



United States Department of the Interior

OFFICE OF THE SOLICITOR

1849 C STREET N.W.
WASHINGTON, DC 20240

AUG 26 2003

MEMORANDUM

To: David Sutfin, Chief
Procurement and Support Services Division
Minerals Management Service

From: Alton E. Woods, Assistant Solicitor *by M.W. (acting)*
Branch of Acquisitions and Intellectual Property
Division of General Law

Subject: Request for legal opinion regarding GovWorks' authority to retain one-year funds until expended

I. Introduction

This will respond to the August 13, 2003, memorandum from the Inspector General (IG) to the Assistant Secretary – Land and Minerals Management regarding GovWorks' representation that one-year funds transferred by agencies to GovWorks may be preserved beyond the end of the fiscal year. The IG asked its Office of General Counsel (OGC) to research this question. By memorandum of August 6, 2002, that office found no "unique, statutory authorization that permits federal agencies to circumvent congressionally-imposed time limitations on spending by depositing fiscal appropriations into GovWorks' franchise fund."

We respectfully suggest that the OGC's framing of the issue has unnecessarily led to a negative conclusion. The OGC framed the issue as follows:

When unexpended fiscal year appropriations of a customer agency are transferred to the Department's no-year franchise fund, do the appropriations lose their fiscal limitation and become no-year funds?

Casting the issue this way unduly raises the bar for finding specific legislative intent. On the contrary, as we point out in this memorandum, expending one-year funds following their period of availability does *not* necessarily require legislation changing the character of those funds to no-year money.

We believe that the issue is better framed as follows:

When a federal agency obligates limited period funds under an interagency agreement with GovWorks during the period of their availability, may unexpended funds remain available for expenditure by GovWorks after the expiration of their period of availability?

The answer is affirmative. First, GovWorks has unique statutory authority to enter into interagency agreements. This means that, in contrast to agreements made under the Economy Act, the funds that GovWorks receives from other agencies need not be deobligated upon expiration of their period of availability. Accordingly, as long as agencies' funds have been obligated under an interagency agreement with GovWorks during their period of availability, they remain available until expended.^{1/}

II. Obligational treatment of funds transferred under other than the Economy Act

The obligational treatment of funds transferred under an interagency agreement depends upon whether the agreement is made under the Economy Act or under another statutory authority. *National Park Service Soil Surveys*, B-282601, Sept. 27, 1999, 1999 U.S. Comp. Gen. LEXIS 254 at *6; GAO's *Principles of Federal Appropriations Law, 2nd Ed.*, Vol. II, 7-22 through 7-24 (GAO/OGC-92-13). When funds are obligated under the Economy Act, they must be deobligated if they remain unexpended at the end of their period of availability. See 31 U.S.C. § 1535(d). On the other hand, where an interagency agreement is "based on specific authority independent of the Economy Act, the funds do not expire at the end of their period of availability if they have been otherwise properly obligated." *National Park Service Soil Surveys, supra*, 1999 U.S. Comp. Gen. LEXIS 254 at *7. See also *Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, April 25, 2001, 2001 U.S. Comp. Gen. LEXIS 211 at *7 - *8; 51 Comp. Gen. 766, 767-68 (1972).

In *National Park Service Soil Surveys*, the GAO examined whether National Park Service (NPS) fiscal year 1998 funds obligated under interagency agreements with the Department of Agriculture remained available to pay for services after fiscal year 1998. Like agencies utilizing GovWorks' contracting services, NPS transferred funds to Agriculture with the understanding that this would prevent their lapse at the end of their period of availability. 1999 U.S. Comp. Gen. LEXIS 254 at *3. After evaluating authorities applicable to the interagency relationship, the GAO found that "both NPS and [Agriculture] have authority to enter into interagency agreements independent of the Economy Act." *Id.* at *4-*5. Having so found, GAO concluded that "any NPS funds that are properly obligated under such an agreement do not lapse at the end of the fiscal year." *Id.* at *5.

