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September 30, 2005

The Honorable Frank R. Lautenberg
The Honorable Edward M. Kennedy
United States Senate

Subject: *Department of Education—Contract to Obtain Services of Armstrong Williams*

This responds to your letter of January 10, 2005, in which you asked that we consider the Department of Education's arrangements with Ketchum, Inc., and Mr. Armstrong Williams concerning the "No Child Left Behind" program. Your letter was prompted by some press reports about a Department of Education contract with Ketchum, Inc., and Ketchum subcontracts with the Graham Williams Group (GWG). Among other things, the press reports allege that pursuant to these arrangements, the Department paid Mr. Williams to promote the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). You asked whether, in contracting for the services of Armstrong Williams, the Department violated the publicity or propaganda prohibition.¹

As explained below, we find that the Department contracted for Armstrong Williams to comment regularly on the No Child Left Behind Act without assuring that the Department's role was disclosed to the targeted audiences. This violated the publicity or propaganda prohibition for fiscal year 2004 because it amounted to covert propaganda. As a result of this violation, the Department also violated the Antideficiency Act, 31 U.S.C. § 1341.

BACKGROUND

Consistent with our usual practice, we requested factual information and the Department's legal justification for using appropriated funds to obtain the services provided by Mr. Williams and his company. Letter from Susan Poling, Managing Associate General Counsel, GAO, to Kent Talbert, Acting General Counsel, Department of Education, Jan. 28, 2005 (hereinafter, Poling Letter). The Department delayed its response to our request pending completion of work by the Inspector

¹ Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004).

General (IG) on whether the Department's arrangements with Ketchum and GWG complied with the Federal Acquisition Regulation and other pertinent contract law.

The IG issued his report on April 15, 2005. ED-OIG Report No. A19-F0007, April 15, 2005 (hereinafter, "ED-OIG Report"). The Department "accept[ed] the report as drafted and embrace[d] the recommendations" made in it. Letter from Margaret Spellings, Secretary, Department of Education, to John P. Higgins, Jr., Inspector General, Department of Education, Apr. 15, 2005. Subsequently, the Department's Acting General Counsel replied to our request. Letter from Kent Talbert, Acting General Counsel, Department of Education, to Susan Poling, Managing Associate General Counsel, GAO, May 18, 2005 (hereinafter, Talbert Letter). In determining the facts pertinent to this opinion, we relied upon the ED-OIG Report, the Acting General Counsel's reply, and the documents provided with them.

The No Child Left Behind Act (NCLB Act) became law in January 2002. In order to disseminate information to the public about the NCLB Act, the Department decided to acquire media relations services. On May 14, 2003, the Department awarded Ketchum, Inc. (hereinafter, Ketchum) a 1-year "indefinite delivery, indefinite quantity" (IDIQ) contract, with three renewal options. ED-OIG Report at 8. Over time, the Department issued multiple task orders and work requests under the Ketchum contract. ED-OIG Report at 2. Two of those task orders were for the services of Armstrong Williams and his company, GWG.

According to the IG report, Mr. Williams initially approached the Secretary of Education in March 2003 with an undated written proposal that the Graham Williams Group (GWG) do some work for the Department.² *Id.* at 5. Mr. Williams told the Department at the time (and later repeated to the IG) that he was willing to accept significantly less for his services than he would normally charge because "he believed in NCLB." *Id.* at 6. In November 2003, the Department directed Ketchum to arrange a subcontract with GWG for a minority outreach program featuring Mr. Williams. *Id.* For this reason, Ketchum submitted a formal proposal to the Department for GWG to regularly comment on the NCLB Act during the course of his broadcasts and to produce, among other things, two television and two radio advertisements for broadcast during Mr. Williams's weekly television and radio show, "The Right Side." *Id.* See also Talbert Letter, Exhibit 1: Memorandum from Monica Marshall, Senior Vice President, Ketchum, to John Gibbons, Director of Public Affairs, and D.J. Nordquist, Deputy Director of Public Affairs, Department of Education, Nov. 17, 2003.

² Mr. Williams is a syndicated columnist and commentator. He founded and heads GWG, which represents Mr. Williams and owns and produces the shows that he hosts. See Armstrong Williams, *About Armstrong—The Graham Williams Group*, at <http://www.armstrongwilliams.com> (last visited Sept. 29, 2005).

