



G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-321387

March 30, 2011

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Daniel K. Inouye
Chairman
The Honorable Thad Cochran
Ranking Member
Subcommittee on Defense
Committee on Appropriations
United States Senate

The Honorable Howard P. “Buck” McKeon
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

The Honorable C.W. Bill Young
Chairman
The Honorable Norman D. Dicks
Ranking Member
Subcommittee on Defense
Committee on Appropriations
House of Representatives

Subject: *Department of the Army—Escrow Accounts and the Miscellaneous Receipts Statute*

The House Committee on Armed Services Report accompanying H.R. 5136, the National Defense Authorization Act for Fiscal Year 2011, 111th Cong. (2010), directs GAO to report to the Defense Committees of Congress on the Department of Defense’s implementation of 10 U.S.C. § 2667 by the execution of enhanced use

leases (EULs). H.R. Rep. No. 111-491, at 508 (2010). In the course of our review, we identified legal issues concerning the Department of the Army's use of escrow accounts and indemnification agreements provided for in EULs. This opinion addresses those aspects of the Army's implementation of 10 U.S.C. § 2667.

Section 2667(a) authorizes each Secretary of the armed forces to lease non-excess real property¹ that is under the control of the Secretary concerned and that is not currently needed for public use, provided the lease satisfies certain statutory criteria. 10 U.S.C. § 2667(a). The Army employs the term, "enhanced use lease," to describe leases executed under the authority of 10 U.S.C. § 2667(a) and that require the payment of an annual rental consideration meeting or exceeding certain statutory thresholds that trigger congressional reporting requirements. *See* 10 U.S.C. §§ 2662, 2667(c)(4). Such enhanced use leases also tend to be long-term (30 years or more) with a large scope and scale of development.

During the course of GAO's review, we examined individual EULs executed by the Army with respect to property located at three Army installations: Picatinny Army Arsenal, NJ; Aberdeen Proving Ground, MD; and Fort Sam Houston, TX. Our review of the legal documents comprising the Picatinny EUL raised questions about the compliance of the EUL with 10 U.S.C. § 2667, as well as with the Antideficiency Act, 31 U.S.C. § 1341, and the miscellaneous receipts statute, 31 U.S.C. § 3302(b). We agreed with your staff to deliver a separate legal opinion addressing these issues.

As discussed in more detail below, we conclude that the Picatinny EUL (as defined below) does not comply with 10 U.S.C. § 2667. Specifically, the Army received cash consideration for the Picatinny EUL, and did not deposit it in the special account of the Treasury as required by 10 U.S.C. § 2667(e)(1)(C). By diverting the cash to an escrow account under the control of the Army rather than depositing such amount in the special account, the Army violated the miscellaneous receipts statute, 31 U.S.C. § 3302(b), and by spending such funds the Army improperly augmented its appropriations. In addition, the indemnification provision in an escrow agreement (subsequently removed by amendment) was a violation of the Antideficiency Act warranting the filing of a report in accordance with 31 U.S.C. § 1351. While this opinion pertains primarily to the Picatinny EUL and the ancillary documents executed in connection therewith, to the extent the EULs for the other Army

¹ The term "excess property" means property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities. 40 U.S.C. § 102(3).

installations are on substantially similar terms as the Picatinny EUL, our conclusions here apply to those EULs as well.²

BACKGROUND

Statutory Framework

Each Secretary of the armed forces may lease certain non-excess real property in exchange for cash or in-kind consideration. 10 U.S.C. §§ 2667(a), (b)(4)–(5). All money rentals received pursuant to leases entered into under 10 U.S.C. § 2667(a) must be deposited into a special account in the Treasury established for the Secretary concerned. 10 U.S.C. § 2667(e)(1)(A)(i). The cash consideration deposited in the special account is available to the Secretary concerned only to the extent provided in appropriations acts and for specific enumerated purposes relating to real property construction, maintenance services, lease of facilities, or payment of utility services. 10 U.S.C. § 2667(e)(1)(c). Conversely, if “in-kind” consideration is received, such consideration may be accepted at any property or facilities under the control, and for the benefit, of the Secretary concerned that are selected for that purpose. 10 U.S.C. § 2667(c)(2).

