



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Funding of Maintenance Contract Extending Beyond
Fiscal Year

File: B-259274

Date: May 22, 1996

DIGEST

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

DECISION

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²The rule has its statutory basis in section 1502(a) of title 31, U.S. Code, which provides: "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability."

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

Antideficiency Act

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

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

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

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

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

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

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

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

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

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

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

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