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Comptroller General  
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United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Services Contract

**File:** B-317139

**Date:** June 1, 2009

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### DIGEST

A nonseverable services contract that is not separated for performance by fiscal year may not be funded on an incremental basis without statutory authority. Failure to obligate the estimated cost (or ceiling) of a nonseverable cost-reimbursement contract at the time of award violated the *bona fide* needs rule.

Contract modifications to a cost-reimbursement contract increasing original ceiling are chargeable to appropriations available when the modifications were approved by the contracting officer. The actual date the agency records the obligation in its books is irrelevant to the determination of when the obligation arises and what fiscal year appropriation to charge.

A provision in an annual appropriations act designating that a portion of a lump-sum amount “shall be available for” a specific project does not preclude the use of other available appropriations for the project.

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### DECISION

The Office of Inspector General, Department of the Treasury (OIG), has requested a decision regarding the Financial Crimes Enforcement Network’s (FinCEN) obligation, expenditure, and accounting of appropriated funds for its Bank Secrecy Act Direct Retrieval and Sharing System (BSA Direct) project. Letter from Marla A. Freedman, Assistant Inspector General for Audit, Department of the Treasury, to Gary L. Kepplinger, General Counsel, GAO, Aug. 29, 2008 (Request Letter). OIG states that FinCEN obligated about \$17.7 million on the project during fiscal years 2004 through 2006, and questions FinCEN’s use of funding in each of those three fiscal years, including whether FinCEN violated the Antideficiency Act. Request Letter, at 3. As discussed below, we conclude that FinCEN improperly charged obligations to its fiscal years 2005 and 2006 appropriations in violation of the *bona*

*fide* needs rule and will have to adjust its accounts to correct the violation. If, at that time, FinCEN finds that it has overobligated the proper appropriation, FinCEN must report an Antideficiency Act violation.

Our practice when issuing decisions or opinions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at [www.gao.gov/legal/resources.html](http://www.gao.gov/legal/resources.html). In this regard, we obtained the views of the Chief Counsel, FinCEN, regarding issues on the source of funding for the project, the nature of the contract, and the recording of obligations under the contract. Letter from Bill S. Bradley, Chief Counsel, FinCEN, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Nov. 7, 2008 (Response Letter). In addition, OIG provided us with copies of the contract document and modifications.

## BACKGROUND

FinCEN is a Department of the Treasury bureau whose mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the U.S. and international financial systems. FinCEN Web site, [www.fincen.gov/about\\_fincen/wwwd/mission.html](http://www.fincen.gov/about_fincen/wwwd/mission.html) (last visited May 28, 2009). In that regard, FinCEN is responsible for administering the Bank Secrecy Act (BSA) and supporting law enforcement, intelligence, and regulatory agencies through sharing and analysis of financial intelligence. *Id.*

Seeking to improve access to BSA data for authorized users, on June 30, 2004, FinCEN entered into a cost-plus-fixed-fee contract with Electronic Data Systems Corporation (EDS) for the design, development, and deployment of a BSA data retrieval system. Contract TPD-04-C-0063, at C.2. A cost-plus-fixed-fee contract is a form of cost-reimbursement contract. FAR § 16.306(a). The system, called BSA Direct, was to provide secure Web access to consolidated BSA data downloaded from the system with capabilities to allow end users to perform *ad hoc*, as well as pre-defined, queries and reporting. Contract TPD-04-C-0063, at C.1. BSA Direct was intended to provide law enforcement and regulatory agencies with easier, faster data access and enhanced ability to query and analyze BSA data. *Id.*

### Pertinent Contract Clauses

Section B.4 of the contract, *ESTIMATED COST AND FIXED FEE (Design, Development, Deployment)*, stated, "The Government's obligation, represented by the sum of the estimated cost plus fixed fee, is \$8,982,985.01." *Id.* at B.4. The clause also provided, however, that "[t]otal funds currently available for payment and allotted to this contract are \$2,000,000" and that "[i]t is estimated that the amount currently allotted will cover performance of the contract through October 31, 2004." *Id.*

Section B.7 of the contract, *INCREMENTAL FUNDING (MAR 2003)*, stated, "This contract shall be subject to incremental funding with \$2,000,000 presently made

available for performance under this contract,” and “In accordance with the ‘Limitation of Funds’ clause (FAR 52.232-22) contained herein, no legal liability on the part of the Government for payment of money in excess of \$2,000,000 shall arise, unless and until additional funds are made available by the Contracting Officer through a modification of this contract.” *Id.* at B.7.