Picatinny Enhanced Use Lease Agreement and Related Escrow Agreement

The Army entered into a Master Agreement to Lease For Enhanced Use Lease, Research Development and Engineering Command Armaments Research, Development and Engineering Center Picatinny Arsenal, New Jersey, with InSitech Inc., lessee, on September 26, 2006 (Master Agreement). The property subject to the Master Agreement consists of 100,000 square feet of existing facility space, as well as 120 acres of land that is to be developed into a million square feet of administrative, laboratory, and light manufacturing space (Project Site). The Master Agreement provides that the Project Site will be leased in incremental portions as separate parcels pursuant to separate site leases. The site leases and the Master Agreement are collectively referred to herein as the Picatinny EUL. Each parcel is to be

² Our practice when issuing decisions and opinions is to obtain the views of the relevant agencies in order to establish a factual record and to establish the agencies’ legal positions 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. The record in this case consists of documentation and information provided to us by the Department of the Army with respect to the Picatinny EUL. The record also includes a letter from the Deputy General Counsel, Department of the Army, to the Assistant General Counsel for Defense Capabilities and Management, GAO, dated Nov. 10, 2010 (Army Legal Letter), providing the Army’s legal views on certain terms and conditions of the Picatinny EUL, including the use of escrow accounts under 10 U.S.C. § 2667.

developed pursuant to plans approved by the Secretary of the Army and subject to the terms and conditions provided in each site lease.

The Master Agreement sets forth the terms and conditions under which the Army and the lessee will enter into each site lease. The Master Agreement contemplates that each site lease will be on substantially the same terms and conditions. To the extent there is a conflict between the provisions of the Master Agreement and a particular site lease, the site lease will control. As of October 19, 2010, the Army had entered into two site leases under the Master Agreement. Site Lease 1 was executed on September 26, 2006.³ Site Lease 2 was executed on August 14, 2007.⁴

Under the terms of the Master Agreement, the aggregate cash consideration to be paid by the lessee for all parcels leased under Site Lease 1 and Site Lease 2 is as follows (collectively, Rent Consideration):

“(1) A one-time, lump-sum payment of \$1.7 million dollars (up-front payment), which was paid upon execution of Site Lease 1;⁵

(2) An aggregate annual rent based on operating revenues earned by the lessee from the leased property and calculated according to a pre-

³ See Enhanced Use Lease Research Development and Engineering Command Armaments Research, Development and Engineering Center Picatinny Arsenal, Picatinny, NJ between the Army and InSitech Inc. (Lease No. DACA31-1-06-444 for Buildings 352 and 353), Sept. 26, 2006 (Site Lease 1). Concurrently with the execution of Site Lease 1, the lessee entered into a sublease with Forge Technology, LLC. Under the sublease, the sublessee will renovate and/or demolish the existing buildings leased under Site Lease 1 and construct, develop and use new buildings, pursuant to a site plan approved by the Secretary. Because the terms and conditions of the Sublease are not relevant to our decision here, they are not discussed in this opinion.

⁴ See Enhanced Use Lease Research Development and Engineering Command Armaments Research, Development and Engineering Center Picatinny Arsenal, Picatinny, NJ between the Army and InSitech Inc. (Lease No. AR-E3-07-G-00355 for Building 350), August 14, 2007 (Site Lease 2).

⁵ The Master Agreement provides that as additional site leases are executed, the lessee is required to pay additional up-front payments. See Master Agreement, ¶¶ 1.6.4, 1.6.5, 1.6.7.

determined formula provided in the Master Agreement and each site lease;⁶ and

(3) Supplemental rent of up to \$850,000 per year.”⁷

See Master Agreement, ¶¶ 1.6.3, 1.6.11, 1.6.12.

The Master Agreement characterizes the Rent Consideration as “funds for in-kind service use” and provides that “it is the intent of the parties that the rent may be collected in cash or as in-kind consideration as authorized by [10 U.S.C. §] 2667.” Master Agreement, ¶ 1.6.14. The lessee is required to deposit the Rent Consideration into an individual interest bearing escrow account at Picatinny Federal Credit Union, which acts as the escrow agent. Upon depositing the Rent Consideration into the escrow account, the lessee “shall have satisfied its obligation with respect to the rent payable [under Master Agreement and each site lease], it being understood that [the] lessee shall have no obligation to provide any other and/or additional in-kind consideration.” Master Agreement, ¶ 1.6.14; Site Lease 1, ¶ 4(e)(i); Site Lease 2, ¶ 4(e)(i).

