



**Comptroller General  
of the United States**

Washington, D.C. 20548

B-235678

July 30, 1990

The Honorable Beverly R. Byron  
House of Representatives

Dear Ms. Byron:

This responds to your May 19, 1989, letter requesting our opinion on the use of 2-year research and development appropriations to pay for various tasks under a cost-reimbursement contract between the Navy Space and Naval Warfare Systems Command (SPAWAR) and the Applied Physics Laboratory (APL) at Johns Hopkins University. Specifically, you ask whether the SPAWAR Deputy Commander properly has concluded that the appropriations may not be used to pay for certain work performed after the term of the appropriation has expired. Your concern with that conclusion is that it generally is impractical for a researcher to stop an ongoing project at the term's end to await further funding.

**Background**

Under the contract between SPAWAR and APL, SPAWAR acts as the contracting agent for numerous military and civilian agency sponsors. Many of the tasks are financed by several appropriations, including 2-year research and development appropriations. Historically, the SPAWAR/APL agreement has been a level-of-effort contract covering the calendar year. At the time the contract is issued the precise work to be performed is not known. All work is performed under the contract pursuant to letters issued by the Navy from time to time describing specific tasks to be performed.

On December 8, 1988, the SPAWAR Deputy Commander issued a memorandum concluding that payments under level-of-effort contracts could not be made from multiyear appropriations for work performed after the date on which the funds no longer are available for obligation. This meant, for example, that under the SPAWAR/APL contract 2-year research and development appropriations obligated to support various level-of-effort contract tasks could only be used for work done during the 2 fiscal years--they could not fund work performed after September 30 of the second year, even though there would be 3 months left to the contract's term (the last 3 months of the calendar year).

The Deputy Commander's memorandum was prompted by our decision in EPA Level of Effort Contracts - Appropriation Availability, 65 Comp. Gen. 154 (1985), where we considered the propriety of issuing a hypothetical 1,000-hour assignment under a cost-reimbursement, level-of-effort (also called a term) contract that covered a period coinciding with the fiscal year, where the assignment would not be finished in the contract's period. A level-of-effort contract is a type of cost-plus-fixed-fee agreement where the scope of work is described in general terms and the contractor is obligated to devote a specified level of effort for a stated time period. Federal Acquisition Regulation (FAR) § 16.306(d)(2). The contract involved in the EPA decision provided for payment for up to 10,000 hours of work (the level of effort) actually performed during the contract's term (the fiscal year). We concluded that both the contract itself and the "bona fide need" rule would preclude EPA from issuing the work assignment, because it would have carried a portion of the 10,000 allowable hours past the contract's term, to be paid for with money available only within the term. The bona fide need rule, found at 31 U.S.C. § 1502 (1988), precludes an agency from obligating, without express statutory authority, an appropriation made for a specified period for the needs of subsequent periods.

In your letter to us you question the soundness of the Deputy Commander's view, and you include a legal memorandum prepared for APL which supports this position. You suggest that the bona fide need rule should not preclude the Navy from using a properly obligated multiyear appropriation to pay research and development contractors for a period of performance extending beyond the period in which the appropriation could be obligated.

To better understand the Navy's position, we requested its views. The Navy General Counsel's office informed us that it believes the Deputy Commander's determination restricting continued use of expired research and development funds on level-of-effort task orders is consistent with General Accounting Office (GAO) decisions.

The Navy General Counsel, however, questioned our Office's recent decisions applying the bona fide need rule to multi-year appropriations, maintaining that the bona fide need prohibition should only apply to annual appropriations. The Navy General Counsel suggests that the bona fide need concept makes sense when applied to 1-year operations and maintenance or military personnel funds since they are expense appropriations and describe what is needed for a particular fiscal year. On the other hand, "investment" accounts, such as research and development appropriations,

have nothing to do with the requirements or needs of a particular period of time. Instead, they involve expenditure of funds for investment items needed for many years. According to the Navy General Counsel, until recent GAO decisions it had been a Department of Defense practice to apply bona fide needs analyses only to annually funded contracts. The Navy General Counsel states that this practice was changed consistent with GAO's decisions.

#### Discussion

We continue to believe that the bona fide need rule applies to multiyear appropriations as well as to single-year appropriations. See 68 Comp. Gen. 170, 171 (1989); 55 Comp. Gen. 768, 773 (1976). As we discussed in 64 Comp. Gen. 359 (1985),<sup>1/</sup> the bona fide need rule initially appeared in 1789. From what can be gleaned from the sparse legislative history, the intent of the Congress was to instill a sense of fiscal responsibility in the newly formed United States departments and agencies. The Congress wanted the balance of appropriations not needed for a particular year's operations to be returned to the Treasury so that it could be reappropriated the following year in accordance with the Congress's current priorities. Of even more importance to the Congress today, a limited period of availability means that after that period has expired an agency has to return to the Congress to justify continuing the program or discuss how much is needed to carry on the program at the same or a different level.

Similar congressional concerns have been voiced specifically with regard to congressional oversight of multiyear appropriations. In 1974 a subcommittee of the Senate Committee on Appropriations complained that unauthorized multiyear funding inhibited the Congress's ability to increase or decrease the levels of funding for specific programs because the agency did not have to return each year to justify the need of continued support for grants made in the previous year. See 64 Comp. Gen. 359 at 362-3, discussing S. Rep. No. 814, 93d Cong., 2d Sess., 65-66.

