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United States Government Accountability Office  
Washington, DC 20548

B-322147

July 6, 2011

The Honorable Ander Crenshaw  
Chairman  
Subcommittee on the Legislative Branch  
Committee on Appropriations  
House of Representatives

Subject: *Contract for Legal Services*

This responds to your letter dated June 21, 2011, requesting our views with respect to a contract entered into by the House Office of General Counsel for the services of outside counsel to represent the House Bipartisan Legal Advisory Group<sup>1</sup> in certain matters. Letter from Chairman, House Appropriations Subcommittee on the Legislative Branch to General Counsel, GAO (June 21, 2011) (Request Letter). Specifically, your letter asked that we address two questions: (1) What obligation did the House Office of General Counsel incur when the General Counsel entered into the contract, and did the House General Counsel violate the Antideficiency Act when he signed the contract? (2) To the extent that the obligation for the contract may implicate the availability of funds for other activities and expenses of the House Office of General Counsel, may the House exercise its transfer authorities under title 2 of the U.S. Code to transfer to the Office of General Counsel appropriations adequate to cover its expenses to avoid any potential Antideficiency Act violation?

For the reasons stated below, based on the information provided, we conclude that when the House General Counsel entered into the contract on April 25, 2011, the House Office of General Counsel incurred an obligation of \$500,000 against its appropriation for salaries and expenses. The House Chief Administrative Officer has advised us that there was an adequate unobligated balance to satisfy the obligation. We conclude, therefore, that the House General Counsel did not violate the Antideficiency Act, 31 U.S.C. § 1341(a). In addition, because of the statutory authorities to transfer appropriations of the House of Representatives, the House may

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<sup>1</sup> The Bipartisan Legal Advisory Group is a five-member panel of House Leadership consisting of the Speaker of the House, Majority Leader, Majority Whip, Minority Leader, and Minority Whip. *See* Rule II, cl. 8, Rules of the House of Representatives at 3, 112th Cong. (2011).

transfer amounts to the Office of General Counsel's appropriation, as needed, in order to avoid Antideficiency Act violations.<sup>2</sup>

## BACKGROUND

On February 23, 2011, the Attorney General advised the Speaker of the House of Representatives that the President had determined that section 3 of the Defense of Marriage Act (DOMA), codified at 1 U.S.C. § 7, violates the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution. Letter from the Attorney General to the Speaker, *Re: Defense of Marriage Act* (Feb. 23, 2011). The Attorney General stated that, as a result, the Department of Justice (DOJ) would no longer defend the constitutionality of section 3 of DOMA. *Id.* at 6. However, the Attorney General noted that DOJ would notify the relevant courts of DOJ's interest in providing Congress a full and fair opportunity to participate in the litigation of pending cases. *Id.*

In response, and with the authorization of the Bipartisan Legal Advisory Group, the Speaker directed the House General Counsel to take appropriate steps to defend the constitutionality of DOMA, including retaining outside counsel to represent the Bipartisan Legal Advisory Group in ongoing litigation. Request Letter at 1. Accordingly, on April 25, 2011, the House General Counsel signed a contract with the law firm of Bancroft PLLC to represent the Bipartisan Legal Advisory Group as a party or an amicus in civil actions litigating the constitutionality of section 3 of DOMA.<sup>3</sup> See Contract for Legal Services between General Counsel, U.S. House of Representatives, and Bancroft PLLC, April 25, 2011 (Contract).

Under the Contract, the House General Counsel agreed to pay Bancroft PLLC "a sum not to exceed \$500,000."<sup>4</sup> Contract, ¶ 2. The Contract will terminate the earlier of the completion of the litigation of civil actions involving the constitutionality of section 3

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<sup>2</sup> Our practice when issuing decisions and opinions is to develop a factual record on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/legal/resources.html](http://www.gao.gov/legal/resources.html). The record in this case consists of the Request Letter and the contract at issue. Because of your need for an expedited opinion, we obtained additional information via teleconferences with the House General Counsel and Chief Administrative Officer on June 24 and June 28, 2011.

<sup>3</sup> We note that the acquisition procedures prescribed for executive agencies by the Federal Acquisition Regulation do not apply to the House of Representatives. See 41 U.S.C. § 133 and § 1121.

<sup>4</sup> The contract also includes a provision allowing the cap to be raised by written agreement of the parties. Contract, ¶ 2.

of DOMA or on January 3, 2013, unless sooner terminated by the House General Counsel.<sup>5</sup> Contract, ¶¶ 1, 8.

For fiscal year 2011, Congress appropriated a lump sum for “Salaries and Expenses” of the House of Representatives. *See Full-Year Continuing Appropriations Act, 2011*, Pub. L. No. 112-10, div. B, § 1101(a)(5), 125 Stat. 38, 102–103 (Apr. 15, 2011); *Legislative Branch Appropriations Act, 2010*, Pub. L. No. 111-68, 123 Stat. 2023, 2027 (Oct. 1, 2009). Under the heading “Salaries, Officers and Employees,” the appropriations act specifies particular amounts from the lump sum to the various offices and activities of the House of Representatives, including an amount “for salaries and expenses of the Office of General Counsel.” Pub. L. No. 111-68, 123 Stat. at 2028.

## DISCUSSION

### Obligational Event and Antideficiency Act

The first question has two parts: (a) what obligation did the Office of General Counsel incur when the House General Counsel signed the contract, and (b) did the House General Counsel violate the Antideficiency Act at that time?