The Department adopted the Ketchum proposal³ and, on January 6, 2004, issued Task Order No. 9,⁴ which amended the Ketchum contract and made \$113,441.06 available for the conduct of a six-month (from December 2, 2003, through June 2, 2004) minority outreach campaign using GWG. The Statement of Work for Task Order No. 9 states that Ketchum “shall arrange” for the production of two television and two radio ads that would run on “The Right Side,” featuring the Secretary of Education and Mr. Williams and focus on the NCLB Act.⁵ It also states that Ketchum “shall arrange for Mr. Williams to regularly comment on NCLB.”

The Statement of Work also set out a list of “Deliverables” that included two television ads and two radio ads “promoting NCLB,” to be broadcast during Armstrong Williams’s radio and television shows; an option for the Secretary and other Department officials to appear from time to time as studio guests to discuss the NCLB Act; a 6-month advertising campaign in “The Right Side” with Armstrong Williams, with “bonus ads” during Black History month and on Rev. Martin Luther King, Jr.’s Birthday; and a requirement that Mr. Williams “utilize his long term working relationship with America’s Black Forum, where he appears as a guest commentator, to encourage the producers to periodically address the No Child Left Behind Act (67 million viewers; reach 87% of urban market).”

The Statement of Work required Ketchum to provide monthly reports to the Department. After the Department issued Task Order No. 9 to Ketchum, Ketchum and GWG entered into a “firm-fixed price subcontract,” effective retroactively from December 2, 2003, through June 2, 2004, to execute the task order. Talbert Letter, Exhibit 2. A copy of the Statement of Work for Task Order No. 9 was included as an attachment to that subcontract. *Id.* On May 18, 2004, Ketchum proposed that the Department renew and expand those arrangements for an additional 6-month period.⁶ The Department agreed and on June 25, 2004, issued Task Order No. 16

³ The Department’s Statement of Work “mirrored the Ketchum proposal,” *see* ED-OIG Report at 7, which was, in turn, based on the GWG proposal “with limited modifications.” *Id.* at 6.

⁴ Talbert Letter, Exhibit 3: Contract No. ED-03-PO-1725, Amendment of Solicitation/Modification of Contract No. 7, Jan. 6, 2004 (hereinafter Task Order No. 9). This task order took effect retroactive to December 2, 2003. Task Order No. 9.

⁵ The Right Side is a radio and television show hosted by Armstrong Williams.

⁶ Talbert Letter, Exhibit 4: Memorandum re: “Response to Statement of Work #16,” from “Ketchum” to Janet D. Scott, Contracting Officer, Department of Education, May 18, 2004.

extending the outreach campaign until December 25, 2004.⁷ The Statement of Work for Task Order No. 16 was nearly identical to that of Task Order No. 9,⁸ and Ketchum and GWG implemented it in the same manner that they implemented Task Order No. 9.

Over the course of both task orders, GWG submitted to Ketchum a series of monthly invoices and reports.⁹ Ketchum passed these invoices and reports to the Department¹⁰ as part of its billing process.¹¹ Ketchum's invoices included line items for its own administrative expenses, plus an additional line item indicating that it had paid GWG's subsidiary, Right Side Productions, Inc., along with the date and amount.¹² All of GWG's invoices billed for "Professional Services."¹³ Some of those invoices included a line item for "Ad production,"¹⁴ "Ad costs,"¹⁵ or "Ad Campaign."¹⁶ The IG found that the invoices paid by the Department did not clearly identify what

⁷ See Talbert Letter, Exhibit 5: Contract No. ED-03-PO-1725, Amendment of Solicitation/Modification of Contract No. 20, June 25, 2004 (hereinafter Task Order No. 16).

⁸ ED-OIG Report at 7.

⁹ See Talbert Letter, Exhibits 28-40.

¹⁰ Talbert Letter at 4, nn.6, 8; ED-OIG Report at 15.

¹¹ In a letter to the Federal Communications Commission (FCC) which the Department submitted to us, Ketchum said, "GWG produced invoices detailing run times and locations for the ads, which Ketchum forwarded to the government for payment." Talbert Letter, Exhibit 47. GWG's monthly reports itemized the run times and locations for the ads, but the GWG invoices did not.

The FCC is presently conducting an ongoing investigation into whether any laws under its jurisdiction were violated as a result of actions taken in this matter. See FCC Press Release dated Jan. 14, 2005, at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-256115A1.pdf (last visited Sept. 29, 2005).

