

Decision

Matter of: Department of Health and Human Services—Multiyear Contracting and the *Bona Fide* Needs Rule

File: B-322455

Date: August 16, 2013

DIGEST

Without statutory authority, fixed period appropriations are only available for the genuine or *bona fide* needs arising in the period of availability for which they are made. Thus, an agency may not obligate current appropriations for the *bona fide* needs of future fiscal years without statutory authority. One provision of the Federal Acquisition Streamlining Act, now codified at 41 U.S.C. § 3903, provides a statutory exception to the so-called *bona fide* needs rule. Section 3903 authorizes executive agencies to obligate current appropriations to enter a multiyear contract for the acquisition of both nonseverable and severable services for the *bona fide* needs of up to five fiscal years.

The *bona fide* needs rule applies to cost-reimbursement contracts, just as it does to other contract types. An agency may use a cost-reimbursement contract to procure severable services that cross fiscal years if done in conjunction with multiyear contracting authority. When modifying a cost-reimbursement contract to procure additional severable services, an agency must also ensure the modification complies with the *bona fide* needs rule or one of its statutory exceptions at the time of modification.

DECISION

The Chief Counsel to the Inspector General of the Department of Health and Human Services (HHS) requested a decision on the scope of the multiyear contracting authority under 41 U.S.C. § 3903 with regard to nonseverable and severable services. Letter from Chief Counsel to the Inspector General, HHS, to General Counsel, GAO (Aug. 24, 2011) (Request Letter 1). The Chief Counsel also requested a decision regarding the proper application of the *bona fide* needs rule to

a National Cancer Institute (NCI) cost-reimbursement contract for operation and technical support of a Federally Funded Research and Development Center. Letter from Chief Counsel to the Inspector General, HHS, to General Counsel, GAO (Dec. 9, 2011) (Request Letter 2). This decision addresses both requests.

We conclude that 41 U.S.C. § 3903 authorizes executive agencies to obligate fiscal year appropriations to enter into a multiyear contract to acquire either nonseverable or severable services for the needs of up to five years. This is a statutory exception to 31 U.S.C. § 1502(a), commonly referred to as the *bona fide* needs rule, which provides that fixed period appropriations are only available for the legitimate needs arising during the period of availability for which they were made.

The NCI contract at issue is a cost-reimbursement contract. The *bona fide* needs rule applies to cost-reimbursement contracts, just as it does to other contract types. An agency may use a cost-reimbursement contract to procure severable services that cross fiscal years if done in conjunction with multiyear contracting authority, such as section 3903. When modifying a cost-reimbursement contract to procure additional severable services and thus raising the cost ceiling, an agency must ensure that the modification complies with the *bona fide* needs rule, as the modification represents a new obligation. After NCI modified the contract in fiscal year 2008 to add services that began in fiscal year 2009, HHS determined that NCI improperly obligated appropriations for the *bona fide* needs of a future fiscal year. We concur with the Secretary of HHS's report that NCI obligated the government in advance of available appropriations in violation of the Antideficiency Act (ADA). Letter from Secretary, HHS, to the President (July 14, 2011), at Enclosure (HHS ADA Report).

Our practice when rendering decisions is to obtain the views of the relevant agency and to establish a factual record on the subject 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. The request letters contained relevant facts and the legal views of HHS's Office of Inspector General (HHS OIG). HHS's Office of General Counsel provided us with additional information and its views on July 11, 2012. Letter from Acting General Counsel, HHS, to General Counsel, GAO, *Re: Request for a Decision on the Scope of 41 U.S.C. § 3903 (previously 41 U.S.C. § 254c)* (July 11, 2012) (HHS Letter).

