



GAO

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Comptroller General
of the United States

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

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.

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. 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 (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.¹ 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.

¹ 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).² 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.³

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

² 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.

³ 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.⁴ 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

⁴ 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.⁵

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
Acting General Counsel

⁵ 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.



GAO

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United States Government Accountability Office
Washington, DC 20548

B-320091

July 23, 2010

Congressional Requesters

Subject: *National Aeronautics and Space Administration—Constellation Program and Appropriations Restrictions, Part II*

In a letter dated March 12, 2010, you requested information and our views on whether the National Aeronautics and Space Administration (NASA) complied with the Impoundment Control Act of 1974 and with restrictions in the fiscal year 2010 Exploration appropriation when NASA took certain actions pertaining to the Constellation program. Your letter asked us (1) for information regarding the planning activities of NASA staff after the President submitted his fiscal year 2011 budget request; (2) whether NASA complied with the provision in the Exploration appropriation which prohibits the use of the Exploration appropriation to “create or initiate a new program, project or activity;” (3) whether NASA has obligated Exploration appropriations in a manner consistent with the Impoundment Control Act; and (4) whether NASA complied with the provision in the Exploration appropriation which prohibits the use of the Exploration appropriation for “the termination or elimination of any program, project or activity of the architecture for the Constellation program.”

We responded to your first two questions in a previous letter. B-319488, May 21, 2010. In that letter, we provided information on planning activities and determined that NASA had not violated the provision in the Exploration appropriation that bars NASA from using the Exploration appropriation to “create or initiate a new program, project or activity.” *Id.* This letter responds to your third and fourth questions. In addition, we address questions raised by your staff subsequent to your letter regarding potential contract termination costs. As explained below, we conclude that, to date, NASA has not violated the Impoundment Control Act or the provision in the Exploration appropriation which bars NASA from using the Exploration appropriation for the “termination or elimination of any program, project or activity of the architecture for the Constellation program.” NASA has not withheld Exploration funds from obligation and has obligated the funds at rates comparable to the rates of obligation in years in which NASA obligated nearly all available Exploration funds. In addition, NASA has obligated Exploration funds to carry out the various Constellation programs, projects, and activities.

Our practice when rendering decisions is to obtain the views of the relevant agency and to establish a factual record 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. By letter of April 26, 2010, the NASA General Counsel supplied NASA's legal views supporting its actions related to the Constellation program as well as relevant information. Letter from General Counsel, NASA, to Assistant General Counsel for Budget Issues, GAO (NASA Letter). We interviewed NASA officials from the Exploration Systems Mission Directorate, the Office of General Counsel, the Office of Procurement, Johnson Space Center, and Marshall Space Flight Center regarding NASA's obligation and contracting practices. We reviewed relevant financial data and contract documents and internal NASA correspondence as well as correspondence between NASA and its contractors. We also interviewed officials of firms operating under contracts with NASA.

BACKGROUND

The primary objective of the Constellation program is to develop capabilities to transport humans to Earth orbit, to the Moon, and back to Earth. The program also serves as a stepping-stone to future human exploration of Mars and other destinations.¹ On February 1, 2010, the President submitted his fiscal year 2011 budget request, which proposed the cancellation of Constellation in favor of the creation of a different approach to human space exploration.²

Prior to the submission of the President's fiscal year 2011 budget request, Congress enacted the fiscal year 2010 Exploration appropriation, which appropriated about \$3.7 billion for "exploration research and development activities." The appropriation made the funds available until September 30, 2011, with the following limitation:

"Provided, That notwithstanding section 505 of this Act, none of the funds provided herein and from prior years that remain available for obligation during fiscal year 2010 shall be available for the termination or elimination of any program, project or activity of the architecture for the Constellation program nor shall such funds be available to create or initiate a new program, project or activity, unless such program termination, elimination, creation, or initiation is provided in subsequent appropriations Acts."

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, div. B, title III, 123 Stat. 3034, 3113, 3143 (Dec. 16, 2009).

¹ For a description of the objectives of the Constellation program, see NASA, *Fiscal Year 2010 Budget Estimates*, at EXP-3, *available at* www.nasa.gov/news/budget/FY2010.html (last visited July 14, 2010) (2010 Budget Estimates).

² *Budget of the United States Government for Fiscal Year 2011*, at 129-30, *available at* www.gpoaccess.gov/usbudget/fy11/index.html (last visited July 14, 2010).

On June 9, 2010, the NASA Administrator sent a letter to several members of Congress regarding the status of the Constellation program. Letter from Administrator, NASA, to the Honorable Pete Olson, June 9, 2010 (June 9 Letter). The letter stated that “[w]hile NASA has fully complied with the provisions of the FY 2010 Consolidated Appropriations Act, the pace of some contractual work to date has been affected by the constrained FY 2010 budget profile for the Constellation program.” *Id.* at 1. The letter then stated:

“Within this already constrained budget profile, funding for the Constellation program is further limited after taking into account estimated potential termination liability for Constellation contracts. Current estimates for potential termination liability under Constellation contracts total \$994 million. Once these termination liability estimates are accounted for, the overall Constellation program is confronting a total estimated shortfall of \$991 million for continued program effort for the balance of the year, compared with the revised FY 2010 plan. Given this estimated shortfall, the Constellation program cannot continue all of its planned FY 2010 program activities within the resources available. Under the Anti-Deficiency Act (ADA), NASA has no choice but to correct this situation. Consequently, the Constellation program has formulated an updated funding plan for the balance of FY 2010”