¹² Talbert Letter, Exhibits 7-14.

¹³ Talbert Letter, Exhibits 15-26.

¹⁴ *E.g.*, Talbert Letter, Exhibit 15.

¹⁵ *E.g.*, Talbert Letter, Exhibit 16.

¹⁶ *E.g.*, Talbert Letter, Exhibit 22.

the Department was paying for.¹⁷ None of the invoices provided the Department by Ketchum or GWG specifically referred any of the “deliverables” listed in the Statements of Work.¹⁸

GWG’s monthly reports were organized into two sections. Every report began with a list (often lengthy) of what GWG characterized as activities undertaken during that month in which “Mr. Armstrong Williams promoted NCLB.”¹⁹ The activities listed included radio and television shows, radio stations, networks, published columns, and other activities. Most of those entries for these activities consisted solely of dates and event names. Other entries were more detailed. For example, in the report for February 2004, GWG included in its list the entry, “Sinclair Broadcasting—February 16 & 23, 2004. Two (2) minute commentary devoted to NCLB.”²⁰ The January report listed and reproduced in full a column that Mr. Williams had published “devoted to NCLB” that appeared in 34 newspapers.²¹ (Mr. Williams did not disclose in the column his contractual relationship to the Department.) The monthly reports also listed the dates, times, and stations on which the GWG-produced TV and radio advertisements ran during that month.²²

The IG found that, taken together, Mr. Williams’s 12 monthly reports listed “168 activities other than ads . . . promoting NCLB.” ED-OIG at 15. We asked the Department for copies or transcripts of all of the interviews, speeches, columns, and other public statements that Armstrong Williams made promoting the NCLB Act as result of its subcontracts with Ketchum.²³ Other than the one column which GWG reproduced in full as part of its Monthly Report for January 2004, *see* Talbert Letter, Exhibit 29, the Department did not provide us with copies or transcripts for any of the activities listed in the monthly reports. For this reason, we searched the internet for copies, transcripts, or press reports of the other public statements that GWG listed in its monthly reports. We were unable to locate any of those statements on the internet, but we did find other columns that Mr. Williams made promoting the

¹⁷ ED-OIG Report at 15.

¹⁸ *Id.* at 1, 18 (“the invoices received and paid by the Department were vague”).

¹⁹ *E.g.*, Talbert Letter, Exhibit 29 (Minority Outreach Campaign, Task Order No. 9, Monthly Report for January 2004).

²⁰ Talbert Letter, Exhibit 30.

²¹ Talbert Letter, Exhibit 29.

²² Talbert Letter, Exhibits 28-40.

²³ Poling Letter.

NCLB Act during the period covered by the Department's task orders.²⁴ However, we could not directly connect these other columns to Task Order Nos. 9 and 16 because, while the GWG and Ketchum proposals stated that Mr. Williams would "place stories and commentaries on NCLB"²⁵ in the media, GWG did not list these other columns in its monthly reports.

The Department told us that it has paid Ketchum a total of \$188,543.48 for Task Order Nos. 9 and 16. Of that amount, \$186,000 covered amounts that Ketchum paid GWG.²⁶ Talbert Letter at 9. The Department paid these amounts using funds appropriated for "Departmental Management—Program Administration" in the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. E, title III, 118 Stat. 3, 262 (Jan. 23, 2004). According to the Department, it has paid eight of the twelve monthly Ketchum invoices. Talbert Letter at 10.

DISCUSSION

Your letter asked us to determine whether the Department's arrangements with Ketchum, GWG, and Armstrong Williams violated the governmentwide publicity or propaganda prohibition, as contained in the 2004 fiscal year appropriations act.²⁷ This prohibition states that "[n]o part of any appropriation . . . shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress."²⁸ It bars agencies from using appropriations (a) to produce or distribute "covert propaganda," (b) for purposes of self-aggrandizement, and (c) for purely partisan purposes. *E.g.*, B-304272, Feb. 17, 2005; B-302504, Mar. 10, 2004; B-178528, July 27, 1973. In our view, the Department violated the publicity or propaganda prohibition when it issued task orders to Ketchum directing it to arrange for Mr. Williams to regularly comment on the NCLB Act without requiring Ketchum to ensure that Mr. Williams disclosed to his audiences his relationship with the Department. This qualifies as the production or distribution of covert propaganda.

