



Decision

Matter of: U.S. Chemical Safety and Hazard Investigation Board—Application of the Antideficiency Act, *Bona Fide* Needs Statute, and Recording Statute to Real-Property Lease and to Occupancy Agreement with the U.S. General Services Administration

File: B-332205

Date: August 9, 2023

DIGEST

The U.S. Chemical Safety and Hazard Investigation Board (CSB) lacked the statutory authority to lease real property situated in the District of Columbia and, therefore, violated 40 U.S.C. § 8141 when it entered into a real-property lease for space in a privately-owned building there. The lease also was inconsistent with the Antideficiency Act, the *bona fide* needs statute, and the recording statute.

In contrast, CSB's agreement to a proposed extension of an occupancy agreement with the U.S. General Services Administration (GSA) to facilitate its continued occupancy of GSA-controlled space would not violate the Antideficiency Act or the *bona fide* needs statute. This is because CSB would not accrue a fiscal liability to GSA when it agrees to the extension, as the occupancy agreement, standing alone, is a budgeting tool that GSA uses to summarize the expected financial impacts of CSB's occupancy of the space. Instead, CSB would accrue a fiscal liability to GSA as it occupies the GSA-controlled space, and must record this liability against properly-available appropriations as it arises, consistent with the recording statute, 31 U.S.C. § 1501(a)(9).

DECISION

The General Counsel of the U.S. Chemical Safety and Hazard Investigation Board (CSB) requests our decision under 31 U.S.C. § 3529 on the consistency of its real-property activities with provisions of appropriations law.¹ We address (1) whether CSB's lease of privately-owned office space in Washington, D.C., along with the steps it took to record its obligations under that lease, were consistent with the Antideficiency Act, *bona fide* needs statute, and the recording statute; and (2) whether CSB's acceptance of a proposed extension of an agreement with the U.S. General Services Administration (GSA) to facilitate its continued occupancy of GSA-controlled space is consistent with those same statutes.

Our practice when rendering decisions is to contact the relevant agencies to seek factual information and their legal views.² Both CSB³ and GSA⁴ provided factual information and their legal views.

¹ Letter from General Counsel, CSB, to General Counsel, GAO (Sept. 30, 2019) (HQ Request Letter); Letter from General Counsel, CSB, to General Counsel, GAO (Apr. 1, 2020) (Request Letter).

² GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <https://www.gao.gov/products/GAO-06-1064SP>; Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, GSA (Aug. 12, 2020).

³ HQ Request Letter; Request Letter; Email from Deputy General Counsel, CSB, to Assistant General Counsel, GAO, *Subject: confidential-Opinion Request of Chemical Safety and Hazard Investigation Board* (Sept. 30, 2019); Telephone Conversation with General Attorney, CSB; Assistant General Counsel, GAO; and Senior Attorney, GAO (Feb. 3, 2022) (February Conversation).

⁴ Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, GSA (Aug. 12, 2020); Letter from Associate General Counsel, GSA, to Senior Attorney, GAO (Sept. 21, 2020) (Response Letter); Letter from Acting Associate General Counsel, GSA, to Senior Attorney, GAO (Apr. 15, 2021) (April Letter); Telephone Conversation with Senior Assistant General Counsel, GSA; Senior Assistant Regional Counsel, GSA; Assistant General Counsel, GAO; and Senior Attorney, GAO (July 7, 2022) (GSA Counsel Conversation); Email from Senior Assistant General Counsel, GSA, to Assistant General Counsel, GAO, and Senior Attorney, GAO, *Subject: Chemical Safety and Hazard Investigation Board -- Occupancy Agreement with the U.S. General Services Administration, B-332205* (July 20, 2022) (July Email).

BACKGROUND

CSB is an independent federal agency charged with, among other things, investigating chemical accidents and issuing reports regarding the safety of chemical production, processing, handling, and storage.⁵ Here, we examine two written real property arrangements that CSB entered into and sought to execute to discharge its responsibilities.