The up-front payment was deposited into the escrow account. The escrow account is in the name of the lessee and the Army. Picatinny Federal Credit Union Account Statements for Oct. 2009 and Nov. 2009. The escrow funds are subject to the terms and conditions of an Escrow Agreement among the Army, the lessee and the escrow agent (Escrow Agreement). No annual rent or supplemental rent had been paid to the Army as of November 10, 2010.⁸ Any interest or proceeds generated by the

⁶ The lessee is required to pay an aggregate annual rent equal to a percentage of the Cash Flow Available for Distribution (CFAD). *See* Master Agreement, ¶ 1.6.3. CFAD is calculated at the end of each calendar year and is equal to the aggregate net revenue generated from the operation of the Existing Buildings leased under site leases, less (1) amounts placed in a reserve account for capital improvements and maintenance expenses, (2) amounts expended by the lessee for certain infrastructure improvements, and (3) a cumulative annual 10 percent return on amounts invested by the lessee in the development of the Project Site. *See* Master Agreement, at 3–4. If CFAD is zero for any given lease year, no annual rent is due and payable. Site Lease 1 and Site Lease 2 each provides for a proportional payment of the annual rent and the supplemental rent. Site Lease 1, ¶ 4(b), (c); Site Lease 2, ¶ 4(b), (c).

⁷ The lessee is also obligated to make supplemental rent payments to the Army, provided the Lessor has generated aggregate net revenue from all leased existing buildings in excess of \$20 million. In such circumstances, the lessee must pay the Army a supplemental rent of \$850,000, less any annual rent paid for that year.

⁸ The Army explained that because the lessee has not generated enough operating revenue to cover its initial investment, there has not been any CFAD to warrant any payment of annual rent or supplemental rent. *See supra* notes 6 and 7.

escrow funds are deemed to be income to Army for income tax purposes. Escrow Agreement, ¶ 3(a). The Army disclaims any ownership in the escrow account, but claims a secured interest in the escrow funds. Escrow Agreement, Recital D. Further, as described in more detail below, the Army exerts control over the escrow account and the escrow funds are utilized for the benefit of the Army.

The Escrow Agreement provides that once the Rent Consideration is deposited into the escrow account by the lessee (or its sublessee): (1) such payment “shall constitute in-kind consideration payments” by the lessee; (2) such payment is to be credited against the total rent owed by the lessee; and (3) the lessee “*shall have no rights*” in or to the escrow funds held in or disbursed from the escrow account. Escrow Agreement, ¶ 2 (emphasis added). The escrow agent may disburse escrow funds either—(1) to a third-party contractor as payment for services rendered by such contractor to property under the control of the Secretary pursuant to a statement of work approved by the Army, or (2) directly as a cash payment to the Army. Escrow Agreement, ¶ 5.

The Escrow Agreement provides for a multi-step process for the disbursement of escrow funds to third-party contractors as payment for services.⁹ Escrow Agreement, ¶ 6. First, the Army delivers to the lessee an “in-kind service request” in the form of a statement of work. The lessee then selects and contracts with a third party to complete the statement of work. Upon completion of the work by the third-party contractor, Army employees from Picatinny’s Department of Public Works inspect the work and notify the lessee whether the work has been satisfactorily completed. If so, the lessee directs the escrow agent to disburse funds from the escrow account sufficient to pay the third-party contractor.

⁹ The escrow funds may be used to pay a third-party contractor for the following services:

- “(a) Maintenance, protection, alteration, repair, improvement, or restoration (including environmental restoration) of property or facilities under the control of the Secretary;
- (b) Construction of new facilities for the Secretary;
- (c) Provision of facilities for use by the Secretary;
- (d) Facilities operation support for the Secretary; and
- (e) Provision of such other services relating to activities that will occur on the leased property as the Secretary considers appropriate.”

Escrow Agreement, ¶ 4.

