



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office Of The General Counsel

12 September 2002

MEMORANDUM FOR AFAA/MSP (MR. ISBELL)

FROM: SAF/GCQ

SUBJECT: Military Interdepartmental Purchase Requests (MIPRs) to the General Services Administration (GSA) Under Authority of the Information Technology Management Reform Act (ITMRA)

Issues: I understand your questions pertain to instances in which Air Force organizations submit military interdepartmental purchase requests (MIPRs) to the General Services Administration (GSA) pursuant to GSA's authority under the Information Technology Management Reform Act of 1996 (ITMRA). You are concerned with funds being transferred for a procurement that is not completed until after the expiration of the appropriation for those funds. In such an instance, you ask how long after the expiration of an appropriation is it reasonable for a purchase to be consummated. You also cite instances in which one official procured contractor support for training and another procured contractor mission analysis work by placing the orders with GSA. You question the authority to order such services under ITMRA and request guidance on these issues as well. You also seek assistance in distinguishing between items authorized for purchase under authority of the Economy Act and those appropriate under ITMRA.

Discussion

The Economy Act. In the absence of any other controlling statute, MIPRs will be considered as being issued under the authority of the Economy Act, 31 U.S.C. 1535. *Obligation of Funds Under Military Interdepartmental Procurement Requests*, B-196404, 59 Comp. Gen. 563 (1980); *To the Secretary of Defense*, B-121982, 34 Comp. Gen. 418 (1955). When a transaction governed solely by the Economy Act is recorded as an obligation against appropriations whose period of availability expires at a fixed time, the Economy Act requires the deobligation of those appropriations when their period of availability for obligation expires, to the extent that the performing agency has not incurred valid obligations under the agreement.

ITMRA. If the MIPR is governed by some provision of law other than the Economy Act, the requirement to deobligate does not apply. 59 Comp. Gen. at 565; *Obligation of Funds for Purchase of Oil for Strategic Petroleum Reserve*, B-193005, Oct. 2, 1978; *To the Director, Administrative Office of the U.S. Courts*, B-186535, 55 Comp. Gen. 1497 (1976). Such is the case with regard to federal agency purchases through GSA pursuant to its authority under ITMRA, 40 U. S.C. 1412(e) (now the Clinger-Cohen Act). In accordance with that provision, Director, Office of Management and Budget, has designated GSA to carry on government wide information technology (IT) programs. Interagency agreements with GSA for use of the

programs authorized by ITMRA are subject to the requirements of ITMRA, and not the Economy Act. Such programs are funded on a reimbursable basis through the IT Fund. The IT Fund is a statutory revolving fund that is available for expenses of providing IT to federal agencies. 40 U.S.C. 757(b)(2). Funds obligated against the IT Fund are available without fiscal year limitation. When an agency transfers funds to GSA pursuant to an interagency agreement, those funds are obligated against the IT Fund. Therefore, those funds are not subject to deobligation if GSA is not able to provide the supplies or services until after the time in which those funds would have otherwise expired. However, the interagency agreement must comply with the requirements discussed below. In addition, the agency providing the funds must have a bona fide need for the supplies or services when the funds are transferred to GSA and must meet an exception to the bona fide need rule to the extent that the supplies or services will not be delivered until the year following the year for which the funds were appropriated. To the extent that funds are provided to GSA that exceed those necessary to satisfy the requirement specified in the interagency agreement, those funds are subject to deobligation once the specified requirement is delivered.

The Interagency Agreement. In order to obligate an appropriation, an agency must execute a binding written agreement before the end of the period of availability for obligation of the appropriation or fund that is used. 31 U.S.C. 1501(a). Therefore, an agency procuring supplies or services through GSA pursuant to its authority under ITMRA would need to enter into such an agreement with GSA that specifies the supplies and/or services to be procured as well as appropriated funds that are available for the purchase.

The Bona Fide Need Rule. As you indicate, your issue with regard to the time period within which a purchase must be accomplished raises the bona fide need rule. This basic principle of appropriations law is contained in 31 U.S.C. 1502(a):

The balance of an appropriation or fund is limited for obligation to a definite period. It 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 and obligated consistent with Section 1501 of this Title. However, the appropriation or fund is not available for expenditure beyond the period authorized by law.

