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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Interagency Agreements—Obligation of Funds under an Indefinite Delivery, Indefinite Quantity Contract

File: B-308969

Date: May 31, 2007

DIGEST

The Department of the Interior, National Business Center, awarded a 1-year indefinite delivery, indefinite quantity contract (IDIQ) on behalf of the Department of Defense (DOD), having a period of performance from July 1, 2003, to June 30, 2004. The contract required the government to purchase a minimum of \$1 million in services from the contractor. The entire minimum amount applicable to the IDIQ contract should have been obligated against fiscal year 2003 funds; however, Interior and DOD only charged \$45,000 to the proper fiscal year appropriation. Accordingly, Interior and DOD should adjust their accounts to correct the improper obligation.

DECISION

The Inspector General for the Department of the Interior requests our decision under 31 U.S.C. § 3529 regarding issues raised during an audit of transactions between the Department of the Interior (Interior) and the Department of Defense (DOD).¹ This

¹ Letter from Earl E. Devaney, Inspector General, Office of the Inspector General, Department of the Interior, to David M. Walker, Comptroller General of the United States, Jan. 22, 2007 (Devaney Letter). This request arose out of the Inspector General's report on an audit of transactions between the Department of Defense (DOD) and the Department of the Interior (Interior). U.S. Department of the Interior Office of Inspector General, *FY 2005 Department of the Interior Purchases Made on Behalf of the Department of Defense*, Report No. X-IN-MOA-0018-2005 (Jan. 9, 2007), available at www.doioig.gov/upload/2007-G-0002.txt (last visited on May 30, 2007) (Interior IG Report). The Inspector General for the Department of Defense also audited many of these transactions and reported results in U.S. Department of Defense Office of Inspector General, *FY 2005 DoD Purchases Made Through the*

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decision addresses the transaction involving DOD's Personnel Security Research Center (PERSEREC) and Interior's National Business Center Acquisition Services Division, Southwest Branch (SWB), for acquisition of support services for PERSEREC.²

The issue is whether SWB and/or DOD violated the Antideficiency Act when SWB awarded a 1-year indefinite delivery, indefinite quantity (IDIQ) contract on behalf of PERSEREC. The contract specified a guaranteed minimum of \$1 million over a 3-year period. Interior obligated \$45,000 at the time of award and \$955,000 the following fiscal year.

As explained below, SWB should have obligated the contract's guaranteed minimum of \$1 million at the time of award using the fiscal year funds of the year of contract award, 2003. Because SWB obligated only \$45,000 of the \$1 million from fiscal year 2003 appropriations and incorrectly obligated the balance from fiscal year 2004 appropriations, it potentially risked committing an Antideficiency Act violation. It should now adjust its accounts to reflect the proper obligation of fiscal year 2003 funds for the full amount of the minimum. Also, since SWB was acting as DOD's contracting agent and because DOD appropriations ultimately funded the contract, as SWB adjusts its accounts, DOD should also adjust its accounts. As with SWB, DOD should have obligated its fiscal year 2003 funds in the amount of the contract's guaranteed minimum, and it incorrectly obligated the balance from fiscal year 2004 appropriations.³

Our practice when rendering decisions is to obtain the views of the relevant federal agencies to establish a factual record and to elicit the agency's legal position on the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington D.C.: Sept. 2006), available at www.gao.gov/legal.htm. In this case, we contacted the General Counsel of DOD and the Solicitor of Interior to obtain their legal views and obtain factual information regarding the above-

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Department of the Interior, Report No. D-2007-044 (Jan. 16, 2007), available at www.dodig.osd.mil/Audit/reports/07report.htm (last visited on May 30, 2007).

² We will be issuing two companion decisions responding to the Interior Inspector General request: B-309181, relating to authority to enter into a lease, and B-308944, relating to expiration of funds transferred in interagency agreements, in the near future.

³ SWB and DOD must determine whether the adjustments to their respective accounts result in any violation of the Antideficiency Act, 31 U.S.C. § 1341(a). To the extent that there are insufficient fiscal year 2003 appropriations available for obligation, SWB and DOD should report the deficiencies in accordance with the Antideficiency Act. B-289209, May 31, 2002.

mentioned transaction. The Solicitor provided documents and responses to our request for factual information. Letter from David Bernhardt, Solicitor of the Interior to Thomas H. Armstrong, Assistant General Counsel, GAO, Apr. 20, 2007 (Bernhardt Letter). He declined, however, to provide us with his legal views regarding this matter. *Id.* The General Counsel of DOD also failed to respond timely to our request for factual information or to our offer to submit legal views. Although a response from the DOD General Counsel would have been useful in our decision making process, we were able to obtain an adequate record upon which to consider fully the issues raised through documents provided to us and public documents such as Interior's and DOD's Inspector General reports.