Washington, D.C. headquarters lease

On September 18, 2014, CSB entered into a lease for new headquarters space in a privately-owned building situated in Washington, D.C.⁶ The lease set out an initial term of 10 years beginning October 1, 2015 and provided for annual rent payable in monthly installments.⁷ When CSB entered into the lease, it had been appropriated \$11 million in fiscal year (FY) 2014 funds available for the agency's necessary expenses.⁸ CSB accepted the premises and began occupying the headquarters space and, on October 28, 2015, it recorded an obligation against its FY 2016 appropriation in an amount sufficient to meet anticipated rental payments during the first lease year.⁹ Similarly, during each of FYs 2017 and 2018, CSB recorded obligations against then-available appropriations in amounts sufficient to pay the amount due to the lessor during that fiscal year.¹⁰

Denver Federal Center occupancy agreement

Beginning in December 2014, CSB occupied space in a federally-owned building on a campus known as the Denver Federal Center.¹¹ Where an agency occupies federally-owned space under the custody and control of GSA, as it was here, GSA

⁵ Request Letter, at 2; Response Letter, at 1; 42 U.S.C. § 7412(r)(6)(C).

⁶ HQ Request Letter, at 2; Lease Between Landlord and CSB (Sept. 18, 2014) (CSB Lease).

⁷ CSB Lease. Specifically, the annual rent was for a total of \$655,196.90, and the monthly rent was \$54,599.74, less 14 months of abated rent.

⁸ Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. G, title III, 128 Stat. 5, 332 (Jan. 17, 2014); *see also* Pub. L. No. 113-76, § 403, 128 Stat. 337 (appropriations are not available for obligation beyond FY 2014 unless expressly so provided); Pub. L. No. 113-76, § 5, 128 Stat. 7 (amounts are available “for the fiscal year ending September 30, 2014”).

⁹ CSB Lease, at 123; HQ Request Letter, at 2.

¹⁰ HQ Request Letter, at 43.

¹¹ Response Letter, at 4. According to CSB, it has occupied space in Building 21B at the Denver Federal Center since 2009. Request Letter, at 5.

assigns and furnishes the space to the agency.¹² GSA memorializes the parties' understanding of the business terms that govern the parties' relationship through the execution of an occupancy agreement.¹³

In February 2020, shortly before the expiration of the occupancy agreement, GSA presented an occupancy agreement extension to CSB that, subject to CSB's approval, memorialized CSB's continued occupancy of space at the Denver Federal Center for an additional 57 months.¹⁴ CSB ultimately declined to agree to the extension and vacated the space.¹⁵

DISCUSSION

I. Washington, D.C. lease of privately-owned property

We first consider whether CSB's lease of privately-owned office space in Washington, D.C., along with the steps it took to record its obligations under that lease, were consistent with the Antideficiency Act, *bona fide* needs statute, and the recording statute. We must first address as a preliminary matter whether CSB had authority to enter into the lease.

By law, federal agencies may not enter into leases "for the rent of a building, or part of a building, to be used for the purposes of the Federal Government in the District of Columbia until Congress enacts an appropriation for the rent." 40 U.S.C. § 8141. We have interpreted this provision as authorizing an agency to rent space in the District of Columbia if Congress has permitted the agency to do so through specific statutory authority. For example, we concluded that the Federal Emergency Management Agency (FEMA) had authority to lease buildings in the District of Columbia because it was authorized to lease real property "wherever situated," which included the District of Columbia. B-195260, July 11, 1979; *see also* B-327242, Feb. 4, 2016, at 6 (law authorizing the Commodity Futures Trading Commission to enter into leases for the "rental of necessary space at the seat of

¹² Response Letter, at 1, 4; 40 U.S.C. § 584.

¹³ See 41 C.F.R. § 102-85.65; Response Letter, at 5; July Email.

¹⁴ Signed Agreement and Financial Summary: Occupancy Agreement Between Chemical Safety Board (9550) and General Services Administration (GSA Proposed Draft No. 19, Feb. 11, 2020) (Occupancy Agreement).

¹⁵ Request Letter. While CSB ultimately declined the occupancy agreement for the Denver Federal Center and vacated the space, it nonetheless remains interested in a decision on this matter. Email from Attorney, CSB, to Senior Attorney, GAO, *Subject: touching base* (May 24, 2021); Email from Attorney, CSB, to Senior Attorney, GAO, *Subject: touching base* (Apr. 20, 2021).