As of June 2010, \$1,474,635.04 of the escrow funds has been disbursed to pay for various services performed on property under the control of the Secretary. Army Written Responses to GAO Written Questions, dated Jun. 29, 2010, at 6. In addition, we understand that as of such date, Picatinny's Department of Public Works had initiated two other service requests that are anticipated to cost \$248,000. *Id.* at 7.

At the time of execution, the Escrow Agreement included an indemnification provision that stated that the Army and the lessee "jointly and severally agree to indemnify and hold the escrow agent harmless from and against any and all liabilities, causes of action, claims, demands, judgments, damages, costs and expenses (including reasonable attorneys fees and expenses) that may arise out of or in connection with the escrow agent's good faith acceptance of or performance of its duties and obligations under this Escrow Agreement." Escrow Agreement, ¶ 3(i). On July 2, 2009, the parties modified the Escrow Agreement to delete the indemnification provision.

DISCUSSION

The Army asserts that the "cash payment for in-kind service use" it received as Rent Consideration constitutes in-kind consideration under 10 U.S.C. § 2667(b)(4). We disagree. The Army has, in fact, received cash consideration for the Picatinny EUL and under section 2667 is required to deposit such amounts in a special account in the Treasury established for such purpose. The cash consideration was deposited in an escrow account rather than the designated account in the Treasury. We will first discuss the implications of the Army's actions under section 2667 and the miscellaneous receipts statute. Next, we will discuss the indemnification provision contained in the Escrow Agreement and the Antideficiency Act.

The Picatinny EUL and Section 2667

Section 2667(b) of title 10 enumerates the statutory criteria that a lease executed under 10 U.S.C. § 2667(a) must satisfy. Of relevance here is subparagraph (4), which requires that the lease ". . . provide for the payment (*in cash or in kind*) by the lessee of consideration in an amount not less than the fair market value of the lease interest, as determined by the Secretary[.]" 10 U.S.C. § 2667(b)(4) (emphasis added). The term "payment in kind" is not defined in section 2667; however, acceptable forms of in-kind consideration are described in 10 U.S.C. §§ 2667(b)(5), 2667(c)(1)–(2). Those subparagraphs provide as follows:

(b) Conditions on leases.—A lease under subsection [10 U.S.C. § 2667(a)]—

* * * *

(5) may provide, notwithstanding section 1302 of title 40 or any other provision of law, for the alteration, repair, or improvement,

by the lessee, of the property leased as the payment of part or all of the consideration for the lease;

* * * *

(c) Types of in-kind consideration.—(1) In addition to any in-kind consideration accepted under subsection (b)(5), in-kind consideration accepted with respect to a lease under this section may include the following:

(A) Maintenance, protection, alteration, repair, improvement, or restoration (including environmental restoration) of property or facilities under the control of the Secretary concerned.

(B) Construction of new facilities for the Secretary concerned.

(C) Provision of facilities for use by the Secretary concerned.

(D) Provision or payment of utility services for the Secretary concerned.

(E) Provision of real property maintenance services for the Secretary concerned.

(F) Provision of such other services relating to activities that will occur on the leased property as the Secretary concerned considers appropriate.

(2) In-kind consideration under paragraph (1) may be accepted at any property or facilities under the control of the Secretary concerned that are selected for that purpose by the Secretary concerned.

10 U.S.C. §§ 2667(b)(5), 2667(c)(1)–(2).

The non-exhaustive list of permissible in-kind consideration provided in the foregoing subparagraphs is consistent with the common definition of “payment in kind,” namely, the “payment for goods and services made in the form of other goods and services, not cash or other forms of money.” *Barron’s Dictionary of Finance and Investment Terms* 506 (6th ed. 2003). When Congress does not specifically define the terms that it uses in a statute, courts often turn to common dictionaries to find the plain, ordinary meaning of a word or phrase. *See, e.g., Mallard v. United States District Court*, 490 U.S. 296, 301 (1989); B-302973, Oct. 6, 2004, at 4–5. While a common dictionary meaning is a helpful aid as we interpret the meaning of the phrase “payment in kind,” we also must interpret the language so that “the statutory scheme is coherent and consistent The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in

which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997) (internal quotation marks and citations omitted); B-318897, Mar. 18, 2010, at 2.