BACKGROUND

The Department of the Interior National Business Center, Acquisition Services Division, Southwest Branch (SWB) provides acquisition services to other government agencies. See www.nbc.gov/organization/index.html (last visited May 30, 2007). The Center's operations are financed by the working capital fund established by 43 U.S.C. § 1467. That section provides:

“There is established a working capital fund of \$300,000, to be available without fiscal year limitation, for expenses necessary for the maintenance and operation of . . . such . . . service functions as the Secretary determines may be performed more advantageously on a reimbursable basis. Said fund shall be reimbursed from available funds of bureaus, offices, and agencies for which services are performed at rates which will return in full all expenses of operation, including reserves for accrued annual leave and depreciation of equipment.”

The fund is a revolving fund which charges its customers fees for the costs of the services provided. On February 11, 2003, SWB awarded a contract pursuant to an interagency agreement between DOD and SWB to Northrop Grumman Mission Systems to provide support to the Defense Personnel Security Research Center (PERSEREC), contract number NBCCHD030003.

PERSEREC was established in 1986 following a number of espionage cases involving United States employees. Devaney Letter, enclosure at tab 3. Its mission is to improve the effectiveness, efficiency, and fairness of DOD's personnel security systems. *Id.* It conducts long-term programmatic research for the security and intelligence communities, provides studies and analyses supporting policy formation and systems operation, disseminates research information to security policymakers and practitioners, and develops tools and job aids for security professionals. *Id.* However, PERSEREC has not had enough staff to accomplish its mission and has outsourced its research since 1987. *Id.*

The contract calls for Northrop Grumman to provide services to design and conduct personnel security research and development tasks. Contract § C.1. The contract is an indefinite delivery, indefinite quantity contract. Contract § B.1. At the time of award, February 11, 2003, the contract stated that the period of performance was “1 July 2003 through 30 June 2004.” Contract § F.4. SWB orders services under the contract by issuing cost-plus-fixed-fee task orders to the contractor. Contract § B.1. Another clause of the contract, I.13, entitled “Indefinite Quantity,” provided in part that “[t]he Government shall order at least the quantity of supplies or services designated in the Schedule as the ‘minimum’.” The contract maximum is \$46,000,000. Contract § F.4. The contract states that the minimum guarantee is “\$1,000,000 over a 3-year period.” Contract § B.2.

SWB did not record any obligation at the time of contract award. SWB, using funds transferred to it by DOD Military Interagency Purchase Requests (MIPRs), recorded obligations as it issued task orders. DOD recorded obligations upon SWB’s acceptance of the MIPRs. On October 18, 2002, DOD transferred \$175,000 of fiscal year 2003 funds from its Office of the Secretary, Operations and Maintenance appropriations.⁴ SWB issued its acceptance of the MIPR on the same date. Interior held the transfer in its working capital fund until September 30, 2003, when it issued its first task order. At that time, SWB obligated \$45,000 of the \$175,000 DOD transferred to cover the task order. Bernhardt Letter enclosure, tab A.

SWB issued a second task order and four amendments after receiving and accepting MIPRs to finance them, as follows:

- On November 3, 2003, DOD submitted MIPR No. QS4H5A44F039MP for Task Order 0002 in the amount of \$422,454. On November 13, 2003, SWB issued its acceptance of the MIPR, and on December 3, 2003, SWB issued the task order.
- On February 12, 2004, DOD transmitted a second MIPR for Task Order 0002 in the amount of \$291,000; SWB accepted the same day. On February 20, 2004, SWB issued the first amendment to Task Order 0002 in the same amount as the second MIPR.
- On April 4, 2004, DOD transmitted the third MIPR for \$3,138,834; SWB’s acceptance followed on April 9, 2004. On April 20, 2004, SWB issued the second amendment to Task Order 0002 in the same amount as the third MIPR.

⁴ MIPR No. QS3H5A33F011MP, Oct. 18, 2002.

- On July 20, 2004, DOD transmitted a MIPR in the amount of \$795,350 that SWB accepted the same day; on August 6, 2004, SWB issued the third amendment to Task Order 0002 for that same amount.
- On September 29, 2004, DOD transmitted a MIPR for \$200,000; SWB accepted the MIPR on September 30, 2004, and issued another amendment to Task Order 0002 on September 30, 2004.