BACKGROUND

The National Institutes of Health (NIH), an operating division of HHS, conducts and funds medical research. Request Letter 1, at 2; NIH, *About NIH*, available at www.nih.gov/about/ (last visited August 7, 2013). HHS OIG has been conducting a series of audits of NIH contracts that exceed one year of performance. Request Letter 1, at 1. To inform its findings, HHS OIG asked us for a statutory interpretation of the scope of 41 U.S.C. § 3903. Section 3903 was enacted in the Federal Acquisition Streamlining Act, which was intended to give agencies the flexibility to

structure contracts for the needs of current and future fiscal years. B-277165, Jan. 10, 2000. Specifically, HHS OIG asked whether section 3903 authorizes executive agencies to enter into a multiyear contract for the acquisition of both nonseverable and severable services. Request Letter 1, at 1. HHS OIG believes that section 3903 “allows only for flexible funding of severable service contracts,” but notes that HHS policy states that section 3903 authorizes flexible funding for nonseverable service contracts as well. *Id.*, at 1–2.

HHS OIG also asked a number of questions regarding the proper obligation of a National Cancer Institute (NCI)¹ cost-reimbursement contract for the operation and technical support of NCI-Frederick, a Federally Funded Research and Development Center.² Request Letter 2, at 1; NCI, Contract No. HHSN261-2008-00001E, NCI Control No. N01-CO-2008-00001, Attachment 1, at 1 (NCI Contract). NCI entered into the contract on September 26, 2008.³ Request Letter 2, at 2. On that same day, NCI established a cost ceiling of \$15 million and obligated that amount to its fiscal year 2008 appropriation,⁴ which NCI estimated would fund the contractor’s performance through October 6, 2008. *Id.*, at 2. The very next day, September 27, NCI modified the contract and obligated \$224 million of fiscal year 2008 appropriations to procure additional severable services to be performed from October 7, 2008, through April 7, 2009. *Id.* Three days later, on September 30, NCI modified the contract again and obligated \$102 million of fiscal year 2008 appropriations to procure additional services to be performed from April 8, 2009, through July 5, 2009. *Id.* In fiscal year 2009, NCI continued to use contract modifications to procure additional services. *Id.* At the time of each modification, NCI obligated then-current appropriations. *Id.*

ANALYSIS

We begin with a discussion of the *bona fide* needs rule and section 3903, one section of the Federal Acquisition Streamlining Act (FASA). HHS OIG asks whether

¹ NCI is one of 27 centers and institutes comprising NIH. Request Letter 2, at 1.

² A Federally Funded Research and Development Center (FFRDC) meets a special long-term research or development need of the federal government. Federal Acquisition Regulation (FAR), 48 C.F.R. § 35.017(a). An FFRDC enables federal agencies to use private sector resources, such as universities or industrial firms, to accomplish tasks that are critical to the mission of the sponsoring agency. *Id.*

³ The parties estimated that the contract would take three years to perform, and that the total cost to NCI would be about \$1.3 billion. NCI Contract, at B.2.e.

⁴ NCI receives a fiscal year appropriation to carry out its activities. See, e.g., Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. G, title II, 121 Stat. 1844, 2173 (Dec. 26, 2007).

the scope of the multiyear contracting authority under section 3903 extends to contracts for both nonseverable and severable services. Next, we discuss the application of the *bona fide* needs rule and multiyear contracting authority to the National Cancer Institute's contract for severable services.

Multiyear Contracting for Nonseverable and Severable Services

To address HHS OIG's first question, it is important to understand section 3903 in the broader framework of service contracts. Without statutory authority otherwise, a fixed period appropriation is available only to fulfill a genuine or *bona fide* need arising during the period of availability for which it was made. 31 U.S.C. § 1502(a); B-308010, Apr. 20, 2007. Thus, an agency may not obligate current appropriations for the *bona fide* needs of future fiscal years. This bedrock of appropriations law is commonly referred to as the *bona fide* needs rule. When contracting for services, in order to comply with the *bona fide* needs rule, an agency must first determine whether the services are nonseverable or severable. B-277165; 71 Comp. Gen. 428, 429 (1992).

A nonseverable services contract is essentially a single, or nonrecurring, undertaking that cannot be feasibly subdivided. B-259274, May 22, 1996. The agency does not receive the full value of the service until the contract is fully performed. For example, a contract to study and report on psychological problems among Vietnam veterans is a nonseverable service contract. See, e.g., 65 Comp. Gen. 741 (1986). An agency must establish that a *bona fide* need for the nonseverable service exists at the time it enters into the contract. The entire cost of the nonseverable services contract is a *bona fide* need of the current fiscal year, and is properly charged to a current appropriation, despite the fact that performance may extend into future fiscal years. 73 Comp. Gen. 77, 79 (1994).