²⁴ Our research revealed several other columns that Mr. Williams published on the NCLB Act during this period which were not mentioned in the monthly reports. *See, e.g.*, Townhall.com, *The Education Costa Nostra*, originally at <http://www.Townhall.com/columnists/ArmstrongWilliams/printaw20040301.shtml> (Mar. 1, 2004) (last visited Sept. 1, 2005); *now available at* <http://www.davidstuff.com/incorrect/williams1.htm> (Mar. 1, 2004) (last visited Sept. 29, 2005).

²⁵ Talbert Letter, Exhibits 1, 4; ED-OIG Report at 7, 12.

²⁶ The Department has already agreed to the IG's recommendation that it recover some of these amounts. ED-OIG Report at 19; ED-OIG Report, Attachment 1 at 6.

²⁷ Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. at 356.

²⁸ *Id.*

This violation, in turn, caused the Department to violate the Antideficiency Act, 31 U.S.C. § 1341. We explain these findings below.

Violation of the Publicity or Propaganda Prohibition

In previous opinions and decisions, we have found “materials . . . prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency” amount to covert propaganda that violates the prohibition. B-229257, June 10, 1988. A critical element of this violation is the concealment of, or failure to disclose, the agency’s role in sponsoring the material. *E.g.*, B-303495, Jan. 5, 2005. For example, in B-223098, B-223098.2, Oct. 10, 1986, the Small Business Administration (SBA) prepared “suggested editorials” and distributed them to newspapers. The editorials advocated public support for an administration proposal to merge the SBA with the Department of Commerce. We found that those agency-prepared editorials were misleading as to their origins. The agency intended for the newspapers to print the editorials as their own position without identifying them as SBA-authored documents. This effort to conceal the agency’s authorship and make it appear that respected, independent authorities were endorsing the agency’s position went “beyond the range of acceptable agency public information activities” and violated the publicity or propaganda prohibition. *Id.* Similarly, in 66 Comp. Gen. 707 (1987), we held that newspaper articles and editorials (supporting the government’s Central American policy) that were prepared by paid consultants at government request and published as the work of nongovernmental parties violated the prohibition. Again, it was the covertness of the government’s actions that led to the violation. In that case, the government was attempting to convey a message to the public advocating the government’s position while misleading the public as to the origins of the message. *Id.* at 709.

In this case, the Department directed Ketchum to subcontract for Armstrong Williams to convey a message to the public on behalf of the government without disclosing to the public that the messengers were acting on the government’s behalf and in return for the payment of public funds. The Statements of Work for both task orders explicitly stipulated that “Ketchum shall arrange for Mr. Williams to regularly comment upon NCLB.” Talbert Letter, Exhibit Nos. 3 and 5. The Statements of Work also required Mr. Williams to “utilize his long term working relationship with America’s Black Forum . . . to encourage the producers to periodically address the No Child Left Behind Act.” *Id.*

The Department knew when it directed Ketchum to contract with GWG that Mr. Williams’s commentary and discussion under these Statements of Work would endorse the NCLB Act. Both Ketchum and Mr. Williams had stressed to the Department that he was willing to accept significantly less than he would normally charge for his services because “he believed in the NCLB.” ED-OIG Report at 6. *See also* Talbert Letter, Exhibits 1 and 4. In fact, as the IG noted, GWG specifically proposed to “win the battle for media space [through] favorable commentaries [that] will amount to passive endorsements from the media outlets that carry them.”

ED-OIG Report at 12 (quoting the GWG proposal presented to the Department in November 2003).

To meet the requirements of the Statements of Work, Mr. Williams reported to the Department on a monthly basis. In those reports he listed the activities in which he had “promoted NCLB.” The IG counted in those monthly reports 168 separate activities in that effort, including speeches, interviews, appearances, and a published newspaper column.²⁹ The Department did not provide us recordings or transcripts of those activities. We only received the newspaper column from the Department because GWG reproduced it in whole in one of its monthly reports. In that newspaper column, Mr. Williams praised NCLB, the President, and the Secretary of Education.³⁰ We independently located on the internet other activities promoting the

²⁹ The Department’s Statements of Work do not mention the use of published columns or other media. However, the IG reported that “there were numerous indicators during the formation process that the GWG work under the work requests could include providing or attempting to arrange favorable NCLB commentary through various media outlets.” ED-OIG Report at 11. For example, the GWG and Ketchum proposals stated that Ketchum and Mr. Williams would “work with African-American newspapers to place stories and commentary on NCLB.” Talbert Letter, Exhibit 1: Memorandum from Monica Marshall, Senior Vice President, Ketchum, to John Gibbons, Director of Public Affairs, and D.J. Nordquist, Deputy Director of Public Affairs, Department of Education, Nov. 17, 2003. *See also* Talbert Letter, Exhibit 4: Memorandum from “Ketchum,” to Janet D. Scott, Contracting Officer, Department of Education, May 18, 2004; ED-OIG Report at 7, 12.

