FISCAL LAW

Time

Can I Get a Subscription for That?

The Government Accountability Office (GAO) approved the obligation by the National Labor Relations Board (NLRB) of its fiscal year (FY) 2006 annual funds for several subscriptions beginning on the first day of FY 2007.[1] In reaching this conclusion, the GAO recognized the key issue as whether the subscriptions were the *bona fide* need of FY 2006.[2] Historically, the GAO has analyzed *bona fide* needs issues based on the specific facts and circumstances of each case. The GAO's starting point was classifying the acquisition as one for materials or services.[3] In determining that the NLRB subscriptions were the *bona fide* need of FY 2006, the GAO appears to have placed acquisition form (subscription) over substance (material or service) and thus strained the *bona fide* needs rule analysis.[4]

In the instant case, the NLRB renewed seven subscriptions for on-line research tools[5] in September 2006, with five beginning on 1 October 2006 and two beginning on 1 November 2006.[6] In renewing these subscriptions in September 2006, the NLRB obligated FY 2006 funds even though the contract would be performed entirely in FYs 2007 and FY 2008.[7] The NLRB justified its actions regarding these obligations by asserting that the research tool subscriptions were critical to NLRB operations, and that to ensure uninterrupted service on 1 October 2006, the NLRB had to renew the subscriptions in September 2006.[8] The GAO accepted the NLRB position, stating that,

> NLRB reasonably determined that it should place the renewal orders before the subscription ended, which would necessarily be FY 2006. . . . While Web site database subscription renewals can be effectuated quickly, we do not believe that the agency should run the risk of the subscription lapsing by waiting until October 1 to renew the subscription that is to begin that same day.[9]

Thus, the GAO determined that the NLRB's need for contract performance beginning on 1 October 2006 made the subscriptions the *bona fide* need of the prior FY, FY 2006.[10]

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[1] Nat'l Labor Relations Bd., B-309530, 2007 U.S. Comp. Gen. LEXIS 172, at *2 (Sept. 17, 2007).

[2] *Id*. at *10. "Over a century ago, the Comptroller of the Treasury stated, 'An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such an appropriation.'" OFF. OF THE GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. I, at 5-11 (3d ed. 2006) [hereinafter GAO REDBOOK] (citing 8 Comp. Gen. 346, 348 (1901)). The Government Accountability Office (GAO), Principles of Federal Appropriations Law (Redbook) continues, stating, "[t]he *bona fide* needs rule is one of the fundamental principles of appropriations law: 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." *Id*. "The *bona fide* needs rule has a statutory basis." *Id*. at 5-12. "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 . . . . " 31 U.S.C. § 1502(a) (2000).

[3] *See* GAO REDBOOK, *supra* note 2, at 5-22 (Delivery of Materials beyond the Fiscal Year), 5-23 (Services Rendered beyond the Fiscal Year). Note that there are only two categories of acquisitions noted in the Redbook, "materials" and "services." *Id*.

[4] A similar form over substance issue also arose in the context of the distinction between severable and nonseverable services. *Id.* at 5-27. The GAO stated in 1985, that level-of-effort contracts are by definition severable services, placing emphasis on the form of the contract vehicle used for the acquisition. *Id*. However, the GAO corrected this error in 1990 when it determined that the application of the *bona fide* needs rule depends not on contract type, but rather on the nature of the service performed. *Id*.

[5] These tools included Westlaw, LexisNexis Online Service, BNA, PACER, GalleryWatch, LexisNexis Shepard's Online Service, and Dun & Bradstreet. *Nat'l Labor Relations Bd*., 2007 U.S. Comp. Gen. LEXIS 172, at *4.

[6] *Id*. at *5. The GAO found that the subscriptions scheduled to commence on 1 October 2006 could be renewed and funded in FY 2006. *Id*. at *2. This article addresses this portion of the GAO decision. The GAO also found that the subscriptions scheduled to commence on 1 November 2006 were the *bona fide* need of FY 2007, and thus the agency improperly awarded the contracts in FY 2006 and also improperly obligated FY 2006 funds. *Id*. As this portion of the GAO decision does not appear noteworthy, this article does not address these particular subscriptions.

[7] *Id*. at *5.

[8] *Id*. at *12.

[9] *Id*. at *12–*13. The GAO did not address alternative solutions, such as modifying the existing subscription period to end in September 2006. This solution would have allowed the NLRB to renew the subscription to begin in FY 2006, thus satisfying the *bona fide* needs rule. Prior GAO opinions regarding subscriptions had previously approved crossing FYs. *See* note 14 *infra*.

[10] Nat'l Labor Relations Bd., 2007 U.S. Comp. Gen. LEXIS 172, at *13.

