Obligational Consequences of Federal Contracts

Contract Type	Description of Contract	Obligational Consequences	GAO References
Firm-Fixed-Price Contract	A firm-fixed-price contract provides for a price that is not subject to any adjustment regardless of the contractor's cost experience in performing the contract. FAR[1] 16.202	Record fixed price stated in the contract.	B-255831, July 7, 1995; 62 Comp. Gen. 143, 146 (1983); 48 Comp. Gen. 497, 502 (1969). Red Book[2] at 7-23
Fixed-Price-Incentive Contract	A fixed-price incentive contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price based on the contractor's performance. The contract will state a target cost that may be adjusted based upon an incentive provision or formula in the contract. FAR 16.403	Record target amount stated in the contract; obligation is adjusted upward as incentive payments become due. Generally an agency will set aside sufficient funds in its administrative funds control system to cover the potential liability.	B-255831, July 7, 1995; 55 Comp. Gen. 812 (1976); 34 Comp. Gen. 418 (1955); B-133170, Jan. 29, 1975. Red Book at 7-24

[1] Federal Acquisition Regulation (FAR), 48 C.F.R. pt. 1 (2010).
[2] GAO, *Principles of Federal Appropriations Law*, vol. 2, 3rd ed., GAO-06-382SP (Washington, D.C.: Feb. 2006) (Red Book).

Cost Reimbursement, Cost-Plus-Fixed-Fee Contract	A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. Contracts will have a ceiling amount that the contractor may not exceed without approval of the contracting officer. FAR 16.301, 16.306	Record ceiling amount stated in the contract. Generally, authorized increases above the ceiling amount are charged against the appropriation current at the time of the increase.	B-317139, June 1, 2009; 61 Comp. Gen 609 (1982); 59 Comp. Gen. 518 (1980).
Indefinite-Delivery, Indefinite-Quantity Contract	An IDIQ contract is a form of an indefinite-delivery contract under which the government is required to order and the contractor required to furnish a stated minimum quantity of supplies or services. The Government may place orders to meet its needs at any time during a fixed period. FAR 16.504	Record minimum contract amount. Amounts over the minimum are obligated as task or delivery orders are placed against the original contract. Thus, current year funds are used when placing orders above the guaranteed minimum.	B-318046, July 7, 2009; B-308969, May 31, 2007; B-302358, Dec. 27, 2004. Red Book at 7-20–21

Requirements Contract	A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor. FAR 16.503	Government does not incur an obligation until an order for goods or services is placed against the requirements contract. As orders are placed, obligate amounts of order.	B-318046, July 7, 2009; B-302358, Dec. 27, 2004; B-256312, June 6, 1994; 21 Comp. Gen. 961 (1942). Red Book at 7-19–20
Letter Contract	A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing supplies or performing services. FAR 16.603	Record maximum liability under the contract itself. If a contract is definitized in the following fiscal year, the recorded obligation should be the amount of the definitized contract minus either (a) actual costs incurred under the letter contract (when known), or (b) the maximum legal liability stated in the letter contract (when the actual costs cannot be determined). The remaining amount to be recorded is obligated against the appropriation current at the time of definitization.	B-197274, Sept. 23, 1983; 34 Comp. Gen. 418 (1955); 33 Comp. Gen. 291 (1954); B-197274, Feb. 16, 1982. Red Book at 7-13–14

Basic Ordering Agreement	A basic ordering agreement is a written instrument of understanding, negotiated between an agency and a contractor, that contains (1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) a description, as specific as practicable, of supplies or services to be provided, and (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement. A basic ordering agreement is not a contract. FAR 16.703	Government does not incur an obligation until a contract is entered into.	B-318046, July 7, 2009.

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United States Government Accountability Office
Washington, DC 20548

B-317636

April 21, 2009

The Honorable Joseph I. Lieberman
Chairman, Committee on
Homeland Security and Governmental Affairs
United States Senate

The Honorable Susan M. Collins
Ranking Minority Member, Committee on
Homeland Security and Governmental Affairs
United States Senate

Subject: *Severable Services Contracts*

This responds to your request for our legal opinion on whether 10 U.S.C. § 2410a and 41 U.S.C. § 253*l* restrict a federal agency using multiple year or no-year appropriations to contracts for periods of performance no longer than 1 year. Both of these provisions permit agencies to enter into severable services contracts that cross fiscal years for up to 1 year and obligate the appropriations current at the time the agencies enter into the contract. In our opinion, these statutory provisions do not restrict to 1 year the contract periods of severable services contracts funded by no-year appropriations or by multiple year appropriations.[1]

BACKGROUND

The two statutes at issue in this opinion authorize agencies to enter into severable services contracts that begin in one fiscal year and end no more than 12 months later, in the next fiscal year. The first, 10 U.S.C. § 2410a (hereafter section 2410a) applies to severable services contracts entered into by the Departments of Defense and Homeland Security, and the Coast Guard in certain circumstances. Section 2410a originated as a permanent provision in the General Provisions section of the 1986 Department of Defense Appropriations Act. Pub. L. No. 99-190, § 8005, 99 Stat. 1185,

[1] Our general practice when issuing opinions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this case, we did not solicit any agency's views because the request involves the interpretation of two statutory provisions that have general applicability, not particular applicability or relevance to any one agency.

1203 (Dec. 19, 1988).[2] In 1997, Congress amended section 2410a, broadening its scope and enacting it in its current form. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 801, 111 Stat. 1629, 1831 (Nov. 18, 1997). It provides as follows:

> "(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)."

(Emphasis added.)

The second statute, 41 U.S.C. § 253*l* (hereafter section 253*l*), applies to severable services contracts entered into by civilian executive agencies. Congress enacted section 253*l* in the Federal Acquisition Streamlining Act of 1994 (FASA). Pub. L. No. 103-355, title I, § 1073, 108 Stat. 3243, 3271 (Oct. 13, 1994). It provides:

> "(a) Authority
>
> The head of an executive agency may enter into a contract for procurement of severable services 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] It was codified in 1988 as part of legislation that codified a number of permanent freestanding provisions of law related to the Department of Defense. Pub. L. No. 100-370, § 1, 102 Stat. 840, 847 (July 19, 1988).

(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) of this section."

(Emphasis added.)