More importantly, GWG’s monthly reports identifying its activities in performance of the task orders explicitly notified Ketchum and the Department that Mr. Williams was publishing columns and using other media outlets to “promote” NCLB in order to satisfy his obligations under the contract.

³⁰ *See* Townhall.com, *Secretary Paige and Mayor Williams fight for change*, at <http://www.townhall.com/columnists/ArmstrongWilliams/aw20040107.shtml> (Jan. 7 2004) (last visited Sept. 1, 2005). This column stated, among other things:

“President Bush’s No Child Left Behind Act was designed to redress th[e] ‘soft bigotry of expectations’ [i.e., that ‘many teachers believe that poor students—mostly of color—cannot really do much better’ in school]. . . .

“[Secretary] Paige has long been at the forefront of the movement to increase educational options for underprivileged students. . . .

. . .

(continued...)

NCLB Act that Mr. Williams undertook between December 2, 2003 and December 25, 2004, but those activities cannot be directly connected to the Department's Task Orders because they were not listed in GWG's reports.

The IG did not opine on whether the activities that it identified violated the prohibition on publicity or propaganda.³¹ His review was limited to "determin[ing] whether the initial award to Ketchum and the subsequent work requests involving the GWG were in compliance with the Federal Acquisition Regulation (FAR) and other pertinent contract law." ED-OIG Report at 1. The IG also evaluated the "effectiveness of the oversight function" with respect to the Ketchum contract and the GWG work requests. *Id.* Nevertheless, the IG noted that "because other activities relating to commentary were included in the [Statements of Work] and activity reports, and because the invoices received and paid by the Department were vague, the appearance is that the Department may have been paying for more than just the advertising." *Id.* at 18.

It is clear to us from the monthly reports and invoices provided by GWG that Mr. Williams promoted the NCLB Act at the behest of the Department and that he thought it was part of the contract. It is also clear that the Department did not ask Ketchum to ensure that the Department's sponsorship of Mr. Williams's activities in promotion of the NCLB Act was disclosed to his targeted audiences. The Department did not include in its contracts a requirement for Ketchum, and hence Mr. Williams, to disclose to intended audiences the fact that the Department had retained him to comment upon the NCLB Act. In the column promoting the NCLB Act that Mr. Williams reproduced in his monthly report for January 2004,

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"Providing children with a decent education is something we can do to haul our society along. We may not be able to end all inequality; but we can, as individuals, demand that our underprivileged children have options when it comes to the greatest single instrument of empowerment—education. This is a rather straightforward goal of men like Secretary Paige . . . And it is the next great battleground in the fight for social equality."

³¹ Recently, the IG published another report reviewing 15 grants and 20 contracts that the Department awarded for public relations services during fiscal years 2002–2004, but did not include the contract and subcontracts at issue here. ED-OIG Report No. ED-OIG/113-F0012, September 2005 at 1. This report did consider whether the Department had violated the prohibition on publicity or propaganda in the 15 grants and 20 contracts that it reviewed. *Id.* at 3.

Mr. Williams did not disclose the Department's sponsorship role.³² As noted above, we asked the Department to provide us copies or transcripts of all of the activities that GWG listed in its monthly reports as "promotional" events, but the Department did not provide us with any of them—with the exception of the one column which GWG included in its January report. For this reason, we could not independently verify whether Mr. Williams made appropriate disclosures to his audiences and colleagues during the other activities listed in GWG's monthly reports.³³ Mr. Williams, however, has publicly acknowledged that he did not regularly, if at all, disclose to his audiences or the colleagues he was to influence that he had been hired at the Department's request to promote the NCLB Act.³⁴ For these reasons, we think it is clear that the Department violated the publicity or propaganda prohibition by using appropriated funds to arrange for commentary by Armstrong Williams on the NCLB Act without assuring that the Department's role in sponsoring that commentary was disclosed to the targeted audiences.