### FinCEN’s Incremental Funding

At the time the contract with EDS was signed, June 30, 2004 (fiscal year 2004), FinCEN obligated \$2 million to the BSA Direct contract. Response Letter at 3. These funds were made available from the Treasury Forfeiture Fund through the Treasury Executive Office for Asset Forfeiture. *Id.*

In fiscal year 2005, FinCEN began modifying the contract in order to provide additional funding to the contract. Modification 1, dated October 7, 2004, increased the amount to \$3.5 million, and Modification 2, dated January 6, 2005, increased the funding to the full estimated contract cost of \$8,982,985.01. FinCEN modified the contract seven more times in fiscal year 2005, ultimately increasing the total estimated cost, including a fixed fee, to more than \$15 million.

To support most of the contract modifications executed in fiscal year 2005, FinCEN obligated its fiscal years 2003, 2004, and 2005 salaries and expenses appropriations, each of which included funding that was to remain available for obligations incurred through fiscal year 2005. For example, FinCEN’s fiscal year 2003 appropriation provided that of the amount appropriated for salaries and expenses, “\$3,400,000 shall remain available until September 30, 2005.” Pub. L. No. 108-7, div. I, title I, 117 Stat. 11, 430 (Feb. 20, 2003). Similarly, FinCEN’s fiscal year 2004 appropriation provided that “\$8,152,000 shall remain available until September 30, 2005.” Pub. L. No. 108-199, div. F, title II, 118 Stat. 3, 316 (Jan. 23, 2004). While both appropriations were available for the BSA Direct contract, neither of them included a provision specifying a certain amount for the BSA Direct project.

Unlike the salaries and expenses appropriations for fiscal years 2003 and 2004, the appropriation for fiscal year 2005 contained a provision stating that \$7,500,000 of the \$72,502,000 appropriated “shall be available for BSA Direct.” Pub. L. No. 108-447, div. H, title II, 118 Stat. 2809, 3238 (Dec. 8, 2004). FinCEN states that it understood the language in the fiscal year 2005 appropriation as a limitation on the maximum amount that could be obligated or expended from the fiscal year 2005 appropriation for BSA Direct. Response Letter, Attachment 3. FinCEN states that in fiscal year 2005, as a result of a number of modifications to the contract, it obligated a total of \$10,823,312 for the BSA Direct project. *Id.* It states that of the amount obligated in fiscal year 2005, \$7,435,500 was from the fiscal year 2005 salaries and expenses appropriation, \$3,382,483, was from the fiscal year 2004 appropriation, and \$5,329 was from the fiscal year 2003 appropriation. *Id.*

On September 12, 2005, and again on September 13, 2005, FinCEN modified the funding amount under the contract, increasing the total to \$12,475,294.94 and

\$15,146,289.01, respectively. Contract Modifications Nos. 7 and 9. Notwithstanding the September 2005 dates, these contract modifications were charged to fiscal year 2006 appropriations. *Id.* FinCEN states that “the amounts in question were not obligated until October 5, 2005” (fiscal year 2006). Response Letter at 4, Attachment 4.

## DISCUSSION

At issue here is the application of the *bona fide* needs rule to the BSA Direct contract, both on June 30, 2004, when FinCEN entered into the contract and, later, when FinCEN modified the contract. The *bona fide* needs rule was developed by the accounting officers of the United States to implement one of the oldest fiscal statutes, now codified at 31 U.S.C. § 1502(a), which provides that “an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability.” As this statute has been interpreted and applied, an appropriation is available only to fulfill a genuine or *bona fide* need of the time period of availability of the appropriation. 73 Comp. Gen. 77 (1994).

