remove the fiscal year 2001 funds⁷ that DOD had transferred on July 10, 2001, and replaced them with the following:

- \$3,600 of 2000 Operation and Maintenance Army funds, “for the acquisition of [automated data processing] and services.” MIPR 0MGSAIT092, Sept. 29, 2000.
- \$94,351 of 2001 Operation and Maintenance Army funds, “for the acquisition of [automated data processing] and supplies.” MIPR 1MITST0074, Sept. 24, 2001.
- \$158,273.50 of 2004 Operation and Maintenance Army funds, “for equipment through the Pentagon IT Store.” MIPR 4LINTMM111, Aug. 18, 2004.
- \$1.4 million of 2004 Operation and Maintenance Army funds, for “[defense messaging system] equipment.” MIPR 4MINTMM130, Sept. 24, 2004.

⁶ The Decision Agent is a suite of software applications that automatically identifies, filters, and distributes electronic messages. Interior IG Report at 4 n. 3.

⁷ The July 10, 2001, MIPR sought “toner cartridges” and the GovWorks contracting officer servicing Contract 41181 believed that Contract 41181, for Decision Agent Network Equipment, did not fill this need. Bernhardt Letter at tab 1H.

The funds GovWorks used to finance this contract expired over 50 months, 38 months, and 2 months, respectively, before GovWorks entered into the contract and were only available to liquidate obligations properly incurred during fiscal years 2000, 2001, and 2004.

Contract 43387 for Telecommunications Support

GovWorks entered into Contract 43387 with Northrop Grumman in the amount of \$3,908,420 for “technical and functional support to the Pentagon Telecommunications Center” consisting of systems and security management, maintenance, and operation of hardware and software. Contract 43387, June 30, 2005. This was a sole source contract, intended as a bridge contract pending award of a final contract. Letter from Paul Martin, Contracting Officer, GovWorks, to Allen Sauck, Northrop Grumman, *Subject: Request for Proposal 43387, Pentagon Telecommunications Center, Decision Agent and Enhanced Communication Gateway System*, June 8, 2005. The duration of the contract was 6 months, from July 1, 2005, to December 31, 2005. Contract 43387, Statement of Work at ¶ 5.0. To fund this contract, GovWorks used Operation and Maintenance Army funds that DOD had transferred to GovWorks via 17 separate MIPRs. *Id.* Of these 17 MIPRs, 1 transferred fiscal year 2003 funds in fiscal year 2003, 13 transferred fiscal year 2004 funds in fiscal year 2004, and 3 transferred fiscal year 2005 funds in fiscal year 2005. *Id.*

The 17 MIPRs used to fund this contract also had four different descriptions of the services DOD wished GovWorks to procure on its behalf:

- “[Decision Agent/Defense Messaging System] Core Product,” 13 MIPRs. *E.g.*, MIPR 4GINTMM058, Apr. 26, 2004.
- “[S]upport of the Decision Agent,” 2 MIPRs. *E.g.*, MIPR 5CINTMM013, Dec. 15, 2004.
- “Secondary site [Defense Messaging System] requirements,” MIPR 3LINTMM101, Aug. 29, 2003.
- “Support [for] the [network] Printers,” MIPR 4HINTMM069, May 26, 2004.

GovWorks executed this contract on June 30, 2005, pursuant to a Statement of Work from DOD dated June 15, 2005,⁸ and GovWorks, at DOD’s direction, funded this contract with funds transferred to GovWorks through the 17 MIPRs listed

⁸ DOD originally submitted a Statement of Work to GovWorks on April 14, 2005. E-mail from Kimberly Elmore, Interior Office of Inspector General, to Wesley Dunn, Senior Staff Attorney, GAO, *Subject: Fw: GAO Request #2*, May 7, 2007. This Statement of Work was revised on June 15, 2005. *Id.*

above. E-mail from Georgette Sumpter, DOD, to Michael Bucceroni, DOD, *Subject: Project Number 5095-0001 DA*, May 31, 2005 (Sumpter E-mail 2).⁹ The fiscal year 2003 and fiscal year 2004 funds GovWorks used to finance this contract expired 19 months and 7 months, respectively, before GovWorks entered into the contract.

DISCUSSION

The overarching issue presented by the Interior IG is whether DOD and GovWorks used the correct appropriation to finance the four contracts. The IG raises the issue because GovWorks, on behalf of DOD, entered into the four contracts in fiscal year 2005 but used expired DOD funds, not fiscal year 2005 funds,¹⁰ to finance the contracts. Expired funds are only available to liquidate obligations properly incurred during their period of availability. To answer the question, we must first determine when DOD incurred obligations against its appropriations: either when it transferred the funds to GovWorks with the MIPRs or at some later time. Second, having established when DOD incurred an obligation, we must determine whether DOD incurred an obligation within the funds' period of availability and, if so, whether GovWorks promptly used the funds to execute a contract on DOD's behalf. We also respond to the IG's concern that DOD and GovWorks may have improperly parked funds with GovWorks.

Incurring Obligations

An interagency transaction like that authorized by Interior's franchise fund authority is, in some ways, not unlike a contractual transaction.¹¹ *See, e.g.*, B-286929, Apr. 25, 2001. Similar to a contractual transaction, at the time the agencies involved in the transaction enter into an interagency agreement, the ordering agency incurs an obligation for the costs of the work to be performed. *See* B-302760, May 17, 2004. However, to incur an obligation, an ordering agency must have documentary evidence of a binding agreement between the two agencies for specific goods or services.

The specificity requirement is a long-standing principle of appropriations law, supported by decisions of the Comptroller General and by the recording statute, 31 U.S.C. § 1501(a). For example, in 44 Comp. Gen. 695 (1965), we considered fiscal year 1964 purchase orders placed by the United States Travel Service (USTS) with the Government Printing Office (GPO) for the printing of sale and promotion

⁹ We have no documents showing GovWorks's acceptance of the funding instructions in this e-mail. However, we may infer acceptance of these terms, as GovWorks followed them. Contract 43387.

¹⁰ GovWorks used fiscal year 2005 funds to partially fund Contract 43387.

¹¹ Both DOD and GovWorks consider MIPRs to be obligating documents. Bernhardt Letter; Pitkin Letter.

materials. 44 Comp. Gen. at 696. The purchase orders stated that manuscripts of the materials to be printed and specifications of the work to be performed by GPO would follow. *Id.* at 698. USTS provided these materials to GPO several months later in fiscal year 1965. *Id.* We concluded that a USTS purchase order for printing services for manuscript material to be provided later did not constitute a firm and complete order needed to create a binding obligation. *Id.* Instead, USTS incurred an obligation in fiscal year 1965 when it provided the manuscripts to GPO. *Id.* An order that lacks a specific, definite description of the goods or services to be provided is not firm and complete.¹² B-196109, Oct. 23, 1979 (National Park Service did not incur an obligation against fiscal year 1978 appropriations with purchase order lacking specificity; the Service incurred an obligation when it provided specifications to vendor in fiscal year 1979).

The recording statute provides additional support for this proposition. As pertinent here, it requires that an interagency agreement be evidenced by a written document, executed during the period of availability of the appropriation used, for “*specific goods to be delivered . . . or work . . . to be provided.*” 31 U.S.C. § 1501(a) (emphasis added). The statute’s obvious purpose is to ensure that the parties understand and accept their rights and duties under the agreement and that Congress, as part of its oversight role, knows how agencies are obligating their funds. *See* 71 Comp. Gen. 109, 110 (1991). *See generally* Senate Committee on Government Operations, *Financial Management in the Federal Government*, S. Doc. No. 87-11, at 85 (1961). In other words, Congress did not want agencies to record obligations against current appropriations based on inchoate agreements—whether with vendors or other agencies. *See* 31 U.S.C. § 1501(a)(1).

Here, only one MIPR was sufficiently specific to establish an obligation against DOD’s appropriation—the April 2004 MIPR for “XEROX 3400 Printers” that GovWorks used to finance contract 44435. MIPR 4GINTMM054, Apr. 9, 2004. The remaining MIPRs, used to finance contracts 41181, 43387, and 43270, were too vague in their descriptions to establish DOD’s and GovWorks’s rights and duties. For example, several MIPRs sought “equipment through the Pentagon IT Store.” *E.g.*, MIPR 4MINTMM125, Sept. 17, 2004. Without further advice from DOD, GovWorks would not know whether any particular equipment purchase at the Pentagon IT Store satisfied DOD’s needs. Several other MIPRs sought “secondary site [defense

¹² The specificity required of interagency agreements under the recording statute is similar, even if not necessarily identical, to the specificity required of solicitations under the Federal Acquisition Regulation (FAR). For example, the FAR requires that solicitations, even for indefinite-quantity contracts, describe the “scope, nature, complexity, and purpose of the supplies or services the Government will acquire.” 48 C.F.R. § 16.504(a)(4). *See also* B-277979, Jan. 26, 1998 (agency’s solicitation was invalid because it did not “reasonably describ[e] the general scope, nature, complexity, and purpose of the services or property to be procured under the contract”).

messaging system] requirements,” without specifying the details needed for GovWorks to address DOD’s needs. *E.g.*, MIPR 3LINTMM101, Aug. 29, 2003.

Not until DOD e-mailed GovWorks identifying specific items did DOD perfect its orders and incur obligations. 44 Comp. Gen. 695. For Contract 41181, DOD incurred an obligation against its appropriation on November 9, 2004, when it e-mailed GovWorks descriptions of specific goods it sought. Bucceroni E-mail. For Contract 43387, DOD incurred an obligation against its appropriation when it transmitted its Statement of Work to GovWorks.¹³ For Contract 43270, DOD incurred an obligation in May 2005, when it perfected its order for body armor and gamma plates.¹⁴ DuCom E-mail 1; DuCom E-mail 2. DOD and GovWorks, therefore, must use fiscal year 2005 funds for Contracts 41181, 43387, and 43270. *See* B-302760, May 17, 2004. To the extent that DOD has recorded obligations against its prior fiscal year funds, DOD should adjust its accounts, deobligating those fiscal year funds and obligating fiscal year 2005 funds. Should DOD lack sufficient fiscal year 2005 funds, it must report Antideficiency Act violations to the President and Congress, with a copy of the report to the Comptroller General. 31 U.S.C. § 1351.

Bona Fide Needs Rule

An appropriation is available for obligation only to fulfill a genuine need of the period of availability for which it was made. B-308010, Apr. 20, 2007. This maxim, the *bona fide* needs rule, applies to all uses of federal funds, including contracts and interagency transactions. B-286929, Apr. 25, 2001. The *bona fide* needs rule is rooted in 31 U.S.C. § 1502(a). This statute provides that a fixed-term appropriation is available only for payment of expenses “properly incurred” during the appropriation’s period of availability and to complete contracts “properly made” during that period.