Sections 2667(b)(5) and 2667(c)(1)–(2) are key in discerning the coherent, consistent meaning that Congress intended. These subparagraphs illustrate that the in-kind consideration contemplated by section 2667(b)(4) includes the provision of a service or property. With the exception of the “[p]rovision or payment of utility services,” each example of in-kind consideration detailed by these subparagraphs describes a specific deliverable related to the provision of a service to a property under the control of the Secretary (for example, “[m]aintenance, protection, alteration, repair, improvement, or restoration . . . of property or facilities”) or the provision of a real property facility (for example, “[p]rovision of facilities for use by the Secretary concerned”). 10 U.S.C. §§ 2667(b)(5), 2667(c)(1)–(2).

Where Congress permits the acceptance of funds without requiring their deposit in the special account in the Treasury, the statute is explicit. *See, e.g.*, 10 U.S.C. §§ 2667(c)(1)(D), 2667(e)(1)(B), 2667(e)(3)–(5). Subparagraph (c)(1)(D) permits either the *provision* of utility services or the *payment* of utility services for the Secretary concerned. All other types of in-kind services enumerated in section 2667(c)(1) are for the *provision* of services. 10 U.S.C. § 2667(c)(1) (emphasis added). Section 2667(e)(1)(B) specifies additional instances where cash payments received by the Secretary under a lease need not be deposited in the special account. For example, money rentals received for a lease under section 2667 for agricultural or grazing purposes of land may be retained by the Secretary concerned and expended in such amounts as the Secretary considers necessary to cover the administrative expenses of leasing for such purposes. 10 U.S.C. §§ 2667(e)(1)(B)(ii), 2667(e)(3).

The Army asserts that the use of an escrow account is permissible under 10 U.S.C. § 2667 as long as the account does not alter the lessee’s responsibility to provide in-kind services using the escrow funds. Army Legal Letter, at 9. However, other than the deposit of the Rent Consideration into the escrow account, neither the Master Agreement, Site Lease 1, Site Lease 2, nor the Escrow Agreement specify any in-kind deliverables to be provided by the lessee to property under the control of the Secretary. Rather, the Master Agreement, Site Lease 1, and Site Lease 2 specify that upon depositing the required cash payments into the escrow account, the lessee has “no obligation to provide any other and/or additional in-kind consideration.” Master Agreement, ¶ 1.6.14; Site Lease 1, ¶ 4(e)(i); Site Lease 2, ¶ 4(e)(i). In fact, under the lease terms, a third-party contractor will provide in-kind services only if the Secretary of the Army so opts at some point in the future. Escrow Agreement, ¶ 5. Escrow funds may be disbursed either—(1) as a payment to a third-party contractor for services rendered pursuant to a statement of work issued by the Army or (2) as a direct cash payment to the Army. Once the Rent Consideration is deposited into the escrow account, the lessee has no rights to escrow funds. In fact, for income tax purposes, any interest earned is earned by the Army, another incidence of ownership.

The fact that the Rent Consideration, paid in cash, may ultimately be used to compensate third-party contractors that provide to the Army the types of services that are permissible under 10 U.S.C. § 2667(c)(1) does not change the essential nature of the transaction: the Army has granted a leasehold interest in the Project Site in exchange for cash consideration. The cash consideration has been deposited into the escrow account in satisfaction of the lessee's rent obligations under the lease instead of being deposited in the special account in the Treasury called for by 10 U.S.C. § 2667(e). Such diversion of cash payments is not authorized by 10 U.S.C. § 2667.