### Proper Appropriation to Charge at Contract Award

On June 30, 2004, FinCEN entered into a cost-reimbursement contract, agreeing to pay EDS for the costs it incurred in the design, development and deployment of the BSA Direct system plus a negotiated fee. In determining what appropriation to charge for a service contract such as FinCEN’s BSA Direct contract, it is important to distinguish between a nonseverable services contract and a severable services contract.

The general rule is that a nonseverable service is considered a *bona fide* need at the time the agency orders the service and, therefore, should be charged to an appropriation current at the time the agency enters into the contract. B-305484, June 2, 2006, at 6–7; 65 Comp. Gen. 741, 743 (1986). A nonseverable service is one that requires the contractor to complete and deliver a specified end product (for example, a final report of research). 65 Comp. Gen. at 743–744. Severable services, which are recurring in nature, are *bona fide* needs at the time the service is completed, and obligations for severable services should be charged to appropriations current at that time. B-287619, July 5, 2001, at 6. A severable service is a recurring service or one that is measured in terms of hours or level of effort rather than work objectives. B-277165, Jan. 10, 2000, at 5; 60 Comp. Gen. 219, 221–22 (1981). Whether a contract is for severable or nonseverable services affects how the agency may fund the contract; severable services contracts may be incrementally funded, while nonseverable services contracts must be fully funded at the time of the award of the contract. 73 Comp. Gen. 77; 71 Comp. Gen. 428 (1992).

The FinCEN contract at issue called for delivery of a defined end product (the design, development, and deployment of a data retrieval system), and as the contract was written, the work could not feasibly be subdivided (and, in fact, was not subdivided)

for separate performance by fiscal year. The contract required the contractor to provide a data retrieval system that will “be implemented by or before 9/30/05, a timeframe that will meet FinCEN’s critical mission needs.” Contract TPD-04-C-0063, at C.1. The contract stated further that “the Contractor is expected to employ a disciplined, incremental approach to analyze, design, develop, and deploy the BSA Direct System and to provide that the developed system meets FinCEN’s technical and business requirements within a predictable schedule and budget . . .” *Id.* at C.2. It stipulated, “It is essential that the completed and tested system be provided as soon as possible . . .” *Id.* Accordingly, as a threshold matter, we conclude that the contract here was a nonseverable services contract.<sup>1</sup> Consequently, FinCEN should have recorded an obligation of \$8,982,985.01 to its fiscal year 2004 appropriations for its estimated cost, including the fixed fee.

FinCEN, however, recorded an obligation of only \$2 million at the time of award in fiscal year 2004. As we noted earlier, while an agency may incrementally fund a severable services contract, the agency must charge its obligation for a nonseverable service contract to appropriations available at time of contract award. This rule applies to cost-reimbursement contracts, like FinCEN’s contract, just as it does to other contracts. 73 Comp. Gen. 77; 71 Comp. Gen. 428. The FAR requires that cost-reimbursement contracts “establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed . . .” FAR § 16.301-1. FinCEN did just that in section B.4 of the BSA Direct contract. It clearly set out that the “Government’s obligation . . . is \$8,982,985.01,” thereby establishing a ceiling of \$8,982,985.01. Contract TPD-04-C-0063, at B.4. By recording an obligation of only \$2 million, FinCEN violated the *bona fide* needs rule, improperly charging the additional \$6.9 million to its fiscal year 2005 appropriations.

FinCEN’s inclusion of section B.7 (*Incremental Funding*), which limited the agency’s liability to \$2 million at the time it awarded the contract, did not remedy the *bona fide* needs problem that necessarily arose when FinCEN attempted to charge its fiscal year 2004 obligation to subsequent fiscal years. *See* 73 Comp. Gen. at 80; 71 Comp. Gen. at 431. Section B.7 apparently was an attempt to avoid an Antideficiency Act violation. *See* Section B.4 (“Total funds currently available for payment . . . are \$2,000,000.”). The difficulty, however, is that FinCEN in section B.4, consistent with FAR § 16.301–1, established its obligation as \$8.9 million. As explained above, it was improper for the agency to shift to fiscal year 2005 most of the cost of a *bona fide* need of fiscal year 2004.

