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Comptroller General
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United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Labor Relations Board—Recording Obligations for Training and Court Reporting

File: B-321296

Date: July 13, 2011

DIGEST

1. The National Labor Relations Board (NLRB) improperly recorded obligations for fiscal year 2011 training expenses against its fiscal year 2010 appropriation. Because the training was delivered during fiscal year 2011, and registration was not required during the prior fiscal year, the training was a *bona fide* need of fiscal year 2011, not of fiscal year 2010. Furthermore, because NLRB signed the agreement during fiscal year 2011, NLRB did not, in fact, incur the obligation until fiscal year 2011.
2. NLRB properly recorded obligations for contracts for court reporting services, which are severable services contracts. Under 41 U.S.C. § 3902, NLRB may enter into severable services contracts that begin in one fiscal year and end in the next fiscal year. Because NLRB did not know the total amount it would ultimately spend on each court reporting contract, NLRB properly obligated an amount based upon a reasonable estimate.

DECISION

The Inspector General of the National Labor Relations Board (NLRB) has requested a decision regarding two issues: first, whether NLRB properly obligated fiscal year 2010 appropriations for the training of two employees in fiscal year 2011; and second, whether NLRB properly recorded obligations against fiscal year 2010 appropriations at the time it awarded several contracts for court reporting services. Letter from Inspector General, NLRB, to Acting General Counsel, GAO, Nov. 9, 2010 (Request Letter). As explained below, we conclude that NLRB improperly recorded obligations against fiscal year 2010 appropriations for the training expenses. Because the training was delivered during fiscal year 2011, and registration was not required during the prior fiscal year, the training was a *bona fide* need of fiscal year 2011, not of fiscal year 2010. Furthermore, because NLRB signed the agreement during fiscal year 2011, NLRB did not, in fact, incur the obligation until fiscal year 2011.

We also conclude that NLRB properly recorded obligations for the court reporting contracts. These are severable services contracts. Under 41 U.S.C. § 3902, NLRB may enter into severable services contracts that begin in one fiscal year and end in the next fiscal year. In such contracts, NLRB may obligate funds available for a single fiscal year at the time it entered into the contract for its total liability under the contract. Because NLRB did not know the total amount it would ultimately spend on each court reporting contract, NLRB properly obligated amounts based upon a reasonable estimate.

Our practice when rendering decisions is to obtain the views of the relevant agency and to establish a factual record on the subject 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. The Request Letter contained relevant facts and the legal views of the Inspector General. By separate letter, the Chairman and the Acting General Counsel of NLRB provided additional information. Letter from Chairman, NLRB, and Acting General Counsel, NLRB, to Acting General Counsel, GAO, Nov. 16, 2010.

BACKGROUND

Training

On September 3, 2010, NLRB received an e-mail from the Office of Personnel Management (OPM), which operates the Federal Executive Institute (FEI), regarding FEI's *Leadership for a Democratic Society* program.¹ In the e-mail, OPM asked NLRB to "sign, date and return by October 15, 2010, the enclosed *Shared Facilities Training Agreement*" (Agreement).² The Agreement stated that OPM would make seven enrollments available to NLRB during fiscal year 2011, that NLRB agreed to pay OPM \$19,500 for each enrollment in the program, and that OPM would not refund the payment if NLRB canceled its attendance.³ An NLRB official signed and dated the Agreement on October 12, 2010, and NLRB sent the document to OPM by e-mail on October 15, 2010.⁴

¹ E-mail from Registrar, FEI, OPM, to H.R. Specialist (Development), NLRB, *Subject: FEI Annual Agreement - ACTION REQUIRED* (Sept. 3, 2010) (Sept. 3 E-mail).

² *Id.*

³ *Id.* Of the seven enrollments, two were for a January 2011 course. These two enrollments are at issue in this decision.

⁴ E-mail from H.R. Specialist (Development), NLRB, to Registrar, FEI, OPM, *Subject: FEI Allotments and 182s* (Oct. 15, 2010).