The escrow account into which the Army deposited (or caused to be deposited) the up-front payment is similar to the trust at issue in *Motor Coach Industries v. Dole*, 725 F.2d 958 (4th Cir. 1984).¹⁰ In *Motor Coach Industries*, the FAA and the airlines servicing Dulles International Airport entered into an “interwoven set of agreements” designed to fund the purchase of buses for airport ground transportation. *Id.* at 961. FAA agreed to waive certain fees it normally charged the airlines for services the FAA provided at the airport, in exchange for the airlines establishing a trust at a national bank and funding that trust with a “per passenger fee” based on an FAA-approved formula. *Id.* FAA monitored the accuracy of the airlines' payments to the trust and performed most of the administrative duties associated with the collection of the fee. *Id.* Although the airlines were the settlors of the trust, the court found that “the FAA maintained firm control over vital aspects of the trust.” *Id.* “The [t]rust's resources were dedicated to the objective of primary importance to the agency—securing suitable buses for Dulles Airport.” *Id.* No expenditures from the trust could be made without FAA authorization. *Id.* at 962. Considering these facts, the court observed that “the FAA's hand was visible in all critical aspects of the Trust—its creation, its funding, and its administration.” *Id.* at 965. The court also noted that while the airlines were the settlors of the trust and made contributions from their own revenues, “there is every indication that their role was nominal.” *Id.* Thus, the court found that the trust moneys were public money.¹¹

The roles of the Army and the lessee here are analogous to those of FAA and the airlines, respectively, in *Motor Coach Industries*. The escrow funds represent

¹⁰ *Motor Coach Industries* involved the challenge of a contract award by an unsuccessful competitor who asserted that the Federal Aviation Administration (FAA) had not followed federal procurement guidelines in awarding a contract for ground transportation at Dulles International Airport. The Fourth Circuit Court of Appeals concluded that the funds channeled by FAA to a trust established by the airlines and used to purchase ground transport buses for Dulles International Airport were public in character; therefore the trust, like FAA was subject to federal procurement guidelines, which had not been followed. *Id.* at 964–65.

¹¹ The court also noted that the trust arrangement undermined the integrity of the congressional appropriations process, enabling the FAA to supplement its budget by millions of dollars without congressional action. *Motor Coach Industries*, 725 F.2d at 968.

payment in full by the lessee of the Rent Consideration. The lessee has no right to the escrow funds. Rather, the escrow funds may be disbursed only in the manner determined by the Secretary. Thus, the Army has control over the disposition of the escrow funds which, except for the payment of expenses of the escrow agent, are used solely for the benefit of the Army. *See, e.g., Scheduled Airlines Traffic Offices v. Dept. of Defense*, 87 F.3d 1356, 1361–62 (D.C. Cir. 1996) (finding that concession fees paid by travel agents into a “Morale Fund” in consideration for government resources, that is, the right to occupy agency office space and to serve as the exclusive on-site travel agent, was “money for the government” and violated the miscellaneous receipts statute). Despite the Army’s disclaimer of ownership of the escrow account, there is no question that the escrow funds are cash consideration for the Picatinny EUL and constitute “money for the government.” Under section 2667, these funds must be deposited in the designated special account in the Treasury. 10 U.S.C. § 2667 (e)(1).

The Miscellaneous Receipts Statute

Under the miscellaneous receipts statute, “an official or agent of the Government receiving *money for the Government* from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b) (emphasis added). As explained above, the cash payment is, in fact, “money for the government.” The requirement for deposit “as soon as practicable without deduction for any charge or claim” applies whether the correct account for deposit is in the general fund of the Treasury or where, as here, the money must be deposited into a specific fund in the Treasury. B-318274, Dec. 23, 2010; B-72105, Nov. 7, 1963. Therefore, the miscellaneous receipts statute required the Army to immediately deposit the proceeds of the Picatinny EUL into the appropriate account in the Treasury. B-307137, July 12, 2006; B-300248, Jan. 15, 2004.

Instead, the Army caused the up-front payment to be deposited into the escrow account. With this action, the Army violated the miscellaneous receipts statute and,

when it expended the funds, it improperly augmented its appropriation.¹² See B-307137 (finding that the Department of Energy used uranium sales proceeds (and earnings on those proceeds) in violation of the miscellaneous receipts statute, which resulted in DOE unlawfully augmenting its appropriations when it directed its agent to receive, retain, and use proceeds from the sale of government assets to compensate the agent for expenses it incurred on behalf of the government); B-265727, July 19, 1996 (finding that SEC violated the miscellaneous receipts statute and improperly augmented its appropriations, by subleasing space and arranging for the sublessee to make its payments directly to the landlord). To remedy the situation, the Army must deposit the proceeds from the Picatinny EUL into the appropriate account in the Treasury.