A general definition of an obligation is a definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. *See McDonnell Douglas Corp. v. United States*, 37 Fed. Cl. 295, 301 (1997); B-300480, Apr. 9, 2003; 42 Comp. Gen. 733, 734 (1963); B-116795, June 18, 1954; *see also* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 70. When it signs a contract, the government incurs a legal liability—that is, a claim that may be legally enforced against the government. B-308969, May 31, 2007; B-300480.2, June 6, 2003; *see also Glossary*, at 63. The amount of the government’s obligation is ascertained from an analysis of the terms and conditions agreed to by the government and the party with whom it has contracted. *See* 42 Comp. Gen. at 734.

Here, the House General Counsel signed a contract with Bancroft PLLC on April 25, 2011, acquiring specified legal services from Bancroft PLLC for the Bipartisan Legal Advisory Group up to an amount of \$500,000: “The General Counsel agrees to pay the Contractor for all contractual services rendered a sum not to exceed \$500,000.00.” Contract, ¶ 2. The Contract does not envision task orders from the General Counsel to the contractor. The quantum of contractual services to be rendered is limited by the \$500,000 cap on payment to the contractor and by the Contract’s definition of the legal services to be provided, and is not contingent upon the issuance of task orders.

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<sup>5</sup> The House of Representatives has authority to enter into multiyear contracts. 41 U.S.C. § 3904(c).

We addressed a situation similar to this in a 2003 opinion analyzing the obligational consequences of grant agreements of the Corporation for National and Community Service (Corporation). B-300480, Apr. 9, 2003; *see also* B-300480.2, June 6, 2003. In that case, the Corporation entered into binding agreements with its grantees authorizing the grantee to enroll up to a specified number of new participants in the AmeriCorps program. At the time of agreement, the Corporation was legally committed to fund education benefits for all participants up to the number of participants specified in the agreement. We found that the Corporation had incurred a legal duty when it authorized the grantee to enroll a specified number of participants, thereby ceding control to the grantee with respect to the government's fiscal exposure.

Similarly, in this case, the Contract stated that the government would pay up to a particular amount "for all contractual services rendered." Here, as in the case of the Corporation, the contractor, not the government, controls the government's fiscal exposure, up to \$500,000. Therefore, we conclude that at the time the contract was signed, the House General Counsel incurred an obligation for \$500,000, which was its maximum potential liability under the contract.<sup>6</sup>

The Antideficiency Act prohibits an officer or employee of the United States Government from making an obligation in excess of available appropriations. 31 U.S.C. § 1341(a)(1). In our view, the contract is an obligation of the appropriations for the Office of General Counsel found under the heading "Salaries, Officers and Employees." That amount is made available "for salaries and expenses" of the Office of General Counsel. *Id.* The House General Counsel signed the Contract to obtain legal services from Bancroft PLLC. The Rules of the House of Representatives establish the Office of General Counsel "for the purpose of providing legal assistance and representation to the House." *Rules of the House of Representatives*, 112th Cong., rule II, cl. 8 (2011). The rule specifies that the Office of General Counsel "shall function pursuant to the direction of the Speaker." *Id.* Consequently, the \$500,000 obligation for the Contract is chargeable against the appropriation for the salaries and expenses of the Office of General Counsel.

The House Chief Administrative Officer has certified to us that there was an adequate unobligated balance in that account to satisfy this obligation. Thus, the House General Counsel did not violate the Antideficiency Act when he signed the Contract.

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<sup>6</sup> We note that the Contract provides for the possibility of raising the \$500,000 cap by written agreement of the parties and approval of the Committee on House Administration of the House of Representatives. Contract ¶ 2. The amount of the obligation will not increase beyond \$500,000, unless and until the General Counsel and Bancroft PLLC enter into an agreement to increase the cap.

## Transfers

The second question addresses the possibility that the \$500,000 obligation might implicate the availability of funds for other activities and expenses of the Office of General Counsel. You ask if the House, as necessary, may exercise its title 2 authorities to provide the Office of General Counsel with adequate funds to cover other salaries and expenses to avoid any Antideficiency Act problems.

Title 2 of the U.S. Code authorizes the House of Representatives to transfer amounts among the various appropriations under the heading, "Salaries, Officers and Employees," as follows:

"Amounts appropriated for any fiscal year for the House of Representatives under the heading 'SALARIES, OFFICERS AND EMPLOYEES' may be transferred among and merged with the various offices and activities under such heading. . . ."

2 U.S.C. § 95b(b). The House Office of General Counsel is one of the offices funded under this heading.

In addition, amounts appropriated for any fiscal year for the House of Representatives under the following headings may be transferred among and merged with each other: "House Leadership Offices," "Members' Representational Allowances," "Committee Employees," "*Salaries, Officers and Employees*," and "Allowances and Expenses." 2 U.S.C. § 95b(c) (emphasis added). These headings are found in the appropriations act under the caption, "Salaries and Expenses." In each case, the House Committee on Appropriations must receive advance notice of transfer. 2 U.S.C. §§ 95b(b), (c).

Accordingly, should the Office of General Counsel require additional funds to carry out its responsibilities during the remainder of fiscal year 2011, the House, under 2 U.S.C. § 95b, may provide the Office of General Counsel with additional amounts from other headings to avoid Antideficiency Act violations.

## CONCLUSION

Because there was an adequate amount in the appropriation for the Office of General Counsel to cover the \$500,000 obligation for the Contract, the House General Counsel did not violate the Antideficiency Act, 31 U.S.C. § 1341(a), when he signed the contract. In addition, the House has statutory transfer authority that the House may utilize to increase the Office General Counsel's fiscal year 2011 appropriation for salaries and expenses in order to avoid Antideficiency Act violations.

If you have any questions, please contact Thomas H. Armstrong, Acting Managing Associate General Counsel, at (202) 512-8257.

Sincerely yours,

A handwritten signature in black ink that reads "Lynn H. Gibson". The signature is written in a cursive style with a large, looping initial "L".

Lynn H. Gibson  
General Counsel