The language of sections 2410a and 253*l* is identical for purposes of the question presented. In both statutes, subsection (a) authorizes agencies to enter into severable services contracts that do not exceed 1 year, and subsection (b) permits agencies with fiscal year funds to obligate the total amount of such contracts to the fiscal year appropriation notwithstanding that contract performance extends into the next fiscal year. You indicated that some agencies interpret subsection (a) of sections 2410a and 253*l* to restrict all severable services contracts to periods of no more than one year, even if the contract is funded by a multiple year or no-year appropriation.

DISCUSSION

Sections 2410a and 253*l* establish a statutory exception to the constraints of the so-called *bona fide* needs rule. *See* B-308026, Sept. 14, 2006; B-259274, May 22, 1996. The *bona fide* needs rule provides that an appropriation limited to obligation for a definite period may be obligated only to meet a legitimate or *bona fide* need arising during the period of availability of the appropriation. 31 U.S.C. § 1502(a); B-289801, Dec. 30, 2002. Since a severable service contract addresses a recurring or continuing need, such as a maintenance contract, 35 Comp. Gen. 319 (1955), the cost of addressing such needs are charged under the *bona fide* needs rule to the appropriation current at the time services are provided. 71 Comp. Gen. 428, 430 (1992). Thus, as a general proposition, a severable services contract that crosses from one fiscal year to the next which is funded by the initial fiscal year's appropriations violates the *bona fide* needs rule because the agency, with regard to services to be rendered in the next fiscal year, is obligating the appropriation for a future year's need.

Accordingly, sections 2410a and 253*l* are statutory exceptions to the *bona fide* needs rule to provide funding flexibility to an agency contracting for severable services. B-259274, May 22, 1996. They do so by permitting an agency to obligate an appropriation that otherwise would be available only for the needs of one fiscal year to meet the needs of a second fiscal year. An agency using multiple year or no-year appropriations does not need to refer to section 2410a or 253*l* to achieve this same flexibility.

The *bona fide* needs rule is derived from the so-called time statute, 31 U.S.C. § 1502(a). B-308010, Apr. 20, 2007. Section 1502(a) provides that—

> "an appropriation . . . limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability . . . . However, the appropriation . . . is not available for expenditure for a period beyond the period otherwise authorized by law."

Section 1502(a) applies to appropriations limited to a definite period, and no-year funds are not so limited. Thus, neither it, nor the *bona fide* needs rule derived from it, applies to no-year funds. While a multiple year appropriation is available for a definite period of time, it is available by its very terms for the *bona fide* needs of the agency arising during that multiple year period. As stated above, severable services are considered a *bona fide* need of the appropriation current at the time rendered. Consequently, an agency using a multiple year appropriation would not violate the *bona fide* needs rule if it enters into a severable services contract for more than 1 year as long as the period of contract performance does not exceed the period of availability of the multiple year appropriation.

It is in this context that we conclude that subsection (a) of sections 2410a or 253*l* does not limit all severable services contracts to 1 year. It is a basic canon of statutory construction that "[a] statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section as to produce a harmonious whole." 2A Sutherland, *Statutes & Statutory Construction,* 46:05 at 154 (6th ed. 2000). *See also United States v. Cleveland Indians Baseball Company,* 532 U.S. 200, 217–18 (2001). When subsections (a) and (b) of sections 2410a and 253*l* are read together, it is clear that they were intended to provide contracting flexibility in the use of fiscal year funds. Each subsection (a) contains the grant of authority to agencies to contract for severable services across fiscal years for up to 1 year. Each subsection (b) authorizes agencies to obligate their funds for the contracts authorized by subsection (a) in a manner that constitutes an exception to the *bona fide* needs rule. The reference in subsection (b) to "[f]unds made available for a fiscal year" as the kind of funds that may be so obligated clearly indicates that the sections cover contracts funded by annual funds. There is nothing to indicate that these provisions were intended to introduce new restrictions on agencies' authority to use multiple year or no-year appropriations to fund severable services contracts lasting more than 1 year.

This view of sections 2410a and 253*l* is consistent with the legislative history, the stated purpose of the statutes and the implementing provisions in the Federal Acquisition Regulation (FAR). As noted above, section 253*l* was enacted as part of FASA. The Administrator of General Services, testifying in support of section 253*l*, described the inefficiency that results when an agency's contracting flexibility is constrained by a fiscal year appropriation:

> "Another problem with current law is the prohibition against contracts for service contracts that cross fiscal years (e.g., trash collection and lawn maintenance). Technically, all such on-going service contracts

> must end on September 30. This rule creates an enormous paperwork burden for contracting officials. At the end of each fiscal year, contracting officials must modify every federal contract to address funding for the new fiscal year contract period."

Federal Acquisition Streamlining Act of 1993: Joint Hearings Before the Committee on Governmental Affairs and the Committee on Armed Services, United States Senate, 103rd Cong. 177, 178 (1994) (statement by Roger Johnson, Administrator of General Services).

A Department of Defense submission for the record described the problem civilian agencies have when they—

> "use *annual appropriations* to enter into contracts for severable services with a period of performance that crosses fiscal years.
>
> "Currently, agencies are precluded from contracting for severable services (e.g. services which are performed on a regular basis over a period of time like janitorial, guard service, etc.) for periods which extend beyond the fiscal year unless they have specific statutory authority to do so."

Federal Acquisition Streamlining Act of 1993: Joint Hearings Before the Committee on Governmental Affairs and the Committee on Armed Services, United States Senate, 103rd Cong. 316 (1994) (Department of Defense Submission for the Record) (emphasis added).

The Department then suggested that Congress—

> "amend the Federal Property and Administrative Services Act in order to authorize civilian agencies to use *annual appropriations* to enter into contracts for severable services with a period of performance that crosses fiscal years so long as the term does not exceed one year unless the contract is a multiyear contract specifically authorized by statute."

Id. at 316–17 (emphasis added).

Our interpretation of sections 2410a and 253*l* is also consistent with the stated purpose of the FASA, which was to "revise and streamline the acquisition laws of the federal government in order to reduce paperwork burdens . . . and improve efficiency and effectiveness of the laws governing the manner in which the government obtains goods and services." S. Rep. No. 103-259, at 1 (1994). To interpret sections 2410a and 253*l* as limiting severable services contracts funded by multiple year or no-year appropriations that cross fiscal years to 1 year would require us to conclude that Congress, while remedying one burden, intended to create a restriction on agency severable services contracting in FASA that agencies had not been subject to before.