The request for this decision stems from a finding in the Interior Office of Inspector General report cited above. The IG reported finding a potential Antideficiency Act violation relating to contract NBCCHD030003. The report concluded that by agreeing to pay a minimum of \$1 million over a 3-year period at a time before Congress had appropriated funds for all 3 years, Interior violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B), because it obligated funds in advance of appropriations. Interior included an “Availability of Funds for the Next Fiscal Year” clause in the contract, as set forth in section 52.232-19 of the Federal Acquisition Regulation. That clause provides:

“Funds are not presently available for performance under this contract beyond _____. The Government’s obligation for performance of this contract beyond that date is contingent upon the availability of appropriated funds from which payment for contract purposes can be made. No legal liability on the part of the Government for any payment may arise for performance under this contract beyond _____, 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.”

41 C.F.R. § 52.232-19.

SWB did not fill in the blank spaces specifying in the clause the last date that appropriations would be available for contract performance and the date after which no government liability would arise until additional funds were made available. The IG’s position is that without specifying those dates, the Availability of Funds clause does not protect the government from obligations beyond the fiscal year in which the contract was executed, when funds were available for the contract.

The Inspector General asks whether in awarding Contract NBCCHD030003, Interior and/or DOD violated the Antideficiency Act by agreeing to pay a minimum of \$1 million over a 3-year period before Congress had appropriated funds for all 3 years.

ANALYSIS

An agency must record an obligation against its appropriation at the time that it incurs a legal liability for payment from that appropriation. B-300480.2, June 6, 2003; B-300480, Apr. 9, 2003; 42 Comp. Gen. 733, 734 (1963). Clearly, an agency can incur a legal liability, that is, a claim that may be legally enforced against the government, by signing a contract. B-300480.2, June 6, 2003. We addressed the question of the proper obligation of an IDIQ contract in our decision, B-302358, Dec. 27, 2004:

“When an agency executes an indefinite-quantity contract such as an IDIQ contract, the agency must record an obligation in the amount of the required minimum purchase. . . . At the time of award, the government has a fixed liability for the minimum amount to which it committed itself. *See* [Federal Acquisition Regulation] 16.504(a)(1) (specifying that an IDIQ contract must require the agency to order a stated minimum quantity). An agency is required to record an obligation at the time it incurs a legal liability. 65 Comp. Gen. 4, 6 (1985); B-242974.6, Nov. 26, 1991. Therefore, for an IDIQ contract, an agency must record an obligation for the minimum amount at the time of contract execution.

“Further obligations occur as task or delivery orders are placed and are chargeable to the fiscal year in which the order is placed.”

Thus, in the case of an IDIQ contract, the government incurs a legal liability in the amount of the guaranteed minimum at the time at which it awards the contract.

Contract clause, I.13, entitled “Indefinite Quantity,”⁵ further supports our conclusion that SWB incurred an obligation at the time of contract award. It provides, in part (with emphasis added):

“This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. . . . The Contractor shall furnish to the Government, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the ‘maximum’. *The Government shall order at least the quantity of supplies or services designated in the Schedule as the ‘minimum’.*”

By using the words “shall order,” the emphasized sentence indicates that under the contract the government is liable to the contractor for the minimum specified in the contract. It therefore incurs a legal liability for that amount. This is so whether SWB

⁵ Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.216-22.

ever issues a task order to the contractor or not, and is so immediately upon contract award.

Accordingly, on February 11, 2003, SWB incurred a legal liability of \$1 million and should have obligated \$1 million on that date. SWB, however, did not obligate any funds at the time of contract award. As indicated above, SWB obligated only \$45,000 in fiscal year 2003 against fiscal year 2003 appropriations when it should have obligated the full amount of the minimum, \$1 million. All funds obligated under the contract after the \$45,000 for the first task order were obligated against fiscal 2004 appropriations. Consequently, SWB obligated \$955,000 against fiscal year 2004 appropriations that it should have obligated against fiscal year 2003 appropriations. SWB used fiscal year 2004 funds to satisfy an obligation established in fiscal year 2003. Fiscal year 2004 funds are not available to satisfy fiscal year 2003 obligations. 31 U.S.C. § 1502. As indicated above, DOD obligated and transferred the funds that SWB used for the task orders upon SWB's acceptance of DOD's MIPRs. Accordingly, DOD also obligated \$955,000 against fiscal year 2004 appropriations that should have been obligated against fiscal year 2003 appropriations.

Although we conclude that SWB and DOD are at risk of violating the Antideficiency Act, it is not for the reason that the IG suggests. As described in the background section above, the IG concluded that by agreeing to pay a minimum of \$1 million over a 3-year period⁶ at a time before Congress had appropriated funds for all 3 years, SWB obligated funds in advance of appropriations and violated the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B). However, the contract, if obligated properly as described above, does not result in the agency's making obligations in advance of appropriations. If, as it should have, SWB had obligated the entire minimum at contract award, it would have completely satisfied the government's initial liability under the contract. No further obligation would remain under the contract that would require an appropriation in a future fiscal year to fund it unless and until the government placed orders exceeding the \$1 million minimum.

