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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Department of Agriculture—Cooperative Agreement for Use of Aircraft

File: B-308010

Date: April 20, 2007

DIGEST

The Animal and Plant Health Inspection Service (APHIS), a division in the U.S. Department of Agriculture, did not violate the *bona fide* needs rule when it used fiscal year 2000 funds to facilitate purchase of an aircraft as part of a cooperative agreement. APHIS had the authority to enter into a cooperative agreement with Wyoming Woolgrowers Association (WWGA), but made the payments prior to a written cooperative agreement. We do not endorse APHIS's actions in expending federal funds prior to executing a cooperative agreement and remind APHIS of its duty to protect government funds from potential loss.

DECISION

The Inspector General (IG), U.S. Department of Agriculture (USDA), asked whether expenditures of appropriated funds by the Wildlife Services (WS) program office of the Animal and Plant Health Inspection Service (APHIS) violated the *bona fide* needs rule. Letter from David R. Gray, Counsel to the Inspector General, USDA, to Anthony Gamboa, General Counsel, GAO, May 30, 2006 (Request Letter). In August and December 2000, APHIS made payments to an aircraft owner to facilitate a purchase agreement between the owner and an industry group, Wyoming Woolgrowers Association (WWGA). *Id.* In August 2000, WWGA purchased the aircraft in anticipation of entering into a cooperative agreement with APHIS for use of the aircraft by WS for its wildlife predation program. *Id.*

For reasons explained below, APHIS did not violate the *bona fide* needs rule when it obligated and subsequently expended fiscal year (FY) 2000 funds to facilitate WWGA's purchase of the aircraft. The purchase agreement between WWGA and the aircraft owner credited a portion of APHIS's payment as reimbursements for past modifications to the aircraft in 1999, which the aircraft owner had made on his own initiative. While APHIS's payments reflected the costs the owner had incurred when he made the modifications, APHIS had neither instructed the owner to make

modifications nor was the payment made to induce the owner into making the modifications. APHIS was making payments to the owner to defray a portion of WWGA's purchase price of the aircraft as measured by the cost of the 1999 modifications.

Also, APHIS had the authority to enter into a cooperative agreement for use of the aircraft, but APHIS should have definitized and executed its agreement with WWGA prior to paying part of the purchase price of the aircraft. Otherwise, APHIS risked losing the money it had paid to the aircraft owner on WWGA's behalf. However, sufficient evidence exists that at the time APHIS made the payments, APHIS and WWGA had already agreed to cooperate in the purchase and subsequent exclusive use of the aircraft by APHIS. We, however, do not endorse APHIS's actions in expending federal funds prior to executing a written cooperative agreement and we remind APHIS that it is the duty of all agencies to protect government funds from potential loss.

Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position in the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal.htm. In this case, the Agriculture Department's General Counsel provided us with a copy of a May 2005 legal opinion in this matter that was prepared for the WS program office. USDA, Office of the General Counsel Memorandum for William H. Clay, Deputy Administrator, Wildlife Services, *Review of Wildlife Services Aircraft Expenditures for Violations of Appropriations Law*, May 24, 2005 (GC Memo).

BACKGROUND

APHIS conducts programs, through its WS office, to eradicate and control predatory and other injurious wild animals for the protection of domestic livestock. GC Memo, at 1. WS cooperates with states and other cooperators, including industry groups, wherein both parties provide resources to meet the objectives of the program. *Id.*

WS uses aircraft to implement the wildlife predation program. *Id.* Prior to FY 2000, APHIS leased its aircraft for the wildlife predation program in Wyoming by competitive solicitation. *Id.* Because of high leasing costs, APHIS sought other means of procuring use of aircraft and ultimately cooperated with an industry group, WWGA, who purchased an aircraft for APHIS's exclusive use. *Id.*

APHIS helped WWGA locate an acceptable aircraft to purchase. *Id.* WWGA entered into a purchase agreement with Baker Air Service (Baker) for the aircraft on August 1, 2000. *Id.* at 2; USDA Inspector General, *Audit Report: Animal and Plant Health Inspection Service, Wildlife Services, Aircraft Acquisition*, USDA/OIG-A/33099-1-KC (Sept. 2004) (IG Report). APHIS had previously leased this particular aircraft from Baker in the summer of 1999. IG Report, at 4. Earlier in 1999, before leasing to APHIS, Baker had modified the aircraft to conform to APHIS standards.

