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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Labor Relations Board—Improper Obligation of Severable Services Contract

File: B-308026

Date: September 14, 2006

DIGEST

The National Labor Relations Board (NLRB), which improperly obligated its fiscal year 2005 appropriation for severable services commencing in fiscal year 2006, may not remedy the improper obligation by modifying the contract's period of performance to a previous fiscal year. NLRB's expired appropriations are available only to adjust obligations properly incurred during fiscal year 2005. NLRB must adjust its accounts to record the obligation against its fiscal year 2006 appropriation.

DECISION

The Inspector General (IG), National Labor Relations Board (NLRB), requested our decision on whether NLRB can remedy an improper obligation of a severable service contract by modifying the period of performance to a previous fiscal year. The contract in question was for performance entirely in fiscal year 2006, running from October 1, 2005, through September 30, 2006, but NLRB obligated its fiscal year 2005 appropriation.¹

NLRB agrees the obligation is improper but instead of adjusting its accounts to record the obligation against its fiscal year 2006 appropriation, NLRB wants to remedy the improper obligation by modifying the contract's performance period in

¹ NLRB receives a Salaries and Expenses appropriation available for one fiscal year. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, title IV, 119 Stat. 2833, 2875 (Dec. 30, 2005); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, div. F, title IV, 118 Stat. 2809, 3159 (Dec. 8, 2004).

order to charge its, now expired, fiscal year 2005 expired appropriations. As explained below, NLRB's fiscal year 2005 expired appropriation is not available for this purpose.

BACKGROUND

NLRB is an independent federal agency established to administer the National Labor Relations Act. 29 U.S.C. § 153. Under the Act, it conducts secret ballot elections of employees in a bargaining unit and is charged with the prevention of unfair labor practices. Letter from Robert Battista, Chairman, and Ronald Meisburg, General Counsel, NLRB, to Anthony H. Gamboa, General Counsel, GAO, July 7, 2006 (Battista Letter). NLRB carries out its duties by acting as a quasi-judicial body that decides cases based upon formal records in administrative proceedings. *Id.* NLRB manages its caseload using its Case Activity Tracking System (CATS), which collects, processes, and stores case activity and status information on new and closed cases. *Id.*

In September 2001, NLRB entered into a contract with Electronic Data Systems (EDS) for the acquisition of ongoing support for CATS. Under the contract, EDS schedules, produces, tests and deploys software upgrades, as well as providing daily operational support. *Id.* The contract's initial performance period was October 1, 2001, through September 30, 2002, with options through September 30, 2015. Letter from Jane E. Altenhofen, Inspector General, NLRB, to Anthony H. Gamboa, General Counsel, GAO, June 27, 2006 (Altenhofen Letter). The period of performance for option three ran from October 1, 2004, through September 30, 2005. On September 30, 2005, NLRB exercised option four, specifying a performance period of October 1, 2005, through September 30, 2006. Contract No. GS-35F-0323J, § 6.0 (Sept. 30, 2005). *See also* Altenhofen Letter, at 1. NLRB's obligation for option four was \$758,875. NLRB charged its obligation to its fiscal year 2005 appropriation. Altenhofen Letter, at 1.

In June 2006, the NLRB Office of Inspector General issued a report on its evaluation of NLRB's acquisition process for information technology related services, including the EDS contract. *Information Technology Procurement Actions*, Report No. OIG-AMR-51-06-02 (June 29, 2006) (IG Report). The report concluded that the agency's obligation of fiscal year 2005 funds for the fourth option violated the *bona fide* needs rule "[b]ecause all services provided by EDS under the FY 2006 contract option are for maintenance and support in FY 2006." *Id.* at 12. The IG recommended that NLRB "[c]orrect the recording of the EDS contract obligation so that the \$758,875 is recorded against the FY 2006 appropriation." *Id.* at 15.

In responding to the IG Report, NLRB proposed a different remedy. NLRB said, "[W]e believe that switching the funding for the EDS contract from FY 2005 to FY 2006 is unwarranted and is not in the best interest of the Agency or the Government." Memorandum from Angela Crawford, Chief, Procurement and Facilities Branch, NLRB, to Jane Altenhofen, Inspector General, NLRB, *Subject: Response to Draft IG*

Report, "Information Technology Procurement Activities," June 1, 2006 (NLRB Response), at 5. NLRB proposed amending the performance period of option three to terminate on September 29, 2005, and the performance period of option four to commence on September 30, 2005, and continue through September 29, 2006.² Battista Letter at 3–4; IG Report, at 12.