The GAO defined this procurement as a "subscription."[11] The GAO then rejected the NLRB's assertion that the *bona fide* needs rule does not apply to subscriptions.[12] The GAO determined that although prior GAO interpretations of the advance payment statute[13] allowed some special treatment of periodical subscriptions,[14] these opinions had not exempted subscriptions from the requirement to comply with the *bona fide* needs rule.[15] In each of the prior GAO subscription opinions, the subscription had begun in the same FY as ordered and needed, thus complying with the *bona fide* needs rule.[16] Although these prior opinions implicitly recognized *bona fide* needs rule applicability, none specifically analyzed how the *bona fide* needs rule should apply to subscriptions.[17]

In the author's opinion, computer access to legal research tools, like internet service or cable or satellite television service, is more closely related to a "service" than to a "material."[18] If the NLRB subscriptions are for services, then the GAO should have applied the principle from its prior opinions addressing the *bona fide* needs rule concerning service contracts.[19] The GAO has stated, "services procured by contract are generally viewed as chargeable to the appropriation current at the time the services are rendered."[20] Application of this principle to the instant NLRB subscription would result in the determination that the NLRB should have obligated FY 2007 funds—vice FY 2006 funds.[21]

Had the GAO analyzed this case's *bona fide* needs issues similar to how it has analyzed prior subscription cases, the materials *bona fide* needs analysis most likely would have been proper if the NLRB's subscriptions involved paper periodicals to be delivered to the agency.[22] The GAO appears to have applied a materials *bona fide* needs analysis to the NLRB subscriptions, even though the NLRB's subscriptions involved an online subscription and not a paper subscription.[23] The GAO recalled past materials opinions in which it stated that,

> [M]aterials may be needed in the future when related work or processes currently under way may be completed. If such material is not obtainable on the open market at the time needed for use, a contract for its delivery when needed may be considered a *bona fide* need of the fiscal year in which the contract is made, provided the time intervening between contracting and delivery is necessary.[24]

The GAO also mentioned an opinion approving the purchase of stock materials which the agency knows it will not use until the next FY.[25] Because these past materials *bona fide* needs opinions approved the obligation of funds in one FY for delivery of materials in the next FY, the GAO determined the same concept should apply for the NLRB subscriptions.[26]

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[11] *Id.* at *10.

[12] *Id.* at *7–*8.

[13] 31 U.S.C. § 3324 (2000). The advance payment statute generally prohibits an agency from paying a contractor before receiving the goods or services under the contract. *Id.* § 3324(a). Section (d), however, provides an exception allowing agencies to pay in advance "charges for a publication printed or recorded in any way for the auditory or visual use of the agency." *Id.* § 3324(d).

[14] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *7. Based upon the exception in the advance payment statute allowing payment in advance for publications, the GAO addressed the proper funding of subscriptions in a number of early opinions. First, the GAO determined that a subscription beginning and funded in one fiscal year (FY) may extend into the next FY so long as it does not exceed one year. Decision by Comp. Gen. McCarl, 2 Comp. Gen. 451 (Jan. 24, 1923). Next, the GAO determined that a subscription may exceed one year in length, and is funded in the year it begins. Comp. Gen. Warren to the Sec'y of Agric., B-37388, 23 Comp. Gen. 326 (Nov. 2, 1943). The GAO then determined that payments may be made by lump sum or installments during the period of the subscription. Acting Comp. Gen. Yates to the Dir., Div. of Cent. Admin. Servs., Office for Emergency Mgmt., B-43844, 24 Comp. Gen. 163 (Aug. 29, 1944). Finally, the GAO determined that a subscription needed and ordered in FY1 may be funded with FY1 annual funds even though the period of performance was subsequently reduced to only FY2 due to the contractor's inability to perform. Decision of the Comp. Gen., B-129390, 1956 U.S. Comp. Gen. LEXIS 2614 (Nov. 28, 1956).

[15] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *9.

[16] *Id.*

[17] *Id.*

[18] The NLRB does not appear to receive anything tangible under this contract; rather, NLRB personnel are granted access to information on the internet. *Id* at *4.

[19] *See, e.g.*, Nat'l Labor Relations Bd., B-308026, 2006 Comp. Gen. LEXIS 149 (Sept. 14, 2006). *See generally* GAO REDBOOK, *supra* note 2, at 5-23 thru 5-28.

[20] GAO REDBOOK, *supra* note 2, at 5-23. Because the GAO apparently did not analyze the provision of web-based database access as a service, this article provides only a surface discussion of the *bona fide* needs rule as applied to services.

[21] *See, e.g.*, *Nat'l Labor Relations Bd.*, 2006 Comp. Gen. LEXIS 149.

[22] *See, e.g.*, *Decision of the Comptroller General*, 1956 U.S. Comp. Gen. LEXIS 2614.

[23] *See Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

[24] *Id.* (citations omitted).

[25] *Id.*

If subscription contracts are to be treated as materials for *bona fide* needs analysis, the GAO stretched the rules for the NLRB subscriptions. First, generally speaking,

> [a]n appropriation may not be used for the needs of some time period subsequent to the expiration of its period of availability. With respect to annual appropriations, a more common statement of the rule is that an appropriation for a given fiscal year is not available for the needs of a future fiscal year.[27]

Applying this basic premise to the NLRB subscriptions appears to require the determination that access to a legal research tool on 1 October 2006 cannot possibly be a need earlier than the day that access will be provided. "[W]here an obligation is made toward the end of a fiscal year and it is clear from the facts and circumstances that the need relates to the following fiscal year, the *bona fide* needs rule has been violated."[28] Thus, the subscriptions would be the *bona fide* need of FY 2007 and must be funded with FY 2007 appropriations.