Government and elsewhere”) (citation omitted); 38 Comp. Gen. 588 (1959) (Administrator of the then-Federal Aviation Agency authorized to make expenditures for rent “at the seat of the government and elsewhere”).

Here, CSB has not identified, nor are we aware of, any statutory authority that authorizes it to rent space in the District of Columbia. CSB’s enabling legislation, which authorizes it to enter into leases with private parties, does not authorize CSB to lease space specifically in the District of Columbia.¹⁶ 42 U.S.C. § 7412(r)(6)(N). Nor does CSB’s enabling language include broader references such as “wherever situated” as was the case in the FEMA decision. Moreover, CSB’s appropriations similarly do not include language authorizing it to lease space in the District of Columbia. See, e.g., Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. G, title III, 136 Stat. 4459, 4813–14 (Dec. 29, 2022). Therefore, CSB was not authorized to lease headquarters space in the District of Columbia.¹⁷

Application of the Antideficiency Act, *bona fide* needs statute, and the recording statute to the Washington, D.C. lease

Despite its lack of authority to lease real property in the District of Columbia, CSB nevertheless entered into such a lease. We next consider whether the lease, and the actions CSB took to record the obligations arising therefrom, were consistent with the Antideficiency Act, the *bona fide* needs statute, and the recording statute. For the reasons discussed below, we conclude that the lease and CSB’s actions were inconsistent with those statutes.

The recording statute, 31 U.S.C. § 1501(a)(1), requires an agency to record the full amount of its contractual obligation against funds available at the time the contract was executed. See, e.g., B-327242, Feb. 4, 2016; B-322160, Oct. 3, 2011. Any authorization to record an obligation for an amount less than the full amount of the government’s contractual obligation must be explicit. *Id.* Here, we are not aware of, and CSB has not identified, any authority for it to record less than its full liability

¹⁶ The legislative history of this provision similarly does not mention that CSB can enter into leases in the District of Columbia. Pub. L. No. 101-549, title III, § 301, 104 Stat. 2399, 2565 (Nov. 15, 1990); see, e.g., H.R. Conf. Rep. No. 101-952 (1990); S. Rep. No. 101-228 (1989).

¹⁷ We note that GSA is authorized to lease space in the District of Columbia, and may delegate its leasing authority to federal agencies. B-327242, Feb. 4, 2016, at 7 n.7 (delegation authority); see, e.g., Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. E, title V, 128 Stat. 2360 (Dec. 16, 2014) (authority to lease in District of Columbia). However, it is our understanding that CSB has neither requested nor received a delegation of authority from GSA. See February Conversation.

when it enters into a real-property lease with a private party.¹⁸ Therefore, when CSB entered into its ten-year real-property lease on September 18, 2014, the recording statute required it to record its total obligation for the duration of the lease.

CSB did not do this. Instead, the obligational data CSB provided demonstrates a practice of obligating funds at various times and in various amounts so that each fiscal year CSB recorded a total obligation corresponding to its lease payments for the fiscal year.¹⁹ Because CSB did not record the full cost of its headquarters lease against funds available when it signed the lease in FY 2014, CSB violated the recording statute.

In addition, CSB lacked sufficient available appropriations against which it could have properly recorded this obligation. When CSB entered into the lease, Congress had appropriated to it \$11 million for its necessary expenses for FY 2014. See Consolidated Appropriations, Act, 2014, Pub. L. No. 113-76, div. G, title III, 128 Stat. 5, 332 (Jan. 17, 2014). Under the *bona fide* needs statute, appropriations made available for a specific fiscal year are available only to fulfill a *bona fide* (that is, genuine) need of the fiscal year for which the funds are appropriated. 31 U.S.C. § 1502(a); B-332430, Sept. 28, 2021; see also B-317139, June 1, 2009; 73 Comp. Gen. 77 (1994). We have long held that an agency's *bona fide* need for office space arises at the time it occupies the space. B-327242, Feb. 4, 2016; B-207215, Mar. 1, 1983. Therefore, unless it has statutory authority to do otherwise,²⁰ an agency may only use an annual appropriation to cover its office space needs of the current fiscal year.²¹ *Id.*