Before signing the Agreement, NLRB, on September 28, 2010, recorded \$39,000 in obligations against its fiscal year 2010 appropriation to cover the fee for attendance of two employees.⁵ It is this obligation that is at issue in this decision. The two employees were scheduled to attend the training in January 2011.⁶ NLRB officials explained the agency's use of fiscal year 2010 appropriations, stating that they had identified this training need as early as May 14, 2010, and had committed to using the two January 2011 slots in a form NLRB sent to OPM in June 2010 indicating the dates of fiscal year 2011 programs in which it wished to reserve spaces.⁷ Officials noted that the January 2011 training class was the date FEI had offered, was the earliest class available to NLRB, and that the time between the procurement and performance was not excessive.⁸

NLRB's fiscal year 2010 appropriations expired on September 30, 2010. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 4, 123 Stat. 3034, 3035 (Dec. 16, 2009).

Court reporting contracts

In the fourth quarter of fiscal year 2010, NLRB awarded 37 contracts for court reporting services.⁹ Each contract is for a one year base period, running from September 27, 2010 through September 26, 2011, with four option periods.¹⁰ The contracts permit NLRB to exercise each option to renew the contract for an additional one year period by written notice to the contractor.¹¹ The contracts provide that the total duration of a contract shall not exceed 60 months.¹²

⁵ Request Letter, at 1.

⁶ *Id.*

⁷ *Id.* In May 2010, OPM emailed a form to NLRB asking it to identify its enrollment needs for fiscal year 2011. E-mail from Registrar, FEI, OPM, to H.R. Specialist (Development), NLRB, *Subject: FEI FY2011 Space Allocation Offer - ACTION REQUESTED* (May 14, 2010). NLRB responded in June 2010. Facsimile from H.R. Specialist (Development), NLRB, to Registrar, FEI, OPM (June 14, 2010).

⁸ *Id.* at 4.

⁹ Telephone conversation with Chief, Acquisitions Management Branch, NLRB (May 19, 2011) (May 19 telephone conversation). The Chief, Acquisitions Management Branch, advised us that all 37 contracts are materially identical to the one the Inspector General had previously provided to us, differing primarily as to their amounts and the regions for which the services were procured. *Id.*

¹⁰ *See, e.g.*, NLRB Contract No. 42C-100000 (Contract), at § F.7.

¹¹ Contract, § I.2(a).

¹² Contract, § I.2(c).

As needs for court reporting services arise, NLRB notifies the contractor prior to the date of the proceedings.¹³ The contractor's fees are determined per proceeding by the page length, number of exhibits, and the amount of time taken to deliver the transcript; contractors may also receive other fees for attendance or if NLRB cancels a particular engagement.¹⁴ Each contractor submits invoices "on a monthly basis, upon completion of transcripts for each month."¹⁵ Each invoice must include the "description, price, and quantity of property and services actually delivered."¹⁶ NLRB pays the contractor's invoices after they are submitted to NLRB.¹⁷

On September 28 and September 29, 2010, NLRB recorded total obligations in the amount of \$876,373.91 for the 37 contracts.¹⁸ The amount of the obligations is NLRB's estimate of the year's needs for court reporting services, based on prior years' experience.¹⁹ NLRB officials stated that they entered into contracts like this in order to avoid the need to record obligations throughout the year as court reporting services were delivered.²⁰

DISCUSSION

Training

At issue here is whether NLRB properly obligated \$39,000 against its fiscal year 2010 appropriation for the January 2011 training.

An agency may obligate its fiscal year appropriation only to meet a legitimate, or *bona fide*, need arising in the fiscal year for which the appropriation was made. This bedrock principle of appropriations law is known as the *bona fide* needs rule. *See, e.g.*, B-317139, June 1, 2009; B-257977, Nov. 15, 1995. The obligation at issue is for training that two NLRB employees received from OPM in January 2011. NLRB officials state that they obligated fiscal year 2010 funds for the training in part because they identified the training as a need during fiscal year 2010. However, as a

¹³ Contract, at § C.3.

¹⁴ Request Letter, at 5.

¹⁵ Contract, at § G.3.

¹⁶ *Id.*

¹⁷ Contract, at § G.2.

¹⁸ Request Letter, at 4.

¹⁹ Request Letter, at 5.

²⁰ *Id.* at 5; NLRB, Acquisitions Management Branch Memorandum to Division Directors and others, *Subject: New Court Reporting Contracts* (Sept. 23, 2010) (Sept. 23 Memorandum).

general matter, the relevant date to ascertain whether the training is a *bona fide* need of a particular fiscal year is the date that the training is delivered, not the date upon which the agency made the decision to enroll its staff in the training. This is because generally, when an agency enters into a contract in one fiscal year for services that will not be performed until the succeeding fiscal year, the agency may not charge the first fiscal year's appropriation with the cost of the contract. B-235086, Apr. 24, 1991. If an agency decides to enroll its staff for training that is delivered during the succeeding fiscal year, the training is a *bona fide* need of the expiring fiscal year only if the training provider requires the agency to register during the expiring fiscal year, the date offered is the only one available, and the time between registration and the training is not excessive. See B-213141-O.M., Mar. 29, 1984.