In our decision in 64 Comp. Gen. 163 (1984), we rejected an argument by the Army that the bona fide needs rule has no application to "investment" accounts, as opposed to "operating" or "expense" accounts, essentially the same argument now made by the Navy General Counsel. As we pointed out in that decision, the Comptroller General and

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<sup>1/</sup> The decision concerned application of the bona fide need rule to 3-year National Institutes of Health research grants.

his predecessor, the Comptroller of the Treasury, have issued a great many decisions on this topic, applying the rule to all types of activities<sup>2/</sup> for which the Congress has seen fit to limit the period of availability of the funds it appropriates to support them. We declined then to reconsider those decisions in view of the lack of evidence in legislative history or otherwise to support the distinction the Army sought to have us draw.

The Navy General Counsel now would have us draw the same distinction, and we again decline to do so. In view of the purpose underlying the bona fide need rule, and frequently stated congressional concerns about the need to retain some control over funding decisions, we see no legal basis to alter our view that the bona fide need rule applies to multiyear appropriations as well as to single-year ones.

Your inquiry, however, has caused us to reconsider the sweeping nature of the suggestion in our EPA decision that level-of-effort contracts are by definition severable, 65 Comp. Gen. at 156, particularly as it applies to research and development contracts like those awarded to APL.

In EPA, we objected to the work assignment in issue essentially for two reasons. First, performance past the contract period clearly would have violated the contract requirement that work be done within the period expressly covered; that was clear from the record furnished by the requester. Second, we said that the bona fide need rule precluded ordering any level-of-effort work that would be performed in the next fiscal period based on our conclusion that the hypothetical level-of-effort contract was "by definition" severable. 65 Comp. Gen. at 156.

The concept of severability is at the heart of the bona fide need rule. A task is severable if it can be separated into components, each of which can be independently performed to meet a separate need of the government. See 60 Comp. Gen. 219 (1981). As we have already said, the bona fide need rule generally precludes an agency from obligating a time-limited appropriation to meet the needs of a subsequent period. If a task is severable, therefore, the separate components that comprise it must be funded by the appropriation for the period in which the need for each component arises.

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<sup>2/</sup> We have held that the bona fide need rule applies to all federal government funding activities carried out with appropriated funds, regardless of whether the funding mechanism is a contract, grant, or cooperative agreement. B-229873, Nov. 29, 1988.

A non-severable task, on the other hand, involves work which cannot be separated into components, but instead must be performed as a single task to meet a need of the government. See 60 Comp. Gen., supra. It follows, then, that the bona fide need rule does not preclude using time-limited funds for work performed in the next fiscal period in connection with a non-severable task, since the later effort is viewed as an inseparable continuation of work to fulfill a need that arose during the appropriation's period of availability.

The level-of-effort contracting approach is founded on considerations other than severability. An agency generally has two choices of contract form in entering into a cost-plus-fixed-fee arrangement like the Navy's agreement with APL. The preferred form is the completion one, in which the contract describes the scope of work by stating a definite goal or target and specifying an end product. The completion form normally requires the contractor to complete and deliver the specified end product within the estimated cost, if possible, as a condition for payment of the entire fixed fee. FAR § 16.306(d) (1), (3).

The level-of-effort form, in contrast, is used if the agency can describe the scope of work only in general terms, and requires a specified level of effort for a stated time period. FAR § 16.306(d) (2). The contractor is paid for allowable costs incurred, and the fixed fee is payable at the end of the period if performance is deemed satisfactory. In both cases, there is work to be completed and, often, a reported result; the essential difference involves the specificity with which the work can be defined.

Thus, a level-of-effort contract is not defined by severability, as our EPA decision suggests. Instead, it represents a contracting arrangement dependent on the government's inability to define the needed work in advance. The arrangement provides a basis for measuring performance and the right to payment when the work to be performed cannot otherwise be defined in sufficient detail. Severability, and the bona fide need rule, are appropriations concepts that concern the extent to which the needed work can be divided into independent components meeting separate needs.

This does not mean that level-of-effort work is not in many instances severable. It is often the case that the work an agency is unable to define precisely enough for a completion contract involves the kind of recurring tasks that meet an independent need of the government each time they are performed. In that event, the concept of

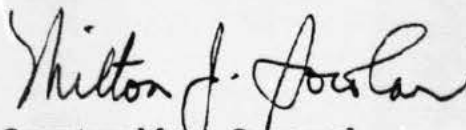
severability applies and the bona fide need rule precludes funding such work in the next fiscal year with appropriations that expire within the current year. The hypothetical economic research contract involved in our EPA decision falls in this category.

On the other hand, we believe there can be level-of-effort work, as that term is used in the FAR, which is non-severable. As APL suggests, research and development contracts in particular may well give rise to non-severable level-of-effort tasks in some circumstances.

Under APL's contract, no performance takes place until a proposal for specific work under the contract has been approved and the contract modified to provide for the performance of tasks to carry out that work. APL argues that in some cases these task orders, while properly issued on a level-of-effort basis under the requirements of the FAR because the work can be described in only general terms, are nonetheless not severable. Some tasks, for example, require the commitment of facilities and other resources the full value of which may be realized only if all work called for in the task order is completed.

In sum, the fact that a task under the APL contract is executed on a cost-reimbursement, level-of-effort basis does not mandate a determination that the work is severable for purposes of the bona fide need rule. Rather, it is the nature of the work being performed, not the contract type, that must be taken into account in reaching a judgment on that issue. That judgment is to be based on all the facts and is, in the first instance, the responsibility of the Navy. To the extent that our decision at 65 Comp. Gen. 154, supra, suggests otherwise, it is modified accordingly.

Sincerely yours,

*for*   
Comptroller General  
of the United States