Unfortunately, the Army has expended substantially all of the Rent Consideration with a minimal balance remaining in the escrow account. The Army did not have the authority to use the Rent Consideration to pay for services performed on property under the control of the Secretary. In doing so, the Army augmented its appropriation. The Army should adjust its accounts by transferring funds from an Army account available to pay for services to property under the control of the Secretary to the appropriate account in the Treasury. If the Army finds that it lacks sufficient budget authority to cover the adjustment, it should report a violation of the Antideficiency Act in accordance with 31 U.S.C. § 1351.

The Indemnification Provision and the Antideficiency Act

Prior to its amendment in July 2009, the Escrow Agreement contained a provision pursuant to which the Army expressly agreed to indemnify the escrow agent against all liabilities. Such an open-ended indemnification provision commits the government to potentially unlimited liability and violates the Antideficiency Act, 31 U.S.C. § 1341. See, e.g., B-260063, June 30, 1995. Once it is determined there has been a violation of 31 U.S.C. § 1341, the agency head “shall report immediately to the

¹² We note that had the Rent Consideration been deposited in a special account in the Treasury established for the Secretary as required by 10 U.S.C. § 2667(e)(1)(A)(i), such amounts would be available to the Secretary only to the extent provided in an appropriation act. 10 U.S.C. § 2667(e)(1)(C). Further, the expenditure of such appropriated funds is subject to certain limitations. 10 U.S.C. § 2667(e)(1)(C). For example, at least fifty percent of the proceeds in the special account shall be available for expenditure at the military installation where the proceeds are derived. 10 U.S.C. § 2667(e)(1)(D). In addition, once appropriated, no more than \$500,000 may be expended at a single military installation until after a report on the proposed expenditure is submitted to the defense committees of Congress. 10 U.S.C. § 2667(e)(1)(E). Here, substantially all of the Rent Consideration received to date has been utilized for services at the Project Site. Such amounts may not have been available for expenditure at the Project Site had the Rent Consideration been deposited into the special account as required.

President and Congress all relevant facts and a statement of actions taken.” 31 U.S.C. §1351. In addition, the heads of executive branch agencies shall also transmit “[a] copy of each report . . . to the Comptroller General on the same date the report is transmitted to the President and Congress.” 31 U.S.C. § 1351. To date, GAO has not received a report from the Army regarding this violation.

CONCLUSION

The Army did not comply with 10 U.S.C. § 2667 and violated the miscellaneous receipts statute by effectively receiving cash, not in-kind, consideration and depositing such proceeds into an escrow account instead of the special account in the Treasury for such purpose as required by 10 U.S.C. § 2667(e)(1)(C). Simply calling a cash payment “in-kind services” does not make it so. The facts show that the Army received a payment of cash and did not deposit it in the appropriate account in the Treasury. Instead, the Army used the funds as if they were permissible in-kind consideration. As a consequence, the Army violated section 2667, violated the miscellaneous receipts statute, and augmented its appropriations. In addition, the Army violated the Antideficiency Act upon execution of the Escrow Agreement, and although the Army subsequently cured the violation by amending the Escrow Agreement to delete the indemnification provision, a report of the violation is still required.

Accordingly, the Army should transfer the balance of the escrow funds to the appropriate account in the Treasury. With respect to the escrow funds that have been expended to date, the Army should adjust its accounts by transferring funds from an Army account available to pay for services to property under the control of the Secretary to the appropriate account in the Treasury. If the Army finds that it lacks sufficient budget authority to adjust its accounts, it should report a violation of the Antideficiency Act in accordance with 31 U.S.C. § 1351. In addition, with respect to the indemnification provision in the original Escrow Agreement, we encourage the Army to make the necessary report as required by 31 U.S.C. § 1351 as soon as possible. Finally, to the extent the Army has entered into EULs on substantially similar terms and conditions as the Picatinny EUL, the Army should take the same corrective action.

If you have any questions, please contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667, or Julia C. Matta, Assistant General Counsel, at (202) 512-4023.

Sincerely yours,

A handwritten signature in black ink that reads "Lynn H. Gibson". The signature is written in a cursive style with a large initial "L" and "G".

Lynn H. Gibson
General Counsel