Of course, the GAO has developed exceptions to the general rule for materials, and it is these exceptions that the GAO relied on in approving the NLRB subscriptions.[29] In an oft-cited opinion, the GAO indicated that material needed in the next FY could be considered the *bona fide* need of the current FY if the material would not be available on the open market at the time needed for use and the time between contracting and delivery was needed for production of the material.[30] This opinion lacks persuasiveness as applied to the NLRB subscriptions. While the GAO accepted the NLRB position that it had to order the subscription in FY 2006 to ensure uninterrupted service,[31] there is no indication that the time between contracting and delivery, or access in this case, was needed for production of "the material."[32] Rather, the NLRB asserted that the intervening time was needed for internal agency coordination.[33]

The GAO next relied on reasoning found in its opinions addressing agency acquisition of materials as stock.[34] The GAO has determined that ordering stock items an agency knows will not be used until the next FY does not violate the *bona fide* needs rule so long as the type and amount of stock is reasonable.[35] Under this rationale, "readily available common use standard items"[36] may be purchased to replace items used during the FY.[37] This stock-level exception does not apply neatly to the NLRB subscriptions. While some new documents will be available through the research tools, these new documents generally are not provided to replace documents used during FY 2006. Further, these research tools do not appear to qualify as "readily available common use standard items."[38]

Thus, it appears that the GAO, rather than considering the funding of the NLRB subscriptions as already authorized by the existing *bona fide* needs rule exceptions, has crafted a new *bona fide* needs rule exception. Agencies may now enter subscription contracts for delivery in the next FY so long as the time between contracting and delivery is necessary.[39] The

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[26] *Id.* at *12.

[27] GAO REDBOOK, *supra* note 2, at 5-15.

[28] *Id.* at 5-16.

[29] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

[30] To the Chairman, U.S. Atomic Energy Comm'n, B-130815, 37 Comp. Gen. 155 (Sept. 3, 1957). In the actual opinion, the GAO stated that "the time intervening between contracting and delivery is necessary for production or fabrication of the material." *Id.* at *13. In the 2007 NLRB opinion, the GAO truncated the sentence, ending with "necessary." *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

[31] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *12. The GAO noted that, "[w]ebsite renewals can be effectuated quickly," but accepted the NLRB position regardless. *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at *11.

[35] GAO REDBOOK, *supra* note 2, at 5-23.

[36] *Id.*

[37] *Id.*

[38] *Id.* If the subscriptions are viewed as readily available common use standard items, this fact would cut directly against one of the limiting factors pertaining to the lead time exception. *See id.* at 5-22.

[39] *See Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *11.

GAO accepted about one month as necessary in this case.[40] Unfortunately, the opinion itself does not expressly state this new *bona fide* needs exception.

Finally, the lead time approved by the GAO in this case is not the result of normal business considerations as had been the underpinning for the prior lead time exceptions.[41] Rather, the GAO allowed for the agency's own administrative lead time "to place and coordinate the orders administratively within the agency."[42] This consideration has not supported funding future FY needs with current FY funds in any cited GAO opinions, and its use in this case provides concerning precedent.[43] In this case, the GAO's reference to selected portions of distinguishable prior opinions to support its new exception to the *bona fide* needs rule may leave fiscal law practitioners frustrated as they struggle to determine just how broad this new exception really is.

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[40] *Id.* at *12.

[41] *See, e.g.*, GAO REDBOOK, *supra* note 2, at 5-22.

[42] *Nat'l Labor Relations Bd.*, 2007 U.S. Comp. Gen. LEXIS 172, at *12.

[43] Much like appellate court opinions, it is impossible to know the import of any given GAO fiscal opinion at the time it is published. The GAO opinion discussed in this article may fade away before the turn of the next fiscal year. Alternatively, the opinion may change the face of the *bona fide* needs rule, much like the past opinions discussed in this article. For example, the opinions cited by the GAO in the instant opinion, and in the Redbook, allowing for materials to be delivered in the next FY actually determined that the agency action involved violated the *bona fide* needs rule. Only in what should be termed *dicta* did the GAO express the concepts we now cite freely as authorizing the "lead time" exception. *See* To the Chairman, U.S. Atomic Energy Comm'n, 37 Comp. Gen. 155; To the Adm'r, Gen. Servs. Admin., B-138574, 38 Comp. Gen. 628 (Mar. 25, 1959).

Antideficiency Act

Something for Nothing? GAO Considers Voluntary Services Prohibition

In an 8 June 2007 opinion,[1] the GAO considered whether the President's appointment of Mr. Sam Fox as the ambassador to Belgium during a congressional recess (called a "recess appointment") violated the Antideficiency Act's (ADA)[2] prohibition against voluntary services. The GAO concluded that because 5 U.S.C.S. § 5503 prohibits the payment of individuals receiving recess appointments, Mr. Fox's appointment would not violate the ADA.[3]

On 9 January 2007, the President nominated Mr. Sam Fox to be the United States' ambassador to Belgium.[4] On 27 February 2007, the Senate Foreign Relations Committee discussed the nomination and scheduled the entire Senate to vote on the nomination on 28 March 2007. Before the Senate voted, however, the President withdrew his nomination of Mr. Fox. On 4 April 2007, while the Congress was in recess, the President made a "recess appointment" of Mr. Fox as ambassador to Belgium.[5]