Id. The letter stated that “NASA intends to pace, rather than terminate, activity on the Constellation contracts,” prioritizing work to be completed in accordance with four stated principles. *Id.* at 2. The four principles are to:

- Maximize retention of personnel/skills and capabilities that can contribute to future technology development,
- Protect advanced development work that could transfer to planned programs as reflected in the FY 2011 budget request,
- Enable a robust transition to work associated with an Orion Crew Escape Vehicle that the President announced in an April 15, 2010 speech, and
- Place a low priority on expenditures for hardware that can be used solely for the program of record and are not applicable to programs as reflected in the FY 2011 budget request.

DISCUSSION

We address three issues: first, whether NASA has complied with the Impoundment Control Act of 1974; second, whether NASA has complied with the provision in the fiscal year 2010 Exploration appropriation which bars NASA from using the Exploration appropriation for the termination or elimination of any program, project, or activity (PPA) of the architecture for the Constellation program; and third, potential contract termination costs.

Impoundment Control Act of 1974

Congress enacted the Impoundment Control Act of 1974 to tighten congressional control over presidential impoundments. Among other things, the act established a procedure under which Congress could consider the merits of impoundments proposed by the President. GAO, *Impoundment Control Act: Use and Impact of Rescission Procedures*, GAO-10-320T (Washington, D.C.: Dec. 2009), at 1. An impoundment is any action or inaction by an officer or employee of the federal government that precludes obligation or expenditure of budget authority. GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 61 (Budget Glossary). There are two types of impoundments: deferrals and proposed rescissions. *Id.* Under the act, the President may propose a rescission when he wishes to withhold funds from obligation permanently or submit a deferral proposal when he wishes to withhold funds temporarily. Agencies may withhold budget authority from obligation only if the President has first transmitted a rescission or deferral proposal in a special message to Congress. 2 U.S.C. §§ 683(a), 684(a); *see also* B-308011, Aug. 4, 2006; B-307122, Mar. 2, 2006.

The President has not transmitted a rescission or deferral proposal to Congress pertaining to NASA or the Exploration appropriation. Therefore, NASA may not withhold funds in the Exploration account from obligation. Throughout this fiscal year, NASA has obligated amounts available in the Exploration appropriation at rates comparable to those in preceding years. According to NASA financial data, by June 30, 2010, NASA had obligated 83 percent of the Exploration funds that Congress appropriated for fiscal year 2010. By comparison, the corresponding figure in fiscal years 2009 and 2008 was 73 percent. If NASA continues to obligate funds at its current rate, it will obligate nearly all the funds available in the Exploration appropriation before the end of this fiscal year, just as NASA obligated nearly all the available funds by the end of fiscal years 2009 and 2008. Because the funds appropriated this fiscal year will be available until the end of fiscal year 2011, it is likely that NASA will obligate nearly all available amounts well before the funds expire.³

We previously found that an agency violated the Impoundment Control Act when it withheld funds from obligation in response to a legislative proposal that appeared in the President's budget request. B-308011, Aug. 4, 2006. In that case, the agency's apportionment schedule for the appropriation identified over \$2 million set aside in reserve, unavailable for obligation, pending congressional action on the President's

³ NASA's 2009 and 2008 appropriations also made the Exploration appropriation available for two fiscal years. Commerce, Justice, Science, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, div. B, title III, 123 Stat. 524, 560, 587-88 (Mar. 11, 2009); Commerce, Justice, Science, and Related Agencies Appropriations Act, 2008, Pub. L. No. 110-161, div. B, title III, 121 Stat. 1844, 1884, 1917 (Dec. 26, 2007). In both years, NASA obligated nearly all available amounts by the end of the first fiscal year of availability.

budget request. In this case, however, we see no evidence that NASA has withheld funds from obligation. NASA has made Exploration appropriations available to program managers for obligation. Accordingly, the managers have obligated the funds at rates comparable to the rates of obligation in years in which NASA obligated nearly all the funds before the end of even the first year of availability. Therefore, we conclude that NASA has not violated the Impoundment Control Act of 1974.

Termination or Elimination of Any Program, Project, or Activity (PPA)

The next issue is whether NASA has complied with the provision in the fiscal year 2010 Exploration appropriation which bars NASA from using the Exploration appropriation “for the termination or elimination of any program, project or activity of the architecture for the Constellation program.” To interpret this provision, we begin with the statutory language. *Carcieri v. Salazar*, 555 U.S. ___, 129 S. Ct. 1058 (2009); *BedRoc Limited, LLC v. United States*, 541 U.S. 176 (2004); B-302548, Aug. 20, 2004. In the absence of indications to the contrary, Congress is deemed to use words in their common, ordinary sense. B-308715, Apr. 20, 2007. To identify the common, ordinary meaning of words, courts look to a standard dictionary. *Mallard v. U.S. District Court*, 490 U.S. 296, 300–02 (1989); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 237 (1990); B-308715, Apr. 20, 2007; B-302973, Oct. 6, 2004. In this case, “terminate” means “bring to an end,” while “eliminate” means “completely remove or get rid of (something).” *The New Oxford American Dictionary* 1741, 548 (2nd ed. 2005). Thus, the appropriations act prohibits NASA from using the Exploration appropriation to bring any Constellation PPA to an end, or to completely remove or get rid of any Constellation PPA.⁴

A “Program, Project or Activity (PPA)” is an “element within a budget account. For annually appropriated accounts, the Office of Management and Budget (OMB) and agencies identify PPAs by reference to committee reports and budget justifications.”