In this case, NLRB charged the training expense against its fiscal year 2010 appropriation, even though the training was not delivered until fiscal year 2011. The training might have been a *bona fide* need of fiscal year 2010 if OPM had required NLRB to register for the course during fiscal year 2010. However, this was not the case. OPM did not require NLRB to register for the training until October 15, 2010, a date which fell in fiscal year 2011. Sept. 3 E-mail. Therefore, the training was a *bona fide* need of fiscal year 2011, not of fiscal year 2010.

Furthermore, although NLRB recorded an obligation against its fiscal year 2010 appropriation, NLRB did not, in fact, incur an obligation until fiscal year 2011. NLRB signed the Agreement on October 12 and e-mailed it to OPM on October 15. Signing the agreement, not NLRB's previous communications internally or with OPM, gave rise to a binding obligation. At that point, NLRB should have recorded the obligation against its fiscal year 2011 appropriations.

It appears NLRB improperly recorded this obligation because of a misunderstanding of one of our 1991 decisions, 70 Comp. Gen 296. NLRB asserted that it obligated the training expenses from fiscal year 2010 funds because the January 2011 course was the earliest course date in fiscal year 2011 and the time between procurement and performance was not excessive.²¹ In support of its obligation, NLRB cited the OPM *Training Policy Handbook*,²² which states that:

“An agency also may charge a previous fiscal year appropriation for the entire cost of a training course scheduled to begin in the next fiscal year when:

1. the course meets a bona fide need of the prior fiscal year,
2. scheduling of the course is beyond the agency's control, and

²¹ *Authorization, Agreement, and Certification of Training, Standard Form 182*, Sept. 24, 2010.

²² E-mail from Director, Office of Employee Development, NLRB, *Subject: Purchasing FY 2011 FEI slots using FY 2010 funds* (June 8, 2010).

3. the time between procurement and performance is not excessive.
See 70 Comp. Gen. 296 (1991).”

OPM, *Training Policy Handbook: Procurement of Training*, available at www.opm.gov/hrd/lead/pubs/handbook/lrbsa12.asp (last visited June 16, 2011).

In 70 Comp. Gen. 296, the Food and Nutrition Service (FNS) enrolled employees for an FEI program that commenced on October 1, 1989—the first day of fiscal year 1990. In the decision, we noted that generally, when a training obligation is incurred and performance begins in one fiscal year, the entire cost is chargeable to that year. *Id.* However, we noted that in the FNS case, the performance “could not possibly have begun in the fiscal year that the need arose” because the course began on the first day of the following fiscal year. *Id.* We concluded that FNS could properly charge the cost of the course to fiscal year 1989.

The FNS case is distinguishable from the facts at issue here. In that case, FNS had to incur an obligation during fiscal year 1989 in order to secure attendance in a program that began on the first day of the following fiscal year. In contrast, NLRB did not need to incur an obligation during fiscal year 2010 to enroll its employees in the January 2011 program. OPM did not require NLRB to submit its executed Agreement until October 15, 2010—after the beginning of fiscal year 2011. Sept. 3 E-mail.

NLRB must obligate the \$39,000 for training delivered in January 2011 against its fiscal year 2011 appropriation. The training was a *bona fide* need of fiscal year 2011, not of fiscal year 2010; furthermore, NLRB did not, in fact, incur the obligation until fiscal year 2011. NLRB should adjust its accounts accordingly. If NLRB lacks sufficient fiscal year 2011 budget authority to make this adjustment, it should report a violation of the Antideficiency Act in accordance with 31 U.S.C. § 1351.

Court reporting contracts

At issue with the court reporting contracts is whether NLRB properly recorded obligations where the amounts were based upon an estimate of the total cost of services that NLRB would order during the period of the contract.

Contracts for services that are continuing and recurring in nature are known as severable services contracts. 71 Comp. Gen. 428 (1992). Under each court reporting contract, NLRB procured services for multiple discrete hearings. The provision of reporting services for each hearing is a separate need, and the provision of the services is continuing and recurring in nature. Therefore, each of the 37 contracts for court reporting services is a severable services contract.