Under the United States Constitution, the President has the responsibility to nominate ambassadors and the Senate has the responsibility to confirm them.[6] The Constitution also authorizes the President to nominate ambassadors while the Senate is in recess.[7] In such cases, the Senate would convene a confirmation hearing once it was in session again. Per 5 U.S.C.S. § 5503, an individual receiving a recess appointment may not be paid while awaiting the Senate to vote on his or her appointment. This section states in pertinent part:

> Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate.[8]

In this case, Mr. Fox's appointment fits with the conditions of 5 U.S.C.S. § 5503 and as such, he could not receive payment for his services unless the Senate confirmed his nomination as ambassador to Belgium.[9] Specifically, the President appointed Mr. Fox during the Senate's recess, the position of ambassador to Belgium was an "existing office" when the President appointed him, the vacancy existed while the Senate was in session, and the vacancy was one that the Senate was required to confirm.[10]

The GAO focused its opinion on whether Mr. Fox's service as ambassador to Belgium during the Senate's recess would violate the ADA's prohibition against accepting voluntary services.[11] In analyzing the facts of this case, the GAO described the history and significance of the voluntary services prohibition. Federal law has prohibited the acceptance of voluntary services since 1884. Congress passed the first law prohibiting voluntary services because it was "faced with claims 'presented for extra services performed here and elsewhere by [employees] of the Government who had been engaged after hours.'"[12] Congress was concerned that government supervisors were routinely forcing subordinates to "volunteer" their services in situations where they would not otherwise entitled to payment.[13] Subsequently, the subordinates would file claims

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[1] Recess Appointment of Sam Fox, B-309301, 2007 U.S. Comp. Gen. LEXIS 97 (June 8, 2007).

[2] The Antideficiency Act (ADA) is actually a series of statutes codified at 31 U.S.C.S. §§ 1341-1354 (LexisNexis 2008). The voluntary services prohibition, located at 31 U.S.C.S. § 1342, states, "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services . . . exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

[3] *Sam Fox*, 2007 U.S. Comp. Gen. LEXIS 97, at *1–*2.

[4] *Id.*

[5] *Id.*

[6] U.S. CONST. art. II, § 2.

[7] *Id.*

[8] 5 U.S.C.S. § 5503 (LexisNexis 2008).

[9] *Sam Fox*, 2007 U.S. Comp. Gen. LEXIS 97, at *2.

[10] *Id.*

[11] *Id.* at *3.

[12] *Id.* at *7 (quoting 15 CONG. REC. 3411 (1884) (statement of Rep. Randall)).

[13] *Id.* at *4.

to compensate them for these "voluntary services," thereby coercing Congress to appropriate additional funds. In other words, Congress feared that agencies would demand employees to engage in additional work for which agencies had insufficient appropriated funds. Then, the employees (or the agencies) would request Congress to appropriate additional funds to compensate the employees and that Congress would feel a moral obligation to do so. Congress sought to prevent such requests by prohibiting the acceptance of voluntary services.[14] The GAO refers to this evil as a "coercive deficiency."[15]

The GAO explained that while the acceptance of voluntary services is clearly prohibited by the ADA, the acceptance of "gratuitous services" is not.[16] On that point, the GAO has issued a number of opinions distinguishing prohibited "voluntary services" from permissible "gratuitous services."[17] When an individual performs gratuitous services, the individual agrees (often in writing in advance) that he will not request payment for his services. Thus, acceptance of these services will not result in a moral obligation to pay for a coercive deficiency.[18]

The GAO related Mr. Fox's recess appointment to gratuitous services.[19] When the President appointed Mr. Fox during Congress' recess, a separate federal statute barred compensating Mr. Fox for his services. Thus, by accepting the recess appointment, Mr. Fox was, in essence, agreeing that he would not be paid unless the Senate confirmed his appointment. So, since 5 U.S.C.S. § 5503 prohibits compensating Mr. Fox, Congress would not entertain a claim for payment for these services.[20]

Therefore, the GAO concluded that Mr. Fox's recess appointment as ambassador to Belgium did not violate the ADA's voluntary services prohibition.[21] The GAO stated, "we will not interpret the voluntary services prohibition to bar Mr. Fox from serving as Ambassador to Belgium, even though he may not receive a salary . . . until he is confirmed by the Senate."[22] While Mr. Fox performed the services of ambassador without compensation, he did so only because a statute precluded payment and thus, these services were not "voluntary" under 31 U.S.C.S. § 1342. Hence, Mr. Fox's service as ambassador following his recess appointment does not violate the ADA.[23]

While government attorneys working in the fiscal law field will likely have infrequent encounters with recess appointments, the GAO's consideration of the topic of voluntary services is yet noteworthy. While the voluntary services prohibition has existed since 1884, there are few opinions interpreting that statute. Still there are many instances in the modern government workplace where the voluntary services issue arises. Practitioners should be wary of the often subtle circumstances where individuals attempt to volunteer their services to the government and the overriding prohibition against accepting them.