In other words, if an agency with an identified *bona fide* need does not act to fill that need before the end of an appropriation’s period of availability, that appropriation is no longer available to fill that need. B-286929, Apr. 25, 2001. If the agency acts in a subsequent fiscal year to meet its continuing need, it must obligate the subsequent fiscal year’s appropriation, notwithstanding that the *bona fide* need was first identified, but not satisfied, in a prior fiscal year. *Id.*

¹³ Neither DOD nor GovWorks provided us with documentation of when DOD transmitted the Statement of Work to GovWorks. It is clear, however, that DOD did this sometime between April 15, 2005 (the date of the original Statement of Work) and June 30, 2005 (the date GovWorks signed the contract).

¹⁴ Neither DOD nor Interior provided us with documentation of an exact date that DOD perfected the order that resulted in Contract 43270. Nevertheless, the circumstances surrounding Contract 43270 show that DOD perfected its order sometime between May 11 and May 20, 2005.

As discussed above, for Contracts 43270, 41181, and 43387, DOD incurred obligations in fiscal year 2005, but DOD and GovWorks used expired funds to cover these obligations. As previously discussed, although DOD transferred these funds to GovWorks during their period of availability, the MIPRs did not obligate these funds and they were no longer available for obligation at the time they were used. Consequently, GovWorks improperly used the expired funds to enter into these three contracts in violation of the *bona fide* needs rule.

For Contract 44435, although DOD and GovWorks had entered into a valid interagency agreement obligating funds, DOD and GovWorks improperly used the fiscal year 2004 funds to finance a fiscal year 2005 contract. Like a contract with a private vendor, funds obligated for an interagency agreement with a franchise fund are used to pay for the supplies or services ordered.¹⁵ However, the fact that GovWorks did not execute Contract 44435 until almost 17 months after executing the interagency agreement, and 11 months after the end of fiscal year 2004, indicates that Contract 44435 did not satisfy a *bona fide* need of fiscal year 2004.

Of course, a performing agency should have a reasonable period of time to use transferred funds, depending on the nature of the order.¹⁶ Here, DOD incurred an obligation against its fiscal year 2004 appropriation on April 9, 2004, when it transferred fiscal year 2004 funds to GovWorks with a MIPR seeking “XEROX 3400 Printers.” GovWorks did not execute Contract 44435 to acquire printers for DOD until almost 17 months later and 11 months after the end of fiscal year 2004. Contract 44435. We have been provided no information suggesting that the printers GovWorks purchased on DOD’s behalf are anything but readily available commercial items that GovWorks could have purchased on DOD’s behalf with little lead time. As such, we find it unreasonable that GovWorks took 17 months to execute Contract 44435. Rather than fulfilling a *bona fide* need of fiscal year 2004, Contract 44435 at best filled a need of fiscal year 2005. GovWorks improperly used fiscal year 2004 funds to purchase the printers.

¹⁵ Under the Economy Act, 31 U.S.C. § 1535, an ordering agency must deobligate any fixed year funds at the end of their period of availability to the extent that the performing agency has not performed or incurred valid obligations under the agreement. 31 U.S.C. § 1535(d); B-289380, July 31, 2002. When an agency validly obligates its funds through an interagency agreement not governed by the Economy Act, the ordering agency does not have to deobligate its funds at the end of their period of availability. B-302760, May 17, 2004; B-286929, Apr. 25, 2001.

¹⁶ In 1984, we concluded that because Army regulations required use of transferred funds within 90 days from receipt of an order, DOD industrial funds had not begun work ordered by other DOD components within a reasonable period of time when work began more than 90 days after receipt. GAO, *Improper Use of Industrial Funds by Defense Extended the Life of Appropriations Which Otherwise Would Have Expired*, GAO/AFMD-84-34 (Washington, D.C.: June 5, 1984).

As with the other three contracts, GovWorks and DOD should adjust their accounts to deobligate DOD's fiscal year 2004 appropriations and record the obligation for Contract 44435 against fiscal year 2005 appropriations. See B-307137, July 12, 2006. Should DOD lack sufficient fiscal year 2005 funds, it must report Antideficiency Act violations to the President and Congress, with a copy of the report to the Comptroller General. 31 U.S.C. § 1351. GovWorks should return to DOD any expired DOD funds that GovWorks retains that are not properly obligated. See B-288142, Sept. 6, 2001.

Parking

For almost 4 years, DOD's Comptroller has expressed concern about the possibility of DOD components "banking," or "parking," DOD funds with other agencies in the course of interagency agreements. In a 2003 memorandum issued departmentwide, the Comptroller alerted DOD to media attention focusing "on the impropriety of using interagency agreements to 'bank' funds that would otherwise expire at the end of the fiscal year." Dov S. Zakheim, Office of the Under Secretary of Defense, Comptroller, Memorandum for the Chairman of the Joint Chiefs of Staff, *et al.*, *Fiscal Principles and Interagency Agreements*, Sept. 25, 2003.

Distinguishing Economy Act orders from non-Economy Act orders, the Comptroller explained that with some federal agencies, such as GovWorks, who have legal authority separate from the Economy Act, DOD need not retrieve DOD funds advanced to the servicing agency but not yet used by the servicing agency.¹⁷ *Id.* The Comptroller noted, however, that "an interagency agreement must be based upon a legitimate, specific and adequately documented requirement representing a *bona fide* need of the year in which the order is made." *Id.* The Comptroller advised, "If these basic conditions are met, these servicing agencies may retain . . . the funds in the *following* fiscal year." *Id.* (emphasis in original). The Comptroller admonished DOD officials to "resist the misguided desire to bank government funds through improper use of interagency agreements," and warned that "[m]isuse of interagency agreements may result in disciplinary action, adverse media attention and additional congressional limitations and oversight Department-wide." *Id.*

The Comptroller's Office reiterated its concern in 2005 and provided additional guidance. Teresa McKay, Deputy Chief Financial Officer, Office of the Under Secretary of Defense, Comptroller, Memorandum for the Assistant Secretary of the Army (Financial Management and Comptroller), *et al.*, *Proper Use of Interagency Agreements for Non-Department of Defense Contracts Under Authorities Other Than the Economy Act*, Mar. 24, 2005 ("[I]t appears that some interagency agreements continue to be used in an attempt to keep funds available for new work after the period of availability for those funds expired.").

¹⁷ See footnote 15.

In October 2006, the Comptroller's Office issued detailed policy and procedures, amending the DOD Financial Management Regulation, for non-Economy Act interagency agreements. Robert McNamara, Acting Deputy Chief Financial Officer, Office of the Under Secretary of Defense, Comptroller, Memorandum for the Secretaries of the Military Departments, *et al.*, *Non-Economy Act Orders*, Oct. 16, 2006. The Comptroller required that DOD components execute such interagency agreements using MIPRs, accepted by the servicing agency, including, among other things, "a firm, clear, specific, and complete description of the goods or services ordered," "[a] statement of work that is specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself," and "[s]pecific performance or delivery requirements." *Id.* ¶¶ C.2, C.4. The Comptroller specified that the interagency agreement "must serve a bona fide need arising, or existing, in the fiscal year (or years) for which the appropriation is available for new obligations." *Id.* ¶ C.7. The Comptroller provided instructions for components to retrieve from a servicing agency expired DOD funds to ensure that they are not used for new obligations.¹⁸ *Id.* ¶ D.2.d.

Unfortunately, the Comptroller's fears, in this case at least, were realized. Clearly, DOD parked funds at GovWorks. An agency may not extend the availability of its appropriated funds by transferring them to another agency. B-288142, Sept. 6, 2001. DOD transferred funds to GovWorks using indefinite, nonspecific MIPRs, and GovWorks held these funds, in some cases for as long as 50 months. DOD improperly directed GovWorks to use expired DOD funds for these contracts. GovWorks, for one contract, improperly substituted expired funds from previous fiscal years. DOD and GovWorks officials share responsibility for the transactions at issue here and should be accountable. Because DOD funds were used to finance the agreements and subsequent contracts, DOD's responsibility is obvious. GovWorks, acting as DOD's contracting agent, also is responsible for ensuring proper use of the funds entrusted to it. In this case, officials of both agencies acted in disregard of the recording statute and the *bona fide* needs rule, parking DOD funds at GovWorks and possibly violating the Antideficiency Act.

DOD has already advised GovWorks "that any funds in excess of \$100,000 provided . . . to GovWorks before [May 31, 2007] that have not already been placed on contract by GovWorks must be returned to [DOD] immediately." Letter from Shay D. Assad, Director, Defense Procurement and Acquisition Policy, Office of the Undersecretary of Defense, Acquisition, Technology and Logistics, to Nina Rose Hatfield, Deputy Assistant for Business Management and Wildland Fire, Department of the Interior, May 31, 2007. DOD also has stopped the practice of advancing funds to GovWorks, with any future payments to be based on billings for completed

¹⁸ See also 1 TFM Bulletin No. 2007-03, Attachment I, ¶ III.B.2, Oct. 1, 2006 (ordering agencies should monitor the activity and age of an order and where there has been no activity for more than 180 days, the ordering agency "shall determine the reason for the lack of activity on the order").

services or delivered goods. Letter from Robert P. McNamara, Office of the Undersecretary of Defense, Comptroller, to Nina R. Hatfield, Deputy Assistant for Business Management and Wildland Fire, Department of the Interior, Feb. 7, 2007. In addition, as we noted earlier, DOD must adjust its appropriations accounts to record obligations for these four contracts against its fiscal year 2005 appropriations. If DOD has insufficient unobligated balances in these appropriations, DOD must report violations of the Antideficiency Act. 31 U.S.C. § 1351.

CONCLUSION

For the reasons discussed above, DOD and GovWorks should review and adjust their accounts for the four contracts reviewed here. We further suggest that GovWorks examine its accounts to identify interagency agreements that lack the requisite specificity. For those agreements that do not constitute firm and complete orders, GovWorks should so inform the ordering agency and return any funds advanced. GovWorks should also develop adequate internal controls to ensure that it does not accept orders lacking the requisite specificity to constitute firm and complete orders nor use expired funds to enter into contracts on behalf of the ordering agency.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Interagency Agreements—Obligation of Funds under an Indefinite Delivery, Indefinite Quantity Contract

File: B-308969

Date: May 31, 2007

DIGEST

The Department of the Interior, National Business Center, awarded a 1-year indefinite delivery, indefinite quantity contract (IDIQ) on behalf of the Department of Defense (DOD), having a period of performance from July 1, 2003, to June 30, 2004. The contract required the government to purchase a minimum of \$1 million in services from the contractor. The entire minimum amount applicable to the IDIQ contract should have been obligated against fiscal year 2003 funds; however, Interior and DOD only charged \$45,000 to the proper fiscal year appropriation. Accordingly, Interior and DOD should adjust their accounts to correct the improper obligation.