Furthermore, our interpretation of sections 2410a and 253*l* is consistent with the FAR provisions that implement these two sections. They expressly state that they apply only to contracts funded by annual appropriations. FAR section 37.106, entitled *Funding and term of service contracts,* states:

> "When contracts for services *are funded by annual appropriations,* the term of contracts so funded shall not extend beyond the end of the fiscal year of the appropriation except when authorized by law (see paragraph (b) of this section . . .)."

48 C.F.R. § 37.106(a) (emphasis added). Paragraph (b) refers to sections 2410a and 253*l*. Similarly, section 32.703-3 of the FAR, entitled *Contracts crossing fiscal years,* states:

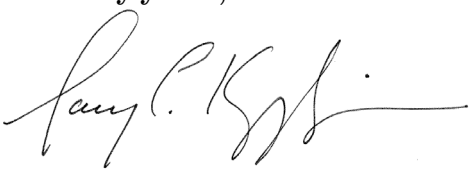
> "A contract that is *funded by annual appropriations* may not cross fiscal years, except in accordance with … paragraph (b). . . ."

48 C.F.R. § 32.703-3(a) (emphasis added). Again, paragraph (b) refers to sections 2410a and 253*l*. The FAR's implementation of the provisions thus reflects an understanding that they apply only to contracts funded with annual appropriations.

CONCLUSION

Sections 2410a and 253*l* provide agencies relief from the constraints of the *bona fide* needs rule so that they may use fiscal year appropriations to contract across fiscal years for severable services. The 1-year contract period limitations in the two provisions do not apply to contracts funded by multiple year or no-year appropriations. Hence, federal agencies may use multiple year or no-year funds to enter into contracts for severable services for a period of performance longer than 1 year and an agency using multiple year or no-year funds is free to contract for the full period of availability the statute appropriating those funds allows.

Sincerely yours,



Gary L. Kepplinger
General Counsel

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Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Services Contract

File: B-317139

Date: June 1, 2009

DIGEST

A nonseverable services contract that is not separated for performance by fiscal year may not be funded on an incremental basis without statutory authority. Failure to obligate the estimated cost (or ceiling) of a nonseverable cost-reimbursement contract at the time of award violated the *bona fide* needs rule.

Contract modifications to a cost-reimbursement contract increasing original ceiling are chargeable to appropriations available when the modifications were approved by the contracting officer. The actual date the agency records the obligation in its books is irrelevant to the determination of when the obligation arises and what fiscal year appropriation to charge.

A provision in an annual appropriations act designating that a portion of a lump-sum amount "shall be available for" a specific project does not preclude the use of other available appropriations for the project.

DECISION

The Office of Inspector General, Department of the Treasury (OIG), has requested a decision regarding the Financial Crimes Enforcement Network's (FinCEN) obligation, expenditure, and accounting of appropriated funds for its Bank Secrecy Act Direct Retrieval and Sharing System (BSA Direct) project. Letter from Marla A. Freedman, Assistant Inspector General for Audit, Department of the Treasury, to Gary L. Kepplinger, General Counsel, GAO, Aug. 29, 2008 (Request Letter). OIG states that FinCEN obligated about $17.7 million on the project during fiscal years 2004 through 2006, and questions FinCEN's use of funding in each of those three fiscal years, including whether FinCEN violated the Antideficiency Act. Request Letter, at 3. As discussed below, we conclude that FinCEN improperly charged obligations to its fiscal years 2005 and 2006 appropriations in violation of the *bona*

fide needs rule and will have to adjust its accounts to correct the violation. If, at that time, FinCEN finds that it has overobligated the proper appropriation, FinCEN must report an Antideficiency Act violation.

Our practice when issuing decisions or opinions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions,* GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this regard, we obtained the views of the Chief Counsel, FinCEN, regarding issues on the source of funding for the project, the nature of the contract, and the recording of obligations under the contract. Letter from Bill S. Bradley, Chief Counsel, FinCEN, to Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, Nov. 7, 2008 (Response Letter). In addition, OIG provided us with copies of the contract document and modifications.

BACKGROUND

FinCEN is a Department of the Treasury bureau whose mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse by promoting transparency in the U.S. and international financial systems. FinCEN Web site, www.fincen.gov/about_fincen/wwd/mission.html (last visited May 28, 2009). In that regard, FinCEN is responsible for administering the Bank Secrecy Act (BSA) and supporting law enforcement, intelligence, and regulatory agencies through sharing and analysis of financial intelligence. *Id.*

Seeking to improve access to BSA data for authorized users, on June 30, 2004, FinCEN entered into a cost-plus-fixed-fee contract with Electronic Data Systems Corporation (EDS) for the design, development, and deployment of a BSA data retrieval system. Contract TPD-04-C-0063, at C.2. A cost-plus-fixed-fee contract is a form of cost-reimbursement contract. FAR § 16.306(a). The system, called BSA Direct, was to provide secure Web access to consolidated BSA data downloaded from the system with capabilities to allow end users to perform *ad hoc,* as well as pre-defined, queries and reporting. Contract TPD-04-C-0063, at C.1. BSA Direct was intended to provide law enforcement and regulatory agencies with easier, faster data access and enhanced ability to query and analyze BSA data. *Id.*

Pertinent Contract Clauses

Section B.4 of the contract, *ESTIMATED COST AND FIXED FEE (Design, Development, Deployment),* stated, "The Government's obligation, represented by the sum of the estimated cost plus fixed fee, is $8,982,985.01." *Id.* at B.4. The clause also provided, however, that "[t]otal funds currently available for payment and allotted to this contract are $2,000,000" and that "[i]t is estimated that the amount currently allotted will cover performance of the contract through October 31, 2004." *Id.*

Section B.7 of the contract, *INCREMENTAL FUNDING (MAR 2003),* stated, "This contract shall be subject to incremental funding with $2,000,000 presently made

available for performance under this contract," and "In accordance with the 'Limitation of Funds' clause (FAR 52.232-22) contained herein, no legal liability on the part of the Government for payment of money in excess of $2,000,000 shall arise, unless and until additional funds are made available by the Contracting Officer through a modification of this contract." *Id.* at B.7.

FinCEN's Incremental Funding

At the time the contract with EDS was signed, June 30, 2004 (fiscal year 2004), FinCEN obligated $2 million to the BSA Direct contract. Response Letter at 3. These funds were made available from the Treasury Forfeiture Fund through the Treasury Executive Office for Asset Forfeiture. *Id.*

In fiscal year 2005, FinCEN began modifying the contract in order to provide additional funding to the contract. Modification 1, dated October 7, 2004, increased the amount to $3.5 million, and Modification 2, dated January 6, 2005, increased the funding to the full estimated contract cost of $8,982,985.01. FinCEN modified the contract seven more times in fiscal year 2005, ultimately increasing the total estimated cost, including a fixed fee, to more than $15 million.