Awarding a Lease Contract Without Authority Does Not Violate ADA

The Department of Defense Inspector General (DOD IG) and the Department of Interior Inspector General (DOI IG) audited a series of transactions conducted between the Counterintelligence Field Activity (CIFA) of the DOD and GovWorks (a Department of Interior franchise fund) for the purpose of leasing office space.[24] Following these audits, the DOI IG requested that the GAO issue an opinion addressing two issues—the authority to lease and the ADA.

In a 17 August 2007 opinion, the GAO considered whether the CIFA or GovWorks had the authority to acquire office space through a lease and additionally whether doing so violated the ADA.[25] The GAO concluded that neither CIFA nor

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[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at *5–*6.

[20] *Id.*

[21] *Id.* at *7.

[22] *Id.* at *18.

[23] *Id.*

[24] Interagency Agreements—Use of an Interagency Agreement between the Counterintelligence Field Activities, Dep't of Defense, and GovWorks to Obtain Office Space, B-309181, Aug. 17, 2007, 2007 CPD ¶ 163.

[25] *Id.* at *1–*2.

GovWorks had the requisite authority to acquire office space by entering into a lease. Nonetheless, the GAO found that awarding a lease contract did not result in an ADA violation by either organization.[26]

In February of 2003, the Office of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence and GovWorks signed an interagency agreement addressing CIFA's need for additional office space.[27] The agreement stated that GovWorks would enter into an indefinite delivery indefinite quantity (ID/IQ) contract, for the benefit of CIFC, to provide this office space. The agreement also stated that GovWorks would oversee and administer the contract for office space. The agreement required CIFA to reimburse GovWorks for the cost of the contract. On 30 April 2003, CIFA executed a Military Interdepartmental Purchase Request (MIPR) for the purpose of transferring funds from CIFA to GovWorks for the first payment on the lease.[28] This MIPR transferred $4,070,311 in fiscal year 2003 Defense-wide Operations and Maintenance (DOD-wide O&M) funds to GovWorks.[29]

On 12 June 2003, GovWorks awarded an IDIQ contract (Contract 70941) to TKC Communication, Inc. (TKC).[30] This contract required TKC to "provide services, including office space and facilitate management services not to exceed $100 million."[31] That same day GovWorks issued a Task Order 73001 requiring TKC to lease office space for a period of ten years and seven months and for GovWorks to pay TKC the annual rent listed on the schedule attached to the task order. As described above, CIFC would reimburse GovWorks for all costs associated with this contract. The total rent cost for the period of the contract was about $90 million.[32]

From 2003 to 2007, CIFA issued a series of MIPRs to GovWorks for both the cost of rent under the lease with TKC and also for GovWorks' administrative fee to oversee the IDIQ contract.[33] All of the MIPRs CIFA issued to GovWorks transferred DOD-wide O&M funds.[34]

In analyzing the issue of authority to lease, the GAO reviewed the relevant contractual documents.[35] While CIFA and GovWorks referred to the IDIQ contract as a "service contract" and not a "lease," the GAO reasoned that Contract 70941 was actually a lease since nearly 90% of the contract costs arose from the lease portion of the contract.[36] The GAO explained that generally, it characterized a contract based on its overall purpose and not upon any particular name the awarding entity used to refer to the contract. The GAO's characterization of Contract 70941 as a "lease" is central to its analysis and conclusions. Thus, the GAO viewed the instant contract as a long-term lease for office space.[37]

After determining that the instant contract was a lease, the GAO next focused on whether the contracting parties had the requisite authority to award a lease contract.[38] The GAO referred to the statute which vests in the Administrator of the General Services Administration (GSA) the authority for "[a]ll functions with respect to acquiring space in buildings by lease, and all functions with respect to assigning and reassigning space in buildings for use by agencies (including both space acquired by lease and space in Government-owned buildings) . . . ."[39] While the Administrator of the GSA may delegate this authority to lease to certain officials in the GSA and also to the head of another federal agency,[40] in the instant case, no such delegation occurred.[41] The GAO further stated that it was aware of no other authority which would authorize either

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[26] *Id.*

[27] *Id.* at *6–*7.

[28] *Id.* at *8.

[29] *Id.*

[30] *Id.* at *9.

[31] *Id.*

[32] *Id.* at *11.

[33] *Id.*

[34] *Id.*

[35] *Id.* at *12–*13.

[36] *Id.*

[37] *Id.* at *13–*14.

[38] *Id.* at *14.

[39] *Id.*; 40 U.S.C.S. § 301 (LexisNexis 2008).

[40] 40 U.S.C.S. § 585.

[41] *Interagency Agreements*, 2007 CPD ¶ 163, at *15.