DECISION

The Inspector General for the Department of the Interior requests our decision under 31 U.S.C. § 3529 regarding issues raised during an audit of transactions between the Department of the Interior (Interior) and the Department of Defense (DOD).¹ This

¹ Letter from Earl E. Devaney, Inspector General, Office of the Inspector General, Department of the Interior, to David M. Walker, Comptroller General of the United States, Jan. 22, 2007 (Devaney Letter). This request arose out of the Inspector General's report on an audit of transactions between the Department of Defense (DOD) and the Department of the Interior (Interior). U.S. Department of the Interior Office of Inspector General, *FY 2005 Department of the Interior Purchases Made on Behalf of the Department of Defense*, Report No. X-IN-MOA-0018-2005 (Jan. 9, 2007), available at www.doioig.gov/upload/2007-G-0002.txt (last visited on May 30, 2007) (Interior IG Report). The Inspector General for the Department of Defense also audited many of these transactions and reported results in U.S. Department of Defense Office of Inspector General, *FY 2005 DoD Purchases Made Through the*

(continued...)

decision addresses the transaction involving DOD's Personnel Security Research Center (PERSEREC) and Interior's National Business Center Acquisition Services Division, Southwest Branch (SWB), for acquisition of support services for PERSEREC.²

The issue is whether SWB and/or DOD violated the Antideficiency Act when SWB awarded a 1-year indefinite delivery, indefinite quantity (IDIQ) contract on behalf of PERSEREC. The contract specified a guaranteed minimum of \$1 million over a 3-year period. Interior obligated \$45,000 at the time of award and \$955,000 the following fiscal year.

As explained below, SWB should have obligated the contract's guaranteed minimum of \$1 million at the time of award using the fiscal year funds of the year of contract award, 2003. Because SWB obligated only \$45,000 of the \$1 million from fiscal year 2003 appropriations and incorrectly obligated the balance from fiscal year 2004 appropriations, it potentially risked committing an Antideficiency Act violation. It should now adjust its accounts to reflect the proper obligation of fiscal year 2003 funds for the full amount of the minimum. Also, since SWB was acting as DOD's contracting agent and because DOD appropriations ultimately funded the contract, as SWB adjusts its accounts, DOD should also adjust its accounts. As with SWB, DOD should have obligated its fiscal year 2003 funds in the amount of the contract's guaranteed minimum, and it incorrectly obligated the balance from fiscal year 2004 appropriations.³

Our practice when rendering decisions is to obtain the views of the relevant federal agencies to establish a factual record and to elicit the agency's legal position on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington D.C.: Sept. 2006), available at www.gao.gov/legal.htm. In this case, we contacted the General Counsel of DOD and the Solicitor of Interior to obtain their legal views and obtain factual information regarding the above-

(...continued)

Department of the Interior, Report No. D-2007-044 (Jan. 16, 2007), available at www.dodig.osd.mil/Audit/reports/07report.htm (last visited on May 30, 2007).

² We will be issuing two companion decisions responding to the Interior Inspector General request: B-309181, relating to authority to enter into a lease, and B-308944, relating to expiration of funds transferred in interagency agreements, in the near future.

³ SWB and DOD must determine whether the adjustments to their respective accounts result in any violation of the Antideficiency Act, 31 U.S.C. § 1341(a). To the extent that there are insufficient fiscal year 2003 appropriations available for obligation, SWB and DOD should report the deficiencies in accordance with the Antideficiency Act. B-289209, May 31, 2002.

mentioned transaction. The Solicitor provided documents and responses to our request for factual information. Letter from David Bernhardt, Solicitor of the Interior to Thomas H. Armstrong, Assistant General Counsel, GAO, Apr. 20, 2007 (Bernhardt Letter). He declined, however, to provide us with his legal views regarding this matter. *Id.* The General Counsel of DOD also failed to respond timely to our request for factual information or to our offer to submit legal views. Although a response from the DOD General Counsel would have been useful in our decision making process, we were able to obtain an adequate record upon which to consider fully the issues raised through documents provided to us and public documents such as Interior's and DOD's Inspector General reports.

BACKGROUND

The Department of the Interior National Business Center, Acquisition Services Division, Southwest Branch (SWB) provides acquisition services to other government agencies. See www.nbc.gov/organization/index.html (last visited May 30, 2007). The Center's operations are financed by the working capital fund established by 43 U.S.C. § 1467. That section provides:

“There is established a working capital fund of \$300,000, to be available without fiscal year limitation, for expenses necessary for the maintenance and operation of . . . such . . . service functions as the Secretary determines may be performed more advantageously on a reimbursable basis. Said fund shall be reimbursed from available funds of bureaus, offices, and agencies for which services are performed at rates which will return in full all expenses of operation, including reserves for accrued annual leave and depreciation of equipment.”

The fund is a revolving fund which charges its customers fees for the costs of the services provided. On February 11, 2003, SWB awarded a contract pursuant to an interagency agreement between DOD and SWB to Northrop Grumman Mission Systems to provide support to the Defense Personnel Security Research Center (PERSEREC), contract number NBCCHD030003.

PERSEREC was established in 1986 following a number of espionage cases involving United States employees. Devaney Letter, enclosure at tab 3. Its mission is to improve the effectiveness, efficiency, and fairness of DOD's personnel security systems. *Id.* It conducts long-term programmatic research for the security and intelligence communities, provides studies and analyses supporting policy formation and systems operation, disseminates research information to security policymakers and practitioners, and develops tools and job aids for security professionals. *Id.* However, PERSEREC has not had enough staff to accomplish its mission and has outsourced its research since 1987. *Id.*

The contract calls for Northrop Grumman to provide services to design and conduct personnel security research and development tasks. Contract § C.1. The contract is an indefinite delivery, indefinite quantity contract. Contract § B.1. At the time of award, February 11, 2003, the contract stated that the period of performance was “1 July 2003 through 30 June 2004.” Contract § F.4. SWB orders services under the contract by issuing cost-plus-fixed-fee task orders to the contractor. Contract § B.1. Another clause of the contract, I.13, entitled “Indefinite Quantity,” provided in part that “[t]he Government shall order at least the quantity of supplies or services designated in the Schedule as the ‘minimum’.” The contract maximum is \$46,000,000. Contract § F.4. The contract states that the minimum guarantee is “\$1,000,000 over a 3-year period.” Contract § B.2.

SWB did not record any obligation at the time of contract award. SWB, using funds transferred to it by DOD Military Interagency Purchase Requests (MIPRs), recorded obligations as it issued task orders. DOD recorded obligations upon SWB’s acceptance of the MIPRs. On October 18, 2002, DOD transferred \$175,000 of fiscal year 2003 funds from its Office of the Secretary, Operations and Maintenance appropriations.⁴ SWB issued its acceptance of the MIPR on the same date. Interior held the transfer in its working capital fund until September 30, 2003, when it issued its first task order. At that time, SWB obligated \$45,000 of the \$175,000 DOD transferred to cover the task order. Bernhardt Letter enclosure, tab A.

SWB issued a second task order and four amendments after receiving and accepting MIPRs to finance them, as follows:

- On November 3, 2003, DOD submitted MIPR No. QS4H5A44F039MP for Task Order 0002 in the amount of \$422,454. On November 13, 2003, SWB issued its acceptance of the MIPR, and on December 3, 2003, SWB issued the task order.
- On February 12, 2004, DOD transmitted a second MIPR for Task Order 0002 in the amount of \$291,000; SWB accepted the same day. On February 20, 2004, SWB issued the first amendment to Task Order 0002 in the same amount as the second MIPR.
- On April 4, 2004, DOD transmitted the third MIPR for \$3,138,834; SWB’s acceptance followed on April 9, 2004. On April 20, 2004, SWB issued the second amendment to Task Order 0002 in the same amount as the third MIPR.

⁴ MIPR No. QS3H5A33F011MP, Oct. 18, 2002.

- On July 20, 2004, DOD transmitted a MIPR in the amount of \$795,350 that SWB accepted the same day; on August 6, 2004, SWB issued the third amendment to Task Order 0002 for that same amount.
- On September 29, 2004, DOD transmitted a MIPR for \$200,000; SWB accepted the MIPR on September 30, 2004, and issued another amendment to Task Order 0002 on September 30, 2004.

The request for this decision stems from a finding in the Interior Office of Inspector General report cited above. The IG reported finding a potential Antideficiency Act violation relating to contract NBCCHD030003. The report concluded that by agreeing to pay a minimum of \$1 million over a 3-year period at a time before Congress had appropriated funds for all 3 years, Interior violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B), because it obligated funds in advance of appropriations. Interior included an “Availability of Funds for the Next Fiscal Year” clause in the contract, as set forth in section 52.232-19 of the Federal Acquisition Regulation. That clause provides:

“Funds are not presently available for performance under this contract beyond _____. The Government’s obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, until funds are made available to the Contracting Officer for performance and until the Contractor receives notice of availability, to be confirmed in writing by the Contracting Officer.”

41 C.F.R. § 52.232-19.

SWB did not fill in the blank spaces specifying in the clause the last date that appropriations would be available for contract performance and the date after which no government liability would arise until additional funds were made available. The IG’s position is that without specifying those dates, the Availability of Funds clause does not protect the government from obligations beyond the fiscal year in which the contract was executed, when funds were available for the contract.

The Inspector General asks whether in awarding Contract NBCCHD030003, Interior and/or DOD violated the Antideficiency Act by agreeing to pay a minimum of \$1 million over a 3-year period before Congress had appropriated funds for all 3 years.

ANALYSIS

An agency must record an obligation against its appropriation at the time that it incurs a legal liability for payment from that appropriation. B-300480.2, June 6, 2003; B-300480, Apr. 9, 2003; 42 Comp. Gen. 733, 734 (1963). Clearly, an agency can incur a legal liability, that is, a claim that may be legally enforced against the government, by signing a contract. B-300480.2, June 6, 2003. We addressed the question of the proper obligation of an IDIQ contract in our decision, B-302358, Dec. 27, 2004:

“When an agency executes an indefinite-quantity contract such as an IDIQ contract, the agency must record an obligation in the amount of the required minimum purchase. . . . At the time of award, the government has a fixed liability for the minimum amount to which it committed itself. *See* [Federal Acquisition Regulation] 16.504(a)(1) (specifying that an IDIQ contract must require the agency to order a stated minimum quantity). An agency is required to record an obligation at the time it incurs a legal liability. 65 Comp. Gen. 4, 6 (1985); B-242974.6, Nov. 26, 1991. Therefore, for an IDIQ contract, an agency must record an obligation for the minimum amount at the time of contract execution.

“Further obligations occur as task or delivery orders are placed and are chargeable to the fiscal year in which the order is placed.”

Thus, in the case of an IDIQ contract, the government incurs a legal liability in the amount of the guaranteed minimum at the time at which it awards the contract.