Id. Baker wanted to recoup the costs of these 1999 modifications as part of the purchase price of the aircraft. GC Memo, at 2. Also, Baker's aircraft required a new engine and other alterations in order to comply with APHIS standards. Baker agreed to upgrade the plane but added these costs to WWGA's purchase price. *Id.*

The final cost of the aircraft exceeded WWGA's available funds, and APHIS agreed to pay the costs above what WWGA could afford to spend. *Id.* Therefore, as part of the negotiations for the purchase of the aircraft by WWGA, and written as terms of the purchase agreement between Baker and WWGA, Baker agreed to sell the aircraft to WWGA for $34,450 on the condition that APHIS pay Baker an additional $15,050 to cover the costs of Baker's modifications to the aircraft in 1999. GC Memo, at 2; IG Report, at 5. Additionally, the purchase agreement between Baker and WWGA made sale of the aircraft contingent on APHIS either furnishing or compensating Baker for other alterations Baker would make to the aircraft, including a new engine, in the amount of $33,450. GC Memo, at 2.

WWGA paid Baker its share of the purchase price, $34,450, on August 8, 2000. *Id.* In August and December 2000, APHIS paid its share of the purchase price. On August 9, 2000, APHIS issued a purchase order in the amount of $24,500 to an aircraft engine supplier, enabling Baker to acquire a new engine for the aircraft. *Id.* On August 29, 2000, APHIS paid Baker $15,050, covering Baker's 1999 modifications to the aircraft. *Id.* APHIS paid Baker a total of $10,157.92 in December 2000 to cover Baker's costs of additional alterations completed in October 2000. *Id.*

On November 20, 2000, 3 months after WWGA's purchase of the aircraft, APHIS entered into the cooperative agreement with WWGA for APHIS's use and management of an aircraft owned by WWGA for aerial hunting services under the wildlife predation program. *Id.*

On September 30, 2004, the IG published the results of a review of the APHIS aircraft cooperative agreement. IG Report. The IG determined that APHIS personnel acted inappropriately in facilitating WWGA's purchase of the aircraft. *Id.* at 3. The IG determined that APHIS likely violated various appropriations law provisions and recommended that APHIS request a legal opinion from the USDA General Counsel's Office (GC) as to whether such violations occurred. *Id.* at 8. The GC determined that, while the transactions made by APHIS to facilitate the cooperative agreement, viewed in their individual parts, appeared problematic, APHIS did have the authority to enter into a cooperative agreement with the industry group and had available appropriations to fund the agreement.[1] GC Memo, at 3. The IG still questions the

[1] Also, both the IG and the GC concluded that APHIS personnel violated purchase card rules by splitting the cost of the final payment of $10,157.92 into five invoices in order to allow for use of purchase cards. GC Memo, at 9–10; IG Report, at 10–11.

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propriety of the expenditures of appropriated funds and requests our decision in this matter. Request Letter.

DISCUSSION

The issue presented to us by the IG is whether there was a *bona fide* need in FY 2000 for the payment for modifications of $15,050 that Baker made to the aircraft in FY 1999. Request Letter. We answer that question below. However, the facts presented to us raise additional questions about APHIS's actions. Therefore, we not only examine the *bona fide* needs question, but we look at APHIS's authority to enter into cooperative agreements for use of aircraft and the legality of APHIS's payments to facilitate WWGA's purchase of an aircraft at a time when APHIS had not definitized or executed a written cooperative agreement with WWGA. We start our discussion with the *bona fide* needs rule.

Bona Fide Needs Rule

The IG questions the propriety of the payments of appropriated funds by APHIS to Baker for improvements, modifications, and other upgrades to an aircraft purchased by WWGA. Request Letter. The GC identified three separate payments to Baker. GC Memo, at 2. Only one of the three payments is at issue here: the payment of $15,050 for modifications made by Baker to the aircraft in 1999.[2] APHIS obligated FY 2000 funds. The IG was specifically troubled by this payment because Baker made the improvements to the plane in 1999, over a year before the plane was bought by WWGA. Request Letter. This decision addresses whether APHIS violated the *bona fide* needs rule by obligating FY 2000 funds.

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The IG and GC agree that APHIS's use of purchase cards was improper, *id.*, and, therefore, this question was not presented to GAO.

[2] The IG examines APHIS's payments by looking at the specific objects for which the funds were used. Besides the $15,050 for 1999 modifications, APHIS also paid $24,500 to an engine supply company for Baker in FY 2000. APHIS obligated FY 2000 funds for this purchase. Therefore, the IG does not question the use of FY 2000 funds for this payment. APHIS made a final payment of $10,157.92 to Baker for charges for alterations on the aircraft in FY 2001. APHIS obligated FY 2001 funds for the final payment. *Id.* The GC directed AHPIS to deobligate the FY 2001 funds used for the final payment and obligate its FY 2000 appropriation. Therefore, this payment is also not at issue.