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<sup>1</sup> FinCEN Chief Counsel also concluded that the contract is a nonseverable service contract, more specifically, a cost-plus-fixed-fee completion contract. Response Letter, Attachment 1, at 1. Because the contract called for the delivery of a specified end product, rather than a level of effort, we agree that the contract, under the FAR, is a completion, rather than a term, contract. FAR § 16.306(d)(1), (2).

Because we conclude that FinCEN failed to properly charge its obligation to the correct fiscal year, we are recommending that the agency adjust its accounts by deobligating \$6,982,985.01 from its fiscal year 2005 appropriations and charging that amount to its appropriations available for fiscal year 2004. If, in doing so, FinCEN determines that the obligation exceeds the amount available in fiscal year 2004, it should report an Antideficiency Act violation.

#### Proper Appropriation to Charge for Contract Modifications

The record shows that FinCEN, during fiscal year 2005, modified the contract a number of times to increase funding on the contract beyond the original ceiling of \$8,982,985. FinCEN states that, with the exception of two modifications that it recorded against fiscal year 2006 appropriations, it charged the modifications to three separate appropriations: the fiscal year 2005 salaries and expenses appropriation, which included a provision making \$7.5 million available for BSA Direct; the fiscal year 2004 salaries and expenses appropriation, of which \$8,152,000 was to remain available until September 30, 2005; and the fiscal year 2003 salaries and expenses appropriation, of which \$3,400,000 was to remain available until September 30, 2005.

With regard to a cost-reimbursement contract like FinCEN's BSA Direct contract, agencies should charge modifications that increase the original ceiling to an appropriation current at the time of the modification. 61 Comp. Gen. 609, 612 (1982).<sup>2</sup> Modifications increasing the ceiling are discretionary in nature and therefore are considered to reflect a new need. *Id.* As such, the modifications should be charged to funds available when the modification is signed by the contracting officer.<sup>3</sup>

For the contract modifications at issue here, the contracting officer approved increases beyond the initial \$8.9 million ceiling established in the contract. Accordingly, the fiscal year 2005 modifications increasing the ceiling beyond

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<sup>2</sup> In 61 Comp. Gen. 609, the agency had properly obligated the contract ceiling at the time it entered into the contract; it did not, as FinCEN did here, violate the *bona fide* needs rule by attempting to incrementally fund the contract.

<sup>3</sup> For fixed-price contracts, the usual rule is that if the modification is within the contract's statement of work, the agency should charge the cost of the modification to the appropriation to which the agency had charged the contract since it is a part of the *bona fide* need established at time of contract award. 59 Comp. Gen. 518, 521 (1980). Modifications outside of the contract's statement of work (and, thus, outside of the scope of the contract) are considered to meet a new *bona fide* need, and the agency should charge obligations for such modifications to appropriations current at the time of modification. B-257617, Apr. 18, 1995. For cost-reimbursement contracts, because the agency, at time of contract award, cannot necessarily anticipate the need for and amount of increases in the contract ceiling, a modification that increases the ceiling is considered a *bona fide* need at the time of the modification. 61 Comp. Gen. at 612.

\$8,982,985 were chargeable to appropriations available for fiscal year 2005. *See* 61 Comp. Gen. 609. In all but two instances, FinCEN, in fact, did charge the modifications to appropriations that were available for fiscal year 2005.

The record shows that FinCEN charged two fiscal year 2005 modifications to fiscal year 2006 appropriations, Contract Modifications Nos. 7 and 9. Both of these modifications were executed in fiscal year 2005; Modification 7 was signed by the contracting officer on September 12, 2005, and Modification 9 was signed on September 13, 2005. It appears that the agency confused the event of incurring an obligation with the act of recording the obligation. The agency points to spreadsheet entries indicating that on October 5, 2005, it recorded obligations for the BSA Direct contract against fiscal year 2006 appropriations. Response Letter, Attachment 4.