Severable services can be separated into components that independently meet an ongoing need of the government. B-277165. Typically, these services are continuing and recurring in nature. *Id.* An agency receives the full value of the service every time it is performed. For example, gardening and window cleaning services are severable services. B-125444, Feb. 16, 1956. Severable services are considered a *bona fide* need of the time period in which the services are rendered. B-277165. For that reason, an agency may only enter into a severable services contract for services to be performed during the time period of availability of the appropriation to be obligated. See B-317636, Apr. 21, 2009. Generally, an agency may not obligate fiscal year appropriations for a severable services contract that procures services to be performed in future fiscal years. *Id.*

In 1994, Congress and the President enacted flexibilities in FASA. Pub. L. No. 103-355, 108 Stat. 3243 (Oct. 13, 1994). HHS OIG asks about one section of

FASA, now codified at 41 U.S.C. § 3903.⁵ Section 3903 authorizes an executive agency to enter into a multiyear contract⁶ for the acquisition of property or services for the needs of up to five years.⁷ The services must start in the current fiscal year and extend into future fiscal years.

Section 3903 provides:

“An executive agency may enter into a multiyear contract for the acquisition of property or services if—

- (1) funds are available and obligated for the contract, for the full period of the contract or for the first fiscal year in which the contract is in effect, and for the estimated costs associated with a necessary termination of the contract; and
- (2) the executive agency determines that—
 - (A) the need for the property or services is reasonably firm and continuing over the period of the contract; and
 - (B) a multiyear contract will serve the best interests of the Federal Government by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency’s programs.”

41 U.S.C. § 3903. If the agency chooses to obligate on a fiscal year basis, the agency records a new obligation in each of the remaining fiscal years. *See id.* § 3903(b). The agency must also record an obligation for estimated termination costs. *Id.*⁸

With this framework in mind, we examine whether section 3903 authorizes multiyear contracting for both severable and nonseverable services. As always, we begin our analysis by looking at the plain meaning of the statute. Countless judicial decisions reiterate this rule. *E.g.*, *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *BedRoc Limited, LLC v. United States*, 541 U.S. 176, 183 (2004); *Lamie v. United States*

⁵ This authority was previously codified at 41 U.S.C. § 254c. *See* Pub. L. No. 111-350, § 3, 124 Stat. 3677, 3774–75 (Jan. 4, 2011); H.R. Rep. No. 111-42, at 8 (Mar. 23, 2009).

⁶ “Multiyear” contracts refer to contracts that cover the *bona fide* needs of more than one fiscal year. B-302358, Dec. 27, 2004. *See also* FAR § 17.103.

⁷ Related statutes extend this authority to various legislative branch agencies. *See, e.g.*, 41 U.S.C. §§ 3904(a), 3904(b). The military departments also have similar authority under 10 U.S.C. §§ 2306b and 2306c.

⁸ Amounts available for paying termination costs remain available for that purpose until the costs associated with termination of the contract are paid. *Id.* § 3903(c).

Trustee, 540 U.S. 526, 534 (2004). As the Supreme Court stated in 1940, “[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes.” *United States v. American Trucking Ass’ns*, 310 U.S. 534, 543.