¹⁸ CSB's original lease contained a clause stating that rent payments were contingent on funds availability and that the lease would terminate if CSB had no available funds to pay its rent. CSB Lease, at 6. CSB and the landlord subsequently modified the lease to provide that no legal liability for payment in a new lease year would arise until, among other things, CSB notified the landlord that funds were available. Lease Amendment 5 Between Landlord and CSB (July 15, 2019). However, such contractual provisions are ineffective and do not override the Antideficiency Act's requirements. See *Leiter v. United States*, 271 U.S. 204 (1926) (the Supreme Court rejected an attempt to limit future liability based on the availability of appropriations where an agency entered into leases providing that each term of occupancy was "contingent upon" available appropriations and that a lease would terminate if appropriations were not available for any year); see also B-327242, Feb. 4, 2016.

¹⁹ HQ Request Letter, at 43.

²⁰ Congress vests some agencies with specific authority to obligate fiscal year appropriations for the space needs of future years. See B-327242, Feb. 4, 2016 (describing such authority for the Commodity Futures Trading Commission).

²¹ The Federal Acquisition Streamlining Act of 1994 (FASA) permits agencies to enter into a multiyear contract for up to five years for the acquisition of property or

CSB has not identified, nor are we aware of, any authority permitting it to use its annual appropriations for the future year needs it satisfied in this lease. Therefore, the \$11 million appropriated to CSB for FY 2014 was not available for any of the lease costs beyond fiscal year 2014. Because the lease term ran from FYs 2016 through 2025, CSB's FY 2014 appropriation was not available for any of the lease costs. Aside from the appropriation for its FY 2014 salaries and expenses, CSB has not identified any other appropriation that was available to it when it signed the lease. Therefore, CSB lacked sufficient available appropriations against which to record the obligation that arose when it signed the lease. CSB thus violated the Antideficiency Act, which prohibits an agency from incurring obligations in excess of or in advance of available appropriations. 31 U.S.C. § 1341(a)(1). Consequently, CSB must report an Antideficiency Act violation for the obligation it incurred when it signed the lease. *Id.* § 1351. Under the ADA, an agency "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." *Id.*²²

II. CSB's liability for occupancy of GSA-controlled space

Next, we consider a proposed extension of an agreement with GSA that contemplates CSB's continued occupancy of GSA-controlled space, and whether agreeing to it would be consistent with the Antideficiency Act, the *bona fide* needs statute, and the recording statute. As discussed below, we conclude that the proposed occupancy agreement extension is a budgeting and planning tool as opposed to a lease. Therefore, the proposed occupancy agreement extension, standing alone, would not violate the Antideficiency Act or the *bona fide* needs statute.

Fiscal liabilities arising from agency occupancy of GSA-controlled space

For the Washington, D.C. headquarters office space that we considered above, CSB entered into a lease with a private party. In contrast, like the office space at the Denver Federal Center, the federal government sometimes owns or manages the

services. Agencies that elect to use FASA must record either an amount equal to the full cost of the contract or an amount equal to the cost of the first fiscal year of the contract plus estimated termination costs. 41 U.S.C. § 3903. Because the CSB lease was for a term exceeding five years, such authority was not available here.

²² This report must include, among other things, the amount involved for each violation, the date the violation occurred, the positions of the officer(s) or employee(s) responsible for the violation, all facts pertaining to the violation, any administrative discipline imposed, and all actions taken to safeguard against the same type of violation. Office of Management and Budget (OMB) Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.7 (Aug. 2022) (OMB A-11).

space occupied by federal agencies. Unless specified otherwise, federally-owned space is under the jurisdiction and control of GSA.

GSA has authority to construct and manage federal buildings, to lease real property, and to assign space to federal agencies for their use. See B-327242, Feb. 4, 2016 (agencies may enter into real-property leases only if they have authority to do so); 40 U.S.C. § 585; 40 U.S.C. §§ 584, 585 (GSA authority to assign space); 40 U.S.C. §§ 581, 583 (GSA authority to purchase and construct buildings). Where GSA assigns federally-owned or -leased space to tenant agencies, it must charge them for the space and services provided. *Id.* § 586. GSA levies these charges on a monthly basis based on an assessment that “approximate[s] commercial charges for comparable space and services”; however, the Administrator is authorized to exempt tenant agencies from any federal charges that the Administrator determines are “infeasible or impractical.” *Id.*