⁴ The conference report accompanying the fiscal year 2010 Exploration appropriation stated that “funds are also not provided herein to *cancel, terminate or significantly modify contracts* related to the spacecraft architecture of the current program, unless such changes or modifications have been considered in subsequent appropriations Acts.” H.R. Rep. No. 111-366, at 756 (Dec. 8, 2009) (emphasis added). This language differs from that in the statute, which prohibits NASA from using Exploration funds for the “termination or elimination of any *program, project or activity* of the architecture for the Constellation program” (emphasis added). Language in a conference report is part of the statute’s legislative history and is therefore not legally binding. Although courts sometimes turn to legislative history to resolve questions of statutory interpretation when the statutory text is unclear, courts do not “resort to legislative history to cloud a statutory text that is clear.” *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994); *see also, e.g., 14 Penn Plaza v. Pyett*, ___ U.S. ___, 129 S. Ct. 1456, 1465 (2009); *Shannon v. United States*, 512 U.S. 573, 583 (1994); 55 Comp. Gen. 307, 325 (1975). In this case, because the meaning of the language in the fiscal year 2010 Exploration appropriation is clear from the text of the statute, we do not refer to the statute’s legislative history to aid our interpretation.

Budget Glossary, at 80. NASA's fiscal year 2010 budget request lists five PPAs within the "Constellation Systems" category:

- Program Integration and Operations,
- Orion Crew Exploration Vehicle,
- Ares I Crew Launch Vehicle,
- Ares V Cargo Launch Vehicle, and
- Commercial Crew and Cargo.

2010 Budget Estimates, at EXP-2.

As discussed above, NASA has continued to obligate Exploration appropriations to all five of these PPAs, notwithstanding the President's proposal in his fiscal year 2011 budget submission; in fact, NASA's current rate of obligation is comparable to or exceeds that of the previous two fiscal years. We found no evidence that NASA is withholding Exploration appropriations from obligation in anticipation of future programmatic changes or that NASA is taking any steps to terminate or end the Constellation program, any of the six large contracts for the hardware of the Constellation program, or any of the five PPAs.

NASA financial data show that NASA has allocated funds across the Constellation PPAs (such as the Ares I and Orion programs) in amounts consistent with the allocations given in congressional committee reports and NASA's public budget documents. In continuing to obligate funds for all the various Constellation PPAs, NASA has neither brought to an end nor completely eliminated any Constellation PPA. As we discussed in our previous opinion, NASA has engaged only in preliminary planning activities related to the proposals in the President's fiscal year 2011 budget submission. B-319488, May 21, 2010. Thus, we conclude that, at this time, NASA has not violated the restriction in the fiscal year 2010 Exploration appropriation.

The June 9 Letter informs Congress that NASA will place a priority on funding work that aligns with the programs planned in the President's fiscal year 2011 budget request and with a space vehicle the President proposed in an April 15, 2010 speech. Meanwhile, NASA will "place low priority on expenditures for hardware that can be used solely for" the current program. June 9 Letter, at 2. It is not clear what NASA specifically means by "low priority." However, such shifts in priority do not in themselves amount to the termination or elimination of a PPA. NASA must coordinate many employees and contractors and multiple undertakings in order to carry out each PPA. For example, NASA divides the Ares I PPA into five "project elements," such as the First Stage, the Upper Stage engine, and the Upper Stage. 2010 Budget Estimates, at EXP-14. NASA has discretion in how it carries out the Constellation program consistent with Congress's statutory direction. In making these choices, NASA continues to obligate funds to carry out all of the Constellation PPAs. It has not diverted the Exploration funds to create or initiate a new PPA. Therefore, this course of action also does not violate the language that bars NASA

from terminating or eliminating any PPA of the architecture of the Constellation program.

The June 9 letter stated that the Ares “program will generally provide no additional funding for the first stage contract, descope remaining contracts, and reduce support contractor levels.” However, NASA has continued to obligate funds for the performance of the Ares program. There are two Ares PPAs: the Ares I Crew Launch Vehicle and the Ares V Cargo Launch Vehicle. In June of 2010, NASA obligated an additional \$222 million for the Ares I PPA, and thus has obligated \$1 billion for the PPA during this fiscal year. In addition, in June of 2010, NASA obligated an additional \$9 million for the Ares V PPA, reaching a total of \$60 million in obligations for Ares V during this fiscal year. We are also aware that NASA has decided not to proceed with some procurements and studies that had been planned but not yet awarded. NASA Letter, at 7. After making these decisions, NASA has continued to obligate funds to carry out all of the Constellation PPAs, and has not used Exploration funds to create or initiate a new PPA. Therefore, these actions do not violate the restriction in the fiscal year 2010 Exploration appropriation.

