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APPROPRIATIONS/FINANCIAL MANAGEMENT - Appropriation Availability - Time availability - Bona fide needs doctrine - Applicability DIGEST: An official of the United States Department of Agriculture, Forest Service, has requested our opinion concerning thirteen matters identified by the USDA Inspector General during an agency wide audit of end of fiscal year procurements. We have applied the bona fide needs rule to each matter to determine whether the Forest Service properly obligated fiscal year funds.

Charles R. Hartgraves

Associate Deputy Chief:

This responds to your request for our opinion regarding thirteen cases identified by the United States Department of Agriculture (USDA) Inspector General as representative of issues that arose during an agency wide audit of end of fiscal year 1984 procurements. The following are our conclusions concerning each case.

Issue I

The Forest Service's Region 6 work plan for fiscal year 1984 included provisions for the purchase of 1,000 slide rules at a total cost of $15,000. However, the slide rules only cost about $3.00 each. Therefore, near the end of fiscal year 1984 the Forest Service used its National Forest System appropriation, available for the needs of fiscal years 1983 and 1984, to purchase 5,800 slide rules at a cost of $14,964. Delivery occurred in fiscal year 1985.

Without express statutory authority, an agency may not obligate or expend an appropriation made for the needs of a limited period of time for the needs of subsequent years. 31 U.S.C. Sec. 1502; B-226198, July 21, 1987. According to the Forest Service, it purchased the slide rules to meet the agency's needs for fiscal years 1985 and beyond. However, it obligated an appropriation available only to meet the needs of fiscal years 1983 and 1984. Therefore, to the extent the number of slide rules procured exceeded the number legitimately needed during fiscal years 1983 and 1984, the purchase was improperly charged to the 1983-1984 appropriation. /1/

Issue 2

At the beginning of fiscal year 1985, the Forest Service purchased supplies to replace supplies used to fight forest fires in fiscal year 1984. It obligated

its fiscal year 1984 appropriation with the cost of the supplies.

Unless otherwise authorized by law, an agency may not obligate an appropriation after its period of availability has expired. 31 U.S.C. Sec. 1501(a)(1)(B); B-224702, Aug. 5, 1987. Here, the Forest Service's fiscal year 1984 appropriation was expired and unavailable for obligation when the Forest Service entered into the contract. Therefore, the Forest Service should have obligated its fiscal year 1985 appropriation since that was the appropriation available for obligation when the agency incurred the obligation.

Issue 3

The Forest Service obligated its fiscal year 1984 annual appropriation for the costs associated with a 3-year maintenance service contract for scientific equipment. The contract called for a fixed number of preventive maintenance calls each year with unlimited emergency service and parts.

Continuing and recurring services are considered severable. 60 Comp.Gen. 219 (1981). Indeed, continuing and recurring services designed to meet the continuing operating needs of an agency are classic examples of such severable services. As such, the portion of such services needed during a fiscal year is properly chargeable to appropriations available for that fiscal year under a contractual commitment made that year. 65 Comp.Gen. 741, 743 (1986). The maintenance services involved here are of a continuing and recurring nature and thus clearly severable. See 60 Comp.Gen. 219 (1981). Further, the agency's need for parts only arose when services were performed and thus would also be considered severable. Therefore, the Forest Service improperly used fiscal year 1984 appropriations for the portion of the contract which extended beyond the end of fiscal year 1984.

Issue 4

Near the end of fiscal year 1984, the Forest Service entered into an agreement to rent equipment to receive weather information. The purpose of the agreement was to allow the Forest Service to evaluate the equipment's capabilities before it purchased the equipment. The term of the trial period was approximately three months and extended into fiscal year 1985. The Forest Service used fiscal year 1984 appropriations to fund the agreement.

Here, the Forest Service had a bona fide need to evaluate the equipment prior to purchase-- not, at this point, simply to receive weather information. It already received weather information from other sources. As such, the entire contract met a bona fide need of fiscal year 1984. See B-235678, July 30, 1990. Therefore, the Forest Service properly charged its fiscal year 1984 annual appropriation with the cost of the agreement.

Issue 5

In fiscal year 1984, the Forest Service issued a purchase order for consulting services to evaluate turnkey microwave telecommunication system proposals. However, Forest Service officials later decided to contract separately for the equipment in fiscal year 1985 and for installation in fiscal year 1986.

As a result, the consultant's evaluation services were no longer needed. Nevertheless, the Forest Service retained the consultant under the original

purchase order to inspect incoming microwave equipment and to prepare specifications for the microwave system installation contract. The Forest Service used fiscal year 1984 funds to pay for services performed in fiscal years 1985, 1986, and 1987.