The *bona fide* needs rule, derived from the time statute, 31 U.S.C. § 1502,[3] addresses the availability of an agency's appropriation as to time. 73 Comp. Gen. 77, 79 (1994); 64 Comp. Gen. 410, 414--15 (1985). The rule is that an appropriation is available for obligation only to fulfill a genuine or *bona fide* need of the period of availability for which it was made. 73 Comp. Gen. at 79; B-289801, Dec. 30, 2002. It applies to all federal government activities carried out with appropriated funds enacted for a fixed period of time, including contract, grant, and cooperative agreement transactions. 73 Comp. Gen. at 78--79. An agency's compliance with the *bona fide* needs rule is measured at the time the agency incurs an obligation, and whether there is a *bona fide* need at the point of obligation depends on the purpose of the transaction and the nature of the obligation being entered into. 61 Comp. Gen. 184, 186 (1981). At issue here is whether APHIS's *bona fide* need arose when the modifications to the aircraft were made or whether the *bona fide* need arose when APHIS acted to facilitate WWGA's acquisition of the aircraft.

The GC opined that APHIS's *bona fide* need arose at the time the purchase agreement was entered into on August 1, 2000, and not in FY 1999 when Baker modified the aircraft. GC Memo, at 9. The GC determined that when WWGA and Baker signed the purchase agreement, APHIS had a *bona fide* need to pay Baker in order to ensure that APHIS could successfully execute the later cooperative agreement with WWGA. *Id.* Therefore, according to the GC, the payments in August 2000 were necessary to guarantee the subsequent cooperative agreement, and thus FY 2000 funds were appropriately obligated. *Id.*

We agree with the GC's determination. APHIS, during the negotiations for, and the signing of, the purchase agreement, acted in anticipation of the cooperative agreement. APHIS was neither paying for alterations nor directly reimbursing Baker for the costs of the alterations. Instead, APHIS was making a payment to facilitate WWGA's purchase of the aircraft, albeit in amounts related to specific improvements to the aircraft. Therefore, the proper event by which to measure the *bona fide* need was at that time when APHIS acted to facilitate WWGA's purchase of the aircraft. It was at that point, and not previously, that APHIS had a *bona fide* need, namely, the need to ensure that WWGA was able to purchase the aircraft. *See* 37 Comp. Gen. 155, 159 (1957) (*bona fide* need determination depends upon the facts and circumstances of the particular case). Therefore, the actual date that Baker completed the modifications is irrelevant in this situation.

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[3] "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability." 31 U.S.C. § 1502(a).

Cooperative Agreement for Use of Aircraft

Notwithstanding our *bona fide* needs conclusion, questions remain regarding APHIS's decision to pay Baker to facilitate WWGA's purchase of an aircraft.[4] The facts of this case present an unusual chain of events leading up to the cooperative agreement between APHIS and WWGA. If APHIS's contribution to the cooperative agreement was a payment to Baker to facilitate WWGA's purchase from Baker, one would have expected APHIS to have entered into a written cooperative agreement with WWGA for the aircraft prior to paying Baker, and the cooperative agreement would have outlined APHIS's share of the costs. Without a written agreement in place, APHIS risked losing the money APHIS had paid to Baker on WWGA's behalf. However, the evidence indicates that at the time APHIS made the payment, APHIS and WWGA had already agreed to cooperate for use of the aircraft.

Like contracts and grants, cooperative agreements are commonly used funding vehicles for agencies to provide financial assistance. 67 Comp. Gen. 13, 14–15 (1987); 64 Comp. Gen. 582, 584 (1985). The purpose of a contract is to acquire goods or services, 31 U.S.C. § 6303; the purpose of a grant is to provide financial assistance, *id.* § 6304. Generally, the purpose of a cooperative agreement is to provide financial assistance to a recipient to carry out a public purpose instead of the agency acquiring property or services directly, as the agency would under a contract. *Id.* § 6305. Unlike grants, the agency as a party to a cooperative agreement is substantially involved with the recipient who is carrying out the activity contemplated in the agreement. *Id.*; 67 Comp. Gen. at 15. APHIS likens the cooperative agreement arrangement to a partnership between the agency and what it calls the nonfederal cooperator.[5]

(1) Authority to enter into cooperative agreement for use of an aircraft

Under the annual Agriculture appropriations acts, APHIS has long been authorized to use cooperative agreements with a state or cooperator "to carry out programs to protect the nation's animal and plant resources." *See*, *e.g.*, Pub. L. No. 106-387, § 713, 114 Stat. 1549A-1, 1549A-29 (Oct. 28, 2000). APHIS is authorized to conduct various animal control programs. 7 U.S.C. §§ 426–426c. Section 426 authorizes the Secretary

[4] The USDA GC memorandum provides a thorough discussion of APHIS's authority to enter into a cooperative agreement for the lease of an aircraft, to use appropriated funds for lease of an aircraft, and to pay amounts to Baker under the purchase agreement, and we find it unnecessary to repeat that discussion in full. *See* GC Memo.