Contract clause, I.13, entitled “Indefinite Quantity,”⁵ further supports our conclusion that SWB incurred an obligation at the time of contract award. It provides, in part (with emphasis added):

“This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. . . . The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the ‘maximum’. *The Government shall order at least the quantity of supplies or services designated in the Schedule as the ‘minimum’.*”

By using the words “shall order,” the emphasized sentence indicates that under the contract the government is liable to the contractor for the minimum specified in the contract. It therefore incurs a legal liability for that amount. This is so whether SWB

⁵ Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.216-22.

ever issues a task order to the contractor or not, and is so immediately upon contract award.

Accordingly, on February 11, 2003, SWB incurred a legal liability of \$1 million and should have obligated \$1 million on that date. SWB, however, did not obligate any funds at the time of contract award. As indicated above, SWB obligated only \$45,000 in fiscal year 2003 against fiscal year 2003 appropriations when it should have obligated the full amount of the minimum, \$1 million. All funds obligated under the contract after the \$45,000 for the first task order were obligated against fiscal 2004 appropriations. Consequently, SWB obligated \$955,000 against fiscal year 2004 appropriations that it should have obligated against fiscal year 2003 appropriations. SWB used fiscal year 2004 funds to satisfy an obligation established in fiscal year 2003. Fiscal year 2004 funds are not available to satisfy fiscal year 2003 obligations. 31 U.S.C. § 1502. As indicated above, DOD obligated and transferred the funds that SWB used for the task orders upon SWB's acceptance of DOD's MIPRs. Accordingly, DOD also obligated \$955,000 against fiscal year 2004 appropriations that should have been obligated against fiscal year 2003 appropriations.

Although we conclude that SWB and DOD are at risk of violating the Antideficiency Act, it is not for the reason that the IG suggests. As described in the background section above, the IG concluded that by agreeing to pay a minimum of \$1 million over a 3-year period⁶ at a time before Congress had appropriated funds for all 3 years, SWB obligated funds in advance of appropriations and violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B). However, the contract, if obligated properly as described above, does not result in the agency's making obligations in advance of appropriations. If, as it should have, SWB had obligated the entire minimum at contract award, it would have completely satisfied the government's initial liability under the contract. No further obligation would remain under the contract that would require an appropriation in a future fiscal year to fund it unless and until the government placed orders exceeding the \$1 million minimum.

Interior stated in response to our development letter that the failure to obligate the minimum in the first contract fiscal year did not result in the government's being obligated for the payment of funds in advance of appropriations because, in its view, the contract ensures that the government has no legal liability unless and until SWB submits a task order to the contractor and that the task orders are not submitted unless they are fully funded. (Bernhardt Letter, enclosure, tab D.) Interior notes

⁶ Since the contract period is for one year, we asked SWB the meaning of the phrase, "over a 3-year period." Telephone conversation between Keith Larsen, Attorney Advisor, Department of the Interior, and Jonathan Barker, Senior Attorney, GAO, May 24, 2007. SWB stated that it initially considered using a multi-year contract, and the phrase was included in the solicitation. *Id.* When SWB awarded the contract as a 1-year contract, SWB mistakenly neglected to remove the phrase. *Id.*

that the contract at award clearly indicated that no funds had been allotted to it. Contract, at 1. Each task order set out a specific period of performance, an end date for the availability of funds, and the funded amount. For this reason, Interior maintains that the task orders themselves provided protection against the obligation of funds in advance of appropriations. Interior relies on the language of clause B.1 of the contract to support its position. Interior states that the clause “provides that all services will be obtained through the issuance of task orders, and therefore the basic IDIQ contract did not allot or obligate any funds on the contract.” (Bernhardt Letter, enclosure, tab C).

As indicated from our discussion above, Interior’s view of how funds should have been obligated under the contract is incorrect, as is its interpretation of clause B.1. The actual language of the clause reads, “This is an Indefinite Delivery, Indefinite Quantity (IDIQ) contract. All supplies and services will be obtained through the issuance of Cost-Plus-Fixed-Fee task orders. Task orders will be issued by a Contracting Officer with the Department of the Interior, National Business Center, Acquisition Services Division, Southwest Branch.” The clause does not speak to the funding of the contract directly in any way. Rather, it definitizes for the parties the authorized manner in which services may be ordered under the contract.⁷ Acceptance of MIPRs for task orders does serve as a trigger for the additional obligation of appropriations under the contract, as Interior maintains, but only, as explained above, after the contract minimum, properly obligated at the time of award, has been expended.

In light of the above, SWB and DOD may have violated the Antideficiency Act by failing to obligate funds for the PERSEREC contract correctly. SWB should have obligated the entire amount of the contract’s guaranteed minimum at the time of contract award against fiscal year 2003 appropriations. Likewise, DOD should have obligated the guaranteed minimum against its fiscal year 2003 appropriations. Then, once SWB had issued task orders sufficient to exhaust the minimum, it should have charged the funds needed to cover the amounts remaining for Task Order 0002 to fiscal year 2004 appropriations. Likewise, once DOD had obligated the minimum, DOD should have obligated fiscal year 2004 appropriations for the remaining amount.

Because of its incorrect obligation of funds, SWB must now adjust its accounts. It should deobligate \$955,000 in funds obligated against fiscal year 2004 appropriations and should instead charge the obligation to fiscal year 2003 appropriations, the appropriations that were current at the time of contract award when SWB incurred

⁷ We note that SWB accepted MIPRs and issued amendments to Task Order 0002 to add services after the expiration of the 1-year period of performance (June 30, 2004). These actions have no bearing on the legal liability of the government at the time it entered into the IDIQ contract.

the liability for the guaranteed minimum. DOD should also make corresponding adjustments to its accounts. SWB and DOD must determine whether those adjustments result in any violations of the Antideficiency Act, 31 U.S.C. § 1341(a). To the extent that there are insufficient fiscal year 2003 appropriations available for obligation, they should report the deficiency in accordance with the Antideficiency Act. B-289209, May 31, 2002.

CONCLUSION

SWB should have obligated its IDIQ contract's guaranteed minimum of \$1 million at time of award, using the fiscal year funds of the year of contract award, 2003. Similarly, DOD should have obligated fiscal year 2003 funds in the amount of the guaranteed minimum. Because Interior and DOD obligated only \$45,000 of the \$1 million from fiscal year 2003 appropriations, and incorrectly obligated the balance from fiscal year 2004 appropriations, the agencies are potentially at risk of committing an Antideficiency Act violation. They should now adjust their accounts to reflect the proper obligation of fiscal year 2003 funds for the full amount of the minimum.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Interagency Agreements—Use of an Interagency Agreement between the Counterintelligence Field Activity, Department of Defense, and GovWorks to Obtain Office Space

File: B-309181

Date: August 17, 2007

DIGEST

Without a delegation from the General Services Administration or independent statutory authority to enter into a lease, neither GovWorks (a Department of the Interior franchise fund) nor the Counterintelligence Field Activity (CIFA) of the Department of Defense (DOD) had authority to obtain office space through a third-party lease. Unless ratified by an appropriate government official, the agreement for office space is unenforceable against the government. GovWorks and CIFA cannot circumvent federal statutory and regulatory requirements on leasing by bundling the lease agreement in a contract for services. Without ratification, all payments made under this third-party lease are improper payments, and DOD and GovWorks should take appropriate action to resolve them.

There is no evidence to suggest that CIFA violated the Antideficiency Act. Although CIFA and GovWorks entered into an agreement to obtain office space through a third-party lease without requisite authority, CIFA does have an appropriation that is otherwise available for the purpose of leasing office space—the Operation and Maintenance, Defense-wide appropriation. CIFA recorded these costs as obligations of this appropriation and transferred funds to GovWorks to pay for them. There is no indication, however, that CIFA recorded or transferred amounts in excess of or in advance of the appropriation. The conclusion that neither CIFA nor GovWorks violated the Antideficiency Act does not diminish or excuse CIFA's and GovWorks's disregard of federal statutes and policy, involving the government in an unauthorized transaction and millions of dollars of improper payments.

DECISION

The Inspector General (IG) for the Department of the Interior requests our decision under 31 U.S.C. § 3529 regarding a transaction involving the Department of Defense's (DOD) Counterintelligence Field Activity (CIFA) and GovWorks, a Department of the

Interior (Interior) franchise fund, for acquisition of space to consolidate CIFA's activities.¹

The IG asked whether either CIFA or GovWorks had the authority to obtain office space to consolidate CIFA's activities, and, if not, whether CIFA and/or GovWorks violated the Antideficiency Act, 31 U.S.C. § 1341. For the reasons stated below, we conclude that neither CIFA nor GovWorks had independent authority to obtain office space.² CIFA desired additional office space, identified the desired space, negotiated terms for the space, and then directed GovWorks to sign a contract with the third party that included all the terms of the lease. GovWorks was acting as CIFA's agent in entering into the contract. Using an interagency agreement and a contract with a third party, CIFA and GovWorks circumvented federal laws and regulations with regard to obtaining office space through a lease. Neither had authority to enter into the multiyear lease that is at the heart of this transaction. Their actions resulted in a void contract, and payments made under it constitute improper payments. CIFA and GovWorks must take appropriate steps to resolve them.

Neither CIFA nor GovWorks violated the Antideficiency Act. Although CIFA and GovWorks entered into an agreement to obtain office space through a third-party lease without requisite authority, CIFA does have an appropriation that is otherwise available for the purpose of leasing office space—the Operation and Maintenance, Defense-wide appropriation. CIFA recorded these costs as obligations of this appropriation and transferred funds to GovWorks to pay for them. There is no indication, however, that CIFA recorded or transferred amounts in excess of or in

¹ Letter from Earl E. Devaney, Inspector General, Office of the Inspector General, Department of the Interior, to David M. Walker, Comptroller General of the United States, Jan. 22, 2007 (Devaney Letter). This request arose out of the Inspector General's report on an audit of transactions between DOD and Interior. U.S. Department of the Interior Office of Inspector General, *FY 2005 Department of the Interior Purchases Made on Behalf of the Department of Defense*, Report No. X-IN-MOA-0018-2005 (Jan. 9, 2007), available at www.doioig.gov/upload/2007-G-0002.txt (last visited on July 16, 2007) (Interior IG Report). The Inspector General for the Department of Defense also audited many of these transactions and reported results in U.S. Department of Defense Office of Inspector General, *FY 2005 DoD Purchases Made Through the Department of the Interior*, Report No. D-2007-044 (Jan. 16, 2007), available at www.dodig.osd.mil/Audit/reports/07report.htm (last visited on July 16, 2007) (DOD IG Report).

² In response to the Interior IG request, we issued two other decisions—B-308969, May 31, 2007, relating to obligation of funds under an indefinite delivery, indefinite quantity contract, and B-308944, July 17, 2007, relating to GovWorks's use of expired DOD funds.

advance of the appropriation. The conclusion that neither CIFA nor GovWorks violated the Antideficiency Act does not diminish or excuse CIFA's and GovWorks's disregard of federal statutes and policy, involving the government in an unauthorized transaction and millions of dollars of improper payments.

Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position in the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal.htm. In this regard, Interior and DOD responded to questions from our office. Letter from David L. Bernhardt, Solicitor of the Interior, to Thomas H. Armstrong, Assistant General Counsel, GAO, Apr. 20, 2007 (Bernhardt Letter); Letter from Roger F. Pitkin, Acting Deputy General Counsel (Fiscal), DOD, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, May 29, 2007. Interior provided the requested information but declined to provide its legal views in response to the questions we asked. Bernhardt Letter.

BACKGROUND

Interior established GovWorks as a franchise fund pursuant to authority of Public Law 104-208, div. A, title I, § 113, 110 Stat. 3009, 3009-200-01 (Sept. 30, 1996), and the Government Management Reform Act of 1994 (GMRA), Public Law 103-356, title IV, § 403, 108 Stat. 3410, 3413 (Oct. 13, 1994). Congress authorized certain agencies to establish franchise funds, like GovWorks, to provide "common administrative support services" to federal agencies more efficiently than through other means. Pub. L. No. 103-356, § 403.

In 2003, CIFA began investigating its options to obtain larger office space to collocate many of its activities. Devaney Letter, exhibit 17. CIFA is a field activity and combat support agency within DOD. The Secretary of Defense established CIFA—

“to develop and manage DoD Counterintelligence (CI) programs and functions that support the protection of the Department, including CI support to protect DoD personnel, resources, critical information, research and development programs, technology, critical infrastructure, economic security, and U.S. interests, against foreign influence and manipulation, as well as to detect and neutralize espionage against the Department.”

DOD Directive 5105.67 (Feb. 19, 2002). As of May 2003, contractor employees comprised almost 90 percent of the CIFA workforce and worked at various locations in the Washington metropolitan area. Bernhardt Letter, tab 3, B1. A presidential directive requiring CIFA and the Foreign Terrorist Tracking Task Force, a component of the Federal Bureau of Investigation, to share and exchange data to combat the Global War on Terrorism placed strain on CIFA operations and its ability

to consolidate its operations in the space capacity it had then. Devaney Letter, exhibit 19 at 2.

In February 2003, the Office of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence, and GovWorks entered into an interagency agreement to address CIFA's need to consolidate its workforce and work space issues. Interagency Agreement, Feb. 7, 2003. The agreement stated that CIFA needed "to consolidate CIFA programs and to provide space for multiple activities that are operated, sustained and controlled by Contractor personnel for" CIFA. *Id.* To achieve the consolidation, the agreement directed GovWorks to contract for the services of a Section 8(a) small business³ in an indefinite delivery, indefinite quantity (IDIQ) contract for facility acquisition. *Id.* The agreement further stated that the contractor "shall oversee a traditional commercial lease for Consolidation activities that include the negotiation and execution of a lease to provide contractor operations." The Director of CIFA and a financial officer for the Washington Headquarters Service (WHS) signed the agreement for DOD.⁴ *Id.*

On April 30, 2003, CIFA executed a Military Interdepartmental Purchase Request (MIPR) for "funding provided to consolidate CIFA programs and to provide space for multiple activities." Devaney Letter, exhibit 7. This MIPR transferred to GovWorks \$4,070,311 of the Operation and Maintenance, Defense-wide appropriation for fiscal year 2003. *Id.* GovWorks accepted this MIPR on May 1, 2003. Pitkin Letter, addendum.

In a letter dated May 28, 2003, from CIFA Director to GovWorks, CIFA approved a proposal submitted to GovWorks by a contractor, TKC Communications, Inc. (TKC), "to provide CIFA with a variety of critical management support functions including, but not limited to, the provision of contractor collocation space." Devaney Letter, exhibit 17. The Director explained that CIFA was in urgent need of "management support services including, among other things, commercial space in close proximity to CIFA's GSA leased offices." *Id.* Such space was necessary to "collocate the personnel and equipment of multiple contractors already providing technical support to CIFA." *Id.* CIFA directed GovWorks to accept this proposal and enter into a contract with TKC on CIFA's behalf. *Id.*

³ Section 8(a) of the Small Business Act established a program that authorizes the Small Business Administration (SBA) to enter into contracts with other agencies and award contracts to eligible subcontractors on a noncompetitive basis. 15 U.S.C. § 637(a). Under this program, SBA grants a preference to small businesses "owned and controlled by socially and economically disadvantaged individuals." *Id.*

⁴ WHS is a DOD field activity established to provide operational support and administrative services to specified DOD components, including facilities management and space acquisition for all DOD-occupied administrative space in the National Capital Region. DOD Directive 5110.4, ¶ 5.3.7 (Oct. 19, 2001).

On June 12, 2003, GovWorks awarded contract number 1435-04-03-RC-70941⁵ (Contract 70941) to TKC.⁶ Devaney Letter, exhibit 4. The contract stated that TKC would provide services, including office space and facilities management services, not to exceed \$100 million. *Id.* On the same day, GovWorks executed Task Order 73001 for “Monthly Rent and Other Direct Costs for a Monthly Facilities Lease.” Bernhardt Letter, tab 1, C2.

Task Order 73001 incorporated by reference the lease that TKC signed for office space in Crystal City, Virginia, at Crystal Square 5 as well as the terms and conditions of the proposal that TKC had submitted to GovWorks and that CIFA had approved on May 28, 2003. *See* Bernhardt Letter, tab 1, C2; Devaney Letter, exhibit 3 at 2 (Lease). The lease is for a term of 10 years and 7 months with varying annual rents that exceed \$6 million. Lease at 2. The proposal and lease contain identical termination clauses, which require the government to provide 12 months’ notice to terminate the lease and, in the event of early termination, to pay termination fees consisting of unamortized costs on the improvements made to the leased space by the property owner. Devaney Letter, exhibit 2 at 28 (proposal of TKC); Lease at 20. These termination fees range from \$14 million to \$180,000 depending upon the date of termination. Devaney Letter, exhibit 2 at 11–13; Lease, exhibit E. TKC agreed to provide other facilities management services including facilities and asset management, modifying the existing CIFA facility database and various facilities-related matters including access control, accounting for building occupants, emergency evacuation and response procedures, and procedures for power failure. Devaney Letter, exhibit 2 at 6.

Attached to Task Order 73001 was a schedule for 10 years of rent on the facility lease and 10 years of operating expenses. *Id.* The annual rent listed on the schedule gradually increases over the 10-year period from \$6.6 million to over \$9 million per year. The total amount in the contract for rent is approximately \$90 million and for “operating expenses” is approximately \$9 million. *Id.*

⁵ GovWorks, on behalf of CIFA, entered into two contracts with TKC on June 12, 2003. The second contract, contract number 1435-04-03-RC-73024, appears to be for “transitional services” for the amount of \$1,615,439.01. This decision only addresses Contract 70941.

⁶ The award names SBA as the prime contractor and TKC as the Section 8(a) subcontractor. Bernhardt Letter, tab 1, C1. Although nominally a prime contractor, SBA serves essentially as a conduit between the contracting agency and the small disadvantaged business. *See* B-225175, Feb. 4, 1987 (SBA is not responsible for procurement costs for defective goods delivered by a defaulting Section 8(a) small business contractor). The only sense in which SBA is expected to perform the contract is by subcontracting the work to eligible firms. *Id.*

From 2003 until the present, CIFA has executed various MIPRs transferring to GovWorks funds from the Operation and Maintenance, Defense-wide appropriation to pay for lease costs on the Crystal Square 5 office space and for GovWorks's administrative fee. Devaney Letter, exhibits 8–13; *see also* Bernhardt Letter, tab 5. DOD states that the space is currently occupied by both CIFA employees and contractor personnel. Pitkin Letter, addendum. As of 2006, 297 employees and 783 contractor personnel occupied the space at Crystal Square 5, and CIFA had paid more than \$26 million in lease costs.⁷ *Id.*

Both the Interior IG and the DOD IG audited the transactions between GovWorks and CIFA that resulted in the lease of property at Crystal Square 5. Interior IG Report at 6–7; DOD IG Report at 49–65. Both IGs concluded that neither CIFA nor GovWorks was authorized to enter into a lease agreement without a delegation of leasing authority from GSA, and they found that GSA has not provided a delegation for this lease arrangement. Interior IG Report at 6; DOD IG Report at 50–51. DOD IG contacted the Director of Leasing Policy and Performance Division of GSA to determine whether GSA would ratify the lease agreement. The Director declined to do so. DOD IG Report at 50. Both IGs also opined that, because both CIFA and GovWorks acted beyond the scope of their authorities, payments on the lease could result in an Antideficiency Act violation. Interior IG Report at 7; DOD IG Report at 52–53. The DOD IG noted that, in addition to acting beyond the scope of its authority, CIFA failed to comply with DOD policy requiring the WHS to coordinate with GSA for leases that exceed certain threshold amounts. *Id.* at 50.

DISCUSSION

Authority to Lease

According to the IG reports, both GovWorks and CIFA described the interagency agreement and Contract 70941 as agreements obligating the government to an IDIQ service contract and not to a lease. Interior IG Report at 6; DOD IG Report at 49. Although GovWorks and TKC may have styled their contract as an IDIQ contract, we look beyond the label of the contract to the actions of the parties and the terms of the contract to determine its legal effect. *See* B-302358, Dec. 27, 2004. It is clear from its terms that, through this contract, GovWorks obtained office space at Crystal Square 5 for CIFA. The costs of space are clearly outlined in the contract between GovWorks and TKC (Contract 70941) as well as TKC's proposal and TKC's lease for the Crystal Square 5 space, both of which were incorporated into the contract in Task Order 73001. Almost 90 percent of the costs of Contract 70941 are for office space at Crystal Square 5; the remaining costs are for facility management services. CIFA sought parties to enter into the lease and negotiated the terms of the lease. CIFA engaged GovWorks to obtain office space on its behalf. In our view,

⁷ Other agencies and DOD components presently occupy Crystal Square 5 space and pay CIFA for use of the space. This decision does not address the appropriateness of others' occupying and paying for the space in question.

Contract 70941 and Task Order 73001 clearly attempt to obligate the government to a long-term lease agreement for office space. Neither CIFA nor GovWorks can circumvent statutory and regulatory requirements on lease authority by bundling the lease with facility management services in an IDIQ contract. Either CIFA or GovWorks had to have some legal authority to enter into a 10-year lease for office space.

Accordingly, we turn to the Interior IG question regarding whether CIFA and/or GovWorks had the authority to lease office space. GSA holds general leasing authority for government agencies. Section 1 of the Reorganization Plan No. 18 of 1950, 5 U.S.C. app. 1, 40 U.S.C. § 301 note, transferred from federal agencies to the Administrator of GSA authority for “all functions with respect to acquiring space in buildings by lease” The Administrator has authority to enter into a lease on behalf of the government for a period not to exceed 20 years. 40 U.S.C. § 585. The Administrator may delegate this authority to an official in GSA or to the head of another federal agency. 40 U.S.C. § 121(d). Without specific statutory authority and absent GSA’s delegation of authority, a federal agency may not enter into a lease on its or the government’s behalf. B-202206, June 16, 1981.