Termination Costs

Your staff has raised questions about which party bears responsibility for the contractors’ potential termination costs under the Constellation contracts because of public statements that NASA has made concerning the requirements of the Antideficiency Act. The Antideficiency Act provides that agency officials may not authorize obligations exceeding the amount available in an appropriation or before the appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1). Generally, an obligation is a “legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States.” B-300480, Apr. 9, 2003, *quoting* 42 Comp. Gen. 733, 734 (1963).

To carry out the Constellation program, NASA has entered into a multitude of contracts and other procurement instruments. NASA refers to six large contracts for the hardware of the Constellation program as the program’s prime contracts.⁵ NASA states that it has not taken any steps to terminate any of the Constellation contracts. NASA Letter, at 8; *Hearing Before the House Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies*, 111th Cong. (Mar. 23, 2010) (statement of NASA Administrator).

All of the prime contracts for the Constellation program are cost-reimbursement contracts. NASA Letter, at 10; *see also, e.g.*, NASA Contract No. NNM07AA75C, at 2 (ATK Launch Systems); NASA Contract No. NNJ06TA25C, schedule A, section B, at 2

⁵ NASA entered into prime contracts with ATK Launch Systems, Lockheed Martin, Oceaneering, and Pratt & Whitney Rocketdyne. NASA entered into two separate prime contracts with Boeing.

(Lockheed Martin). In general, these types of contracts require the government to reimburse the contractor for allowable costs incurred in performing the contract, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.301-1.

Some contract termination costs are allowable under the FAR. Generally, termination costs are costs that would not have arisen had the contract not been terminated. FAR § 31.205-42. As required by the FAR, the prime contracts include a provision stating that the government is not obligated to reimburse the contractor for costs incurred in excess of the total allotment that is specified in the contract; this limitation on liability would include termination costs. FAR §§ 32.705-2(b), 52.232-22(f)(1), 52.232-22(h); *see, e.g.*, NASA Contract No. NNM07AA75C, at 33; NASA Contract No. NNJ06TA25C, schedule A, section I, at 3. This limitation on the government's liability is generally known as the "limitation of funds clause." NASA must record an obligation for the entire amount that is allotted to the contract, which represents NASA's legal liability, in order to comply with various fiscal statutes, including the Antideficiency Act.⁶

Under the limitation of funds clause, when the contractor expects that the costs it will incur in the next 60 days of performance will exceed 75 percent of the total amount allotted to the contract, the contractor must notify the agency. FAR § 52.232-22(c). Additionally, 60 days before the end of the period specified in the contract, the contractor must notify the agency of the estimated amount to continue performance under the contract or for any further period specified in the contract's schedule⁷ or

⁶ In January 2010, NASA and one of its contractors agreed to modify two of the six Constellation prime contracts to include clauses pertaining to "special termination costs." These clauses enumerated several categories of allowable termination costs and provided that "in the event of a termination for convenience, and subject to negotiation of a termination settlement, funds will be applied to cover Special Termination Costs from amounts available within the Exploration Systems Appropriation or from such other funds appropriated or to be appropriated by Congress for this purpose." NASA Contract No. NNM08AA16C, modification 34 (Boeing Avionics contract), NASA Contract No. NNM07AB03C, modification 57 (Boeing Upper Stage contract.) Further, "the Contractor agrees to perform this contract in such a manner that the Contractor's claim for special termination costs will not exceed" a particular amount (\$29 million for the Avionics contract, \$52 million for the Upper Stage contract.) *Id.* Although these two prime contracts also include the standard limitation of funds clause, the standard limitation of funds clause specifically allows the contractor and the government to agree to exceptions. FAR § 52.232-22(f). As required by law, NASA has recorded obligations corresponding to the amounts for each special termination cost clause. NASA Letter, at 12; B-238581, Oct. 31, 1990.

⁷ The contents of the schedule are specified in the FAR, §§ 14.201-1 and 15.204-1.

otherwise agreed upon. FAR § 52.232-22(d). During this and previous fiscal years, the Constellation prime contractors have sent notifications to NASA in accordance with this provision. The contractor is not obligated to continue performance, including any actions related to contract termination, if such performance would cause the contractor to incur costs in excess of the amount allotted. FAR § 52.232-22(f)(2).

The limitation of funds clause creates an incentive for contractors to accurately track both the costs of performance and any termination costs that they may incur. Because the costs that contractors might incur in the event of a termination may be considerable, many contractors consider it prudent to track their estimated termination costs and to consider the possibility of termination in the course of performance. The contractor might believe that it must incur some costs—those related to the contractor’s contractual obligations to third parties, for example—in the event of a termination. Consequently, contractors may take steps to limit their possible liability in the event of a termination. For example, an official of one NASA contractor told us that his company’s standard practice on contracts with agencies other than NASA is to incur costs only up to an amount that would leave the government agency with enough funds available under the allotted amount to reimburse any allowable termination costs that might arise. *See also* B-238581, Oct. 31, 1990 (“Consequently, as dictated by good business practice, [the contractor] kept an accounting of the unliquidated funds which were obligated on the contract so as to guarantee that sufficient amounts remained to liquidate termination costs.”).