In order to comply with the statute, a federal agency may obligate a fiscal year appropriation only to meet a bona fide agency need in the fiscal year the appropriation was made. *Funding for Air Force Cost Plus Fixed Fee Level of Effort Contract*, B-277165, Jan. 10, 2000, 2000 CPD P 54; *Funding of Maintenance Contract Beyond Fiscal Year*, B-259274, May 22, 1996, 96-1 CPD 247; *Magnavox-Use of Contract Underrun Funds*, B-207453, Sep. 16, 1983, 83-2 CPD 401; *To the Secretary of the Army*, B-115736, 33 Comp. Gen. 57 (1953). The bona fide need analysis differs depending upon whether the contract is a supply contract or a service contract. Violation of the bona fide need rule occurs when the work to be performed or the supplies to be delivered does not relate to a bona fide need of the fiscal year in which the funds were appropriated.

Supply Contracts. Generally, a bona fide need is determined by when the government actually requires the supplies being acquired. An agency must generally obligate appropriations for the

fiscal year in which the supplies will be used. *Betty F. Leatherman, Department of Commerce*, B-156161, 44 Comp. Gen. 695 (1965); *Chairman, United States Atomic Energy Commission*, B-130815, 37 Comp. Gen. 155 (1957). An agency may not obligate funds in one fiscal year where there will be no need for the supplies until the following fiscal year. *To the Director, FGMS Division*, B-95136, 61 Comp. Gen. 184 (1972).

There are however, two recognized exceptions to this rule: the lead-time exception and the stock-level exception. DOD 7000.14-R, vol.3, para. 080303; DFAS-DE 7000-4, para. 4c(1). Under the lead-time exception, the bona fide need rule is not violated where materials cannot be obtained in the same fiscal year in which they are needed and contracted for because of the delivery time necessary to obtain them. However, the time intervening between contracting and delivery cannot be excessive and the procurement cannot be for standard commercial items readily available from other sources. *Administrator, General Services Agency*, B-138574, 38 Comp. Gen. 628, 630 (1959). The lead-time exception also includes supplies that cannot be obtained until the following fiscal year due to the production lead-time necessary to produce them. 37 Comp. Gen. at 159. The stock-level exception permits an agency to purchase supplies in one fiscal year that will not be used until the following fiscal year in order to maintain adequate and normal stock levels. DFAS-DE 7000-4, para. 4c(1). However, fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited. *Mr. H.V. Higley*, B-134277, Dec. 18, 1957.

Service Contracts. For purposes of properly funding service contracts, there is a distinction between those in which the services are severable and those in which they are nonseverable. A service is nonseverable if the service produces a single task or product that cannot be subdivided for separate performance in different fiscal years. *Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course*, B-238940, 70 Comp. Gen.296 (1991); *To H. B. Herms, Department of Agriculture*, B-37929, 23 Comp. Gen. 370 (1943). In such cases, the agency must fund the entire effort with current funds at the time the contract is executed and contract performance may cross fiscal years. A service is severable if it can be separated into components that independently meet a separate need of the government. As a general rule, severable services are a bona fide need of the fiscal year in which the services are performed. *Incremental Funding of Multiyear Contracts*, B-241415, 71 Comp. Gen. 428 (1992). Therefore, severable contracts may not cross fiscal years and an agency must fund the services with funds available for the year in which the services are performed. However, a statutory exception now permits DoD agencies (and the Coast Guard) to use funds current at the time of award to finance any severable service contract for a period of performance that does not exceed one year. 10 U.S.C. 2410a.

“Information Technology.” ITMRA defines the term "information technology" with respect to an executive agency as “any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency.” 40 U.S.C. 1401(3)(A). For purposes of that definition, “equipment is used by an executive agency if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency which (i) requires the use of such equipment, or (ii) requires the use, to a significant extent, of such equipment in the performance

of a service or the furnishing of a product.” ITMRA further states that the term information technology “includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.” 40 U.S.C. 1401 (3)(B). It is apparent that the statutory definition of information technology is quite broad and that it includes services, including support services. It would appear that contractor support for training could fall within that definition if the training relates to information technology, such as training for the use of IT equipment or software. It would also appear that contractor mission analysis work would fall with the statutory definition because it would require the use of IT.

Conclusion. Supplies or services that are acquired in a fiscal year following the fiscal year in which funds for the supplies or services are appropriated must be within the scope of the supplies or services specified in the interagency agreement with GSA and must satisfy an exception to bona fide need rule. To the extent that such funds are transferred to GSA that exceed those necessary for the supplies or services identified in the interagency agreement or are not covered by an exception to the bona fide need rule, such funds are subject to deobligation. In order to determine whether specific items or services may be purchased through GSA pursuant to its authority under ITMRA, refer to the definition of information technology in the statute. Procuring through GSA or another agency an item or service that is not covered by the definition of IT under ITMRA would require the use of the Economy Act (unless there is other statutory authority that permits the transfer of funds for the interagency procurement).

If you have any questions or I can be of further assistance, please do not hesitate to contact me

Signed

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(Acquisition)