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Decision

Matter of: Defense Television-Audio Support Activity—Advance Payments

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Digest

Agency payment of membership fees to private fitness center at the beginning of each option year under contract for providing fitness facilities and services for government employees before the agency employees use the contractor's facilities and services would violate the advance payment provisions of 31 U.S.C. § 3324.

DECISION

The Television-Audio Support Activity (T-ASA), Department of Defense, requests an advance decision concerning the legality of proposed advance payments to be made to Ballston Common Sport & Health, under contract No. MDA112-01-D0001, for providing health and fitness facilities and related services to employees of the American Forces Information Service (AFIS).¹

T-ASA awarded this commercial-item contract on March 1, 2001. As amended, the contract provides a total of 42 full-time memberships for AFIS employees. Under the contract, T-ASA pays the total cost of 12 full-time memberships (*i.e.*, memberships without co-payment) for employees who are paid less than a specified rate of pay. T-ASA pays only part of the cost of the other 30 full-time memberships (*i.e.*, memberships with co-payment) for employees who are paid at or more than a specified rate of pay.² Even though the contract uses the term “memberships,” under

¹Under the authority of 5 U.S.C. § 7901 to establish health service programs “by contract or otherwise,” an agency may properly use appropriated funds to provide its employees access to private health and fitness exercise facilities as part of its health service program. 70 Comp. Gen. 190 (1991).

²For example, during option period one, the government will pay an annual fee of \$906 for each of the 12 memberships without co-payments. The government will pay
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the contract, T-ASA is simply paying Ballston so that AFIS employees can have access to Ballston's fitness facilities (including equipment, lockers, and showers) and to obtain related services (such as health assessments and exercise prescriptions). Under the contract, AFIS officials control (through the use of authorization forms) which employees can use the facilities and receive the services. The primary beneficiaries of the contract are the AFIS employees who use the facilities and receive the services.

T-ASA asks whether it may pay the government's portion of all full-time memberships fees at the beginning of each option year. T-ASA states that an alternative payment method--paying in monthly increments based upon the actual number of employees using the fitness facility in a given month--would be "more burdensome." We conclude that paying for full-time memberships at the beginning of each option year, before employees have used the fitness facilities or received related services, would violate the advance payment provisions of 31 U.S.C. § 3324.

Under 31 U.S.C. § 3324, agencies may not make advance payments on contracts unless the payments are specifically authorized by law.³ Under 10 U.S.C. § 2307, agencies are authorized to make advance payments under contracts for property or services, but they must obtain adequate security from the contractor and the head of the agency must first determine that the advance payments are in the public interest. 10 U.S.C. § 2307(d). Security may be in the form of liens in favor of the federal government on any property being acquired, on the balance of advanced funds held by the contractor, or on property acquired for performance of the contract. *Id.* Advance payments made for commercial items may not exceed 15 percent of the contract price in advance of any performance of work under the contract. 10 U.S.C. § 2307(f)(2).

Section 32.202-1 of the Federal Acquisition Regulation (FAR) sets forth the government's financing policy and implements the advance payment authority of 10 U.S.C. § 2307(f)(2) for purchases of commercial items. FAR section 32.202-1(b) provides, among other things, that advance payments may be used as a form of contract financing for acquisitions of commercial supplies or services where the agency determines that advance payment financing is in the best interest of the government, adequate security is obtained, and prior to any performance of work under the contract the total of commercial payments shall not exceed 15 percent of the contract price.

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an annual fee of just \$642, while the using employee will be required to make a \$264 co-payment, for each of the 30 memberships that require co-payments.

³ Section 3324 itself authorizes certain advance payments, but none of those authorizations is applicable here.