The Recording Statute, 31 U.S.C. § 1501, requires agencies to record an obligation at the time an authorized contracting officer signs a contract modification. *See* B-300480.2, June 6, 2003. The fact that the actual recording of the obligation is not made at that time is immaterial insofar as determining what fiscal year appropriation to charge. 38 Comp. Gen. 81 (1958). While it appears that FinCEN did not record the obligations until fiscal year 2006, it incurred the obligations in fiscal year 2005 when it signed the modifications.<sup>4</sup> FinCEN should have recorded the obligations against appropriations available for obligation in fiscal year 2005, not its fiscal year 2006 appropriations. Accordingly, FinCEN should adjust its accounts.

#### Antideficiency Act

Because of the \$7.5 million provision in FinCEN's fiscal year 2005 appropriation, and the fact that FinCEN obligated more than that on the contract, OIG questions whether FinCEN violated the Antideficiency Act. FinCEN's fiscal year 2005 salaries and expenses appropriation provided FinCEN "\$72,502,000, of which \$7,500,000 shall be available for BSA Direct." Pub. L. No. 108-447, div. H, title II, 118 Stat. at 3238. FinCEN points out that while it obligated funds in fiscal year 2005 that exceeded \$7.5 million, it did not obligate more than \$7.5 million from its fiscal year 2005 salaries and expenses appropriation. Rather, it also obligated funds from its fiscal years 2003 and 2004 appropriations, each of which was available through fiscal year 2005.

We agree that FinCEN could legally draw on its fiscal years 2003 and 2004 appropriations, to the extent that they had sufficient unobligated balances, for costs related to the BSA Direct project. The \$7.5 million provision did not preclude the

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<sup>4</sup> This case differs from those cases where an agency, signing a contract near the end of the fiscal year, may properly obligate next fiscal year's appropriation because the agency has included clauses in the contract expressly requiring that, among other things, the contractor may not proceed under the contract unless and until an authorized contracting officer notifies the contractor that performance may commence. 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959).

agency's use of these appropriations. We see nothing in the language of the fiscal year 2005 appropriation or its legislative history to suggest that Congress intended to restrict the availability of these appropriations for the project. The plain language of the \$7.5 million provision addressed only the use of the fiscal year 2005 appropriation, affirmatively directing that a portion, \$7.5 million, be used for the BSA project. The language makes \$7.5 million available only for the BSA Direct project. *See* B-278121, Nov. 7, 1997. The fiscal years 2003 and 2004 appropriations contained lump sum amounts that were available for the necessary expenses of FinCEN for obligations incurred through September 30, 2005. We therefore conclude that use of the other appropriations to obligate funds in excess of \$7.5 million did not violate the Antideficiency Act.<sup>5</sup>

## CONCLUSION

We are recommending that FinCEN adjust its accounts in accordance with this decision. If there are not sufficient funds available in the proper appropriations, the agency should report an Antideficiency Act violation. These adjustments will involve obligating an additional \$6,982,895.01 to appropriations available in fiscal year 2004 and deobligating that amount from the fiscal year 2005 appropriation. FinCEN should also deobligate amounts from fiscal year 2006 appropriations that were used for Modification Nos. 7 and 9 in fiscal year 2005 and obligate that amount against appropriations available in fiscal year 2005.



Daniel I. Gordon  
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<sup>5</sup> We note that FinCEN interpreted the \$7.5 million provision as a limitation on the amount of its fiscal year 2005 salaries and expenses appropriation that it could obligate for this purpose, and that it, therefore, could not draw from the remainder of the fiscal year 2005 lump sum for this purpose. Response Letter, Attachment 3. While FinCEN's interpretation is consistent with our case law, 36 Comp. Gen. 526, 528 (1957), we have not had occasion to consider this case law in over 50 years, and we are concerned that the case law may not reflect more recent congressional practice of using appropriations provisions to enact affirmative direction rather than a limitation. Because FinCEN, in fact, did not use (or propose to use) amounts from its lump sum appropriation for this purpose, we do not reconsider that case law in this decision.