III. Interagency agreements between GovWorks and other agencies are made under authority other than the Economy Act

We discussed pertinent authorities at length in our March 27, 2002, memorandum in which we concluded GovWorks may retain funds it receives from agencies until expended.

^{1/} We also find persuasive that, as you have advised us, the General Accounting Office (GAO), with full knowledge of GovWorks' practice of retaining agency funds for expenditure after their period of availability, does not believe that this violates congressional spending limitations.

A. The Government Management Reform Act of 1994

The Government Management Reform Act of 1994 (GMRA), Pub.L. No. 103-356, Title IV, § 403, 108 Stat. 3410 (1994), as amended (*see* 31 U.S.C.A. § 501 note (2003)), provides in relevant part:

- (a) **Establishment.**— There is authorized to be established on a pilot program basis in each of six executive agencies a franchise fund. The Director of the Office of Management and Budget [after specified consultations] shall designate the agencies.^{2/}
- (b) **Uses.**— Each such fund may provide, consistent with guidelines established by the Director of the Office of Management and Budget, such common administrative support services to the agency and to other agencies as the head of such agency, with the concurrence of the Director, determines can be provided more efficiently through such fund than by other means. * * * Services shall be provided by such funds on a competitive basis.
- (c) **Funding.**— (1) There are authorized to be appropriated to the franchise fund of each agency designated under subsection (a) such funds as are necessary to carry out the purposes of the fund, to remain available until expended. To the extent that unexpended balances remain available in other accounts for the purposes to be carried out by the fund, the head of the agency may transfer such balances to the fund. ^{3/}
- (2) Fees for services shall be established by the head of the agency at a level to cover the estimated costs of providing such services.

(Underscoring added).

B. Interior Franchise Fund

The Interior Franchise Fund was established under the Omnibus Consolidated Appropriations Act of 1997, Pub.L. 104-208, Title I, § 113, 110 Stat. 3009-316 (1996), as amended Pub.L. 106-554, § 1(a)(3), Title I, § 120, 114 Stat. 2763 (2000) (*see* 31 U.S.C.A. § 501 note (2003)). It

^{2/} By letter of May 17, 1996, signed by OMB Director Alice Rivlin, Interior became one of six executive branch agencies authorized to establish a franchise fund in accordance with GMRA.

^{3/} Although not essential to our conclusion in this memorandum, we believe that the statements in GMRA that “such funds as are necessary to carry out the purposes of the fund . . . remain available until expended,” as well as in the sentence following, are also dispositive of this issue.

provides in relevant part:

There is hereby established in the Treasury a franchise fund until October 1, 2004 to be available without fiscal year limitation, for expenses and equipment necessary for the maintenance and operation of such financial and administrative support services as the Secretary determines may be performed more advantageously as central services; * * * *Provided further*, That such fund shall be reimbursed or credited with the payments, including advanced payments, from applicable appropriations and funds available to the Department and other Federal agencies for which such administrative and financial services are performed, at rates which will recover all expenses of operation, including accrued leave, depreciation of fund plant and equipment, amortization of Automatic Data Processing (ADP) software and systems, and an amount necessary to maintain a reasonable operating reserve, as determined by the Secretary * * *

(Underscoring added).

We believe that both of these authorities provide authority entirely apart from the Economy Act for interagency orders to be placed with franchise fund agencies. *See Continued Availability of Expired Appropriation for Additional Project Phases, supra*, 2001 U.S. Comp. Gen. LEXIS 211 at *7 - *8 (interagency agreement authorized under the Brooks Act, 40 U.S.C. § 757(c)(1)); *National Park Service Soil Surveys, supra*, 1999 U.S. Comp. Gen. LEXIS 254 at *7-*8 (multiple authorities cited); *Interagency Agreement— Administrative Office of the U.S. Courts*, 55 Comp. Gen. 1497, 1500 (1976)(interagency agreement authorized under the Brooks Act, 40 U.S.C. § 759 (1970)); *Principles of Federal Appropriations Law, 2nd Ed.*, Vol. II, 7-24. We are not alone in this belief. *See* attached Memorandum of Department of Defense Senior Counsel, dated October 19, 1999.