GSA uses occupancy agreements to detail the financial terms and conditions of a tenant agency’s use of assigned space, but, according to GSA, it is not a legally enforceable agreement.²³ An occupancy agreement contains estimates of charges for the use of assigned space, and a tenant agency can use these estimates to budget for future payments to GSA for space and services. The occupancy agreement also states that the tenant agency’s financial obligations for future years for the use of space do not mature until the later years are reached, and the tenant agency is not required to certify future year funds are available when the agreement is executed. Occupancy Agreement, at 2. Generally, GSA requires tenant agencies to execute an occupancy agreement before it will assign space to the tenant agency and permit occupancy of such space. See 41 C.F.R. § 102-85.45.

There are some similarities between a real-property lease and an occupancy agreement. Both are written arrangements that document real-property arrangements between two parties. Both contemplate that an agency will obligate amounts to pay for its use of the space: for a lease, to a private landlord for rent; or for an occupancy agreement, to GSA for charges for space and services. However, despite these similarities, there are critical differences in the legal underpinnings of these two kinds of documents. A lease arises where a federal agency enters into a binding contractual agreement with a private party. In contrast, an occupancy agreement is not between the federal government and a private party but, rather, documents a relationship between two federal agencies: GSA and the tenant

²³ Response Letter, at 6. GSA also asserts that guidance in OMB A-11 suggests the occupancy agreement should be viewed as a budgeting tool. July Email. GSA points to language in OMB A-11 that instructs agencies to record obligations for rental payments to GSA in the year the premises are occupied, whether or not a bill has been rendered. July Email; April Letter, at 7 n.3; see OMB A-11, pt. 1, at § 20.5(d).

agency.²⁴ A lease is a contract that creates legal rights in, and liabilities against, both parties. Should a dispute arise under a lease, either party may file a lawsuit and seek damages or other judicial remedies. In contrast, should a dispute arise between GSA and a tenant agency, no lawsuit may result: two federal agencies are part of the single United States government and may not bring suit against each other.

As a result, the fiscal consequences of leases and occupancy agreements differ substantially. A lease obligates the federal government to make payments from the Treasury to satisfy liabilities to the lessor. In contrast, the tenant agency under an occupancy agreement pays GSA for space and services. GSA deposits these charges into the Federal Buildings Fund. 40 U.S.C. § 592(b)(1); see *a/so* Pub. L. No. 117-103, 136 Stat. 49, 271 (Mar. 15, 2022). Such charges are the Fund's primary financing source, and the Fund is the primary means of financing the operating and capital costs associated with federal space.²⁵

An examination of the differing natures of occupancy agreements and leases, as well as the different legal and fiscal consequences of occupancy agreements as compared to leases, reveal that our prior decisions applicable to leasing do not also apply to an occupancy agreement.²⁶ Nevertheless, a tenant agency occupying GSA-controlled space must still comply with the Antideficiency Act, the *bona fide*

²⁴ We note that our case law on interagency agreements does not apply here. We have repeatedly held that interagency agreements are similar to contracts, and funding should be obligated in the same manner as if they were contracts. See 31 U.S.C. § 1501(a)(1); B-323940, Jan. 7, 2015; B-318425, Dec. 8, 2009; B-286929, Apr. 25, 2001. However, an occupancy agreement is not an interagency agreement; instead, it serves as a budgeting and planning tool for tenant agencies.

²⁵ Since revenues and collections deposited in the Federal Buildings Fund are only available to the extent provided in annual appropriations acts, the amounts deposited into the Fund are not immediately available to pay private contractors or other GSA services. 40 U.S.C. § 592(c)(1); Response Letter, at 2.

²⁶ In B-327242, Feb. 4, 2016, we examined whether the Commodity Futures Trading Commission (CFTC) violated the recording statute when it entered into multiple year lease contracts for real property. We found that even though CFTC had authority to enter into multiple-year leases, it failed to record an obligation equal to the government's total liability when it entered into the leases, in violation of the statute. 7 U.S.C. § 16(b)(3); B-327242, Feb. 4, 2016, at 6-7. Similarly, we examined a multiple year lease executed by the Securities and Exchange Commission (SEC) in B-322160, Oct. 3, 2011. Although SEC had the authority to enter into multiple-year leases, we found that SEC lacked statutory authority to obligate an amount less than the government's total liability under the lease at issue. Accordingly, SEC should have recorded its total obligation for the duration of the lease at the time it signed the lease agreement.

needs statute, and the recording statute, just as it must whenever it obligates its appropriations. Therefore, we next consider the application of these statutes where an agency occupies GSA-controlled space.