As discussed earlier, FASA permits executive agencies to enter into multiyear contracts. Section 3903 broadly states that executive agencies may enter into a multiyear contract “for the acquisition of property or services.” 41 U.S.C. § 3903(b). The plain language of section 3903 establishes that this multiyear contracting authority applies to the acquisition of *all* services. The language makes no distinction between nonseverable and severable services.⁹ We conclude, therefore, that agencies may rely on section 3903 to use fiscal year appropriations for the needs of future fiscal years, regardless of whether the contract procures nonseverable or severable services.¹⁰

This interpretation is consistent with what Congress intended, that is, to offer contracting flexibilities to federal agencies. See B-316860, Apr. 29, 2009. For example, if an agency were statutorily required to report annually to Congress on psychological problems among Vietnam veterans for the next five years, it could do so using section 3903. Section 3903 would permit that agency to enter into a contract for the delivery of a report (a nonseverable service)¹¹ each year for the next five years.¹² Under this contract for nonseverable services, which represent the needs of both current and future fiscal years, the agency could either obligate funds

⁹ We note that we did not identify any legislative history that would further illuminate the congressional intent of this statutory language.

¹⁰ HHS comes to the same view of section 3903. HHS asserts that section 3903 “should be construed in accordance with the explicit language of the statute to apply to the acquisition of services, whether severable or nonseverable,” noting also that FASA was “intended to provide agencies with additional funding flexibility.” HHS Letter, at 1, 7. HHS proffers that “Congress enacted [section 3903] with a goal of revising and streamlining the acquisition process, which included lowering the procurement barriers presented by the Antideficiency Act and the *bona fide* needs rule.” *Id.*, at 4.

¹¹ As we previously explained, a contract to study and prepare a report is a nonseverable service because the full value of the service is not realized until the contract has been performed. See 65 Comp. Gen. 741.

¹² The agency must determine that the need for these services is “reasonably firm and continuing over the period of the contract” and that “a multiyear contract will serve the best interests of the Federal Government by encouraging full and open competition or promoting economy in administration, performance, and operation of the agency’s programs.” 41 U.S.C. § 3903(b)(2).

for the full period of the contract, or obligate funds for the first fiscal year, plus estimated termination costs. 41 U.S.C. § 3903(b)(1).

Similarly, if any agency wanted to enter into a multiyear contract for monthly gardening and window cleaning services (severable services),¹³ it could also use section 3903. That agency could enter into a multiyear contract for the needs of up to five years.¹⁴ Under this contract for severable services, which represent the needs of both current and future fiscal years, the agency could use section 3903 to either obligate funds for the full period of the contract, or obligate funds for the first fiscal year, plus estimated termination costs. *Id.*

Application of the *Bona Fide* Needs Rule to NCI's Contract

We now turn to HHS OIG's questions about NCI's obligations for a contract for the operation and technical support of NCI-Frederick. At issue here is the application of the *bona fide* needs rule to the NCI cost-reimbursement contract, both on September 26, 2008, when NCI entered into the contract, and later, when NCI modified the contract. HHS OIG and HHS agree that this contract was for severable services. Request Letter 2, at 2; HHS ADA Report, at Enclosure. The Statement of Work stipulated that the contractor would provide "executive scientific and business leadership," "shared-research support services," "program-dedicated research," and "business execution and operational support activities." NCI Contract, at Attachment 1.

On September 26, 2008, when the contract was signed, NCI recorded an obligation of \$15 million. This obligation was intended to cover services from that date through October 6, 2008. Request Letter 2, at 2. The cost ceiling of \$15 million properly limited the agency's liability to that amount. See 73 Comp. Gen. at 80. The inclusion of the cost ceiling ensures compliance with 31 U.S.C. § 1341(a)(1)(A), one section of the Antideficiency Act, which prohibits the obligation or expenditure of funds in excess of available appropriations.

NCI could legally procure these services under FASA. One FASA provision discussed earlier, section 3903 of title 41 of the U.S. Code, would allow NCI to enter into a multiyear contract for the needs of up to five years. Another FASA provision, section 3902 of title 41 of the U.S. Code, would allow NCI to enter into a multiyear severable services contract for the needs of up to 12 months.

¹³ As we previously explained, gardening and window cleaning services are considered severable services, because the services are recurring and confer the full benefit on the agency every time they are performed. See B-125444.

¹⁴ Of course, the agency would need to make the requisite determinations under section 3903(b)(2)(B).