To support most of the contract modifications executed in fiscal year 2005, FinCEN obligated its fiscal years 2003, 2004, and 2005 salaries and expenses appropriations, each of which included funding that was to remain available for obligations incurred through fiscal year 2005. For example, FinCEN's fiscal year 2003 appropriation provided that of the amount appropriated for salaries and expenses, "$3,400,000 shall remain available until September 30, 2005." Pub. L. No. 108-7, div. I, title I, 117 Stat. 11, 430 (Feb. 20, 2003). Similarly, FinCEN's fiscal year 2004 appropriation provided that "$8,152,000 shall remain available until September 30, 2005." Pub. L. No. 108-199, div. F, title II, 118 Stat. 3, 316 (Jan. 23, 2004). While both appropriations were available for the BSA Direct contract, neither of them included a provision specifying a certain amount for the BSA Direct project.

Unlike the salaries and expenses appropriations for fiscal years 2003 and 2004, the appropriation for fiscal year 2005 contained a provision stating that $7,500,000 of the $72,502,000 appropriated "shall be available for BSA Direct." Pub. L. No. 108-447, div. H, title II, 118 Stat. 2809, 3238 (Dec. 8, 2004). FinCEN states that it understood the language in the fiscal year 2005 appropriation as a limitation on the maximum amount that could be obligated or expended from the fiscal year 2005 appropriation for BSA Direct. Response Letter, Attachment 3. FinCEN states that in fiscal year 2005, as a result of a number of modifications to the contract, it obligated a total of $10,823,312 for the BSA Direct project. *Id.* It states that of the amount obligated in fiscal year 2005, $7,435,500 was from the fiscal year 2005 salaries and expenses appropriation, $3,382,483, was from the fiscal year 2004 appropriation, and $5,329 was from the fiscal year 2003 appropriation. *Id.*

On September 12, 2005, and again on September 13, 2005, FinCEN modified the funding amount under the contract, increasing the total to $12,475,294.94 and

$15,146,289.01, respectively. Contract Modifications Nos. 7 and 9. Notwithstanding the September 2005 dates, these contract modifications were charged to fiscal year 2006 appropriations. *Id.* FinCEN states that "the amounts in question were not obligated until October 5, 2005" (fiscal year 2006). Response Letter at 4, Attachment 4.

DISCUSSION

At issue here is the application of the *bona fide* needs rule to the BSA Direct contract, both on June 30, 2004, when FinCEN entered into the contract and, later, when FinCEN modified the contract. The *bona fide* needs rule was developed by the accounting officers of the United States to implement one of the oldest fiscal statutes, now codified at 31 U.S.C. § 1502(a), which provides that "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." As this statute has been interpreted and applied, an appropriation is available only to fulfill a genuine or *bona fide* need of the time period of availability of the appropriation. 73 Comp. Gen. 77 (1994).

Proper Appropriation to Charge at Contract Award

On June 30, 2004, FinCEN entered into a cost-reimbursement contract, agreeing to pay EDS for the costs it incurred in the design, development and deployment of the BSA Direct system plus a negotiated fee. In determining what appropriation to charge for a service contract such as FinCEN's BSA Direct contract, it is important to distinguish between a nonseverable services contract and a severable services contract.

The general rule is that a nonseverable service is considered a *bona fide* need at the time the agency orders the service and, therefore, should be charged to an appropriation current at the time the agency enters into the contract. B-305484, June 2, 2006, at 6–7; 65 Comp. Gen. 741, 743 (1986). A nonseverable service is one that requires the contractor to complete and deliver a specified end product (for example, a final report of research). 65 Comp. Gen. at 743--744. Severable services, which are recurring in nature, are *bona fide* needs at the time the service is completed, and obligations for severable services should be charged to appropriations current at that time. B-287619, July 5, 2001, at 6. A severable service is a recurring service or one that is measured in terms of hours or level of effort rather than work objectives. B-277165, Jan. 10, 2000, at 5; 60 Comp. Gen. 219, 221--22 (1981). Whether a contract is for severable or nonseverable services affects how the agency may fund the contract; severable services contracts may be incrementally funded, while nonseverable services contracts must be fully funded at the time of the award of the contract. 73 Comp. Gen. 77; 71 Comp. Gen. 428 (1992).

The FinCEN contract at issue called for delivery of a defined end product (the design, development, and deployment of a data retrieval system), and as the contract was written, the work could not feasibly be subdivided (and, in fact, was not subdivided)

for separate performance by fiscal year. The contract required the contractor to provide a data retrieval system that will "be implemented by or before 9/30/05, a timeframe that will meet FinCEN's critical mission needs." Contract TPD-04-C-0063, at C.1. The contract stated further that "the Contractor is expected to employ a disciplined, incremental approach to analyze, design, develop, and deploy the BSA Direct System and to provide that the developed system meets FinCEN's technical and business requirements within a predictable schedule and budget . . ." *Id.* at C.2. It stipulated, "It is essential that the completed and tested system be provided as soon as possible . . ." *Id.* Accordingly, as a threshold matter, we conclude that the contract here was a nonseverable services contract.[1] Consequently, FinCEN should have recorded an obligation of $8,982,985.01 to its fiscal year 2004 appropriations for its estimated cost, including the fixed fee.

FinCEN, however, recorded an obligation of only $2 million at the time of award in fiscal year 2004. As we noted earlier, while an agency may incrementally fund a severable services contract, the agency must charge its obligation for a nonseverable service contract to appropriations available at time of contract award. This rule applies to cost-reimbursement contracts, like FinCEN's contract, just as it does to other contracts. 73 Comp. Gen. 77; 71 Comp. Gen. 428. The FAR requires that cost-reimbursement contracts "establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed . . ." FAR § 16.301-1. FinCEN did just that in section B.4 of the BSA Direct contract. It clearly set out that the "Government's obligation . . . is $8,982,985.01," thereby establishing a ceiling of $8,982,985.01. Contract TPD-04-C-0063, at B.4. By recording an obligation of only $2 million, FinCEN violated the *bona fide* needs rule, improperly charging the additional $6.9 million to its fiscal year 2005 appropriations.