NLRB stated that if the fourth option's performance period "bridged" fiscal years (beginning in fiscal year 2005 and terminating in fiscal year 2006), the Federal Acquisition Streamlining Act (FASA) would permit the agency to charge its obligation for option four to its fiscal year 2005 appropriations.³ NLRB Response, at 4–5. NLRB explained that it had intended, in September 2005 when it exercised option four, to enter into a contract that crossed fiscal years, but that the agency's contracting staff had inadvertently used the wrong start date for the performance period.⁴ *Id.* at 5. NLRB argued,

"Given that management's *intended* actions were within the letter of the law and the *actual* actions were within the spirit of the law, it would seem to elevate form over substance to insist that a mistake must not be corrected, when it is clear that all actions taken in this matter have been in the utmost good faith, transparent, well-intentioned, and the correction of which is lacking in any harm to either party."

Id. (emphasis in original).

NLRB IG disagreed with the agency's proposed remedy. The IG said, "We believe that the Agency cannot modify an expired contract." IG Report, at 13. The IG argued

² NLRB charged two options to fiscal year 2005: option three for a performance period of October 1, 2004, through September 30, 2005 and option four for a performance period of October 1, 2005, through September 30, 2006.

³ FASA permits an agency to enter into a contract for severable services for a period beginning in one fiscal year and ending in the next fiscal year and obligate the appropriation current at the time it entered into the contract. 41 U.S.C. § 253l. This authority is available only so long as the contract period does not exceed 1 year. *Id.*

⁴ As evidence of its intent to adjust the performance period of option four, NLRB referred to various e-mail traffic in late September 2005 among agency personnel, including NLRB's Office of General Counsel, as well as advice NLRB contracting staff solicited from an attorney of another federal agency; the requisition for EDS services (NLRB Form 12), dated September 30, 2005; and an OMB Apportionment Schedule (SF 132), date illegible, showing a reapportionment of NLRB's fiscal year 2005 Salaries and Expenses appropriation of \$750,000 for CATS. NLRB Response, at 4.

that “[b]ecause the obligation to furnish the services under the FY 2005 EDS contract option [option three] no longer exists, it is not possible for the parties . . . to modify an expired obligation of EDS to furnish services in FY 2005” *Id.*

DISCUSSION

Both NLRB and the IG agree that NLRB, regardless of intent, exercised option four for a performance period beginning October 1, 2005, using fiscal year 2005 funds. The contract itself provides that “[t]he period of performance shall commence on October 1, 2005 and end on September 30, 2006 for Option Year 4.” Contract No. GS-35F-0323J, § 6.0. As the IG indicated, because NLRB recorded the obligation against its fiscal year 2005 appropriation instead of its fiscal year 2006 appropriation, NLRB’s recorded obligations do not accurately reflect its contract action. Fiscal year 2005 appropriations were not available to fund severable services that did not commence until fiscal year 2006. By the very terms of the agreement, these services can only be rendered in fiscal year 2006, and the services cannot be said to be a *bona fide* need of the agency for fiscal year 2005. *See* 60 Comp. Gen. 219, 220-21 (1981). We agree with the IG that NLRB must adjust its accounts, removing the obligation from its fiscal year 2005 accounts and recording the obligation in the accounts of its fiscal year 2006 appropriation. B-224702, Aug. 5, 1987.

NLRB, however, would prefer to remedy its improper obligation of fiscal year 2005 appropriations by adjusting its contract instead of its accounts. NLRB asserts that it had intended a performance period commencing September 30, 2005, and the fact that the contract does not reflect its intent is due to “an inadvertent ministerial error” that it can now correct. Battista Letter, at 4. At issue here is whether NLRB can modify its contract with EDS to adjust the performance period to run from September 30, 2005, through September 29, 2006, so that, relying on FASA, it can obligate the contract to its fiscal year 2005 expired appropriation.

Were NLRB to proceed with its proposed remedy, NLRB would need to adjust not only the performance period of option four but also the performance period of option three. Otherwise, NLRB would be left with two contracts (options three and four) acquiring the same severable services from the same contractor for the same day, violating the *bona fide* needs rule. Even were the law of contracts to permit reformation of completed contracts, and we are not convinced it does,⁵ NLRB’s proposed remedy fails because fiscal law does not permit NLRB to adjust the performance period of option four in order to reach fiscal year 2005 appropriations.

⁵ “As a general rule, courts are reluctant to reform contracts that have been performed.” *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 26 (1987), citing *National Presto Industries, Inc. v. United States*, 338 F.2d 99, 106–07 (Ct. Cl. 1964). *Cf.* Restatement (Second) of Contracts, ch. 6, introductory note (1979) (“The law of contracts supports the finality of transactions . . .”).