Our research found no statutory authority that would allow GovWorks to obligate the United States to a lease nor has GovWorks or the Solicitor of Interior on behalf of GovWorks asserted such authority. Congress, however, has authorized DOD to lease real property in certain limited situations. For example, the military departments have authority to lease structures and real property in foreign countries that are needed for military purposes for terms of up to 10 years (15 years in Korea). 10 U.S.C. § 2675.

Also, the Secretary of Defense is authorized to lease facilities under 10 U.S.C. § 2661(b), and DOD has indicated that this authority could apply to acquiring space for contractor personnel required to be collocated with DOD employee personnel. Pitkin Letter at 1. Section 2661(b) provides, in relevant part: “The Secretary of Defense . . . may provide for . . . [t]he leasing of buildings and facilities.” Nevertheless, there is no need to dwell on this potential source of authority. CIFA in fact failed to follow agency policy and procedures in leasing under this statute. The Secretary of Defense has delegated his leasing authority to WHS. DOD Directive 5110.4, ¶ E2.1.1.20 (Oct. 19, 2001). In the event that an acquisition of space has a projected annual rent beyond a threshold amount determined annually by GSA, WHS is required to request GSA to coordinate congressional notification before the lease may be executed. DOD Instruction 5305.5 (June 14, 1999). The annual rent threshold amount for fiscal year 2003, the year this lease was executed, was \$2.21 million. *See* www.gsa.gov (last visited on July 16, 2007). The annual rent for Crystal Square 5 exceeded \$6 million. *See* Bernhardt Letter, tab 1, C2. There is no evidence that WHS sought GSA coordination of congressional notification before GovWorks entered into the contract for office space. Accordingly, even if the Secretary’s authority under section 2661(b) might otherwise apply, this authority was not properly exercised here.

Regardless, DOD could not have used section 2661(b) for this lease, because it was a lease for 10 years and 7 months and section 2661(b) does not provide the authority to enter into a multiyear agreement. A lease under authority of section 2661(b) would have had to have been structured differently; instead of a 10-year lease, a section 2661(b) lease would have had to have been structured as a 1-year lease with options to renew for future years. *See Leiter v. United States*, 271 U.S. 204 (1926).

For GovWorks or CIFA officials to have authority to enter into this 10-year lease, GSA would have had to delegate its leasing authority. As noted in both IG Reports, GSA has stated that it did not delegate authority to CIFA or GovWorks. Interior IG Report at 6; DOD IG Report at 50. GSA regulations set out various standing delegations that may give an agency authority to enter into a lease independent of GSA, including (1) categorical space delegations, (2) agency special purpose delegations, and (3) a delegation of authority under a program known as “Can’t Beat GSA Leasing.” 41 C.F.R. § 102-72.30. None of them apply to this transaction, however.

Categorical space delegation applies to specific types of space outlined in 41 C.F.R. § 102-73.155. None of these types apply to CIFA’s use of the Crystal Square 5 space. The agency special purpose delegations are standing delegations of authority from the Administrator to specific federal agencies to lease their own special purpose space. 41 C.F.R. § 102-73.160. Both DOD and Interior have special purpose delegations, 41 C.F.R. §§ 102-73.180,⁸ 102-73.200;⁹ however, none of the special purpose delegations would allow either CIFA or GovWorks to enter into a lease for office space to consolidate CIFA’s operations.

Under the third type of delegation, the “Can’t Beat GSA Leasing” program, GSA has delegated to the heads of all federal agencies the authority to enter into a lease for up to 20 years as long as the annual rent is below threshold amounts determined annually by GSA. 41 C.F.R. § 102-72.30(b). As noted above, the annual rent of the lease in question far exceeded the annual threshold amounts. Accordingly, neither CIFA nor GovWorks could have entered into this leasing arrangement pursuant to a standing delegation under the “Can’t Beat GSA Leasing” program.

⁸ GSA has delegated to DOD the authority to lease the following special purpose space: the Civil Air Patrol Liaison Offices, armories, a film library in the vicinity of Washington, D.C., mess halls, ports of embarkation and debarkation, post exchanges, the Postal Concentration Center in Long Island, N.Y., recreation centers, reserve training space, service clubs, and testing laboratories. 41 C.F.R. § 102-73.180.

⁹ GSA has delegated to Interior the authority to lease the following special purpose space: space in buildings and land incidental thereto used by field crews of the Bureau of Reclamation, the Bureau of Land Management, and the Geological Survey in areas where no other government agencies are quartered; and National Parks/Monuments Visitors Centers that are not general office or administrative space. 41 C.F.R. § 102-73.200.

Consequently, because neither CIFA nor GovWorks had authority to enter into the lease transaction, the government is not bound by the contract. *See* B-306353, Oct. 26, 2005, and cases cited therein. It is axiomatic that the United States cannot be bound beyond the actual authority conferred upon its officials by statute or regulation. *Id.* Where, as here, a government official with no authority purports to commit the government to a transaction, the contract is void *ab initio* and unenforceable. *See* B-204002, Mar. 31, 1982. It has long been recognized that an authorized government official possessing knowledge of the facts may give effect to an unauthorized act of another government official by subsequently ratifying the action. B-306353, Oct. 26, 2005. Only GSA has the requisite multiyear leasing authority to ratify the contract between GovWorks, on behalf of CIFA, with TKC for lease of office space. *See* 40 U.S.C. § 585. According to the DOD IG report, GSA's Director of Leasing Policy and Performance refused to ratify the contract in question, and we have no indication that GSA has changed its position in this regard.

Payments made by the government pursuant to void or otherwise unenforceable contracts are improper payments that should be recovered from the contractor. *See* 62 Comp. Gen. 337, 338–39 (1983) (the Department of Labor must recover payments made on contract provisions that were unenforceable because they violated a federal statute). *See also Sutton v. United States*, 256 U.S. 575, 579–80 (1921) (the War Department could recover payments to a contractor made on an unauthorized agreement). Thus, absent a ratification of the contract by GSA, GovWorks and CIFA should take appropriate action to resolve the improper payments made under this contract.¹⁰ Furthermore, all payments for rent due under the contract must cease to prevent future improper payment of government funds.

Application of the Antideficiency Act

The Interior IG also asked whether CIFA and/or GovWorks violated the Antideficiency Act by entering into a lease without proper authority. The Antideficiency Act prohibits a government official or employee from making an expenditure or an obligation that exceeds or is in advance of available appropriations. 31 U.S.C. § 1341(a). *See also* B-302710, May 19, 2004.

The appropriation used to make the lease payments, the Operations and Maintenance, Defense-wide appropriation, is available for lease payments. This

¹⁰ In resolving the issue of an improper payment, GovWorks may consider whether it may waive collection of some or all of the payments on the basis of the equitable theories of *quantum meruit* or *quantum valebant*. *See, e.g.*, 62 Comp. Gen. 337, 339 (1983). These theories require four findings. First, the contract would have been a permissible procurement had the proper procedures been followed. Second, the government must have received and accepted a benefit. Third, the claimant must have acted in good faith. Fourth, the amount to be paid must not exceed the reasonable value of the benefit received. *See* B-271163, May 22, 1996.

appropriation is available for “expenses . . . necessary for the operation and maintenance of activities and agencies of the Department of Defense . . . as authorized by law.” *See, e.g.*, Pub. L. No. 107-248, title II, 116 Stat. 1519, 1522–23 (Oct. 23, 2002). The DOD Financial Management Regulation directs DOD’s components to obligate an account within the Operation and Maintenance appropriation for leases of real property. DOD Federal Management Regulation 7000.14-R, vol. 2A, ch. 1, ¶ 0106, at 1-128–29.

While there is no authority for the underlying lease transaction, and, consequently, the lease is not enforceable against the government, CIFA and GovWorks did intend to commit the government to pay for the lease costs. An agency accounting records should reflect the agency’s actions. In that regard, CIFA recorded these costs as an obligation of the Operation and Maintenance, Defense-wide appropriation. Notwithstanding the fact that the obligation was not enforceable against the government, CIFA’s actions from an Antideficiency Act perspective, burdened the appropriation to the same extent. From the date that CIFA and GovWorks entered into the interagency transaction, CIFA has transferred to GovWorks funds from this appropriation to pay for lease costs. There is no evidence, however, that CIFA transferred or recorded amounts in excess of or in advance of the Operation and Maintenance, Defense-wide appropriation for any fiscal year since CIFA began occupying the space in 2003. Thus, neither CIFA nor GovWorks violated the Antideficiency Act.

This conclusion does not in any way diminish or excuse CIFA’s or GovWorks’s violation of law. The record in this case suggests that officials of both agencies acted in disregard of both statute and policy, effectively circumventing the statutory and regulatory framework for obtaining office space by lease, and DOD and Interior should take appropriate steps to address the accountability of those CIFA and GovWorks officials involved in this unauthorized transaction.

CONCLUSION

Regardless of how CIFA and GovWorks label the contract between GovWorks and TKC, the agreement, by its very terms, committed the government to a long-term lease for a period of approximately 10 years. GovWorks and CIFA cannot circumvent federal statutory and regulatory requirements on leasing by bundling the lease agreement in a contract for services. Because they did not have specific statutory authority to lease space or a delegation of leasing authority from GSA, neither CIFA nor GovWorks has authority to enter into an agreement or contract to lease the Crystal Square 5 office space. Thus, the contract for office space with TKC is not legally binding on the government unless ratified by an appropriate government official. Without ratification, all payments made under this lease are improper payments, and GovWorks should take appropriate action to resolve such improper payments.

There is no evidence to suggest that either CIFA or GovWorks violated the Antideficiency Act. Although CIFA and GovWorks entered into an agreement to

obtain office space through a third-party lease without requisite authority, CIFA does have an appropriation that is otherwise available for the purpose of leasing office space—the Operation and Maintenance, Defense-wide appropriation. CIFA recorded these costs as obligations of this appropriation and transferred funds to GovWorks to pay for them. There is no indication, however, that CIFA recorded or transferred amounts in excess of or in advance of the appropriation. The conclusion that neither CIFA nor GovWorks violated the Antideficiency Act does not diminish or excuse CIFA's and GovWorks's disregard of federal statutes and policy, involving the government in an unauthorized transaction and millions of dollars of improper payments.

A handwritten signature in black ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Continued Availability of Expired Appropriation for Additional Project Phases

File: B-286929

Date: April 25, 2001

DIGEST

The U.S. Total Army Personnel Command (PERSCOM) entered into an agreement with the General Services Administration's (GSA) Federal Systems Integration and Management Center (FEDSIM) to implement a declassification information management system pursuant to GSA's multiyear contract authority in 40 U.S.C. § 757. Although the agreement envisioned a three-phase project, PERSCOM obligated fiscal year 1997 funds to cover only the first phase. Because PERSCOM entered into an agreement for only the first phase of the declassification project and incurred an obligation during the period of availability of the appropriation only for the first phase, PERSCOM may not apply the expired balance of the amount originally obligated for the first phase of the project to complete the remaining project phases.