The Department's Position

In its reply to us, the Department did not dispute that Armstrong Williams made favorable commentaries on the NCLB Act during the period covered by Task Order Nos. 9 and 16. Nor did it dispute that the Statements of Work in the Task Orders required Mr. Williams to comment regularly on the NCLB Act. Instead, the Department argued that it contracted only for television and radio advertisements featuring Mr. Williams.³⁵ Talbert Letter at 2. The Department offered three points in

³² See Townhall.com, *Secretary Paige and Mayor Williams fight for change*, at <http://www.townhall.com/columnists/ArmstrongWilliams/aw20040107.shtml> (Jan. 7, 2004) (last visited Sept. 1, 2005).

³³ As noted above, we found on the Internet several other columns that Mr. Williams published on the NCLB Act between December 2003 and January 2005, the period covered by these task orders, but he did not list these in his monthly reports. These columns did not disclose that the Department had retained Mr. Williams to comment on the NCLB Act.

³⁴ See Media Matters for America, *Armstrong Williams's conflicting statements on disclosure*, at <http://mediamatters.org/items/200501110001> (video recording at <http://mediamatters.org/static/video/williams-200501100010.wmv>) (last visited Sept. 29, 2005).

³⁵ To the extent that the Department maintains that the advertisements were the main deliverables under Task Order Nos. 9 and 16, the IG found that the Department "only received two of the eight ads it was supposed to receive under both work requests," yet it paid the full invoiced prices anyway. ED-OIG at 16.

(continued...)

support of its position: First, the only portions of its Statements of Work that have any legal significance are the lists of “deliverables.” The Department argues that its task orders did not procure Mr. Williams’s commentary, which meant there was nothing for the Department to disclose. Second, the Department did not pay any appropriated funds for covert propaganda. Third, the Department’s task orders represented the legitimate dissemination of information to the public. *Id.* We do not agree.

The Department’s first point is that the only portions of its Statements of Work that have any legal significance are the lists of “deliverables.” Although the Department acknowledges that its Statements of Work contained language directing Ketchum to “arrange for Mr. Williams to regularly comment upon NCLB,” the Department stresses that this language was not in the lists of “deliverables” included in the Statements of Work.³⁶ Talbert Letter at 4–5. The Department offers no explanation of the meaning or significance of the rest of the language contained in the Statements of Work, nor does it offer any precedent in support of its position.

We identified no case law supporting the Department’s position that contractual obligations are limited to those enumerated as deliverables.³⁷ On the contrary, the courts have long recognized that a “cardinal principle of contract construction [is] that a document should be read to give effect to all its provisions and to render them consistent with each other.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). *See also KiSKA Construction Corp. v. Washington Metropolitan Area Transit Authority*, 321 F.3d 1151, 1163 (D.C. Cir. 2003); Restatement (Second) of Contracts, § 203(a). The Department’s approach, however, would have us ignore key sentences contained in the Statements of Work and assign to them no legal

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We reviewed the GWG-produced television and radio ads that the Department provided to us. We found that those ads did not violate the prohibition on publicity or propaganda. They clearly disclosed to the target audiences that the Department had paid for them.

³⁶ As noted above, each list of “Deliverables” specified two television ads and two radio ads promoting the NCLB Act ; an option for the Secretary and other Department officials to appear from time to time as studio guests to discuss the NCLB Act; a 6-month advertising campaign in *The Right Side* with Armstrong Williams, with bonus ads during Black History month and on Rev. Martin Luther King, Jr.’s Birthday; and a requirement that Mr. Williams utilize his influence with America’s Black Forum to encourage the producers to periodically address the NCLB Act.

³⁷ We also note that the FAR, which does not require deliverables, does require that the statement of work define the requirements and specific work to be accomplished. *See, e.g.*, 48 C.F.R. §§ 37.602-1(a), 16.504(a).

significance. Indeed, the Department's own policies and procedures state: "The final Statement of Work . . . serves as the nucleus of . . . the contract. It tells offerors what [the Department] wants and, after award, it establishes the standard for the contractor's performance." Departmental Directive No. OCFO:2-107, *Acquisition Planning*, § VII.G.1.b(3) at 12 (June 10, 1992) ("establishing departmental policy and procedures for . . . acquisitions").