An agency may only obligate fiscal year funds by a subsequent modification to a contract if the modification is within the scope of the original contract. 65 Comp.Gen. 741 (1986). Here, the work contemplated under the original agreement involved evaluation of proposals for turnkey microwave engineering systems. The work actually performed, however, involved inspection of equipment and preparation of specifications for a separate installation contract. As such, the services actually performed were substantially different from those contemplated under the original agreement and thus outside the scope of the original agreement. Therefore, the Forest Service improperly used fiscal year 1984 appropriations to pay for the services performed in subsequent fiscal years. Id.

Issue 6

The Forest Service accepted a sealed bid for a contract in fiscal year 1984 but did not notify the successful bidder in writing until early fiscal year 1985. The Forest Service obligated its fiscal year 1984 annual appropriation.

Generally, in order to obligate an appropriation, an agency must execute a binding agreement in writing before the end of the period of availability for the fiscal year sought to be charged. 31 U.S.C. Sec. 1501(a). Previously, we have held that no binding agreement arises until the agency mails acceptance of a bid to the successful bidder. Comp.Gen. 431 (1980). Here, the Forest Service did not mail acceptance of the bid until fiscal year 1985. As such, there was no agreement let alone a binding written agreement until fiscal year 1985. See 35 Comp.Gen. 272 (1955). Therefore, the Forest Service should have recorded the obligation in fiscal year 1985 and charged it against fiscal year 1985 appropriations.

Issue 7

The Forest Service awarded a contract for janitorial services near the end of fiscal year 1984 and obligated fiscal year 1985 appropriations. The term of the contract was for fiscal year 1985.

The Forest Service is specifically authorized to enter into "conditional" contracts in connection with the administration of the national forests for an ensuing fiscal year before Congress has enacted an appropriation for that fiscal year. 16 U.S.C. Sec. 557a. However, the contract must include a clause stating that the government's obligation is contingent upon the passage of an applicable appropriation. Id. Without such a clause, the contract is not conditioned upon the availability of funds. /2/

Unless authorized by law, an officer or employee of the government may not enter into a contract for the payment of money prior to enactment of an appropriation. 31 U.S.C. Sec. 1341(b). Here,the contracting officer failed to include the clause that the government's obligation was contingent upon the passage of the applicable appropriation. As such, the contract obligated the government in advance of an appropriation.

Therefore, technically at least, a violation of 31 U.S.C. Sec. 1341(b) occurred.

However, considering the extended time period since the agency contracted for the services and the fact that the agency received the benefit of the services and the contractor received payment, we see no benefit in reporting a violation at this late date.

Issue 8

Congress provided the Forest Service with a specific appropriation in fiscal year 1984 for the construction and acquisition of buildings and other facilities. Pub.L. No. 98-146, 97 Stat. 919, 939 (1983). In fiscal year 1984, the Forest Service used the more general National Forest System appropriation to acquire three modular constructed buildings.

Generally, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation. 65 Comp.Gen. 881, 884 (1986). The existence of a specific appropriation for the construction and acquisition of a building would thus preclude the Forest Service from using a more general appropriation to pay for such a purchase.

Here, each building was permanently installed and cost more than $100,000. Thus, we think it reasonable to classify them as major construction projects. See 63 Comp.Gen. 422, 435 (1984). However, even if we did not consider them "construction" projects, we would nevertheless consider them "acquisitions" for purposes of Pub.L. No. 98 146. Therefore, since Congress provided a specific appropriation for the "construction and acquisition" of buildings, the Forest Service improperly used the more general appropriation to purchase the buildings.

Issue 9

In September of fiscal year 1984, the Forest Service contracted to have two bridges painted. However, because of certain environmental considerations, the Forest Service chose not to issue a "Notice to Proceed" for performance to begin until May of fiscal year 1985.

Generally, when an agency enters into a contract in one fiscal year for services which it will not require to be performed until the succeeding fiscal year, the agency may not charge the first fiscal year's appropriation with the cost of the contract.

See B-174226, Mar. 13, 1972. Here, because of certain environmental conditions, the agency chose to delay performance until fiscal year 1985. As such, the Forest Service did not require and thus did not have a bona fide need for the services until fiscal year 1985. The Forest Service should have obligated its fiscal year 1985 appropriation under a contract made in that fiscal year. /3/

Issue 10

At the end of fiscal year 1984, the Forest Service planned to plant seedling trees in a national forest in March of the following fiscal year. Once planted, the seedlings would need protection from wildlife grazing. Therefore, on September 27, 1984, the Forest Service entered into a contract to have a fence constructed to enclose the area to be planted. The agency issued a "Notice to Proceed" on October 15 of fiscal year 1985.