FinCEN's inclusion of section B.7 (*Incremental Funding*), which limited the agency's liability to $2 million at the time it awarded the contract, did not remedy the *bona fide* needs problem that necessarily arose when FinCEN attempted to charge its fiscal year 2004 obligation to subsequent fiscal years. *See* 73 Comp. Gen. at 80; 71 Comp. Gen. at 431. Section B.7 apparently was an attempt to avoid an Antideficiency Act violation. *See* Section B.4 ("Total funds currently available for payment . . . are $2,000,000."). The difficulty, however, is that FinCEN in section B.4, consistent with FAR § 16.301--1, established its obligation as $8.9 million. As explained above, it was improper for the agency to shift to fiscal year 2005 most of the cost of a *bona fide* need of fiscal year 2004.

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[1] FinCEN Chief Counsel also concluded that the contract is a nonseverable service contract, more specifically, a cost-plus-fixed-fee completion contract. Response Letter, Attachment 1, at 1. Because the contract called for the delivery of a specified end product, rather than a level of effort, we agree that the contract, under the FAR, is a completion, rather than a term, contract. FAR § 16.306(d)(1), (2).

Because we conclude that FinCEN failed to properly charge its obligation to the correct fiscal year, we are recommending that the agency adjust its accounts by deobligating $6,982,985.01 from its fiscal year 2005 appropriations and charging that amount to its appropriations available for fiscal year 2004. If, in doing so, FinCEN determines that the obligation exceeds the amount available in fiscal year 2004, it should report an Antideficiency Act violation.

Proper Appropriation to Charge for Contract Modifications

The record shows that FinCEN, during fiscal year 2005, modified the contract a number of times to increase funding on the contract beyond the original ceiling of $8,982,985. FinCEN states that, with the exception of two modifications that it recorded against fiscal year 2006 appropriations, it charged the modifications to three separate appropriations: the fiscal year 2005 salaries and expenses appropriation, which included a provision making $7.5 million available for BSA Direct; the fiscal year 2004 salaries and expenses appropriation, of which $8,152,000 was to remain available until September 30, 2005; and the fiscal year 2003 salaries and expenses appropriation, of which $3,400,000 was to remain available until September 30, 2005.

With regard to a cost-reimbursement contract like FinCEN's BSA Direct contract, agencies should charge modifications that increase the original ceiling to an appropriation current at the time of the modification. 61 Comp. Gen. 609, 612 (1982).[2] Modifications increasing the ceiling are discretionary in nature and therefore are considered to reflect a new need. *Id.* As such, the modifications should be charged to funds available when the modification is signed by the contracting officer.[3]

For the contract modifications at issue here, the contracting officer approved increases beyond the initial $8.9 million ceiling established in the contract. Accordingly, the fiscal year 2005 modifications increasing the ceiling beyond

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[2] In 61 Comp. Gen. 609, the agency had properly obligated the contract ceiling at the time it entered into the contract; it did not, as FinCEN did here, violate the *bona fide* needs rule by attempting to incrementally fund the contract.

[3] For fixed-price contracts, the usual rule is that if the modification is within the contract's statement of work, the agency should charge the cost of the modification to the appropriation to which the agency had charged the contract since it is a part of the *bona fide* need established at time of contract award. 59 Comp. Gen. 518, 521 (1980). Modifications outside of the contract's statement of work (and, thus, outside of the scope of the contract) are considered to meet a new *bona fide* need, and the agency should charge obligations for such modifications to appropriations current at the time of modification. B-257617, Apr. 18, 1995. For cost-reimbursement contracts, because the agency, at time of contract award, cannot necessarily anticipate the need for and amount of increases in the contract ceiling, a modification that increases the ceiling is considered a *bona fide* need at the time of the modification. 61 Comp. Gen. at 612.

$8,982,985 were chargeable to appropriations available for fiscal year 2005. *See* 61 Comp. Gen. 609. In all but two instances, FinCEN, in fact, did charge the modifications to appropriations that were available for fiscal year 2005.

The record shows that FinCEN charged two fiscal year 2005 modifications to fiscal year 2006 appropriations, Contract Modifications Nos. 7 and 9. Both of these modifications were executed in fiscal year 2005; Modification 7 was signed by the contracting officer on September 12, 2005, and Modification 9 was signed on September 13, 2005. It appears that the agency confused the event of incurring an obligation with the act of recording the obligation. The agency points to spreadsheet entries indicating that on October 5, 2005, it recorded obligations for the BSA Direct contract against fiscal year 2006 appropriations. Response Letter, Attachment 4.

The Recording Statute, 31 U.S.C. § 1501, requires agencies to record an obligation at the time an authorized contracting officer signs a contract modification. *See* B-300480.2, June 6, 2003. The fact that the actual recording of the obligation is not made at that time is immaterial insofar as determining what fiscal year appropriation to charge. 38 Comp. Gen. 81 (1958). While it appears that FinCEN did not record the obligations until fiscal year 2006, it incurred the obligations in fiscal year 2005 when it signed the modifications.[4] FinCEN should have recorded the obligations against appropriations available for obligation in fiscal year 2005, not its fiscal year 2006 appropriations. Accordingly, FinCEN should adjust its accounts.

Antideficiency Act

Because of the $7.5 million provision in FinCEN's fiscal year 2005 appropriation, and the fact that FinCEN obligated more than that on the contract, OIG questions whether FinCEN violated the Antideficiency Act. FinCEN's fiscal year 2005 salaries and expenses appropriation provided FinCEN "$72,502,000, of which $7,500,000 shall be available for BSA Direct." Pub. L. No. 108-447, div. H, title II, 118 Stat. at 3238. FinCEN points out that while it obligated funds in fiscal year 2005 that exceeded $7.5 million, it did not obligate more than $7.5 million from its fiscal year 2005 salaries and expenses appropriation. Rather, it also obligated funds from its fiscal years 2003 and 2004 appropriations, each of which was available through fiscal year 2005.