The case law and the Department's own directives compel us to conclude that the language in the statements of work of these task orders may not be casually read out of the contract. Accordingly, we reject the Department's suggestion that we ignore the explicit language from the Statements of Work that "Ketchum shall arrange for Mr. Williams to regularly comment on NCLB." This passage was not rendered nugatory simply because the Department did not replicate it in its list of deliverables. To determine the "scope" of the Department's arrangements with Ketchum and GWG and the "specific work to be accomplished" under them, we must construe all of the language of the Statements of Work. 48 C.F.R. § 37.602-1(a).

Having concluded that the Department's contract may not be restricted to the lists of deliverables, we think the Department's task orders did procure commentary from Mr. Williams. "It is widely accepted that the plain language of a contract, if unambiguous, is the best source to use to interpret it." B-302358, Dec. 27, 2004, *citing In re: Crow Winthrop Operating Partnership*, 241 F.3d 1121, 1124 (9th Cir. 2001); *In re: Cambridge Biotech Corp.*, 186 F.3d 1356, 1374 (Fed. Cir. 1999); *Kokomo Tube Co. v. Dayton Equipment Services Co.*, 123 F.3d 616, 624 (7th Cir. 1997). The Statements of Work, which are the "nucleus"³⁸ of the Department's task orders and which define and identify the "specific work to be accomplished,"³⁹ use clear, plain English: "Ketchum shall arrange for Mr. Williams to regularly comment upon NCLB." Having issued task orders for Ketchum to arrange for regular commentary by Mr. Williams, the Department was obligated by the publicity or propaganda prohibition to assure that its role in procuring that commentary was disclosed to the target audiences. We can find no evidence in the record that the Department took any steps to assure that appropriate disclosures were made.

The Department's second argument is that it did not pay any appropriated funds for covert propaganda because none of the invoices reference commentary by Mr. Williams. The problem with this argument is that none of the invoices actually identified any specific deliverable listed in the statements of work.⁴⁰ Instead, GWG billed for "Professional Services." Some of the invoices mention "ad production," "ad

³⁸ Departmental Directive No. OCFO:2-107, *Acquisition Planning*, § VII.G.1.b(3) at 12 (June 10, 1992).

³⁹ 48 C.F.R. § 37.602-1(a).

⁴⁰ See Talbert Letter, Exhibits 7-26; ED-OIG Report at 15.

costs,” or “ad campaign,” but the language used in the invoices is not sufficient to identify a specific deliverable under Task Order Nos. 9 and 16, such as one of the television or radio ads. The Statements of Work do not specify unit prices for anything in the task orders that could serve as a basis to separately bill for the performance of a particular deliverable. Each task order is a firm, fixed price contract for everything in the task order.

The invoice reference to “Professional Services” is to a package of products and services, including commentary that GWG had bundled together and offered to the Department at a reduced price. The record shows that the proposals Ketchum and GWG made and the Department adopted featured a complete package of services, including both ads and favorable commentary in the media, at a reduced cost. GWG and Ketchum recommended an “integrated marketing campaign” to target audiences through a variety of mediums, including commentary by Mr. Williams in other forums he frequently appeared. Talbert Letter, Exhibit 4. Ketchum had noted to the Department that the typical fee for this level of services would be far greater than the amount that the Department agreed to pay under the task orders. Talbert Letter, Exhibit Nos. 1, 4. In its proposals to the Department, which eventually became the statements of work, GWG had offered to provide all of the services as a package at a reduced fee.⁴¹ In light of the vague billing, the monthly reports itemizing the number of times Mr. Williams promoted the NCLB Act, and the inclusive packages of services included in the proposals and statements of work, when GWG billed the Department for “Professional Services,” these services included the commentary that Mr. Williams reported in his monthly reports.⁴²

The Department’s third argument is that these task orders are no more than the legitimate dissemination of information to the public.⁴³ In its view, the subcontracts

⁴¹ Mr. Williams told the IG that “the cost associated with the level of services he provided was well below what he would normally charge. Because he believed in NCLB, and wanted the business, [he] agreed to perform for the cost the Department was willing to pay.” ED-OIG Report at 6.

⁴² Although the ED IG’s investigation was focused on contract formation and oversight issues, the Inspector General did conclude that the Department paid for ads that were never received (ED-OIG Report at 15-16) and the ads that were received were of poor quality. ED-OIG Report at 16, 18. In addition, because commentary was included in the Statements of Work and the activity reports, the Inspector General concluded that the Department “may have been paying for more than just the advertising.” ED-OIG Report at 18.