GovWorks or CIFA to award this particular lease. While the GAO stated that statutory authority exists authorizing DoD to enter into building leases under certain circumstances, this authority is inapplicable in the instant case.[42]

Regarding the issue of whether GovWorks or CIFA had the authority to enter into a lease, the GAO concluded that both entities did not.[43] The GAO further concluded that since neither entity had the authority to award a lease contract, the subject lease was either void or voidable.[44] Further, the GAO found that the funds CIFA transferred to GovWorks (via MIPR) and which GovWorks, in turn, distributed to TKC were improper payments.[45] Accordingly, the GAO recommended that the agencies attempt to recover these improper payments from the contractor. Moreover, GAO recommended that all future contract payments cease.[46]

Regarding the issue of whether GovWorks and CIFA violated ADA in obligating and expending appropriated funds pursuant to Contract 70941, the GAO concluded in the negative.[47] In analyzing this issue, the GAO found that the obligation of DOD-wide O&M funds to pay for the lease contract did not exceed an amount available in an appropriation nor was it made in advance of an appropriation.[48]

Moreover, the GAO stated that the DOD-wide O&M appropriation was the correct appropriation to fund the lease contract. The GAO made this determination after referring to the relevant section of the DOD Appropriations Act and the DoD Financial Management Regulation (FMR). Specifically, regarding proper uses of DOD-wide O&M, the Fiscal Year 2003 DoD Appropriations Act states that such funds may be used for "for expenses . . .for the operation and maintenance of activities and agencies of the Department of Defense"[49] Further, the FMR states in that DOD-wide O&M appropriations are the proper funding source for real property leases.[50] The GAO reasoned that because there were sufficient DoD-wide O&M funds to cover the obligations and expenditures for the subject lease contract, neither CIFA nor GovWorks violated the ADA.[51]

Based upon the GAO's reasoning, it would seem logical to conclude that no obligation of funds occurred at all. Consequently, where if no appropriated funds were obligated, then no ADA violation could have occurred. Recall that the GAO concluded that because neither CIFC nor GovWorks had the requisite authority to award a lease contract, that the instant contract was void or voidable.[52] Therefore, it would seem to follow that if the contracting officer had no contractual authority to award the contract, then the funds would never have been obligated (which occurs at the time of contract award).[53] Remarkably, the GAO did not mention this analysis. Instead, the GAO's ADA analysis, again, concentrated on the availability of the proper source of appropriated funds, DoD-wide O&M.

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[42] *Id.* at *16–*17.

[43] *Id.* at *19.

[44] *Id.*

[45] *Id.* at *20.

[46] *Id.* at *20–*21.

[47] *Id.* at *23.

[48] *Id.* at *22–*23. The ADA states that:

> An officer or employee of the United States Government or of the District of Columbia government may not—
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> (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or]
>
> (B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law;

31 U.S.C.S. § 1341 (LexisNexis 2008).

[49] Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, 116 Stat. 1519, tit. I (2004).

[50] *Id.* The GAO referred to the DOD Financial Management Regulation which states that Operations and Maintenance appropriations are the appropriate funds to pay for lease payments. U.S. DEP'T OF DEFENSE 7000.14-R, DOD FINANCIAL MANAGEMENT REG., vol. 2A, ch. 1, para. 0106 (June 2006) [hereinafter DOD FMR].

[51] *Interagency Agreements*, 2007 CPD ¶ 163, at *23.

[52] *Id.* at *19.

[53] The GAO has stated that the government's legal obligation to compensate a contractor arises at the moment of contract award. United States Fish and Wildlife Service—Installment Payments for Real Property, B-114841, 56 Comp. Gen. 351 (1997).

In government legal practice, ADA issues arise in a variety of different forms. Regardless of the type of violation, if a government employee suspects a potential violation of the ADA, he or she must follow the reporting requirements located in the DoD FMR.[54] An initial ADA report often leads to an ADA investigation.[55]

These investigations are normally time-consuming and lengthy. If an investigation leads to a final determination of an ADA violation, then the agency head must report the violation to the President and to Congress.[56] Government attorneys should keep a constant watchful eye over government monetary transactions and attempt to avoid violations whenever possible.

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[54] DOD FMR, *supra* note 50, vol. 14, ch. 3, para. 0301.

[55] *Id.*

[56] *Id.* at ch. 7.

GAO Implies that Severable Services Exception to Bona Fide Needs Rule Applies to Guaranteed Minimum in ID/IQ Contracts for Services

In *Interagency Agreements—Obligation of funds under an Indefinite Delivery, Indefinite Quantity Contract* (hereinafter *Interagency Agreements*),[57] the Government Accountability Office (GAO) explored the issue of whether a Department of Interior (DOI) one-year Indefinite Delivery, Indefinite Quantity (ID/IQ) contract, awarded on behalf of DOD's Personnel Security Research Center (PERSEREC) for support services, violated the Antideficiency Act's (ADA) "in advance of"[58] prohibitions when the contract specified a guaranteed minimum of $1 million over a three-year period.[59] The DOI, on behalf of DOD via an Economy Act transaction, awarded an ID/IQ contract to Northrop Grumman Mission Systems with a period of performance from 1 July 2003 to 30 June 2004.[60] The funding source was DOD Operations and Maintenance funds (O&M), which are available for a period of one year.[61] The Department of Interior Inspector General (DOI IG) reported a potential ADA violation, and opined to the GAO that "by agreeing to pay a minimum $1 million over a 3-year period at a time before Congress had appropriated funds for all 3 years,[the DOI] violated the Antideficiency Act, 31 USC § 1341(a)(1)(B), because it obligated funds in advance of appropriations."[62] The GAO disagreed with the DOI IG's opinion, finding that although the DOI may have violated the Antideficiency Act in executing this contract, a one-year contract with a three-year guaranteed minimum over a three-year period would not automatically violate the Antideficiency Act.[63]