We agree that FinCEN could legally draw on its fiscal years 2003 and 2004 appropriations, to the extent that they had sufficient unobligated balances, for costs related to the BSA Direct project. The $7.5 million provision did not preclude the

[4] This case differs from those cases where an agency, signing a contract near the end of the fiscal year, may properly obligate next fiscal year's appropriation because the agency has included clauses in the contract expressly requiring that, among other things, the contractor may not proceed under the contract unless and until an authorized contracting officer notifies the contractor that performance may commence. 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959).

agency's use of these appropriations. We see nothing in the language of the fiscal year 2005 appropriation or its legislative history to suggest that Congress intended to restrict the availability of these appropriations for the project. The plain language of the $7.5 million provision addressed only the use of the fiscal year 2005 appropriation, affirmatively directing that a portion, $7.5 million, be used for the BSA project. The language makes $7.5 million available only for the BSA Direct project. *See* B-278121, Nov. 7, 1997. The fiscal years 2003 and 2004 appropriations contained lump sum amounts that were available for the necessary expenses of FinCEN for obligations incurred through September 30, 2005. We therefore conclude that use of the other appropriations to obligate funds in excess of $7.5 million did not violate the Antideficiency Act.[5]

CONCLUSION

We are recommending that FinCEN adjust its accounts in accordance with this decision. If there are not sufficient funds available in the proper appropriations, the agency should report an Antideficiency Act violation. These adjustments will involve obligating an additional $6,982,895.01 to appropriations available in fiscal year 2004 and deobligating that amount from the fiscal year 2005 appropriation. FinCEN should also deobligate amounts from fiscal year 2006 appropriations that were used for Modification Nos. 7 and 9 in fiscal year 2005 and obligate that amount against appropriations available in fiscal year 2005.

Daniel I. Gordon
Acting General Counsel

[5] We note that FinCEN interpreted the $7.5 million provision as a limitation on the amount of its fiscal year 2005 salaries and expenses appropriation that it could obligate for this purpose, and that it, therefore, could not draw from the reminder of the fiscal year 2005 lump sum for this purpose. Response Letter, Attachment 3. While FinCEN's interpretation is consistent with our case law, 36 Comp. Gen. 526, 528 (1957), we have not had occasion to consider this case law in over 50 years, and we are concerned that the case law may not reflect more recent congressional practice of using appropriations provisions to enact affirmative direction rather than a limitation. Because FinCEN, in fact, did not use (or propose to use) amounts from its lump sum appropriation for this purpose, we do not reconsider that case law in this decision.

G A O
Accountability * Integrity * Reliability

Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Library of Congress—Obligation of Guaranteed Minimums for Indefinite-Delivery, Indefinite-Quantity Contracts under the FEDLINK Program

File: B-318046

Date: July 7, 2009

DIGEST

The Library of Congress uses indefinite-delivery, indefinite-quantity (IDIQ) contracts, against which agencies place orders for library and information products and services, in support of its Federal Library and Information Network (FEDLINK). FEDLINK is a voluntary program, and the Library states that it cannot accurately anticipate use of an IDIQ contract. The Library proposes using a standard amount of $500 as the guaranteed minimum for these contracts regardless of the maximum ordering limitations or total contract value, which amount would be obligated at the time it awards the IDIQ contract. To provide adequate consideration for a binding IDIQ contract, an agency must establish a guaranteed minimum that is more than a nominal amount and reflects the amount the agency is fairly certain to order. In the absence of reliable historical data indicating that a $500 guaranteed minimum for a particular IDIQ contract is too high or too low, we have no basis to object to the use of $500 as a guaranteed minimum.

DECISION

The General Counsel of the Library of Congress (Library) requested a decision on the proper obligation of funds for indefinite-delivery, indefinite-quantity (IDIQ) contracts for use by federal agencies participating in the Library's Federal Library and Information Network (FEDLINK) revolving fund program. Letter from Elizabeth A. Pugh, General Counsel, Library of Congress, to Gary Kepplinger, General Counsel, GAO, Mar. 31, 2009 (Request Letter).[1] Specifically, the Library seeks guidance on the

[1] Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions,*

(continued...)

proper estimation of amounts to be obligated as the guaranteed minimums under centralized IDIQ contracts against which various federal organizations place orders. The Library asks whether a standard amount of $500 could be used as the guaranteed minimum for these contracts regardless of the maximum ordering limitations or total contract value. Also, the Library seeks our views on the use of other contract vehicles—such as basic ordering agreements and requirements contracts—in the context of the FEDLINK program.

As we explain below, to provide adequate consideration for a binding IDIQ contract, an agency must establish a guaranteed minimum that is more than a nominal amount and reflects the amount the agency is fairly certain to order. The Library should review available historical usage data for the item or service being purchased to ensure that $500 is a reasonable estimate of the amount that is fairly certain to be purchased through each IDIQ contract. However, in the absence of reliable historical data, we have no basis to object to the use of $500 as the guaranteed minimum. Although we are not stating views on the use of the different contract vehicles, we are providing some information on the three types of vehicles raised in the request letter.

BACKGROUND

The Library operates the FEDLINK intragovernmental revolving fund pursuant to 2 U.S.C. § 182c. FEDLINK is a cooperative procurement, accounting, and training program designed to provide access to online databases (*e.g.,* Lexis-Nexis, Westlaw, Dun and Bradstreet), periodical subscriptions, books, services to repair and preserve library material, and other library and information support services available from commercial suppliers. 2 U.S.C. § 182c(f)(1). Through FEDLINK, the Library develops technical specifications and statements of work for these electronic and print information services, conducts formal negotiated procurements, evaluates contractor proposals, and establishes IDIQ contracts or basic ordering agreements with multiple vendors.[2] Although not required to do so, federal agencies and other organizations entitled to use federal sources of supply may place orders for these products and services with FEDLINK and thus are able to take advantage of volume discounts, which can be as high as 50 percent off commercial rates.[3] The total amount purchased through the various procurement vehicles ranges from $1,000 per year to as much as $15.8 million; a few procurement vehicles have no orders; and individual orders range from approximately $500 to $1.9 million. Request Letter.

(...continued)
GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html. In this case the General Counsel fully articulated the agency's views in the request letter.

[2] *See Ten Reasons to Use FEDLINK, available at* www.loc.gov/flicc/fedlink/10reasons.html (last visited June 5, 2009).