⁴³ We note in passing that in each of his monthly reports, Mr. Williams claimed to be “promoting” the NCLB Act, not educating the public. The column reproduced in the monthly report for January 2004 is the only sample provided of those activities. It discussed the political controversy surrounding the NCLB Act and the character, roles, and motives of the Department, the Secretary, the President, and various other
(continued...)

to obtain the services of Mr. Williams and GWG represented “a concerted effort . . . to inform the public and parents about NCLB and the opportunities it offers to them and their children.” Talbert Letter at 6. Every agency has a legitimate interest in the “dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws” for which the agency is responsible. 31 Comp. Gen. 311 (1952). *See also, e.g.*, B-303495, Jan. 4, 2005. However, while we agree that the Department should disseminate information to the public on the NCLB Act, it must disclose its role.

Antideficiency Act Violation

The Department’s use of appropriated funds in violation of the publicity or propaganda prohibition also constituted a violation of the Antideficiency Act, 31 U.S.C. § 1341(a). This act prohibits making or authorizing an expenditure or obligation that exceeds available budget authority. B-300325, Dec. 13, 2002. Because the Department has no appropriation available to procure favorable commentary in violation of the publicity or propaganda prohibition, it violated the Antideficiency Act, 31 U.S.C. § 1341(a). *Cf.* B-303495, Jan. 4, 2005; B-302710, May 19, 2004. Under 31 U.S.C. § 1351, the Department must report its Antideficiency Act violations to the President and the Congress. At the same time, a copy must be sent to the Comptroller General.⁴⁴

CONCLUSION

The Department of Education violated the fiscal year 2004 publicity or propaganda prohibition by contracting with Ketchum for the services of GWG to obtain commentary by Armstrong Williams on the NCLB Act without requiring Ketchum to

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interested parties with respect to the enactment and implementation of the NCLB Act.

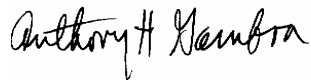
⁴⁴ Recent amendments to 31 U.S.C. § 1351 require the Department to transmit a copy of that report to the Comptroller General. 31 U.S.C. § 1351, as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title I, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004) (“[a] copy of each report [required by 31 U.S.C. § 1351] shall also be transmitted to the Comptroller General on the same date the report is transmitted to the President and Congress”).

Office of Management and Budget Circular No. A-11 provides guidance on what information to include in Antideficiency Act reports. Agencies must report violations found by GAO, even if they disagree with the finding. OMB advises agencies, “If the agency does not agree that a violation has occurred, the report to the President and the Congress will explain the agency’s position.” OMB Circ. No. A-11, ¶ 145.8 (July 2004).

ensure that Mr. Williams disclosed to his audiences the Department's role. The commentary obtained as a result of these contracts violated the publicity or propaganda prohibition because it was "covert," in that it did not disclose to the targeted audiences that it was sponsored by the Department and was paid for using appropriated funds. *E.g.*, B-303495, Jan. 4, 2005; B-302710, May 19, 2004. At the same time, because the Department had no appropriation available to contract for commentary in violation of the cited publicity or propaganda prohibitions, the Department also violated the Antideficiency Act, 31 U.S.C. § 1341. B-303495, Jan. 4, 2005; B-302710, May 19, 2004. It must report this violation to the Congress and the President, and submit a copy of that report to the Comptroller General. 31 U.S.C. § 1351, as amended. B-304335, Mar. 8, 2005.

If you have any questions regarding this matter, please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667, or Thomas H. Armstrong, Assistant General Counsel, at 202-512-8257.

Sincerely yours,

A handwritten signature in cursive script, reading "Anthony H. Gamboa".

Anthony H. Gamboa
General Counsel

Digests

1. The Department of Education contracted to obtain commentary on the No Child Left Behind Act by Mr. Armstrong Williams, but took no steps to assure that its role in sponsoring that commentary was disclosed to the targeted audiences. This constituted covert propaganda in violation of the fiscal year 2004 publicity or propaganda prohibition found in the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004).
2. Because the Department of Education had no appropriations available to contract for covert propaganda in violation of the publicity or propaganda prohibitions found in Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, div. F, title VI, § 624, 118 Stat. 3, 356 (Jan. 23, 2004), the Department also violated the Antideficiency Act, 31 U.S.C. § 1341. It must report these violations to the Congress and the President, and transmit a copy of that report to this Office. 31 U.S.C. § 1351, as amended.