IV. Interagency agreements with GovWorks obligate agency funds

When agencies execute interagency agreements with GovWorks specifying exact or even estimated total funding and the purpose for which it is being transferred, the transferring agency may properly record this as an obligation. *See* 31 U.S.C. § 1501(a)(1).^{4/} This obligation must

^{4/} Section 1501(a)(1) provides that:

An amount shall be recorded as an obligation . . . only when supported by documentary evidence of—

(1) a binding agreement between an agency and another person (including an agency) that is—

(A) in writing, in a way and form, and for a purpose authorized by law;
and

(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered . . . or work or service to be provided. (Parentheses in original; underscore added).

occur during the fund's period of availability. 31 U.S.C. § 1502(a). Delivery of goods or performance of services subsequent to the period of availability does not preclude charging an appropriation when the goods or services are intended to meet an immediate need of the agency. *Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course*, 70 Comp. Gen. 296, 297 (1991).

Title 31 U.S.C., § 1501(a)(1) applies whether an interagency agreement is based on the Economy Act or on another authority. *Principles of Federal Appropriations Law, 2nd Ed.*, Vol. II, 7-23. Although interagency agreements may not be "binding" in the sense of an agreement with a private party, they are nevertheless viewed—and for the purpose of § 1501 considered binding—based on their express undertakings. *Id.* at n. 9. See also *Continued Availability of Expired Appropriation for Additional Project Phases*, 2001 U.S. Comp. Gen. LEXIS 211 at *3 and *8 (agency agreement with GSA FEDSIM obligates funds); *Interagency Agreement—Administrative Office of the U.S. Courts, supra*, 55 Comp. Gen. 1498 (execution of interagency agreement for total estimated project cost obligates funds).

V. Conclusion

For the reasons discussed here, as well as those discussed in our memorandum of March 27, 2002, we believe that funds received from agencies by GovWorks under interagency agreements may be retained in the franchise fund until expended. Please call me or Jim Weiner, at (202) 208-6201, if you have any questions.

Attachment



DEPARTMENT OF DEFENSE
WASHINGTON HEADQUARTERS SERVICES
1158 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

General Counsel

October 19, 1999

MEMORANDUM FOR DIRECTOR, ADMINISTRATION & MANAGEMENT

SUBJECT: Orders from CASUs under Franchise Fund Pilot Programs

Questions have been raised to the Executive Director National CASU program by some DoD activities regarding the authority to obtain administrative support services from CASU Network members designated as Franchise Fund programs under section 403 of the Government Management Reform Act of 1994 (GMRA)¹.

It has long been clear that absent other specific authority Federal agencies can provide to, or obtain from, each other goods and services under the provisions of the Economy Act, 31 U.S.C. §§ 1535 and 1536. It is under such general authority that CASUs provide interagency services. However, where specific statutory authority exists, the general authority of the Economy Act is not necessary or applicable.

Six Executive Agencies have been designated by the Office of Management and Budget (OMB) under section 403 of the GMRA as Franchise Fund Pilot programs and have been given specific authority to provide common administrative support services to their agencies and other agencies. This office agrees with your conclusion that interagency orders placed with Franchise Fund Pilot programs for administrative support services are, in fact, authorized by the GMRA and do not rely on the authority of the Economy Act. The franchise authority currently is set to expire on October 1, 2001, unless further extended. I have attached the current relevant provisions of the GMRA for those activities seeking guidance.

I trust this memorandum will resolve lingering questions regarding the inapplicability of the Economy Act to Franchise Fund Pilot programs, especially in regard to CASUs that fall under that program.

William E. Brazis
Senior Counsel

cc: T.R. Brooke, General Counsel
Executive Director, National CASU program

¹ See 31 U.S.C.A. 501 note. [Pub.L. 103-356, Title IV, §403, Oct. 13, 1994, 108 Stat. 3413 as amended.]