Four of the five prime Constellation contractors told us that NASA’s past practice has been to agree to reimburse all termination costs, even if such costs exceeded the amount currently allotted to the contract under the limitation of funds clause.⁸ Some of the contractors assert NASA stated in various written and oral communications that NASA would reimburse such costs. The contractors further assert that NASA’s behavior during contract performance also indicated that NASA would reimburse such costs. These four contractors did not take steps to ensure that the funds that NASA allotted to the contract would also be sufficient to reimburse any termination costs that may arise under the contract. Instead, these contractors told us that, in the past, they would incur performance costs up to the amount that NASA had allotted to the contract, without leaving any of the allotted amount available for termination costs.

In August 2009, NASA sent a letter to one contractor which cited the limitation of funds clause and stated that—

“the Government is not obligated to reimburse [the contractor] for costs incurred in excess of the total amount allotted by the Government to this contract . . . Plainly stated, should [the contractor] expend funds

⁸ The fifth Constellation prime contractor told us that the contractor, not NASA, bears the responsibility for accounting for potential termination liability that may arise.

over and above the funds allotted to the subject contract it does so at its own risk.”

Letter from Contracting Officer, NASA, to ATK Launch Systems, Inc., *Subject: Contract NNM07AA75C, Continuing Resolution and Limitation of Funds*, Aug. 14, 2009, at 1. In response, the contractor stated that “NASA has the obligation to reimburse [the contractor] for any termination related costs incurred.” Letter from Manager, Contracts, ATK, to Marshall Space Flight Center, NASA, *Subject: Contracts NAS8-97238 and NNM07AA75C Limitation of Funds*, Sept. 10, 2009, at 1. Stating that “[t]his is the course of conduct that has been in place for many years on NASA contracts,” the contractor concluded that it “will continue to rely on NASA’s long standing course of conduct under which NASA will continue to have the obligation to provide additional funding to [the contractor] for termination related costs.” *Id.*

In March 2010, after the President submitted his fiscal year 2010 budget request, two prime contractors sent letters to NASA stating the contractors’ understanding that NASA would reimburse termination costs even if such costs exceeded the amount NASA had allotted to the contract. Letter from Manager, Contracts, ATK, to Marshall Space Flight Center, NASA, *Subject: Contract NNM07AA75C Proposed Draft Termination Liability Clause*, Mar. 10, 2010; Letter from Contracts Management, Lockheed Martin Space Systems Company, to Contracting Officer, NASA, *Subject: Contract NNJ06TA25C—Notification of Funding Expenditure Limitation*, Mar. 22, 2010. In response letters sent in April 2010, NASA stated that the contractors’ understanding “is inconsistent with written NASA Guidance⁹ and, more importantly, the contract’s Limitation of Funds clause.” Letter from Procurement Officer, NASA, to Chief, Contracts Administration, Lockheed Martin Corp., *Subject: Contract NNJ06TA25C, Project Orion, Notification of Funding Expenditure Limitation*, Apr. 23, 2010, at 1; Letter from Procurement Officer, NASA, to ATK Launch Systems, Inc., *Subject: Contract NNM07AA75C Proposed Special Termination Clause*, Apr. 23, 2010, at 1. The letters NASA sent quoted language from the limitation of funds clause stating that “the Government is not obligated to reimburse the Contractor for any costs incurred in excess of the total amount allotted by the Government to this contract, whether incurred in the course of the contract or as a result of termination.” *Id.*; FAR § 52.232-22(h).

⁹ Internal NASA memoranda state NASA policy: “absent specific Congressional or regulatory authority, the Limitation of Funds clause clearly provides that termination costs are subject to the limitation of funds amount in the contract. The maximum amount NASA would be required to pay, as a result of a contract’s termination, would be the funds obligated on the contract.” Memorandum from Associate Administrator for Procurement and from Chief Financial Officer, NASA, *Subject: Procedures for Termination Liability*, Mar. 19, 1997. *See also* Memorandum from Comptroller and from Assistant Administrator for Procurement to Center Directors, NASA, *Subject: Funding for Termination Liability*, Apr. 22, 1992; Memorandum from Associate General Counsel (Contracts) to Director, Program Operations Division, NASA, *Subject: Request for Deviation Regarding Termination Liability*, July 28, 1989.

We take no position in this opinion regarding whether NASA ever promised contractors, explicitly or implicitly, that NASA would reimburse contract termination costs even if they exceeded the total amount allotted to the contract. However, we note that if NASA were to agree to pay termination costs that exceed the total amount allotted under FAR section 52.232-22, such an agreement would be an obligating event. NASA would need to have sufficient funds available to obligate the amount that it agreed to pay; otherwise, NASA would risk violating the Antideficiency Act. *See* B-238581, Oct. 31, 1990.

Current estimates provided to NASA by the prime contractors for potential termination costs total \$994 million. June 9 Letter. NASA explained that it obligates amounts to the contracts and is not reserving these funds for termination costs; however, NASA is negotiating with the prime contractors to formulate appropriate work plans for the balance of this fiscal year. At the end of June 2010, NASA had obligated about \$3.1 billion of the \$3.7 billion that Congress appropriated for the Exploration appropriation this fiscal year. This leaves approximately \$600 million in budget authority in the Exploration account for the remainder of the fiscal year.