[3] *Id.*

Before the FEDLINK revolving fund was established in 2 U.S.C. § 182c, the Library operated FEDLINK under the Economy Act, 31 U.S.C. § 1535. At that time the Library would establish basic ordering agreements (BOAs) with qualified vendors pursuant to the Federal Acquisition Regulation (FAR), at § 16.703.[4] The BOAs would set forth technical requirements, fix pricing and discounts, and include administrative requirements and standard FAR contract clauses. Request Letter. After signing annual interagency agreements with its customer agencies, the Library would synopsize customer requirements for particular services, review offers received, and place orders referencing the appropriate BOAs. *Id.* In this manner the Library established agreements with vendors but did not incur any obligation when it established the BOAs; obligations were only incurred and recorded when customer-specific orders were issued, which protected the government from liability should orders for specific items or services not arise. *Id.*

However, the Library and its FEDLINK customer agencies found using BOAs was administratively burdensome because of the additional competition requirements for placing orders against agreements and the potential for renegotiation of terms. *Id., citing* FAR § 16.703(d). The Library also believed that by using contracts instead of BOAs it would be able to secure better pricing and discounts for the government and streamline the process. As a result, when the revolving fund was established in 2 U.S.C. § 182c, the Library began using IDIQ contracts in some situations.[5] The Library stated that, in using FEDLINK IDIQ contracts, orders against an established IDIQ contract do not require additional notice and competition because the IDIQ contract itself is established competitively.[6] Request Letter.

To establish a binding IDIQ contract, the FAR requires that there be a stated guaranteed minimum quantity of supplies or services to be ordered under the IDIQ

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[4] Although, as a legislative branch agency, the Library is not subject to the FAR, for the FEDLINK program the Library follows the FAR as a service to FEDLINK customers, most of whom are executive agencies subject to the FAR. *See Authority and Eligibility for the FEDLINK Program, available at* www.loc.gov/flicc/fedlink/auth_elig.html (last visited June 5, 2009).

[5] BOAs are still used where FEDLINK has no history with a vendor and obligating against the FEDLINK reserve in anticipation of unknown customer requirements would place a significant risk on FEDLINK. Request Letter.

[6] The FAR states that contracting officers "to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources." FAR § 16.504(c). (Exceptions are set out in section 16.504(c)(ii)(B).) In addition, the FAR requires contracting officers, under a multiple-award IDIQ contract, to provide each vendor "a fair opportunity to be considered for each order exceeding $3,000." FAR § 16.505(b)(1). Additional competition requirements apply for orders exceeding $5 million. FAR § 16.505(b)(1)(iii).

contract, FAR § 16.504(a)(1), and this amount must be obligated at the time the contract is awarded. B-308969, May 31, 2007; B-302358, Dec. 27, 2004. This requirement has proven problematic for the Library in implementing the FEDLINK program since there is a range in the value of its contracts and the annual requirements of the program's customers vary. Request Letter. Also, since the Library records obligations for the FEDLINK IDIQ contract minimums against the administrative reserves in the FEDLINK revolving fund, the Library finds itself in the difficult position of having to establish IDIQ contract minimums that meet the legal requirements without accumulating excessive obligations that might jeopardize the program's financial stability. *Id.* To remedy this concern, the Library proposes to use a flat amount of $500 as the guaranteed minimum amount for its FEDLINK IDIQ contracts. *Id.* The Library also asks whether the FEDLINK program could use requirements contracts as described in FAR § 16.503(a), which do not require guaranteed minimums that must be obligated at the time of award.

DISCUSSION

IDIQ Contract Minimum Quantity Guarantee

An agency may use an IDIQ contract where the government cannot predetermine, above a specified minimum, the precise quantity of supplies or services that will be required during the contract period and where it is inadvisable for the government to commit itself for more than a minimum quantity. FAR § 16.504(b). An IDIQ contract must require the government to order and the contractor to furnish at least a stated minimum quantity of supplies or services, and if ordered, the contractor to furnish any additional quantities, not to exceed the stated maximum. FAR § 16.504(a)(1). To ensure the contract is binding, the minimum quantity must be more than a nominal quantity but, to avoid an unjustified commitment of agency funds, should not exceed the amount the government is fairly certain to order. FAR § 16.504(a)(2).

From an appropriations standpoint, an agency must record an obligation against its appropriation at the time that it incurs a legal liability, such as when the agency signs a contract committing the government to purchase a specified amount of goods or services. B-116795, June 18, 1954. *See also* B-300480.2, June 6, 2003, at 3 n.1. In the case of an IDIQ contract, the agency must record an obligation in the amount of the guaranteed minimum at the time the contract is executed because, at that point, the government has a fixed liability for the minimum amount to which it committed itself. B-308969, May 31, 2007; B-302358, Dec. 27, 2004. A valid obligation must reflect a *bona fide* need at the time the obligation is incurred. Thus the agency must have a *bona fide* need for the guaranteed minimum. *See* B-317636, Apr. 21, 2009; B-308969, May 31, 2007.

Since the agency incurs a recordable legal liability in the amount of the guaranteed minimum at the time at which it awards the contract, determining that minimum quantity is an important step in the execution of an IDIQ contract. While an agency may exercise its discretion in setting the guaranteed minimum in an IDIQ contract, this discretion is not unlimited. The stated minimum quantity forms the

consideration for the contract,[7] and the FAR requires that the minimum quantity be more than a nominal amount. FAR § 16.504(a)(2).

The determination of whether a stated minimum quantity is nominal must consider the nature of the acquisition as a whole. For example, in a case involving IDIQ contracts for an agency's travel agent services, GAO concluded that a $2,500 guaranteed minimum provided adequate consideration. B-295530, Mar. 7, 2005, *reconsideration denied,* B-295530.2 *et al.*, July 25, 2005. The solicitation had specified that while the guaranteed minimum would be $2,500, the estimated minimum order would be $15,000,000 and the maximum order would be $150,000,000. We stated that "[t]here is no 'magic number' that the FAR or our decisions set as adequate consideration for a contract." *Id.* at 2. The agency established the $2,500 minimum based on its review of minimums in other travel-related contracts which had transaction fees ranging from $5 to $16, so the $2,500 guaranteed minimum here could represent up to several hundred transactions. We stated also that a contract's guaranteed minimum need not have a specific relationship to the estimated minimum order amount; rather, the guaranteed minimum must be evaluated in the context of all the specific facts and circumstances of the procurement. *Id.* In this case, the $2,500, representing the amount to which the government was willing to commit itself, was sufficient consideration to bind the parties to the contract. *Id. See also* B-299255, Mar. 19, 2007 (guaranteed minimum of $1,000 for multiple IDIQ contracts for health marketing training and consultation services was reasonable where the agency at the time of contract award could not determine how much work would go to any particular contractor).