A determination of what constitutes a bona fide need of a particular year depends primarily upon the facts and circumstances of a particular year. 61 Comp.Gen. 184, 186 (1981). Here, we can conceive of situations where the Forest Service would have had a legitimate need to begin construction of the fence long before the seedlings were planted- weather, size of the area to be enclosed, etc. However, it is unclear whether such circumstances existed. Therefore, based on the record provided, we are unable to determine whether the fence was a bona fide need of the fiscal year charged.

Issue 11

The Forest Service entered into a contract to lease copiers for fiscal year 1984. Under the contract, the Forest Service could exercise an option to purchase the copiers at any time during the term of the contract. Near the end of the fiscal year, the Forest Service used fiscal year 1984 appropriations to exercise its option to purchase the copiers.

Here, the Forest Service had a continuing bona fide need for copiers throughout fiscal year 1984. The need remained unchanged whether the agency leased or purchased the copiers. The lease agreement required the Forest Service to exercise the purchase option, if it chose to do so, before the end of fiscal year 1984. By exercising the option before the end of the fiscal year, the Forest Service met a bona fide need of fiscal year 1984. As such, the Forest Service properly used fiscal year 1984 funds to purchase the copiers.

Issue 12

The Forest Service issued a purchase order on September 20, 1983 to lease "Redi's Real Estate Atlas." Under the agreement, the Forest Service received a real estate atlas that was periodically updated over a twelve month period. Apparently, the only disagreement between the Inspector General and Forest Service officials on this issue is whether the agreement constituted a lease or a subscription for purposes of 31 U.S.C. Sec. 3324(d). Under 31 U.S.C. Sec. 3324(d), advance payment is authorized for "charges for a publication printed or recorded in any way for the auditory or visual use of the agency." In 1978, we concluded that for purposes of advance payments there is no meaningful difference between the purchase and rental of publications needed by the government. 57 Comp. Gen. 583 (1978). As such, we held that the rental of a microfilm library for official government use fell within the purview of the publications exemption. Id. Similarly, here, the Forest Service could properly treat an agreement to lease "Redi's Real Estate Atlas" as it would a subscription. Issue 13

At the end of fiscal year 1984, the Forest Service awarded a land line survey contract and obligated its fiscal year 1984 annual appropriation. The agency estimated that at least 180 days would be needed to perform the surveys. Work began before the end of the fiscal year charged.

The Forest Service needed the surveys to establish boundaries for planned timber sales and to prevent an alleged trespass. According to the Forest Service, it generally needs to establish boundaries for timber sales at least two years prior to the scheduled sale date. Here, the timber sales were all scheduled to be held within three years after establishment of the boundaries. Further, the agency needed the boundary to prevent the trespass immediately. As such, we do not dispute the agency's determination that each survey met a bona fide need of

the agency in fiscal year 1984.

Further, the services provided were not of a continuing and recurring nature. Each survey resulted in an end product a metes and bounds map. We would thus consider them non-severable completion type contracts properly chargeable to fiscal year 1984. See 59 Comp.Gen. 741 (1986).

I hope you find our analysis of these issues helpful and apologize for any delay. You may contact Mark Speight of my staff at 275-5644 if you have any further questions.

/1/ We note that the Forest Service could have properly charged slide rules purchased to replace stock used during fiscal years 1983 and 1984 to its fiscal year 1983-84 appropriation. See 44 Comp.Gen. 695 (1965). determination of whether the Forest Service intended to replace stock requires attention to the reasonableness of the quantities ordered in light of the agency's needs during the fiscal year. 32 Comp.Gen. 437 (1953). Here, the Forest Service's work plan and the number of slide rules actually used during fiscal year 1985 (1,500) indicates that the agency increased its purchase to 5,800 for the purpose of obligating funds before they expired at the end of the fiscal year. Since it appears that the Forest Service did not intend to use the increased number of slide rules to replace stock used during fiscal years 1983 and 1984, it should not have charged the increase to its fiscal year 1983-1984 appropriation.

/2/ The Forest Service asks whether the "Christian Doctrine" applies to this situation. Under the "Christian Doctrine," a provision required by law that a contracting officer failed to include in a government contract, either intentionally or unintentionally, will be read into the contract by operation of law. G.L. Christian Associates v. United States, 160 Ct.Cl. 1, 312 F.2d 418 (1963), cert. denied, 375 U.S. 954 (1963). Traditionally, the courts and the Comptroller General have only discussed the "Christian Doctrine" in situations involving the administration of government contracts to prevent a private contractor from avoiding certain legal requirements. See, e.g., General Services Administration v Benson, 415 F.2d 878, 880 (1969): and 47 Comp.Gen. 457 (1968). We know of no authority to apply the doctrine to relieve a government official of his responsibility under the law.

/3/ We distinguish this situation from situations in which the contractor and not, as here, the government sets the time to proceed. See, e.g., B-238940, February 25, 1991.