The general rule is that severable services contracts may not cross fiscal year lines unless authorized by statute, and that the services are a *bona fide* need of the appropriation that is current at the time the services are delivered, rather than the appropriation that was current at the time the contract was executed. 71 Comp. Gen. 428 (1992). By statute, however, agencies may enter into severable services

contracts for a period that begins in one fiscal year and ends in the next fiscal year. 41 U.S.C. § 3902(a).²³ When using this authority, an agency obligates funds available at the time it enters into the contract for the total amount of the contract. 41 U.S.C. § 3902(b). The NLRB contract period runs from September 27, 2010 to September 26, 2011. Such a contract is permitted under 41 U.S.C. § 3902(a), and under 41 U.S.C. § 3902(b), NLRB obligated its fiscal year 2010 funds for performance of the entire contract.

At the time each contract was executed, NLRB, as a matter of fact, did not know with certainty the total amount it would ultimately spend on court reporting services ordered under the contract. The amount of NLRB's liability depends on various factors such as the number of proceedings, the length of the transcripts delivered, and the number of ancillary materials such as exhibits. NLRB knows the amount of its liability with certainty only at the conclusion of the performance period, after it has ordered all the services under the contract. To determine the amount to obligate when each contract was executed, NLRB calculated an estimate, based on past practices and trends, of the total amount of court reporting services it would need under a particular contract.

We have previously addressed the amount an agency should obligate when the amount of its obligation is uncertain. B-305484, June 2, 2006. In that case, the National Mediation Board (NMB) contracted for arbitrators, and incurred obligations, when it appointed an arbitrator to hear a specific case. However, the length of the arbitrator's appointment and, therefore, the amount of the obligation were uncertain at the time of appointment. We noted that "it is the amount of the commitment, not the commitment itself, that is uncertain." *Id.* We concluded that NMB should "record an obligation based on its best estimate of the costs of paying the arbitrator and adjust the obligation up or down as more information becomes available." *Id.*

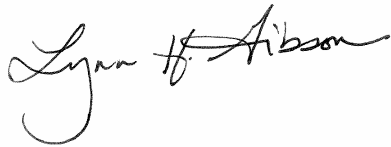
Similarly, in this case, the quantity of court reporting services that NLRB would ultimately order was uncertain at the time each contract was executed. NLRB properly obligated an amount based upon a reasonable estimate. As the performance period continues, NLRB should deobligate amounts if it realizes that it overestimated the quantity of services that it would order under the contracts. Conversely, if NLRB determines that it will need to order more services than initially estimated, it should obligate additional funds in accordance with a revised estimate. Because NLRB

²³ This provision previously appeared at 41 U.S.C. § 253l. On January 4, 2011, Congress revised and codified certain laws related to public contracts and enacted these laws as title 41, United States Code. Pub. L. No. 111-350, 124 Stat. 3677.

initially obligated only fiscal year 2010 funds for the contracts, any adjustments to the obligations must also be made against fiscal year 2010 funds.²⁴

CONCLUSION

NLRB improperly recorded obligations against its fiscal year 2010 appropriation for training expenses. Because the training was delivered during fiscal year 2011, and registration was not required in a prior fiscal year, it was a *bona fide* need of fiscal year 2011, not of fiscal year 2010. Furthermore, because NLRB signed the training agreement during fiscal year 2011, NLRB did not, in fact, incur an obligation until fiscal year 2011. NLRB's contracts for court reporting services were severable services contracts. NLRB properly obligated its fiscal year 2010 funds for its total liability under the contract under 41 U.S.C. § 3902. Because NLRB did not know the total amount it would ultimately spend on each contract, NLRB properly obligated an amount based upon a reasonable estimate.



Lynn H. Gibson
General Counsel

²⁴ Although the fiscal year 2010 funds are no longer available for new obligations, any outstanding balance “remains available for recording, adjusting, and liquidating obligations properly chargeable to that account.” 31 U.S.C. § 1553(a). As we gathered the information necessary to develop this decision, we learned that NLRB is recording adjustments to its obligations against its fiscal year 2011 funds. May 19 telephone conversation. NLRB should ensure that past and future adjustments are obligated against the appropriation that it used when it recorded the initial obligation for each contract.