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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Securities and Exchange Commission—Recording of Obligation for Multiple-Year Contract

File: B-322160

Date: October 3, 2011

DIGEST

The Securities and Exchange Commission (SEC) failed to fully record its obligation when it entered into a 10-year contract. The recording statute, 31 U.S.C. § 1501(a)(1), requires SEC to record an obligation for its total liability under the contract. Although SEC estimated that its total obligation would be at least \$371.7 million, SEC recorded an obligation for only \$180,000. SEC had no authority to record an obligation for an amount less than its full liability under this contract.

DECISION

The Chief Financial Officer of the Securities and Exchange Commission (SEC) requested a decision under 31 U.S.C. § 3529 regarding whether SEC had authority to enter into a multiple-year contract to lease real property and, if the contract was proper, the amount that SEC must obligate. Letter from Chief Financial Officer, SEC, to General Counsel, GAO, June 15, 2011 (Request Letter). As explained below, we conclude that SEC had authority to enter into the multiple-year contract. However, SEC failed to obligate an amount equal to the government's total obligation under the contract.

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 Chief Financial Officer and Office of General Counsel. The Office of General Counsel provided us with additional information and a copy of the contract.

BACKGROUND

On July 28, 2010, SEC signed a contract to lease additional headquarters office space in Washington, D.C. Contract between SEC and David Nassif Associates, July 28, 2010 (Contract). “The lease term is for Ten (10) years firm.” Contract, Attachment 2 at 6.¹ The annual base rent is \$44.80 per square foot, “escalating to \$47.00 for years six through ten of the lease term, subject to adjustment for operating expenses and taxes.” Contract, at 4. SEC’s Office of General Counsel told us that SEC estimated that the total cost of the lease would range from \$371.7 million to \$454.4 million, depending upon the amount of space ultimately leased. E-mail from Assistant General Counsel, SEC, to Assistant General Counsel, GAO, *Subject: Information Requested by GAO on B-322160*, Aug. 19, 2011 (August 19 email). According to SEC’s Office of General Counsel, SEC obligated \$180,000 because, in the agency’s view, this was the only payment due to the lessor in the several months subsequent to the lease’s execution. *Id.*

The Financial Services and General Government Appropriations Act, 2010 appropriated about \$1.1 billion for SEC’s Salaries and Expenses appropriation.² Pub. L. No. 111-117, 123 Stat. 3034, 3159, 3197 (Dec. 16, 2009). The funds remain available until expended. *Id.* The appropriation is available for “the rental of space (to include multiple year leases).” *Id.*

DISCUSSION

At issue here is the proper recording of SEC’s obligation under the contract. As a threshold matter, we first consider whether SEC had legal authority to enter into the 10-year contract. SEC has specific statutory authority to enter into leases for real property:

“Notwithstanding any other provision of law, the Commission is authorized to enter directly into leases for real property for office, meeting, storage, and such other space as is necessary to carry out its functions, and shall be exempt from any General Services Administration space management regulations or directives.”

¹ In addition, “[t]he Government shall have one five (5) year renewal option, at the Government’s option, the terms and rental rates of which shall be more clearly set forth in a subsequent Supplemental Lease Agreement.” Contract, Attachment 2 at 6.

² The Act provided that amounts appropriated from the general fund shall be reduced as SEC collects fees and charges during the fiscal year “so as to result in a final total fiscal year 2010 appropriation from the general fund estimated at not more than \$0.” Pub. L. No. 111-117, 123 Stat. at 3197.

Securities Exchange Act of 1934, § 4(b)(3), *codified at* 15 U.S.C. § 78d(b)(3). Thus SEC is not required to obtain its space through the General Services Administration (GSA).³ *Cf.* B-309181, Aug, 17, 2007; B-202206, June 16, 1981 (without specific statutory authority or absent GSA's delegation of authority, a federal agency may not enter into a real property lease). Because SEC's appropriation remains available until expended, SEC may enter into multiple-year contracts. 43 Comp. Gen. 657, 661 (1964). Therefore, with specific statutory authority to enter into real property leases and funds that remained available until expended, SEC had authority to enter into the multiple-year lease contract that is at issue in this decision.

We now consider whether SEC properly recorded the obligation it incurred when it signed the contract. The recording statute, 31 U.S.C. § 1501(a)(1), requires an agency to record the full amount of its contractual obligation against funds available at the time the contract was executed.⁴ *See, e.g.,* B-305484, June 2, 2006; B-195260, July 11, 1979. Any authorization to record an obligation for an amount less than the full amount of the government's contractual obligation must be explicit. B-195260, July 11, 1979 (the Federal Emergency Management Agency had authority to enter into multiple-year leases, but must obligate the rental charges for the full term of the lease because it lacked statutory authority to do otherwise). GSA has authority to enter into leases of real property for periods of up to 20 years and to record obligations on a year-by-year basis.⁵ 40 U.S.C. § 585. SEC does not have the same authority that GSA has. We are not aware that SEC has any authorization to obligate leases on a year-by-year basis, nor has SEC cited any such authority.

