



Decision

Matter of: Department of the Treasury—Acceptance of Voluntary Services

File: B-324214

Date: January 27, 2014

DIGEST

The Department of the Treasury (Treasury) violated the voluntary services prohibition of the Antideficiency Act, 31 U.S.C. § 1342, when it accepted the unpaid services of four individuals. An agency may accept unpaid services when someone offering such services executes an advance written agreement that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. Treasury obtained no such written agreements in this case.

DECISION

The Department of the Treasury (Treasury), Office of Inspector General, requested our decision concerning whether Treasury's acceptance of the services of four individuals without payment constituted a violation of the Antideficiency Act, 31 U.S.C. § 1342. Letter from Assistant Inspector General for Audit, Treasury, to General Counsel, GAO (Dec. 3, 2012). Section 1342 prohibits federal agencies from accepting voluntary services. As discussed below, we conclude that Treasury violated the Antideficiency Act when it accepted the services of the four individuals. Without statutory authority otherwise, an agency may accept unpaid services only when someone offering such services executes an advance written agreement that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. Treasury obtained no such written agreements in this case.

In accordance with our regular practice, we contacted Treasury to develop a factual record and obtain its legal position on this matter. Letter from Assistant General Counsel for Appropriations Law, GAO, to Acting General Counsel, Treasury, Jan. 8, 2013; GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/lawresources/resources.html. Treasury provided us a letter with

additional information and its legal views. Letter from Assistant General Counsel, Treasury, to Assistant General Counsel for Appropriations Law, GAO, Feb. 1, 2013 (Treasury Letter).

BACKGROUND

From February 2010 through April 2011, Treasury's Office of International Affairs accepted services from four individuals. Treasury Letter, attachment 1; Treasury Letter, at 1. The length of service of each individual varied from about four months to fourteen months. Treasury Letter, attachment 1. Treasury did not pay any of the individuals. Treasury Letter, at 1. Treasury did not execute written agreements with any of the individuals stating that Treasury had no financial obligation and would not make any payment for the services rendered. *Id.* Treasury did not appoint any of the individuals to federal employment, nor did any individual qualify as a student who may, under certain circumstances, perform voluntary service.¹ *Id.* Treasury assigned each individual to perform substantive official business. For example, Treasury assigned one individual to analyze the performance of projects in the Global Agriculture and Food Security Program, while Treasury had another individual support preparations for Treasury's participation in the annual meeting of the Inter-American Development Bank. Treasury Letter, attachment 1. Treasury had three of the individuals provide daily written briefings on European financial market developments. *Id.*

DISCUSSION

At issue here is whether Treasury violated the voluntary services prohibition of the Antideficiency Act when it accepted the services of four individuals on an unpaid basis.

The Antideficiency Act provides that an agency "may not accept voluntary services."² "The purpose of the prohibition is to preclude situations that might generate claims for compensation that might exceed an agency's available funds." B-308968, Nov. 27, 2007, at 3. In this case, Treasury admits that it accepted the unpaid services of four individuals, and that it never intended to pay the individuals. See Treasury Letter, at 1. Treasury clearly violates the plain meaning of the voluntary services prohibition. In addition, Treasury's actions implicate the purposes that animate the voluntary services prohibition. By accepting the services of these

¹ 5 U.S.C. § 3111.

² Although the prohibition allows agencies to accept voluntary services in emergencies which "imminently threaten the safety of human life or the protection of property," it is apparent that no such emergency existed in this case, and Treasury does not suggest that this exception applies here.

individuals, Treasury created a risk that the individuals will assert a claim for payment.

The voluntary services prohibition addresses the problem that the acceptance of service may later lead to claims for compensation. GAO decisions, as well as the opinions of the Attorney General, have well established that an agency does not violate the voluntary services prohibition if it accepts services in a manner that precludes the possibility of such future claims.³ In particular, agencies may accept services that are offered to the government with a written record noting that the services are offered with no expectation of payment. Such services are considered “gratuitous” and are not “voluntary” within the meaning of the voluntary services prohibition. See, e.g., GAO, *Food and Drug Administration: Response to Heparin Contamination Helped Protect Public Health; Controls That Were Needed for Working With External Entities Were Recently Added*, GAO-11-95 (Washington, D.C.: Oct. 2010), at 28-29; see also 30 Op. Att’y Gen. 51 (1913).