We recognize that progress toward meeting key Constellation milestones has slowed and that job losses have occurred.¹⁰ However, the evidence we have gathered to date indicates that NASA is adhering to its policy and the FAR terms incorporated into the Constellation prime contracts concerning allowable costs, including potential termination costs. NASA officials and financial data indicate that NASA continues to obligate funds to the prime contracts and that the obligation rates have not changed in response to either the President's budget request or to the Administrator's June 9 Letter. The agency's obligation of the amounts allotted to the Constellation prime contracts and its adherence to the terms of the FAR with regard to allowable costs help ensure NASA's compliance with the Antideficiency Act and do not constitute a violation of the provision in the fiscal year 2010 Exploration appropriation prohibiting

¹⁰ Of the five Constellation prime contractors, three contractors state that they are implementing or planning reductions in the workforces assigned to their Constellation contracts. Contractors are reassigning some staff to non-Constellation projects and are laying off other staff. Of these three contractors, one states that the changes were necessary because NASA funded the contract at a lower level than the contractor had previously expected, while another asserts that the changes were necessary because NASA changed its practice with regard to the funding of termination liability. A third contractor states that a combination of these two factors made workforce reductions necessary. Two of these three contractors also have slowed or stopped some procurements from their subcontractors.

The two remaining Constellation prime contractors state that they have not changed staffing levels on their prime contracts. However, one of these contractors also performs work for other Constellation prime contractors as a subcontractor. This contractor states that it has reduced its workforce because of reduced funding from the prime contractor.

NASA from terminating or eliminating any PPAs of the architecture for the Constellation program.

CONCLUSION

NASA's actions to date with regard to the Constellation program have not violated either the Impoundment Control Act of 1974 or the provision in the fiscal year 2010 Exploration appropriation that bars NASA from terminating or eliminating any PPAs of the architecture for the Constellation program.

We hope the information provided in this opinion is helpful to you. If you have questions, please contact Assistant General Counsel Julia Matta at (202) 512-4023 or Managing Associate General Counsel Susan A. Poling at (202) 512-2667.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Lynn H. Gibson". The signature is written in a cursive style with a large initial "L" and "G".

Lynn H. Gibson
Acting General Counsel

List of Requesters

The Honorable Robert Aderholt
The Honorable Ralph Hall
The Honorable Gene Green
The Honorable Bill Posey
The Honorable Pete Olson
The Honorable John Culberson
The Honorable Jason Chaffetz
The Honorable Parker Griffith
The Honorable Michael D. Rogers
The Honorable Kevin Brady
The Honorable Jo Bonner
The Honorable Spencer Bachus
The Honorable Steve LaTourette
The Honorable Ken Calvert
The Honorable John Fleming
The Honorable Suzanne Kosmas
The Honorable Rob Bishop
House of Representatives



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Funding of Maintenance Contract Extending Beyond
Fiscal Year

File: B-259274

Date: May 22, 1996

DIGEST

1. Section 2410a of title 10, U.S. Code, provides that funds appropriated to Department of Defense for a fiscal year are available for payments under maintenance contracts for 12 months beginning at any time during the fiscal year. Kelly Air Force Base may award two vehicle maintenance contracts charging fiscal year 1994 money for each contract so long as each contract is properly awarded in fiscal year 1994 and each contract does not exceed 12 months in duration.
2. Section 2410a of title 10, U.S. Code, is a statutory exception to the bona fide needs rule. The statute authorizes the Department of Defense to use current fiscal year budget authority to finance a severable service contract for equipment maintenance that continues into the next fiscal year.
3. Air Force decision to leave 8 months of a 12-month severable service contract unfunded at the time of award does not violate the Antideficiency Act because of Availability of Funds clause in the contract. Nor did the Air Force decision violate the bona fide needs rule, because severable services contracts are funded out of funds current at the time services are provided unless otherwise authorized by law.

DECISION

During the third option year of a fixed price contract for vehicle maintenance services, Kelly Air Force Base modified the contract period so that the contract would expire on August 31, 1994. Kelly Air Force Base exercised a fourth option to extend performance from September 1, 1994 to August 31, 1995. Because fiscal year 1994 budget authority was only available to finance performance through the first 4 months, that is, until December 31, 1995, the Air Force modified the contract

to provide that after that date, the government's obligation under the contract was contingent upon the contracting officer notifying the contractor in writing that funds were available for continued performance and that the contractor continue work.

A certifying officer at the Kelly Air Force Base asks whether the use of fiscal year 1994 budget authority to finance both the initial 11 months of orders covered by the third option period and the 4 months of orders covered by the fourth option period violates 10 U.S.C. § 2410a and the bona fide needs rule. There is also implicit in the facts and circumstances of this case a second question, namely, did the Air Force's failure to fund at the time of award the remaining 8 months of the contract violate the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B). For the reasons discussed below, we have no objection to the Air Force's financing of the contracts.