As noted, the Antideficiency Act bars agencies from incurring obligations in advance of or in excess of available appropriations. 31 U.S.C. § 1341(a)(1). The *bona fide* needs statute permits agencies to incur obligations only for the legitimate needs of the fiscal year for which the funds were appropriated. *Id.* § 1502(a); B-332430, Sept. 28, 2021. And the recording statute requires agencies to record their obligations against appropriations properly available as to purpose, time, and amount. 31 U.S.C. § 1501(a)(1). Critically important to the application of all these statutes is whether an agency has incurred an obligation, which occurs when it makes a definite commitment for the payment of goods or services ordered or received, or takes an action that could mature into a legal liability by virtue of actions beyond the control of the federal government.²⁷ Thus, we must consider whether CSB will make such a commitment if it agrees to the extension of the agreement.

By law GSA must charge tenant agencies when it provides “space, services, quarters, maintenance, repair and other facilities.” 40 U.S.C. § 586. As noted, GSA levies these charges on a monthly basis based on an assessment that “approximate[s] commercial charges for comparable space and services.” *Id.* Therefore, as an agency occupies GSA-controlled space and as GSA provides that space and associated services to the agency, GSA must levy an appropriate charge, and the agency must pay that charge. In annual appropriations acts, Congress typically provides that agency appropriations available for necessary expenses are also available for payment to GSA for charges for space and services. *See, e.g.*, Pub. L. No. 117-328, div. E, title VII, § 705, 136 Stat. 4650, 4650, 4705.

GSA’s authorizing statutes do not state that GSA and the tenant agency must make an agreement prior to agency occupancy of space. Nor do the statutes provide that an agreement will determine the charge GSA imposes; instead, the law provides that GSA shall “determine” and “prescribe regulations providing for the rates.” 40 U.S.C. § 586(b)(2). Indeed, GSA previously did not use occupancy agreements, and adopted their use in the mid-1990s to resolve several issues, including to correct many tenant agencies’ erroneous belief that they could occupy particular space in perpetuity.²⁸ GSA states that the use of occupancy agreements in its program did not materially alter the prior framework under which GSA and tenant agencies

²⁷ *See, e.g.*, B-325526, July 16, 2014 (concluding that the Department of Defense incurs an obligation for the full amount of recruitment and retention bonuses when it executes agreements with individuals providing for these bonuses in exchange for terms of military service).

²⁸ April Letter, at 5.

operated with no written agreements.²⁹ Furthermore, under some circumstances, GSA does not require a tenant agency to sign an occupancy agreement.³⁰

Therefore, a federal agency's legal liability to pay GSA for space and services does not arise from an occupancy agreement. Instead, this legal liability arises from GSA's statutory authority to levy charges for space and services, coupled with a tenant agency's occupancy of the space and its duty to pay GSA the charges. 40 U.S.C. § 586. A tenant agency accrues liability for charges for space and services only as the agency actually occupies GSA space and uses GSA services. An occupancy agreement, therefore, imposes no legal liability on a tenant agency, and no fiscal obligation arises from it.

Even though an occupancy agreement imposes no fiscal liability on a tenant agency, it still performs valuable functions. As GSA states, an occupancy agreement is "a complete, concise statement of the terms governing the relationship between GSA and the occupant agency for a specific space assignment, and serves as the document upon which occupant agencies are expected to base their budgets for rent payments to GSA."³¹ GSA practice also aids agencies in their use of occupancy agreements as a budget planning tool: GSA typically provides tenant agencies with updated estimates for charges for space and services over two years in advance so that agencies may submit accurate budgets to the Office of Management and Budget.³²

Application of the Antideficiency Act

The proposed occupancy agreement extension between CSB and GSA has a term of 57 months.³³ CSB asks whether execution of the occupancy agreement extension would trigger for CSB a liability to make payments for years for which Congress has not yet appropriated it any funds and, therefore, cause CSB to violate the Antideficiency Act. The occupancy agreement, however, imposes no legal liability upon CSB. In fact, the agreement states that the tenant's financial obligations for future years do not mature until those years and that tenants are not certifying current year funds be available for future years.³⁴ Therefore, execution of the agreement, standing alone, would not violate the Antideficiency Act. Instead, legal liability arises only as CSB occupies space and uses GSA services.