The GAO reasoned that had DOI and DOD obligated the minimum $1 million in O&M required under the contract within the first year, even though the contract would allow three years to order the minimum, DOI "would have completely satisfied the government's initial liability under the contract. No further obligation would remain . . . that would require an appropriation in a future fiscal year."[64] As a result, although DOI and DOD may have violated the Antideficiency Act by failing to obligate the minimum $1 million in O&M at the time of contract award in Fiscal Year (FY) 2003, the GAO opined that it is not a *per se* violation of the Antideficiency Act for the government to obligate one-year funds for a one-year ID/IQ contract which permits a three-year time period during which to order the minimum, as long as the minimum is obligated during the funds' period of availability.[65] Ultimately, the GAO ordered DOI and DOD to adjust its accounts by de-obligating $955,000 in FY 2004 O&M funds and then obligating $955,000 in FY 2003 O&M funds, since $45,000 of FY 2003 funds had been previously obligated under the ID/IQ contract.[66] Thus, the GAO recommended that DOI and DOD obligate a total of $1 million in FY 2003 O&M to satisfy the minimum order under the FY 2003 ID/IQ contract.[67]

From an obligations perspective, DOD and DOI would have avoided the issues cited by GAO if they had issued a task order against the ID/IQ contract for the minimum obligation, $1 million, in the fiscal year of the contract award, FY 2003. Contracting officers and resource managers should consider executing the first task order, for the full minimum obligation, concurrently with contract award. Such a practice would ensure that the contracting officer meets the minimum obligation under the ID/IQ contract immediately, and the resource manager would ensure that the minimum obligation is charged against current year funds. This recommendation, however, assumes that the minimum obligation cited in the ID/IQ contract is actually a bona fide need of the current year.

It is curious that the GAO did not address the Bona Fide Needs (BNF) rule in its analysis. The BFN rule states that appropriated funds are available only for an agency's requirements occurring during the period of availability of those

[57] Comp. Gen. B-308969, May 31, 2007, 07-1 CPD ¶ 120.

[58] The Antideficiency Act's "in advance of" prohibition states, "An officer or employee of the United States Government or of the District of Columbia government may not . . . involve either 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) (2000) (emphasis added).

[59] *Interagency Agreements*, 07-01 CPD ¶ 120.

[60] *Id*. at 3–4.

[61] *Id*. at 4.

[62] *Id*. at 5.

[63] *Id*. at 7.

[64] *Id*.

[65] *Id*.

[66] *Id*.

[67] *Id*.

funds.[68] The severable services exception to the BFN rule, however, allows the DOD to enter into severable services contracts that cross fiscal years as long as the contracts do not exceed one year (civilian agencies like DOI have the same authority under 41 U.S.C. 253l).[69] In the instant ID/IQ contract, the initial period of performance was 1 July 2003 through 30 June 2004, with a contract option of 1 July 2004 – 30 June 2005.[70] The chart below shows the funds that DOD transferred to DOI, via military interagency purchase requests (MIPRs), to execute task orders on the contract:[71]

DOD MIPR Date	**DOD MIPR Amount**	**DOI ORDER Date**	**DOI ORDER Amount**
18 October 2002	$175,000	30 September 2003	$45,000
3 November 2003	$422,454	3 December 2003	$422,454
12 February 2004	$291,000	20 February 2004	$291,000
4 April 2004	$3,138,834	20 April 2004	$3,138,834
20 July 2004	$795,350	6 August 2004	$795,350
29 September 2004	$200,000	30 September 2004	$200,000

The GAO opined that the minimum obligation of $1 million should be recorded against FY2003 appropriations, even though the majority of task orders occurred in FY 2004. Does this mean that the severable services exception applies to the guaranteed minimum in ID/IQ contracts? Although the GAO left this question unaddressed, the implication of its order to record the full minimum against FY 2003 appropriation is that the severable services exception applies to the guaranteed minimum in ID/IQ contracts.[72] In this case, DOD obligated a total of $4,027,288 prior to the expiration of the contract's first period of performance on 30 June 2004, but the GAO ordered only $1 million to be charged to FY 2003 accounts. GAO's recommendation that DOD charge the $1 million minimum to FY 2003 O&M appropriations, even though $955,000 of that minimum was used to order supplies for Bona Fide Needs of FY 2004, seems to apply the severable services exception to the guaranteed minimum of the ID/IQ contract. On the other hand, the GAO did not allow obligations that exceeded *t*he ID/IQ guaranteed minimum (the additional $3,027,288 obligated during the first year of contract performance after it had crossed into FY 2004) to be charged against FY 2003 appropriated funds; the implication is that the Severable Services Exception does not apply to obligations exceeding the guaranteed minimum that arise after the fiscal year in which the ID/IQ was awarded (FY1). Finally, obligating FY1 funds before the end of the fiscal year (30 September) to order services that exceed the minimum obligation in severable service ID/IQ contracts should be consistent with the BFN rule.