In a 2009 decision, we concluded that the National Transportation Safety Board, an agency with statutory authority to enter into real property leases, could use the Federal Acquisition Streamlining Act (FASA) as the basis for obligating its appropriations on a year-by-year basis to fund multiple-year real property leases. B-316860, Apr. 29, 2009. FASA, codified at 41 U.S.C. § 3903, permits an agency to obligate an amount equal to costs for the first fiscal year of contract performance plus estimated contract termination costs. However, this authority is available only for contracts up to five years in duration. 41 U.S.C. § 3903(a). Because the contract

³ SEC is not the only agency that has statutory leasing authority independent of GSA. *See, e.g.,* GAO, *Federal Real Property: Overreliance on Leasing Contributed to High-Risk Designation*, GAO-11-879T (Washington, D.C.: Aug. 4, 2011), at Appendix I. In this decision, we do not examine the practices of these agencies or the extent of their leasing authority.

⁴ The Supreme Court viewed a lease as a "contract or other obligation" that is subject to the Antideficiency Act. *Leiter v. United States*, 271 U.S. 204, 206-07 (1926). *See also* *FDIC v. Mahoney*, 141 F.3d 913 (9th Cir. 1998); *Cupey Bajo Nursing Home v. United States*, 36 Fed. Cl. 122 (1996); B-316860, Apr. 29, 2009.

⁵ GSA may delegate this authority to other agencies. 40 U.S.C. § 121(d); 41 C.F.R. pt. 102-72. SEC did not act pursuant to a delegation of authority from GSA.

at issue has a 10-year term, FASA would not have offered SEC any flexibility in recording its obligation.⁶

Lacking statutory authority to obligate an amount less than the government's total liability, SEC should have recorded its total obligation for the duration of the lease at the time it signed the lease agreement. This SEC did not do. Although SEC estimated the total costs of the lease to be at least \$371.7 million, it obligated only \$180,000.

SEC argues that Congress has granted SEC authority to enter into lease contracts notwithstanding the provisions of the Antideficiency Act, which bars agencies from entering into contracts in advance of appropriations or that exceed available appropriations. Request Letter, at 7-8. SEC asserts that the phrase "notwithstanding any other provision of law" in section 4(b)(3) allows SEC to enter into leases without regard for the provisions of the Antideficiency Act. Memorandum from Associate General Counsel and others, SEC, to Executive Director, SEC, April 19, 1991. SEC asserts that it, therefore, was permitted to enter into multiple-year leases without obligating the government's total obligation. Request Letter, at 8.

We disagree with SEC's argument. Exceptions to the Antideficiency Act must be explicit, and a general "notwithstanding" clause like that here does not explicitly waive the Antideficiency Act. We addressed similar statutory language in a 2004 decision. B-303961, Dec. 6, 2004. In that case, we concluded that participation by the Architect of the Capitol (AOC) in a multiemployer defined benefit plan would constitute a violation of the Antideficiency Act because of the possibility of indeterminate withdrawal liability under the Employee Retirement Income Security Act. *Id.* at 1. We noted that statutory language "instructing AOC to take all steps which may be required to pay fringe benefits to its temporary employees 'notwithstanding any other provision of law' does not suffice to waive the Antideficiency Act." *Id.* Courts have held that laws with "notwithstanding" clauses preempt only those other laws that irreconcilably conflict. *Id.* at 7; *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993).⁷ Because AOC could give effect both to its mandate to pay fringe benefits and to the Antideficiency Act, we concluded that the "notwithstanding any other provision of law" clause did not waive the Antideficiency Act. *Id.* at 9. For the same reasons, we conclude that the phrase "notwithstanding any other provision of law" in section 4(b)(3) does not waive the Antideficiency Act, as there is no conflict between section 4(b)(3) and the Antideficiency Act. By

⁶ Our 2009 decision addressed a lease funded with fiscal year appropriations. B-316860, Apr. 29, 2009. Because the duration of the SEC lease exceeds five years, we need not consider here whether FASA is available to manage obligations incurred by a multiple-year contract funded with no-year appropriations.

⁷ See also 31 U.S.C. § 1301(d) (a law may be construed to authorize contracts in excess of an appropriation only if the law specifically so states).

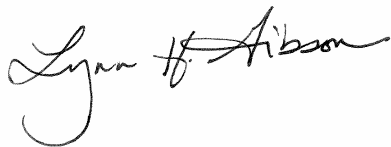
entering into a lease and by obligating the government's total obligation, SEC may comply both with the Antideficiency Act and with section 4(b)(3).

Another argument SEC advances is that it has routinely submitted budget documents to Congress showing that, each year, the agency obligated the amount due annually under each of its real property leases. Request Letter, at 7. SEC argues that its interpretation was permissible because Congress knew of SEC's practice and expressed no disapproval. *Id.* SEC, in effect, would have us interpret the recording statute, and its application here, based on assumptions about Congress's silence rather than the language of the statute itself. We disagree with this argument. "Congressional inaction cannot amend a duly enacted statute." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994). Congress acts only through the enactment of legislation. *Id.*

In a similar vein, SEC argues that because its annual Salaries and Expenses appropriation is available "for rental of space (to include multiple year leases)," Congress authorized SEC to obligate funds for its leases annually. Request Letter, at 7. As noted earlier, the fact that Congress, without more, authorized SEC to enter into multiple-year leases does not, by itself, exempt SEC from the recording statute or otherwise authorize SEC to deviate from the obligating standards established therein. SEC's argument fails because the language in its Salaries and Expenses appropriation does not supersede the requirement under the recording statute that agencies properly record the government's total obligation.

CONCLUSION

When SEC entered into a multiple-year lease, it was required to record an obligation equal to the government's total liability over the term of the lease. SEC should adjust its accounts accordingly. If SEC lacks sufficient budget authority to make this adjustment, it should report a violation of the Antideficiency Act in accordance with 31 U.S.C. § 1351.



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