²⁹ April Letter, at 9.

³⁰ See GSA, *Pricing Desk Guide*, 5th Edition, at § 33 (effective Nov., 16, 2019).

³¹ April Letter, at 2.

³² Response Letter, at 3; OMB A-11, pt. 2, at § 31.8(e) (stating that occupancy agreements are not leases).

³³ Occupancy Agreement, at 1.

³⁴ Occupancy Agreement, at 2.

Similarly, CSB asks whether provisions of the occupancy agreement that would authorize GSA to impose additional operational charges on CSB,³⁵ and make CSB solely liable for potential claims resulting from CSB's use of the property,³⁶ constitute open-ended indemnification provisions in violation of the Antideficiency Act.³⁷ See *Hercules, Inc. v. United States*, 516 U.S. 417, 427 (1996). Since the occupancy agreement does not impose any financial liabilities on CSB, none of these provisions would impose an indefinite or other liability on CSB were it to execute the agreement or occupy the space.

CSB also asks whether a termination provision of the occupancy agreement that permits it to vacate the space early in exchange for four months' notice and rent (plus any associated charges) would cause CSB to violate the Antideficiency Act if it chose to vacate the space over a period that crosses fiscal years.³⁸ As the occupancy agreement is a budget planning tool and imposes no fiscal liabilities on CSB, liabilities accrue to CSB only for the periods during which it occupies space and consumes services. Of course, should CSB give GSA the agreed four months' notice and continue to occupy the space during the four-month period, it would owe amounts for space and services for that period as it would for any other. If CSB vacates and the federal government has a continuing liability for the space, GSA advises that the Federal Buildings Fund would cover such liability until GSA is able to assign the space to another tenant.³⁹ While the occupancy agreement imposes no fiscal liabilities, GSA states that it will abide by the terms of the occupancy agreement, and expects CSB to do the same.⁴⁰

Application of the recording statute and *bona fide* needs statute

As previously discussed, the occupancy agreement alone does not impose a liability on CSB. However, because GSA is statutorily required to charge for space and services and the tenant agency is statutorily required to pay such charges, CSB

³⁵ Specifically, the occupancy agreement contains an escalation clause authorizing GSA to levy "additional charges for operating expenses, security, joint use, parking, and other space items such as antennas." Occupancy Agreement, at 2; Request Letter, at 7.

³⁶ Occupancy Agreement, at 6.

³⁷ Request Letter, at 12–13.

³⁸ Request Letter, at 2, 11. Specifically, the termination provision states that the tenants' obligation can be "reduced to four (4) months of rent, plus the unamortized balance of any tenant improvements financed" by GSA. Occupancy Agreement, at 2.

³⁹ GSA Counsel Conversation.

⁴⁰ Response Letter, at 5.

incurs a liability as it occupies GSA-controlled space. The recording statute, in pertinent part, requires agencies to record an obligation where there is documentary evidence of a “legal liability of the Government against an available appropriation or fund.” 31 U.S.C. § 1501(a)(9). GSA’s authority to assign to and charge CSB for the assigned space, the documentary evidence of the amounts due as outlined in the occupancy agreement and monthly billing invoice, and CSB’s occupancy of the space itself are sufficient to create a recordable legal liability pursuant to the recording statute. See *id.* Further, CSB must follow the *bona fide* needs statute: office space is a *bona fide* need of the fiscal year in which an agency occupies the space, so CSB must record the liability arising from its occupancy against an appropriation properly available for that time period. B-327242, Feb. 4, 2016, at 9 (citing B-207215, Mar. 1, 1983). In particular, it must ensure that it does not use its fiscal-year appropriations to fund its future year office space needs.