Background

According to the Air Force, in an effort to minimize the surge in workload at the end of the fiscal year, it has staggered contract periods for certain support service contracts, including this one, so that the contracts do not all expire simultaneously. The Air Force awarded the vehicle maintenance contract here, a fixed price contract with K&M Maintenance Services, Inc., in 1990 for fiscal year 1991, with four 1-year option periods. During the third option year, the Air Force modified the contract period, cutting it short by 1 month for that year, so that the contract would expire on August 31 instead of September 30. The Air Force correspondingly changed the fourth option period to run from September 1, 1994 to August 31, 1995.

At the time of exercise of the fourth 1-year option, the Air Force only had fiscal year 1994 budget authority available to finance the first 4 months of the new contract (September through December 1994). Accordingly, the Air Force modified the contract by adding a clause stating that the government's obligation beyond December 31, 1994, was contingent upon the availability of appropriations. The clause further provided that no legal liability on the part of the government would arise for contract performance beyond December 31, 1994, unless and until the contractor received notice in writing from the Air Force contracting officer that sufficient funds were available and that the contractor could continue work.

The Air Force cited section 2410a of title 10, U.S. Code, as authority for its action. Memorandum for SA-ALC/FM10 from SA-ALC/JAN, Sept. 22, 1994. Section 2410a authorizes the Air Force to use funds appropriated for a fiscal year for payments under contracts for the maintenance of tools, equipment, and facilities for 12 months beginning at any time during the fiscal year.

The certifying officer has questioned the legality of the Air Force's action. The certifying officer asserts that the Air Force used fiscal year 1994 funds to finance, effectively, a 15-month contract, i.e., the 11-month third option period (October 1, 1993 through August 31, 1994) and the first 4 months of the fourth option period (September 1, 1994 through December 31, 1994). The certifying officer believes that while section 2410(a) permits the Department of Defense (DOD) to convert an in-house function to a 12-month contract at any time during a fiscal year, it does not permit DOD to order more than 12 months worth of services using fiscal-year funds. The certifying officer reads section 2410a to permit the acquisition of only 12-month contract services using fiscal year funds, because the law refers to "payments under contracts . . . for 12 months beginning at any time during the fiscal year." Our review of the facts and circumstances identified a second issue concerning the Anti-Deficiency Act prohibition, 31 U.S.C. § 1341(a)(1)(B), against involving the government in a contract or an obligation in advance of the appropriation properly chargeable therefor.

10 U.S.C. § 2410a and the Bona Fide Needs Rule

The first issue is one of statutory construction. The statute at issue, 10 U.S.C. § 2410a, reads as follows:

"Funds appropriated to the Department of Defense for a fiscal year shall be available for payments under contracts for any of the following purposes for 12 months beginning at any time during the fiscal year:

"(1) The maintenance of tools, equipment, and facilities"¹

The Air Force Staff Judge Advocate takes the position that the use of fiscal year 1994 funds to support 15 months of services "is consistent with both the letter and spirit of 10 U.S.C. § 2410a". He reasons that when in October 1993, the Air Force awarded the contract for the third option period, the Air Force properly charged fiscal year 1994 funds for the obligation incurred. By virtue of 10 U.S.C. § 2410a, when the Air Force on September 1, 1994, entered into a contract for the fourth option period, it necessarily charged fiscal year 1994 funds for the 4-month liability

¹Section 2410a is a codification of a freestanding, permanent authority contained in a continuing defense appropriation for fiscal year 1986. Pub. L. No. 99-190, § 8005(e), 99 Stat. 1202-1203 (1985). The language of section 8005(e) of Public Law 99-190 is not materially different from section 2410a and as relevant here simply made fiscal year DOD appropriations available for "payments under contracts for maintenance of tools and facilities for 12 months beginning at any time during the fiscal year."

it incurred. The only limitation in 10 U.S.C. § 2410a is that the contract may not exceed 12 months in duration. The fact that the Air Force could obligate fiscal year funds to cover a period in excess of 12 months is without "any legal significance."

We agree with the Air Force's reading of the statute. In our opinion, the phrase "for 12 months" modifies "contracts" and not "payments." Fiscal year appropriations have long been available to make payments for more than 12 months to liquidate valid obligations. We know of no reason for Congress to enact legislation to limit payments on valid obligations only to 12 months. If Congress had intended such a significant departure from settled law, we think it would have more clearly so indicated.

The purpose of 10 U.S.C. § 2410a is to overcome the bona fide needs rule of this Office. By making current fiscal year budget authority available in the next fiscal year when it would otherwise not be available, section 2410a is a statutory exception to the bona fide needs rule. The bona fide needs rule provides that a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made.² For service contracts, whether an expense was properly incurred or properly made during the period of availability depends upon whether the services are severable or nonseverable. A nonseverable contract is essentially a single undertaking that cannot be feasibly subdivided. B-240264, Feb. 7, 1994. It is considered a bona fide need of the fiscal year in which the agency entered into the contract. Consequently, agencies should record nonseverable service contracts as obligations at the time of award. Service contracts, where the services are continuing and recurring in nature, such as the vehicle maintenance contract here, are severable and are chargeable to the appropriation current at the time services are rendered. See 60 Comp. Gen. 219, 221 (1981). By definition, severable services address needs of the time the services are rendered. 71 Comp. Gen. 428, 430 (1992).