[5] USDA-APHIS-Marketing and Regulatory Programs Business Services, *Frequently Asked Questions*, *available at* www.aphis.usda.gov/mrpbs/fmd/agreements_faq.html (last visited Apr. 19, 2007).

of Agriculture to "conduct a program of wildlife services with respect to injurious animal species and take any action the Secretary considers necessary in conducting the program." The Secretary is required to administer the program "in a manner consistent with all of the wildlife services authorities in effect on the day before October 28, 2000." *Id.* § 426. On October 27, 2000, section 426 authorized the Secretary to conduct investigations, experiments, and tests where necessary in order to determine, demonstrate, and promulgate the best methods of eradication, suppression, or bringing under control various injurious wildlife on areas of public and private land. 7 U.S.C. § 426 (2000). The Secretary was also directed to protect stock and other domestic animals from predatory and other animals and was to conduct campaigns for the destruction or control of these animals. *Id.* Section 426, at that time, also provided that "in carrying out the provisions of [section 426] the Secretary of Agriculture may cooperate with States, individuals, and public and private agencies, organizations, and institutions." *Id.*

The GC argues that "WS entered into the Cooperative Agreement here to further the wildlife predation program, the purpose of which is to protect animal resources in the form of various livestock from predatory animals." GC Memo, at 5. We agree. The agreement itself says, "These aircraft will be used by WS primarily to provide aerial hunting services to Wyoming livestock producers and others requesting control of predatory animals." *Cooperative Agreement Between Wyoming Wool-Growers Association (WWGA) and United States Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS), Wildlife Services (WS), Regarding Use of WWGA Fixed-Wing Aircraft by APHIS-WS*, Nov. 2000. In our view, APHIS's authority to enter into cooperative agreements for this purpose was broad enough for use of aircraft, so long as the aircraft was used to carry out the section 426 programs. *See generally* B-306748, July 6, 2006; B-303145, Dec. 7, 2005 (appropriations are available for expenses which are necessary and incident to the proper execution or achievement of the object of the appropriation).

(2) Authority to use appropriated funds for a cooperative agreement for use of aircraft

Subsection 1343(d) of title 31, United States Code, prohibits an agency from using its appropriation to buy, maintain, or operate an aircraft unless its appropriation specifically authorizes the purchase, maintenance, or operation of an aircraft. At the time of this transaction, APHIS's annual appropriation was available for "the operation and maintenance of aircraft and the purchase of not to exceed four, of which two shall be for replacement only." *See, e.g.*, Pub. L. No. 106-78, title I, 113 Stat. 1135, 1142--43 (Oct. 22, 1999).

In this case APHIS was not purchasing aircraft; APHIS, instead, entered into a cooperative agreement for use of WWGA's aircraft. Because the prohibition of 31 U.S.C. § 1343(d) is on the purchase of aircraft and APHIS did not purchase the aircraft, the prohibition does not apply here. We presume that Congress carefully crafted the language of the prohibition and when it limited only the *purchase* of

aircraft, it did not otherwise intend to limit agencies' *use* of aircraft. Compare, for example, subsection 1343(d) to subsection 1343(b), which prohibits agencies from buying *or leasing* passenger motor vehicles unless specifically provided by law. 31 U.S.C. § 1343(b)(2). The subsection (b) prohibition against leasing was added in 1946. At that same time, subsection (d) was enacted to establish the prohibition on the purchase of aircraft, but Congress did not mention the leasing of aircraft. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (*quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). At the same time Congress amended subsection 1343(b) to include a prohibition on leasing passenger motor vehicles, it also added the provision to prohibit the purchase of aircraft, omitting any prohibition on the lease of aircraft. Therefore, we assume that Congress omitted the prohibition against leasing aircraft intentionally. Congress, having affirmatively limited agencies' purchase and leasing of passenger motor vehicles at the same time it limited only purchase of aircraft can be presumed not to have limited agencies' use of aircraft by lease or otherwise.