Upon executing the real-property lease for its Washington, D.C. headquarters space, CSB incurred a legal liability to its landlord for the entire amount due under the lease. Therefore, CSB’s signing of the lease constituted a single obligating event that compelled CSB to record an obligation for the total amount due. In contrast, no single event obligated CSB to pay for its occupancy of the federally-owned, GSA-controlled space in the Denver Federal Center. Instead, CSB’s obligations for the Denver Federal Center space arose continuously, incident not only to the documentary evidence of the obligation (such as the occupancy agreement and the monthly billing invoice) but also incident to CSB’s continuing occupancy of the space. We therefore consider how CSB must record obligations for this continuously arising liability.

Accurate records of the obligations that an agency has actually incurred are essential to an agency’s compliance with the Antideficiency Act: only through such records can an agency ensure that it incurs new obligations only when sufficient appropriations are available. Therefore, an agency must record its obligations under an occupancy agreement in a manner sufficient to ensure it does not over-obligate its appropriation and has sufficient proper funds available to liquidate those obligations to pay GSA for space and services.⁴¹

⁴¹ Agency obligational records also form the basis for agency reports that are required by law. For example, agencies must submit appropriation requests to OMB and certify that obligations they report in their requests are consistent with the requirements of the recording statute. 31 U.S.C. § 1108(c). An agency also must ensure that any statement of obligations it submits to Congress or to any congressional committee contains only amounts recorded consistent with the recording statute. *Id.* § 1501(b). An agency must ensure that any report of obligations for an elapsed time period reflects the amounts arising from its occupancy of GSA-controlled space.

Several factors may be relevant to an agency's determination of when it records these obligations and the amount to record on each occasion. Key factors include the amount due under each monthly billing invoice from GSA for space and services and the amount estimated in the occupancy agreement. Agencies must record obligations, including those arising from occupancy of GSA-controlled space, consistent with their apportionment, which, at the discretion of the appropriate official,⁴² may limit how much can be obligated at various points of a fiscal year. 31 U.S.C. § 1512(a) (permitting reapportionment).⁴³ Other relevant factors an agency would need to consider could change while an agency is operating under a continuing resolution. This decision does not limit an agency's flexibility to record obligations for its continued occupancy of GSA space on a periodic basis, such as monthly based on its receipt of the GSA invoice or annually based on the estimates in the occupancy agreement, as long as such amounts are recorded against an appropriation available for the time period in question.⁴⁴

CONCLUSION

CSB violated 40 U.S.C. § 8141 when it entered into a lease for space in the District of Columbia without statutory authority to do so. In addition, CSB violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1), when it entered into a ten-year real-property lease without sufficient available appropriations. It should report this violation as required by 31 U.S.C. § 1351.

CSB would not, however, violate the Antideficiency Act or other appropriations laws if it were to execute an extension of an occupancy agreement with GSA to facilitate its occupancy of space in the Denver Federal Center because the occupancy agreement is a budgeting tool that imposes no fiscal liability on CSB. Instead, GSA's statutory authority to charge CSB for the space and associated services, the documentary evidence of the amounts due in the form of the occupancy agreement and monthly billing invoice, and CSB's occupancy of the space itself are sufficient to create a recordable legal liability pursuant to the recording statute, 31 U.S.C. §

⁴² In the executive branch, OMB apportions most appropriations. See 31 U.S.C. § 1513(b); Exec. Order No. 6166, § 16 (June 10, 1933). The official with administrative control of budgetary resources available to the legislative branch, the judicial branch, or the United States International Trade Commission apportions for that entity. 31 U.S.C. § 1513(a).

⁴³ The Antideficiency Act also bars agencies from incurring obligations that exceed an apportionment or allotment. 31 U.S.C. § 1517. An apportionment may subdivide an appropriation by time period, by activity, or by some combination thereof. *Id.* § 1512. An agency will need to consider similar factors as it determines how to record its obligations in a manner sufficient to prevent exceeding apportionments and allotments.

⁴⁴ We note that a multiple-year or no-year appropriation affords an agency more flexibility in this regard than a one-year appropriation.

1501(a)(9). Those considerations are the determining factors in recording obligations for this liability, which did not arise because CSB ultimately vacated the space.

A handwritten signature in cursive script, reading "Edda Emmanuelli Perez".

Edda Emmanuelli Perez
General Counsel