Interior stated in response to our development letter that the failure to obligate the minimum in the first contract fiscal year did not result in the government's being obligated for the payment of funds in advance of appropriations because, in its view, the contract ensures that the government has no legal liability unless and until SWB submits a task order to the contractor and that the task orders are not submitted unless they are fully funded. (Bernhardt Letter, enclosure, tab D.) Interior notes

⁶ Since the contract period is for one year, we asked SWB the meaning of the phrase, "over a 3-year period." Telephone conversation between Keith Larsen, Attorney Advisor, Department of the Interior, and Jonathan Barker, Senior Attorney, GAO, May 24, 2007. SWB stated that it initially considered using a multi-year contract, and the phrase was included in the solicitation. *Id.* When SWB awarded the contract as a 1-year contract, SWB mistakenly neglected to remove the phrase. *Id.*

that the contract at award clearly indicated that no funds had been allotted to it. Contract, at 1. Each task order set out a specific period of performance, an end date for the availability of funds, and the funded amount. For this reason, Interior maintains that the task orders themselves provided protection against the obligation of funds in advance of appropriations. Interior relies on the language of clause B.1 of the contract to support its position. Interior states that the clause “provides that all services will be obtained through the issuance of task orders, and therefore the basic IDIQ contract did not allot or obligate any funds on the contract.” (Bernhardt Letter, enclosure, tab C).

As indicated from our discussion above, Interior’s view of how funds should have been obligated under the contract is incorrect, as is its interpretation of clause B.1. The actual language of the clause reads, “This is an Indefinite Delivery, Indefinite Quantity (IDIQ) contract. All supplies and services will be obtained through the issuance of Cost-Plus-Fixed-Fee task orders. Task orders will be issued by a Contracting Officer with the Department of the Interior, National Business Center, Acquisition Services Division, Southwest Branch.” The clause does not speak to the funding of the contract directly in any way. Rather, it definitizes for the parties the authorized manner in which services may be ordered under the contract.⁷ Acceptance of MIPRs for task orders does serve as a trigger for the additional obligation of appropriations under the contract, as Interior maintains, but only, as explained above, after the contract minimum, properly obligated at the time of award, has been expended.

In light of the above, SWB and DOD may have violated the Antideficiency Act by failing to obligate funds for the PERSEREC contract correctly. SWB should have obligated the entire amount of the contract’s guaranteed minimum at the time of contract award against fiscal year 2003 appropriations. Likewise, DOD should have obligated the guaranteed minimum against its fiscal year 2003 appropriations. Then, once SWB had issued task orders sufficient to exhaust the minimum, it should have charged the funds needed to cover the amounts remaining for Task Order 0002 to fiscal year 2004 appropriations. Likewise, once DOD had obligated the minimum, DOD should have obligated fiscal year 2004 appropriations for the remaining amount.

Because of its incorrect obligation of funds, SWB must now adjust its accounts. It should deobligate \$955,000 in funds obligated against fiscal year 2004 appropriations and should instead charge the obligation to fiscal year 2003 appropriations, the appropriations that were current at the time of contract award when SWB incurred

⁷ We note that SWB accepted MIPRs and issued amendments to Task Order 0002 to add services after the expiration of the 1-year period of performance (June 30, 2004). These actions have no bearing on the legal liability of the government at the time it entered into the IDIQ contract.

the liability for the guaranteed minimum. DOD should also make corresponding adjustments to its accounts. SWB and DOD must determine whether those adjustments result in any violations of the Antideficiency Act, 31 U.S.C. § 1341(a). To the extent that there are insufficient fiscal year 2003 appropriations available for obligation, they should report the deficiency in accordance with the Antideficiency Act. B-289209, May 31, 2002.

CONCLUSION

SWB should have obligated its IDIQ contract's guaranteed minimum of \$1 million at time of award, using the fiscal year funds of the year of contract award, 2003. Similarly, DOD should have obligated fiscal year 2003 funds in the amount of the guaranteed minimum. Because Interior and DOD obligated only \$45,000 of the \$1 million from fiscal year 2003 appropriations, and incorrectly obligated the balance from fiscal year 2004 appropriations, the agencies are potentially at risk of committing an Antideficiency Act violation. They should now adjust their accounts to reflect the proper obligation of fiscal year 2003 funds for the full amount of the minimum.

A handwritten signature in black 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