DECISION

The certifying officer for the U.S. Total Army Personnel Command (PERSCOM) requests a decision regarding the continued availability of a fiscal-year 1997 appropriation to cover additional phases of a project initiated through an interagency agreement with the General Services Administration (GSA), as authorized by 40 U.S.C. § 757. PERSCOM, in 1997, obligated its fiscal year 1997 appropriation in the amount of \$17.5 million for one phase of a three-phase project. To complete the first phase, PERSCOM needed only \$8.5 million of the total amount obligated. PERSCOM would now like to apply the remaining amount to the remaining two phases of the project. Because PERSCOM entered into an agreement incurring an obligation for only one phase of the project, it cannot now obligate and charge payments for additional phases to the expired fiscal year 1997 appropriation.

BACKGROUND

Executive Order (EO) 12958, Classified National Security Information, dated April 17, 1995, prescribes a uniform system for classifying, safeguarding, and declassifying national security information. Pursuant to E.O. 12958, the U.S. Army is

required to develop and implement a classified information management system for review of classified records prior to declassification to prevent the release of classified information that may have a negative impact on national security.

Department of the Army Headquarters delegated the mission of developing and implementing a declassification information management system to PERSCOM. To accomplish this task, PERSCOM entered into an agreement on May 2, 1997 with the GSA's Federal Systems Integration and Management Center (FEDSIM). FEDSIM provides a wide range of technical and contracting services to federal agencies related to the acquisition, management and use of information systems and technology.

The agreement was authorized pursuant to the Brooks Act, § 111, Pub. L. No. 89-306, as amended, now codified at 40 U.S.C. § 757. Section 757 provides GSA statutory authority to enter into multiyear contracts for the provision of information technology hardware, software, or services for periods up to five years.

The agreement stated as follows:

“FEDSIM derives its financing from the Information Technology Fund, a revolving fund established under the authority of the Brooks Act (PL 89-306) as amended by the Paperwork Reduction Reauthorization Act of 1986, as included in PL 99-500 and PL 99-591. In accordance with a Comptroller General ruling (Memorandum of Decision, File B-186535, Matter of: Interagency Agreement – Administrative Office of the U.S. Courts), payments for FEDSIM services under this agreement are governed by the terms of the Brooks Act rather than the Economy Act. Under these terms, the existence of a defined requirement at the time this Basic Agreement is executed forms the basis for the incurring and recording of a financial obligation on the part of the client. This obligation remains in force across fiscal year boundaries until the specified services are delivered or the Agreement is rescinded by the signatories. The funds so obligated by the client do not have to be deobligated at the end of a fiscal year as they would have been if subject to the Economy Act. The client should ensure that any financial obligation incurred under this Agreement is properly recorded so that the funds are available to pay for FEDSIM services for the duration of this Agreement.”

The agreement articulated a three-phase project, but provided for only the first phase. The agreement stated that “This Basic Agreement addresses Phase I. Phase II and III will be addressed upon completion of Phase I.” Phase I, which the parties called a Proof of Principle, consisted of designing and testing. Phase II will consist of establishing the declassification program in accordance with the provisions of E.O. 12958. Phase III will consist of developing a long-term program to sustain the declassification effort.

The agreement was composed of separate project element plans, each of which contained specific requirements for each element of work to be completed. The agreement described the requirements, deliverables, and timeframes for Phase I and stated that the estimated cost for this project element was \$17.5 million. The agreement also provided that, pending approval of PERSCOM, this project element plan might be expanded to include Phases II and III. However, the agreement did not provide specific work requirements, time frames, or cost estimates for additional phases.

PERSCOM obligated \$17.5 million of fiscal year 1997 funds towards the agreed-upon work under Phase I. FEDSIM completed this work in May of 1998 at a cost of \$8.5 million. PERSCOM would now like to use the unexpended, but expired, balance of \$9 million to complete work at least on Phase II of the declassification project.

Discussion

Obligated budget authority is available only to liquidate liabilities (*i.e.*, obligations) legally incurred during the period for which the appropriation is available. B-129579, Dec. 7, 1956. Generally, if an agency has obligated more funds than needed for a project, it should deobligate the excess amount. B-207433, Sept. 16, 1983; B-183184, May 30, 1975. If an agency deobligates the unobligated balance within the period of availability of the appropriation, the funds are available to support new obligations. If an agency deobligates funds after the expiration of the period of availability, the funds are not available for new obligations. 64 Comp. Gen. 410 (1985); 52 Comp. Gen. 179 (1972). However, the unobligated funds remain available to the agency for up to five years to cover appropriate adjustments for obligations in an expired account. 31 U.S.C. § 1553(a).

Unless otherwise authorized by law, transfers of funds between government agencies and instrumentalities, such as between PERSCOM and FEDSIM, are prohibited by law.¹ Transfers must be authorized pursuant to statutory authority such as the Economy Act, 31 U.S.C. § 1535, which authorizes an agency to provide goods or services to another agency on a reimbursable advance payment basis. 70 Comp. Gen. 592, 595 (1991). The Economy Act requires that a fixed-year appropriation be deobligated at the end of the fiscal year charged to the extent that the performing agency has not performed or incurred valid obligations under the agreement. 31 U.S.C. § 1535(d); 39 Comp. Gen. 317 (1959); 34 Comp. Gen. 418, 421-22 (1955).

¹ There are several legal impediments to inter- and intra-agency transfers. These include 31 U.S.C. 1301(a), which requires that appropriations be applied only to the objects for which appropriated; 31 U.S.C. § 1532, which prohibits agencies from transferring amounts between accounts unless otherwise authorized by law; and the Rule Against Augmenting Appropriations, which proscribes unauthorized augmentations of agency appropriations. See 31 U.S.C. §§ 1301(a), 1532; B-217093, Jan. 9, 1985.

The PERSCOM agreement with FEDSIM was authorized by the Brooks Act, as amended, and not the Economy Act. As FEDSIM noted in its agreement with PERSCOM, the Brooks Act, as amended, does not require a fixed-year appropriation to be deobligated at the end of the period of availability; obligated budget authority remains obligated at the end of the fiscal year of availability as an expired appropriation to liquidate the obligation when FEDSIM completes the agreed upon work. 40 U.S.C. § 757(c)(1). In this regard, the Brooks Act, as amended, treats interagency obligations between FEDSIM and its customers like other agency obligations, rather than Economy Act obligations. However, as with other contractual obligations, once the agency liquidates the obligation, any remaining balances are not available to enter into a new obligation after the account has expired (i.e., if fiscal year funds, after the end of the fiscal year). 51 Comp. Gen. 766 (1972).

As noted earlier, PERSCOM entered into an agreement only for Phase I of the declassification project, with the understanding that other phases would follow. The fiscal year 1997 funds that PERSCOM obligated at the time of the agreement, therefore, were available only to liquidate obligations incurred for Phase I during the fiscal year. While PERSCOM obligated more funds than it needed to complete Phase I, it did not deobligate the fiscal year 1997 budget authority prior to the expiration of the fiscal year. Therefore, the funds are no longer available for new obligations, including Phases II and III.

PERSCOM argues that Phases II and III are bona fide needs of fiscal year 1997, and that the expired budget authority should remain available to fund these additional phases. The bona fide needs rule provides that the balance of a fixed-term appropriation “is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period...” 31 U.S.C. § 1502 (a) (emphasis added). What this means is that an agency may validly obligate an appropriation only to meet a legitimate need existing during the period of availability. 73 Comp. Gen. 77, 79 (1994); 65 Comp. Gen. 741, 743 (1986). Even conceding that PERSCOM could establish Phases II and III as a bona fide need of fiscal year 1997, PERSCOM did not take appropriate action to satisfy that need during the fiscal year by contracting (i.e., incurring valid obligations) for additional phases during the period of availability of the appropriation. Nothing in the bona fide needs rule suggests that expired appropriations may be used for a project for which a valid obligation was not incurred prior to expiration merely because there was a need for that project during that period. B-207433, Sept. 16, 1983. Once the obligational period has expired, new obligations must be charged to current funds even if a continuing need arose during the prior period.²

²Within scope modifications of the original contract are charged to the same appropriation as the original contract. 61 Comp. Gen. 184 (1981); B-202222, Aug. 2, 1983. The reason is that the obligation reflected by the within scope modification relates back to and stems from the original contractual liability.

Accordingly, PERSCOM cannot charge payments for additional phases of the project to the balance of the expired, unliquidated fiscal year 1997 appropriation. This does not mean, however, that PERSCOM cannot now satisfy these needs using current year funds. PERSCOM may enter into a new agreement for the remainder of the project using current year funds assuming, of course, sufficient budget authority is available currently for that purpose.

/signed/
Anthony H. Gamboa
General Counsel



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund

File: B-288142

Date: September 6, 2001

DIGEST

The Library of Congress (LOC) has requested an advance decision concerning the Library of Congress Fiscal Operations Improvement Act of 2000, Pub. L. No. 106-481, 114 Stat. 2187 (2000), as it applies to the Federal Library and Information Network (FEDLINK) revolving fund. LOC asks whether Public Law 106-481 authorizes it to retain in the FEDLINK revolving fund, without fiscal year limitation, deobligated, unexpended balances of customer funds advanced to FEDLINK with orders for services, placed prior to or after the effective date of Public Law 106-481, to cover the cost of customer orders in future fiscal years. We conclude that Public Law 106-481 will not permit the Library to retain any deobligated, unexpended fiscal year appropriations advanced by a customer agency that the Library determines, after filling the customer's order and reconciling the customer's account, is not needed for costs the Library incurred in filling the order.

DECISION

The Library of Congress (LOC) has requested an advance decision concerning its proposed implementation of the Library of Congress Fiscal Operations Improvement Act of 2000, Pub. L. No. 106-481, 114 Stat. 2187 (2000), as it applies to the Federal Library and Information Network (FEDLINK) revolving fund. Specifically, LOC asks whether Public Law 106-481 authorizes it to retain in the revolving fund, without fiscal year limitation, deobligated, unexpended balances of customer funds advanced to FEDLINK with orders for services, placed prior to or after the effective date of Public Law 106-481, to cover the cost of customer orders in future fiscal years. For the reasons discussed below, the Act does not provide the Library with the authority to retain deobligated, unexpended balances without fiscal year limitation.

BACKGROUND

The LOC has operated FEDLINK under the authority of the Economy Act, 31 U.S.C. § 1535, for over 25 years. FEDLINK is a cooperative procurement, accounting, and training program designed to provide access to online databases, periodical subscriptions, books and non-print materials and other library and information support services. Under the program, LOC has negotiated contracts with commercial suppliers to take advantage of volume discounts. In addition, FEDLINK provides an accounting of customer agency funds, training in the use of library systems, and management of federal library and information services.