Under Agriculture's annual appropriation, APHIS is authorized to use appropriated funds "to discharge the authorities of the Secretary of Agriculture under [7 U.S.C. §§ 426--426b]." Pub. L. No. 106-78. Therefore, APHIS had authority to enter into a cooperative agreement with WWGA, and APHIS's appropriation is available to fund the costs under the agreement.

(3) Authority to pay amounts to Baker in advance of the written cooperative agreement

One final issue remains: whether APHIS had the authority to pay amounts to Baker in advance of the written cooperative agreement. If APHIS had entered into a cooperative agreement with WWGA prior to August 2000, under which APHIS agreed to make a payment to Baker to facilitate WWGA's purchase of the plane from Baker, we would not be presented with this issue. Unfortunately, this version of events is not what actually took place. APHIS, instead of making payments under a written, signed agreement, made its payments directly to Baker prior to the execution of the cooperative agreement with WWGA. In this case, however, it is important to examine the course of dealing between APHIS and WWGA because the record indicates that APHIS and WWGA had agreed to cooperate at the time APHIS made payments to Baker. "A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Restatement (Second) of Contracts § 223 (1981). *See also Brines v. XTRA Corp.*, 304 F.3d 699, 703 (7th Cir. 2002).

The course of dealing between APHIS and WWGA lends support to the finding that APHIS and WWGA had agreed to cooperate before APHIS made payments to Baker.

First, it was APHIS that sought out WWGA as a cooperator. GC Memo, at 1. Apparently, because of rising aircraft leasing costs, APHIS was looking to enter into a cooperative agreement for use of an aircraft and approached an industry group that did not yet own an aircraft. *Id.* APHIS had worked with woolgrowers associations under cooperative agreements in several states to carry out the wildlife predation program, and WWGA was no exception. *Id.* APHIS helped WWGA find the aircraft. *Id.* When WWGA notified APHIS that it did not have the necessary funds to acquire the aircraft, APHIS agreed to share the cost of the aircraft, to the extent of the past modifications and future alterations that Baker made, in order to facilitate WWGA's acquisition. *Id.* at 2. Also, prior to the cooperative agreement with WWGA, APHIS had leased the same model plane from another party. On August 4, 2000, before making any payments to Baker and before entering into the cooperative agreement, APHIS notified the previous lessor that APHIS would not renew the option on the aircraft because it was transferring its requirement for a plane to WWGA under the cooperative agreement. *See Baine Clark*, B-289545, Feb. 5, 2002.[6] It is clear that APHIS made payments to Baker only to aid WWGA in procuring the plane for APHIS's exclusive use under the cooperative agreement, and sufficient evidence exists to show that APHIS and WWGA had agreed to cooperate before APHIS made any payments towards the aircraft purchase.

While we acknowledge that no real harm came from APHIS's payments to Baker, we do not endorse APHIS's actions in expending federal funds prior to executing a written cooperative agreement. If something had prevented APHIS and WWGA from entering into the cooperative agreement, the government could have lost the money APHIS paid to Baker on WWGA's behalf. In addition, once executed, the cooperative agreement here did not clearly and affirmatively set out all of the duties and responsibilities of the two parties. APHIS's failure to put into writing the entirety of its relationship with WWGA required us to rely on WWGA's purchase agreement with Baker, and addenda thereto, and APHIS's course of dealing with WWGA. We remind APHIS that it is an agency's responsibility to protect governmental funds from potential loss.[7] *See* 65 Comp. Gen. 806, 809 (1986); B-180713, Apr. 10, 1974. Going forward, APHIS should be aware of the dangers and take steps to alleviate the possibility of loss. Written agreements provide certainty and definition to any relationship between the government and another party.

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[6] The previous aircraft lessor filed a bid protest with our Office protesting APHIS's decision to use a cooperative agreement for use of aircraft instead of a procurement contract for lease. The facts above were presented in that protest. We did not examine the merits of the case because it was dismissed due to a procedural deficiency.

[7] See, for example, 31 U.S.C. § 3324, which generally prohibits advance payments under a contract. The primary purpose of this prohibition is to protect the government from nonperformance.

CONCLUSION

We concur with the USDA GC that APHIS did not violate the *bona fide* needs rule when it obligated and subsequently made payments to Baker to facilitate WWGA's acquisition of Baker's aircraft. While APHIS had the authority to enter into the cooperative agreement for use of the aircraft, APHIS made payments prior to a written cooperative agreement. We do not endorse APHIS's actions in expending federal funds prior to executing a cooperative agreement and we remind APHIS that it is the duty of all agencies to protect government funds from potential loss.



Gary L. Kepplinger
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