If this is the correct understanding of *Interagency Agreements*, then for one-year ID/IQ contract crossing fiscal years from FY1 to FY2, resource managers should continue to charge the FY1 appropriation, even during FY2, until the task orders have satisfied the guaranteed minimum. Caution is warranted, however, since it is unclear whether the GAO truly considered the Bona Fide Needs Rule and the severable services exception in *Interagency Agreements*, or whether they had a different rationale that led to its decision. A definitive answer to the obligations rules for severable service ID/IQs that cross fiscal

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[68] Modification to Contract Involving Cost Underrun, 1995 U.S. Comp. Gen. LEXIS 258 (Apr. 18, 1995).

[69] The severable services exception to the Bona Fide Needs Rule states:

> (a) Authority.—
>
> (1) The Secretary of Defense, the Secretary of a military department, or the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, *may enter into a contract for a purpose described in paragraph (2) for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.*
>
> (2) The purpose of a contract described in this paragraph is as follows:
>
> *(A) The procurement of severable services.*
>
> (B) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.
>
> (b) Obligation of funds.--Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a).

See 10 U.S.C.S. § 2410a (LexisNexis 2008) (emphasis added); *see also* 41 U.S.C. § 253l (2000) (severable services exception for civilian agencies).

[70] *Interagency Agreements*, 07-1 CPD ¶ 120, at 2.

[71] *Id*. at 3.

[72] Mr. Vernon Edwards provides an excellent discussion of how the BFN rule and the Severable Services Exception might apply to the ID/IQ services contracts. Mr. Edwards identified six possibilities as to how the BFN rule might apply to severable services ID/IQs, depending on whether or not the Severable Services Exception applies to ID/IQs, whether the exception applies only to the guaranteed minimum or new obligations exceeding the guaranteed minimum, and whether at the time of the obligation, the agency is in FY1 or FY2 of a 1 year severable services contract that straddles fiscal years. *See* Vernon Edwards, *Obligating Funds for Services Under IDIQ Contracts that Cross Fiscal Years: What Are the Rules?*, NASH & CIBINIC REP., Aug 2007, ¶ 42.

years will be topic for a future Year in Review. Until then, contracting officers and resource managers may wish to avoid this thorny issue by ensuring that they order the guaranteed minimum in services ID/IQs prior to the beginning of the new fiscal year.

Government is Only Obligated to Order the Guaranteed Minimum in an ID/IQ—Even if Minimum is Based on a Negligently Prepared Annual Estimated Value of the Contract

In *Transtar Metals, Inc.*,[73] the Armed Services Board of Contract Appeals granted the government's motion for summary judgment holding that in an ID/IQ contract, the government met its required minimum obligation to the contractor, Transtar Metals Inc. (hereinafter Transtar), when the required minimum obligation under the contract was calculated as 10% of the annual estimated value of the contract, even though the government negligently prepared this annual estimated value.[74] On 30 September 1999, the contracting officer awarded an ID/IQ contract to Transtar for delivery of aluminum products to the Defense Industrial Supply Center (DISC).[75] The total annual estimated value of the contract at award was $2,923,206.50.[76] The guaranteed minimum in both the solicitation for the ID/IQ and the award stated that "The Government guarantees that it will order under this contract. . . . [s]upplies which have a dollar value of at least 10 percent of the annual estimated value. . . ."[77] Transtar alleged that the annual estimates on which the guaranteed minimum was based on were negligently prepared by the contracting officer, because the government had not informed Transtar "that its 'annual estimated quantities' included prior sales under Regional Supplier Contracts,"[78] which would remain in effect during Transtar's contract.[79] Transtar also alleged that due to the government's negligent estimates, it had incurred additional costs to service the contract in the amount of $644,349.63.[80] Transtar alleged that these additional costs were incurred as a direct result of the government ordering only fifty to sixty percent of the annual estimated value of the contract.[81] For purposes of the summary judgment motion, the Board assumed that Transtar's allegations that the government negligently prepared the annual estimated value of the contract were factually correct.[82]

The Board granted the government's motion for summary judgment, and denied all of Transtar's claims.[83] The Board reasoned that under the ID/IQ contract, Transtar was guaranteed no more than ten percent of the annual estimated value of the contract, and the government had ordered amounts which exceeded the guaranteed minimum, $292,320.65.[84] As a result, the government fulfilled its obligations to Transtar under this contract, even if the annual estimates were negligently prepared.[85] The Board cited *Travel Centre v. Barram*[86] as a case with a similar set of operative facts and cited the *Travel Center* Court's reasoning that "'[r]egardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, Travel Centre could not have had a reasonable expectation that any of the government's needs beyond the minimum contract price would necessarily be satisfied under this contract.'"[87] The Board reasoned that as

[73] Transtar Metals, Inc., ASBCA No. 55039, 07-3 BCA ¶ 33,482, 165,955.

[74] *Id.* at 165,959.

[75] *Id.* at 165,957.

[76] *Id.*

[77] *Id.* at 165,956.

[78] *Id.* at 165,958.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 165,959.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] 236 F.3d 1316 (Fed. Cir. 2001).

[87] *Transtar Metals*, 07-1 BCA ¶ 33,482, at 165,959 (quoting *Travel Centre*, 236 F.3d at 1319).

in *Travel Center*, Transtar could not have reasonably expected that they were entitled to meet any of the government's needs beyond the guaranteed minimum.[88] As a result, the Board approved the government's motion for summary judgment and denied all of Transtar's claims.[89]

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[88] *Id.*

[89] *Id.*