After NCI's initial obligation of \$15 million, the record shows that NCI executed a number of modifications in the last days of fiscal year 2008 to increase funding on the contract. Request Letter 2, at 2 (listing various modifications), Attachment 3 (documenting the modifications). On September 27, 2008, the day after entering into the contract, NCI added about \$224 million to the contract to cover services from October 7, 2008, through April 7, 2009. *Id.* On September 30, 2008, NCI added about \$102 million to the contract to cover services from April 7, 2009, through July 5, 2009. *Id.*

NCI had to consider the *bona fide* needs implications of obligating fiscal year 2008 funds to cover severable services that would be provided in fiscal year 2009 (for instance, from October 7, 2008, through April 7, 2009) because of another section of the Antideficiency Act, codified at 31 U.S.C. § 1341(a)(1)(B). This section prohibits the obligation or expenditure of funds for the *bona fide* needs of a future fiscal year in advance of an appropriation available for that fiscal year. Because severable services are considered a *bona fide* need of the fiscal year in which the service is provided, this section raises a question about the services to be performed at NCI-Frederick in fiscal year 2009.

The Secretary of HHS reported in July 2011 that the NCI contract violated the Antideficiency Act. HHS ADA Report, at Enclosure. HHS determined that NCI improperly obligated annual appropriations for the *bona fide* needs of future fiscal years. *Id.*, at 2–3, Enclosure. As a result, the Secretary of HHS reported that NCI obligated the government in advance of available appropriations in violation of the Antideficiency Act. *Id.* See 31 U.S.C. § 1341(a)(1)(B).

We concur with HHS's determination. When NCI obligated fiscal year 2008 funds on September 27, 2008, and September 30, 2008, it did so for severable services that did not begin until fiscal year 2009. Both multiyear contracting authorities in FASA—sections 3903 and 3902—require that the agency establish a *bona fide* need at the time of the contract for the services, despite the fact that some services will be rendered in future fiscal years. In fiscal year 2008, NCI did not have a *bona fide* need for services that did not begin until fiscal year 2009. Accordingly, as the Secretary of HHS reported, NCI violated the *bona fide* needs rule and the Antideficiency Act.

If an agency determines at year-end that it has both available funding and a *bona fide* need arising in that fiscal year for additional services under a cost-reimbursement contract, then it may modify the contract accordingly. The agency should obligate funds against an available appropriation, thereby increasing the cost ceiling, in compliance with the *bona fide* needs rule or one of its statutory exceptions.

However, an agency may not use a cost-reimbursement contract modification to preserve expiring funds.¹⁵ Regardless of the contracting vehicle, an agency must have a *bona fide* need arising in that fiscal year when it incurs an obligation, not a mere need to use up remaining dollars before the end of the fiscal year. See B-309530, Sept. 17, 2007 (finding that an agency violated the *bona fide* needs rule when it obligated fiscal year 2006 funds to renew database subscriptions that were not due to expire until October 31, 2006).

CONCLUSION

Section 3903 of title 41 of the U.S. Code authorizes executive agencies to obligate current appropriations to enter into multiyear contracts for the acquisition of either severable or nonseverable services for the needs of up to five years. This is a statutory exception to 31 U.S.C. § 1502(a), commonly referred to as the *bona fide* needs rule, which provides that fixed period appropriations are only available for the legitimate needs of the period of availability for which they were made.

The *bona fide* needs rule applies to cost-reimbursement contracts, just as it does to other contract types. An agency may use a cost-reimbursement contract to procure severable services that cross fiscal years if done in conjunction with multiyear contracting authority, such as the authority provided in FASA. When modifying a cost-reimbursement contract to add severable services, an agency must also ensure the modification complies with the *bona fide* needs rule or one of its statutory exceptions. HHS concluded that NCI improperly obligated annual appropriations for the *bona fide* needs of future fiscal years. We concur with HHS's report that NCI obligated the government in advance of available appropriations in violation of the Antideficiency Act.



Susan A. Poling
General Counsel

¹⁵ Although “an appropriation is just as much available to supply the needs of the [last day] of a particular year as any other day or time in the year, . . . [a]n appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such appropriation. This would be a plain violation of the law.” 8 Comp. Dec. 346, 348 (1901).