Because FEDLINK customer agencies make payments in advance, the payments are based on estimates rather than actual costs. Frequently, FEDLINK customer agencies transfer payments to the Library greater than the estimated cost to ensure coverage of any cost overruns that might occur. Upon receipt of customer payments, the Library enters into an agreement with vendors, obligating the payments as it receives them. Any amount not obligated for FEDLINK services or contracts before the end of the period of availability of the customer agency funds is returned to the agency as required by section 1535(d).¹ After the Library completes performance of a customer agency's order, often after the end of a fiscal year, it closes the customer agency's account, and reconciles all liabilities associated with the account. At that time, an excess of funds may remain, sometimes, for example, because of over-budgeting by the customer, and the Library deobligates this amount.² Currently, the Library returns these deobligated, unexpended balances to the customer for credit to the proper appropriation account.

Congress enacted Public Law 106-481 to improve the financial management of the Library and to increase savings for the LOC and its FEDLINK customer agencies. 146 Cong. Rec. H10015-02, H10017. Section 103 of Public Law 106-481 established a revolving fund within the LOC for FEDLINK and the Federal Research Program.³ By virtue of section 105, the revolving fund becomes available to the Library at the

¹ Section 1535(d) of title 31, U.S.C., requires an agency to deobligate a fixed-year appropriation at the end of the fiscal year charged to the extent the performing agency has not performed or incurred valid obligations against such budget authority. 39 Comp. Gen. 317 (1959); 34 Comp. Gen. 418 (1955).

² The process of account reconciliation, according to the Library, can take up to 5 years. See 31 U.S.C. § 1552(a).

³ Public Law 106-481 established two other revolving funds, for (1) audio and video duplication services associated with the national audiovisual conservation center, and (2) a gift shop, decimal classification development, and photo duplication services.

beginning of fiscal year 2002, i.e., October 1, 2001. As relevant here, section 103(b) directs LOC to maintain separate accounts within the revolving fund for FEDLINK and the Federal Research program. Section 103(c)(1) authorizes the Librarian to charge a fee for FEDLINK services and deposit such fees into the FEDLINK account. The FEDLINK revolving fund is intended to be self-sufficient and to use deposits to cover the costs of providing FEDLINK products and services.

The question that LOC has asked us to address arises in two contexts—for orders placed after October 1, 2001, and for orders placed before October 1 but not reconciled until after October 1.⁴ Section 103(c)(2) authorizes advance payments for orders placed after October 1:

“Participants in the FEDLINK program and the Federal Research program shall pay for products and services of the program by advance of funds—
(A) if the Librarian determines that amounts in the Revolving Fund are otherwise insufficient to cover the costs of providing such products or services; or
(B) upon agreement between participants and the Librarian.”

Section 103(d)(1)(A) requires the Librarian to deposit advances into the revolving fund.

Section 103(d)(2) addresses the deposit of funds during the transition of the FEDLINK program from an Economy Act activity to a revolving fund activity, and is relevant to disposition of amounts deobligated as a result of reconciling orders placed before October 1:

“Notwithstanding section 1535(d) of title 31, United States Code, the Librarian shall transfer to the appropriate account of the revolving fund under this section the following:
(A) Any obligated, unexpended balances existing as of the date of the transfer which are attributable to the FEDLINK program or the Federal Research program.”

The LOC would like to treat any deobligated, unexpended balances associated with pre- or post-effective date customer orders as remaining available to the Library and its customers without fiscal year limitation, notwithstanding any fiscal year limit otherwise imposed upon the customer’s appropriation from which the funds were advanced. In support of its position, LOC cites section 103(e):

⁴ LOC advises that the issues are the same for FEDLINK and the Federal Research program. For ease of reference, we address only the implementation of the FEDLINK program.

“Amounts in the accounts of the revolving fund under this section shall be available to the Librarian, in amounts specified in appropriations Acts and without fiscal year limitation, to carry out the program covered by each such account.”

The LOC views its interpretation of section 103(e) as “the key to new flexibility and cost savings for FEDLINK customer agencies.” Letter from General Counsel, LOC, at p. 2, dated June 6, 2001. LOC would like to use deobligated, unexpended balances to pay for account deficits or rejected invoices of orders of later fiscal years placed by the customer agency, modifications to current delivery orders to cover known requirements, and new delivery orders for needed services.⁵

ANALYSIS

Technically, fees for services under the FEDLINK program have two components: (1) advances the customer agency provides the Library to cover the customer’s order for goods and services, and (2) reimbursements to the Library for the accounting services and its other administrative costs, both direct and indirect, of operating the program. The Library acknowledges that at the time it receives the advances, or what it refers to as “service dollars,” it does not consider that amount to be “earned.” The Library does consider itself as having earned the reimbursements for accounting services and administrative costs when they are received. This is particularly important to the Library because it factors into its assessment of administrative costs the need to build a reserve over the years to finance future improvements and to replace outdated equipment. The Library may not necessarily spend such amounts in the fiscal year collected, waiting until it has accumulated a sufficient reserve. Such costs are legitimate business costs to the FEDLINK program, and acting today to accumulate a reserve for such purposes is prudent. Because the Library intends for these amounts to reimburse the Library for the administrative costs of running the program rather than as an advance to cover the customer’s order for goods and services, we agree with the Library’s conclusion that it may retain these amounts without fiscal year limitation. Our decision, therefore, focuses on the so-called “service dollars”, or advances, and whether the Library has the authority to retain without fiscal year limitation the deobligated balances of fiscal (or fixed) year funds a customer agency had advanced for one order for use in defraying costs of that customer’s future year orders.

⁵ The LOC also proposes the following new procedures: (1) no longer requiring an annual contract closeout, refund and redeposit of no-year balances for customer agencies funded with no-year appropriations, (2) accepting end-of-year orders from customer agencies and delivering services in the following fiscal year, and (3) using unobligated unexpended balances to pay for account deficits or rejected invoices under other delivery orders of the same fiscal year. These procedures are not at issue.

When, as here, an agency withdraws funds from its appropriation and makes them available for credit to another appropriation, that amount is available for obligation only for the same time period as the appropriation from which the funds were withdrawn:

“An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount.” 31 U.S.C. § 1532.

Because they are subject to the same limitations as the appropriation from which they were withdrawn, the withdrawn amounts retain their time character and do not assume the time character of the appropriation to which they are credited. See 31 Comp. Gen. 109, 114-15 (1951); see also OMB Cir. A-34, § 11.2(c) (1995) (“Amounts transferred are available for obligation only for the same period as the original appropriation, unless the language authorizing the transfer provides for a change.”). Consequently, unless otherwise specifically provided by law, amounts withdrawn from a fiscal year appropriation and credited to a no year revolving fund, such as the FEDLINK revolving fund, are available for obligation only during the fiscal year of availability of the appropriation from which the amount was withdrawn. See, e.g., 55 Comp. Gen. 1012 (1976); 23 Comp. Gen. 668 (1944).

We addressed this situation in 1944 with regard to a no year revolving fund called the Navy Procurement Fund. 23 Comp. Gen. 668 (1944). The law establishing the fund authorized the Navy to advance amounts from other Navy appropriations to the revolving fund when placing orders with the revolving fund. The Navy believed that because the revolving fund was not subject to fiscal year limitation, advances made to the fund, whether from annual or no year appropriations, were available until expended. We concluded that “the mere fact that advancements from the various naval appropriations to the Fund are authorized to be made does not operate ipso facto to effect such a result.” Id. at 672. We explained that if that were the case, “the action of the Congress in making annual appropriations for a fiscal year could be nullified completely,” and we stated, “that such a result was contemplated by the Congress cannot seriously be contended.” Id.

Section 1532 is a significant control feature protecting Congress’ constitutional prerogatives of the purse. The Congress imposes accountability on the Executive’s use of federal funds and exercises its oversight through the appropriations process. Appropriations constitute legal authority granted to the Executive by Congress to incur obligations and to make disbursements for the purposes, up to the amount and during the time periods specified by Congress in appropriation acts. Placing time limits on the availability of appropriations is a fundamental means of congressional

control because it permits Congress to periodically review a given agency's programs and activities.

Of course, the Congress, in legislation, can provide for the modification or elimination of previously enacted time limitations, including the conversion of fiscal (or fixed) year funds to no year funds. Indeed, section 1532 recognizes that possibility with the proviso "except as specifically provided by law." Given the significance of time restrictions in preserving congressional power of the purse, we look for clear legislative expressions of congressional intent before we will interpret legislation to override the time limitations that Congress, through the appropriations process, imposes on an agency's use of funds.

The Library argues that the language of section 103(e) overrides any time restrictions imposed on the agency appropriation from which amounts were advanced to the FEDLINK revolving fund. Section 103(c), the Library points out, authorizes the Library to charge fees for FEDLINK services (and permits the Library to require advances), and requires the Library to deposit fees collected into the revolving fund. See also § 103(d)(1)(A). Section 103(e) specifies that amounts in the revolving fund are available to the Librarian "without fiscal year limitation" to carry out the FEDLINK program. The Library asserts that this language of section 103(e) acts to remove any time restrictions on any amounts credited to the revolving fund. We disagree.

In our opinion, section 103(e) does not clearly indicate that Congress intended unobligated balances of agency advances to be available without fiscal year limitation regardless of the time restrictions imposed on the appropriation from which the advances were withdrawn. As noted above, until the amounts are "earned," they are not part of the corpus of the fund that is available to the Librarian "without fiscal year limitation." Accordingly, without more, we are unwilling to read section 103(e) as the Library would have us read it. For example, we contrast the language of section 103(e) with language in 10 U.S.C. § 2865, a statute offering incentives to the Defense Department to encourage energy savings at military installations. Section 2865(b) permits the Secretary of Defense, in certain circumstances, to extend the time period of availability of fiscal year funds:

"Two-thirds of the portion of the funds appropriated to the Department of Defense for a fiscal year that is equal to the amount of energy cost savings realized by the Department . . . shall remain available for obligation . . . through the end of the fiscal year following the fiscal year for which the funds were appropriated, without additional authorization or appropriation."

The language of section 2865(b) clearly evidences congressional permission for an agency to alter a previously enacted time restriction imposed on appropriated funds. We find no comparable expression in section 103(e).

Consequently, we conclude that section 103 will not permit the Library to retain any deobligated, unexpended fiscal (or fixed) year appropriations advanced by a customer agency that the Library determines, after filling the customer's order and reconciling the customer's account, is not needed for costs the Library incurred in filling the order. That the Library would reserve the deobligated amounts to cover future year orders placed by the customer agency which advanced the funds is beside the point. The Library's proposal would violate section 1532 as well as the time constraints legislatively imposed on the appropriation from which the advance was made.

Anthony H. Gamboa
General Counsel