Nothing in the FAR requires that a guaranteed minimum be a large amount. So, for example, under a solicitation for multiple IDIQ contracts for international ocean and intermodal transportation services, there was a minimum volume guarantee of one Forty-Foot Equivalent Unit (FEU) over the contract term because it was impossible for the agency, at contract award, to ascertain whether a contractor would carry more than that volume. B-278404.2, Feb. 9, 1998, at 8--9, 12. We concluded, therefore, that, while the quantity of one FEU is minimal, it was adequate consideration. *Id. See also Travel Centre v. Barram,* 236 F.3d 1316 (Fed. Cir. 2001) ($100 guaranteed minimum for an IDIQ contract for travel management services was not nominal where it was not known how many agencies would choose to utilize the contract); B-291185, Nov. 8, 2002 (guaranteed minimum of only a few hundred dollars in an IDIQ contract for freight transportation services was sufficient where, after the minimum was satisfied, selection of contractors would be on a best-value basis).

In the information the Library has presented, the Library uses FEDLINK IDIQ contracts in those situations where there is some historical data, although the range of use varies depending on the particular contract. As mentioned above, the total

[7] B-278404.2, Feb. 9, 1998; B-249307, Oct. 30, 1992. *See also Willard, Sutherland & Co. v. United States,* 262 U.S. 489, 493 (1923) (holding that a contract without a minimum quantity is unenforceable for "lack of consideration and mutuality").

amount purchased through each IDIQ contract ranges from $1,000 to $15.8 million. Some IDIQ contracts had no orders. In setting guaranteed minimums, the Library should evaluate the historical usage data for each category of items and services purchased, such as online databases or book repair services, and take into consideration any other factors for estimating the next year's use. We recognize that it is difficult for the Library to rely on historical data since it is serving the needs of other agencies. In the absence of reliable historical data, we have no basis to object to the use of $500 as a guaranteed minimum amount.

Contracting Vehicles

We have long held that the contracting agency has the primary responsibility for determining its needs and the method of accommodating them, and that this principle applies to the contracting format used to purchase the items which the agency has determined are necessary. *See, e.g.,* B-295737, B-295737.2, Apr. 19, 2005; B-289378, Feb. 27, 2002; B-224004, B-224005, Dec. 18, 1986; B-220224, Dec. 17, 1985. Thus, the Library of Congress is in the best position to determine which contracting vehicle would suit any particular item or service that is part of the FEDLINK program. That being said, we offer the following information on the three types of contract vehicles raised in the request letter—basic ordering agreements, IDIQ contracts, and requirements contracts.

Basic ordering agreements (BOAs) are essentially open-ended agreements between a government agency and a contractor against which specific orders for specific items and services may be placed. FAR § 16.703. BOAs are often used when the specific items and quantities to be covered by a contract are not known at the time the agreement is executed. B-244633, Nov. 6, 1991, at 3 n.3. They are entered into for the mutual convenience of the government and the contractor, and contain "(1) terms and clauses applying to future contracts (orders) between the parties during its term, (2) a description, as specific as practicable, of supplies or services to be provided, and (3) methods for pricing, issuing, and delivering future orders under the basic ordering agreement." FAR § 16.703. BOAs are not contracts, and the government is not required to place any orders under these agreements. *Id.* Thus, placement of an order (and acceptance by the contractor), consistent with the FAR and the terms of the BOA, is the point at which there is a binding commitment which creates a legal liability of the government for the payment of appropriated funds for the goods or services ordered and the government incurs an obligation that must be recorded against the proper appropriation. 31 U.S.C. § 1501(a)(1). No obligation is incurred when the agency and contractor enter into a BOA.

The requirements of the IDIQ contract were explored in the previous section. Basically, the IDIQ contract requires the government to order only a stated minimum quantity of supplies or services. Purchase of that minimum quantity ends any governmental legal obligation under the contract and the government "is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor." *Travel Centre,* 236 F.3d at 1319. This contract vehicle generally provides the needed flexibility for

requirements that cannot be accurately anticipated. The concern identified by the Library is the difficulty of estimating an appropriate guaranteed minimum to be charged against the Library's reserve at the time the IDIQ contract is executed since the items and services are not for FEDLINK but for other agencies. This concern, addressed in the previous section, may be overcome by the recommended assessment of each category of goods and services to determine an amount that, based on historical usage, agencies are fairly certain to order through FEDLINK, and the use of $500 as the guaranteed minimum in the absence of reliable historical data.

The Library also inquired into the use of a requirements contract, which differs from an IDIQ contract. A requirements contract provides for filling all purchase requirements of designated government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor. FAR § 16.503(a). The promise by the buyer to purchase the subject matter of the contract exclusively from the seller is an essential element of a requirements contract. A solicitation will not result in the award of an enforceable requirements contract where a solicitation provision disclaims the government's obligation to order its requirements from the contractor and therefore renders illusory the consideration necessary to enforce the contract. *See* B-280945 *et al.*, Dec. 4, 1998; B-266238, Feb. 8, 1996. The applicable regulation requires that the solicitation and resulting contract state the estimated total quantity of goods or services needed. FAR § 16.503(a)(1). We have held that requirements contracts are valid if the estimate of the probable amount of goods or services to be generated was determined in good faith and based on the best information available. 63 Comp. Gen. 117 (1983). In addition, if feasible, the contract must include "the maximum limit of the contractor's obligation to deliver and the Government's obligation to order." FAR § 16.503(a).

Unlike the IDIQ contract, no minimum guarantees are required for a requirements contract because the agreement to procure all of the agency's requirements constitutes adequate consideration for the contract. 50 Comp. Gen. 506, 508 (1971); B-213046, Dec. 27, 1983. Since there is no guaranteed minimum, the government does not incur an obligation until an order for goods or services is placed against the requirements contract. B-302358, Dec. 27, 2004; B-259274, May 22, 1996. If, in the exercise of good faith, the anticipated requirements simply do not materialize, the government is not obligated to purchase the stated estimate or to place any orders with the contractor. 47 Comp. Gen. 365, 370 (1968). The contractor assumes the risk that nonguaranteed requirements may fall short of expectations, and has no claim for a price adjustment if they do. *Medart, Inc. v. Austin,* 967 F.2d 579 (Fed. Cir. 1992); 37 Comp. Gen. 688 (1958). If, however, the government attempts to meet its requirements elsewhere, including the development of in-house capability, or if failure to place orders with the contractor for valid needs is otherwise found to

evidence lack of good faith, liability on the part of the government will result. *E.g., Rumsfeld v. Applied Companies, Inc.,* 325 F.3d 1328, 1339 (Fed. Cir), *cert. denied,* 540 U.S. 981 (2003); *Torncello v. United States,* 681 F.2d 756, 768–69 (Ct. Cl. 1982).

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