Our review of the record reveals that T-ASA has not satisfied the requirements of either 10 U.S.C. § 2307 or FAR § 32.202-1(b). First, there has been no determination that advance payments are in the government's best interest. In fact, the only reason T-ASA has given for wanting to make payment at the beginning of the option periods is that paying for these services in monthly increments is "more burdensome." We fail to see how obtaining a schedule of monthly rates, or having the contractor submit monthly invoices, and then making payment on a monthly basis is so burdensome as to justify a determination that advance payments are in the government's best interest. Second, there is no indication that adequate security has been obtained from the contractor. In this connection, T-ASA states that the advance payments would be safeguarded because, if an employee fails to use the fitness facilities for any reason during the membership period, the contract permits the government to transfer the membership to another employee upon payment of a \$30 administrative fee. However, such membership transfers will not protect the government if the contractor goes out of business or otherwise fails to provide the required services and facilities after the memberships fees are paid by the government. In any event, the types of security envisioned by 10 U.S.C. § 2307(d) and the implementing regulations include the contractor's financial condition, liens, irrevocable letters of credit, bonds, guarantees supported by demonstrated liquid net worth, and title to identified contractor assets, but do not include the membership transfers set forth in the present contract. FAR §§ 32.202-1(b)(5), 32.202-4. Third, payment of the government's share of the price for all full-time memberships at the beginning of the year will result in advance payments that far exceed 15 percent of the total contract price. For example, according to the contract's payment schedule for the first option period, the government's share of the cost of all full-time memberships will be \$30,132, or roughly 80 percent of the total contract price of \$37,819. Accordingly, we conclude that paying the government's portion of all full-time membership fees at the beginning of the contract option periods, before AFIS employees have used the fitness facilities and related services, would violate the prohibition against advance payments. 31 U.S.C. § 3324; Federal Aviation Admin. Negotiations with Pacific Gas and Electric Co., to Provide Elec. Utility Serv. to a Remote Air Route Surveillance Radar Facility, B-260063, June 30, 1995, 96-1 CPD ¶ 122 at 4; see also National Park Serv. Cable Television Subscription, B-254295, Nov. 24, 1993.

Counsel for T-ASA cites a prior decision of this Office, Coast Guard Membership Fees, B-221569, June 2, 1986, as offering support for its paying the government's portion of all full-time membership fees at the beginning of the contract option periods. However, the cited case is inapposite to the present situation.

In the Coast Guard Membership Fees case, the Coast Guard had determined that memberships in certain unspecified private organizations (not physical fitness facilities) would benefit the agency and was purchasing the memberships in its own name. We held that the Coast Guard could properly use its funds to pay the membership fees at the beginning of the membership period and that the advance payment prohibition was not applicable because "the Government gets the benefit of

what it has purchased upon payment.” That the Coast Guard received the benefit of membership upon enrollment established that the payment, in fact, was not an advance payment as that term is used in the advance payment prohibition.

We think that the facts presented by T-ASA here are readily distinguishable from the facts that were presented by the Coast Guard. While the T-ASA contract, like the Coast Guard arrangement, purchases “membership” in the agency’s name, that is not the determining factor for purposes of the advance payment prohibition. The determining factor, rather, is when the agency receives the benefit of membership. The purpose of the advance payment prohibition is to protect the government from the possibility of not receiving services for which it has already paid. With some organizations, the Rotary Club or Chamber of Commerce, for example, the benefits of membership accrue upon enrollment, and payment upon enrollment does not constitute a prohibited advance payment. Here, neither AFIS nor its employees receive the benefits of the contract until the employees actually access Ballston’s facilities and avail themselves of related health fitness services. Thus, any payment to the contractor before the employees receive the benefits of the contract (i.e., access and services) would be an advance payment and would violate the prohibition of 31 U.S.C. § 3324.

Accordingly, T-ASA may not make advance payments to Ballston Common Sport & Health Club under the contract. To the extent that any of the contract’s provisions require the agency to make unauthorized advance payments, the contract should be modified to conform to this decision.⁴

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⁴ For example, the contract provides at paragraph 4.10.1: “Advance payment is authorized for the annual membership portion of the contract only.”