As a general rule, a severable service contract crossing fiscal years and financed exclusively from annual appropriations in the year of award requires specific statutory authority. 71 Comp. Gen. at 430. Section 2410a provides the requisite statutory authorization for DOD vehicle maintenance contracts. By making current year budget authority available for such contracts for a 12-month period "beginning at any time during a fiscal year," section 2410a clearly exempts DOD from the bona fide needs rule as it ordinarily applies to severable service contracts. It permits

²The rule has its statutory basis in section 1502(a) of title 31, U.S. Code, which provides: "The balance of 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."

DOD to obligate budget authority covering the entire, annual contract at the time it enters into the contract, similar to nonseverable service contracts, rather than budget authority available at the time the services are rendered. The fact that fiscal year funds may be used to make payments for more than 12 months of services is a consequence of the law that, in the words of the Air Force Staff Judge Advocate, has "no legal significance."

Antideficiency Act

The second issue in this case is application of the basic proscription of the Antideficiency Act contained in 31 U.S.C. § 1341(a)(1)(B). The Antideficiency Act prohibits an officer or employee of the United States from "involving [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). Here, the Air Force, as a result of its actions during the period questioned by the certifying officer, awarded two contracts: one covering the 11-month third option period and the other covering the 12-month fourth option period. With respect to the latter contract, the Air Force included an Availability of Funds clause in an attempt to limit its liability under the contract to the amount of fiscal year 1994 funds obligated to cover performance in the first 4 months, that period beginning September 1, 1994 and ending December 31, 1994, of the 12-month contract:

"No legal liability on the part of the Government for any payment may arise for performance under this contract beyond 31 December 1994, until funds are made available to the Contracting Officer for performance and until the contractor receives notice of availability to be confirmed in writing by the Contracting Officer."

Under these circumstances, the issue is whether the Air Force involved the government in a contract for the payment of money in advance of the appropriation available for the remaining 8-month period of the contract without authority of law.

We think the resolution of this issue is controlled by our decision in A-60589, July 12, 1935. In order to even out the workload, the Procurement Division of the Treasury Department adopted the practice of staggering the award of contracts. To this end, the Treasury Department awarded a contract for gear oil, the contract term running from January 1, 1935 to March 31, 1936 (the then fiscal year ran from July 1 to June 30). The contract was for an indefinite quantity and imposed no financial liability on the government until the government placed an order; the only obligation under the contract was a negative one--not to procure from someone else. Even though the contract extended beyond the period of availability of the

annual appropriation involved, we did not object to the "contractual obligation" as a violation of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B).³

We have had occasion to revisit our decision in A-60589, July 12, 1935, and expressly declined to overrule it. 48 Comp. Gen. 497, 500 (1969). In 48 Comp. Gen. 497, 500 (1969), we questioned whether the decision was "technically correct" in light of 42 Comp. Gen. 272 (1962). However, since we had permitted 1-year requirements contracts under fiscal year appropriations to extend beyond the end of the fiscal year "for over 30 years apparently in reliance upon the July 12, 1935, decision [A-60589]," we did not object to the continuance of this practice. Id. at 500.

Today, as in 1969, we see no reason to disturb the implicit holding of A-60589, July 2, 1935, namely, that a naked contractual obligation that carries with it no financial exposure to the government does not violate the Antideficiency Act.⁴ Indeed, the criticism of the logic of A-60589 contained in 48 Comp. Gen. 497, 500, is arguably based on a misreading of the facts and the rationale for our decision in 42 Comp. Gen. 272 (1962). (See, in this regard, our discussion of the effect of a Limitation of Funds clause in light of the Antideficiency Act in 71 Comp. Gen. at 431.) However, we need not resolve that matter here since we are persuaded that the Availability of Funds clause included in the contract converted the government's obligation for the remaining 8 months of the fourth option period contract to no more than a "negative" obligation not to procure maintenance services elsewhere should such services be needed. Since section 2410a extended the availability of Air Force's budget authority beyond the end of the fiscal year, the critical point in time for Antideficiency Act purposes was the date on which the Air Force was to exhaust the amount of its fiscal year 1994 appropriations. At this point, the Air Force had a choice: either fund the remaining term of the contract with fiscal year 1995 funds or do without the maintenance services. The effect of the Air Force's

³We did object in this case to the 15-month term of the contract. Title 41 U.S.C., Section 13, then Revised Statutes § 3735, limits the duration of contracts for stationery and other supplies to one year from the date of contract award.

⁴We do not view our conclusion here or our reliance on A-60589, July 12, 1935, as inconsistent with the Supreme Court's decision in Leiter v. United States, 271 U.S. 204 (1925) or our decisions based thereon. See 63 Comp. Gen. 129 (1983) (3-year Multiple Award Schedule agreements do not violate Anti-Deficiency Act since there is no binding obligation to expend funds until agencies issue purchase orders against MAS agreements).

inclusion of the Availability of Funds clause, for fiscal law purposes, was to convert the government's financial obligation to only a contractual obligation not to procure elsewhere.

Accordingly, we do not object to the Air Force's financing of its fourth option period, beginning September 1, 1994.

/s/Robert P. Murphy
for Comptroller General
of the United States