Under the Antideficiency Act, an agency may not accept gratuitous services if the individual offering to serve without compensation is entitled to a statutory rate of pay, as such pay cannot be waived. *Glavey v. United States*, 182 U.S. 595, 609 (1901); 26 Comp. Gen. 956 (1947). If this condition is satisfied, an agency may accept services only if someone offering such services executes an advance written agreement that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government.⁴ GAO-11-95, at 29-30; B-322832, Mar. 30, 2012; B-204326, July 26, 1982; 27 Comp. Gen. 194 (1947); 30 Op. Att’y Gen. 51 (1913).

Although Treasury concedes that “[n]o written waiver of compensation was provided,” it states that the four individuals provided “binding oral waivers.” Treasury Letter, at 1-2. Treasury argues that these “binding oral waivers” permitted it to accept the unpaid services of the individuals. We disagree. The voluntary services prohibition is part of the Antideficiency Act, a statute which is the cornerstone of the statutory framework that protects Congress’s constitutional power of the purse. The prohibition serves to prevent future pay claims. Only a written document, executed prior to the beginning of performance by those providing services to the government,

³ Prior to the establishment of GAO, the Comptroller of the Treasury, whose office was abolished and its functions transferred to the Comptroller General by the Budget and Accounting Act, 1921, issued decisions on this subject. See, e.g., 27 Comp. Dec. 131 (1920).

⁴ Separately, we have noted that agencies may also enter into what is known as a “no-cost contract.” Under such a contract, the agency has no financial obligation and the contractor has no expectation of payment from the government. B-308968, Nov. 27, 2007; B-302811, July 12, 2004; B-291947, Aug. 15, 2003.

provides the necessary protection from such claims. The document must clearly state that the services are offered without expectation of payment, and it must waive any future claims against the government for pay for the services rendered. As the U.S. Court of Appeals for the Ninth Circuit stated when asked to accept evidence of an oral agreement in a copyright infringement dispute:

“Common sense tells us that agreements should routinely be put in writing. This simple practice prevents misunderstandings by spelling out the terms of a deal in black in white . . . and encourages [the parties] to take their promises seriously because it’s harder to backtrack on a written contract than on an oral one.”

Effects Associates v. Cohen, 908 F.2d 555, 557 (9th Cir. 1990). Similar principles apply in the context of the prohibition against the acceptance of voluntary services. A written agreement executed in advance by the individual offering the services is important for evidentiary purposes should a claim subsequently be attempted. Our decisions have long established that such an agreement is a necessary prerequisite to the permissible acceptance of gratuitous services. See, e.g., GAO-11-95, at 30; B-308968, Nov. 27, 2007; 27 Comp. Gen. 194 (1947). A “binding oral waiver” does not constitute such a written agreement.⁵

We caution that compliance with the Antideficiency Act is but one of many relevant considerations when agencies accept gratuitous services. Agencies must ensure that all their activities are authorized and performed in accordance with applicable law, including personnel law, and that they avoid conflicts of interest, both institutional and individual, actual and perceived. Importantly, agencies may also need to consider whether a function is inherently governmental and, therefore, must be performed by a federal employee. B-259499, Aug. 22, 1995; B-237356, Dec. 29, 1989.

CONCLUSION

Treasury violated the voluntary services prohibition of the Antideficiency Act, 31 U.S.C. § 1342, when it accepted the unpaid services of four individuals. An agency may accept unpaid services when someone offering such services executes

⁵ Treasury also points out that Treasury employees who worked with those who provided the unpaid services provided written statements after Treasury officials “discovered the individuals’ unauthorized service.” Treasury Letter, at 2. In these statements, the Treasury employees asserted that the unpaid individuals offered their services with no expectation of payment. *Id.* Such a statement does not constitute an appropriate advance written agreement.

an advance written agreement that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. Treasury obtained no such written agreements in this case. Treasury should report a violation of the Antideficiency Act as required by 31 U.S.C. § 1351.⁶



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⁶ The Office of Management and Budget has published requirements for executive agencies for reporting violations. OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, §§ 145, 145.8, available at www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc (last visited Jan. 22, 2014).