A fiscal year appropriation, such as NLRB's Salaries and Expenses appropriation, is available for obligations consistent with the time statute (and the bona fide needs rule) and the recording statute. The time statute states that an appropriation limited 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 and obligated consistent with the recording statute. 31 U.S.C. § 1502(a). The recording statute provides that an agency may record a contractual obligation only when the contract is executed before the end of the period of availability of the appropriation being used. 31 U.S.C. § 1501(a)(1)(B). Here, the option as exercised on the last day of the fiscal year is for a *bona fide* need of the next fiscal year that, consistent with 31 U.S.C. §§ 1501(a)(1) and 1502(a), obligates fiscal year 2006 funds.

It is one thing for an agency to take full advantage of available appropriations, maximizing the effectiveness of federal funds entrusted to its use; it is quite another thing, however, for an agency to alter executed contracts in order to reach expired funds—funds that Congress appropriated for agency programs and activities of the previous fiscal year. That is what NLRB proposes to do. Were NLRB to adjust the fourth option's performance period, its sole reason for doing so would be to reach fiscal year 2005 appropriations because, in September 2005, that is what NLRB had intended to do. However, NLRB's fiscal year 2005 appropriation has expired.⁶ Conceding that NLRB's error, indeed, may have been inadvertent, NLRB's expired appropriation is not available for this purpose.

An expired appropriation is available only for recording and adjusting obligations properly chargeable to that appropriation. 31 U.S.C. § 1553(a). NLRB's obligation for option four was not properly chargeable to fiscal year 2005 because option four is for severable services to be performed entirely in fiscal year 2006. Ordinarily, an adjustment to an expired appropriation is instigated by a factual finding that the obligational records do not reflect what actually occurred during the period of the appropriation's availability. B-272191, Nov. 4, 1997. *See also* B-245856.14, Dec. 12, 1993. Agencies are required to record against expired appropriations obligations previously incurred that were not recorded when the obligation was incurred and to adjust recorded amounts to reflect the amount actually incurred. 73 Comp. Gen. 338, 342 (1994). Here, NLRB would not be adjusting its accounts to redress an erroneous under-recording, over-recording or failure to record. Instead of adjusting its obligations to reflect what actually occurred, NLRB would revise what actually occurred so that it can finance option four with fiscal year 2005 funds. While unfortunate, NLRB's error in this case resulted from a failure in NLRB's contracting

⁶ An appropriation available for a fixed period of time expires at the end of that time period. 71 Comp. Gen. 39, 40 (1991). NLRB's fiscal year 2005 appropriation expired on September 30, 2005.

process.⁷ NLRB's contracting staff did not exercise the degree of vigilance and oversight to ensure that its actions reflected the intent of agency management. The account adjustment authority of section 1553(a) is not a palliative for errors of this sort.

The head of each agency is required to make and preserve records containing adequate and proper documentation of its transactions. 44 U.S.C. § 3101. Section 3512 of title 31 of the U.S. Code (commonly known as The Financial Managers' Financial Integrity Act) requires agencies to establish systems of internal accounting and administrative controls to provide agency management with reasonable assurance that agency obligations are in compliance with applicable laws and are properly accounted for and recorded. The recording statute contemplates that each agency will record obligations properly and certify to the accuracy of its obligations in its budget submission to the President and Congress. 31 U.S.C. § 1501. *See also* 31 U.S.C. § 1108(c). Obviously, an agency's contracting process, where an agency incurs many of its obligations, is a critical element of sound funds control. NLRB's cure here, rather than altering its contract in an attempt to reach expired appropriations, should address its internal administrative controls and possible adjustments to its contracting process and oversight.

CONCLUSION

NLRB entered into a contract for severable services for fiscal year 2006 and improperly charged the obligation for that contract to its fiscal year 2005 appropriation. NLRB must adjust its accounts to reflect its contract action, that is, remove the obligation from its fiscal year 2005 obligation records and record it in its fiscal year 2006 records.

NLRB may not now remedy its improper obligation by adjusting its contract's performance period instead of its accounts in order to reach its fiscal year 2005 expired appropriation. Expired appropriations are not available for this purpose. Fiscal year 2005 appropriations remain available only for adjustments to obligations properly incurred in fiscal year 2005.

⁷ The fact that NLRB could have, or even that it actually intended to, charge fiscal year 2005 appropriations by use of FASA and amending the performance period of option three does not change our views. To ensure the reliability and accuracy of the accounting for obligations, the emphasis needs to be on what actually happened, not on what one would have wished had happened.

While the error of NLRB's contracting staff is unfortunate, NLRB should address that error by assessing the need for possible adjustments in its internal controls, with a particular eye to its contracting process and oversight, rather than altering executed contracts in an attempt to reach expired appropriations.

A handwritten signature in dark ink, appearing to read "Gary L. Kepplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Kepplinger
General Counsel