

Contract and Fiscal Law Note

The Current Scope of 10 U.S.C. § 2410a

“There is no exception to the rule that every rule has an exception.”¹

I. Introduction

Title 10, United States Code, section 2410a (2410a) provides commanders with a great deal of flexibility with regard to funding severable service contracts that cross fiscal years.¹ Congress first provided the authority in 1985,² and since then, the Government Accountability Office (GAO) has issued three opinions regarding the scope of 2410a, including one in January 2015.³ The purpose of this article is to provide the current limits of 2410a through analysis of the GAO opinions.

II. Background

Congress enjoys the power of the purse⁴ and exerts its control over federal spending in three primary ways: limiting the purpose, limiting the period of availability, and limiting the amount of each appropriation.⁵ Therefore, analysis of purpose, time, and amount is typically the starting point for fiscal law practitioners. The time principle⁶ requires federal agencies to obligate funds only for legitimate—or bona fide—needs that arise within an appropriated fund’s period of availability as established by Congress.⁷ To determine when the bona fide need arises, one must look to what is being procured.⁸

¹ James Thurber, *available at* <http://www.brainyquote.com/quotes/quotes/j/jamesthurb383659.html>.

¹ 10 U.S.C. § 2410a (2015).

² Department of Defense Appropriations Act, 1986, Pub. L. 99-190 § 8005, 99 Stat. 1185 (Dec. 19, 1985).

³ Matter of: U.S. Army Europe—Obligation of Funds for an Interagency Acquisition, B-323940 (Comp. Gen. Jan. 7, 2015), *available at* <http://www.gao.gov/assets/670/667868.pdf> [hereinafter Matter of USAREUR].

⁴ U.S. CONST. art I, § 9, cl. 7; U.S. GOV’T ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, vol I, ch. 1, at 1-3 to -7 (3d ed. 2004).

⁵ CONT. & FISCAL L. DEP’T, THE JUDGE ADVOC. GEN.’S LEGAL CENTER & SCH., U.S. ARMY, FISCAL LAW DESKBOOK, at 1-6 (2014) [hereinafter FISCAL LAW DESKBOOK].

⁶ 31 U.S.C. § 1502 (2015).

⁷ *Id.*; FISCAL LAW DESKBOOK, *supra* note 6, at 1-6.

⁸ FISCAL LAW DESKBOOK, *supra* note 6, at 3-8 to -10 (When the bona fide need arises depends upon what is being acquired. For supply contracts, the bona fide need arises when the items or goods are actually required, that is, when the item will be used or consumed. For severable services, the bona fide need arises when the services are actually rendered. For non-severable service contracts, construction contracts, and training contracts, the bona

As a general rule, severable service contracts address a recurring or continuing need, and the bona fide need arises at the time the services are provided.⁹ Therefore, a severable services contract that crosses fiscal years and is funded with the initial year’s appropriation violates the bona fide needs rule because the agency is using the initial year’s appropriation to fund a future year need.¹⁰ However, 2410a provides the Departments of Defense and Homeland Security with an exception to the general rule. It states:

The [agencies] may enter into a contract for [severable services, maintenance, and leases] 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. . . .

Therefore, based upon this statutory exception, the military departments may use current funds to pay for a severable services contract that extends into the next fiscal year so long as the contract does not exceed twelve months. The application of 2410a is typically straight forward, however, there are unusual circumstances in some cases that warrant further analysis. The GAO has opined in three such cases.

III. Applying the Exception

The GAO first addressed the application of 2410a in a 1996 opinion regarding an Air Force vehicle maintenance contract.¹¹ In 1990, the Air Force entered into a one-year contract with four one-year options.¹² The first year of the contract was from October 1, 1991, until September 30, 1992.¹³ During the third option year, the Air Force decided to restructure some of its support contracts so they did not

fide need generally arises at contract execution even though the period of performance may extend into future fiscal years.) The scope of this paper is limited to severable service contracts.

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, B-317636, SEVERABLE SERVICE CONTRACTS 3 (2009), *available at* <http://www.gao.gov/assets/390/385620.pdf>.

¹⁰ *Id.*

¹¹ Matter of: Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274 (Comp. Gen. May 22, 1996), *available at* <http://www.gao.gov/products/476343#e-report>.

¹² *Id.* at 2.

¹³ *Id.*

all conclude at the end of the fiscal year.¹⁴ Therefore, the Air Force modified the third option year of the vehicle maintenance contract to end one month early, on August 31, instead of September 30, and changed the fourth option year to run from September 1, 1994, until August 31, 1995.¹⁵ To complicate matters, the Air Force only had enough funds from fiscal year 1994 appropriations to fund the first four months of the newly-structured option year.¹⁶ In light of 2410a's one-year limitation, a certifying official was concerned that the Air Force was exceeding its authority by paying for fifteen months of performance—eleven in option year three and four in option year four—all with fiscal year 1994 funds.¹⁷

The GAO opined that the statute's one-year limitation applies to contracts, not payments.¹⁸ While 2410a limits a contract period to one year, it does not limit an agency's authority to make more than one year's worth of payments for severable services.¹⁹ The GAO states, "The fact that fiscal year funds may be used to make payments for more than 12 months of services is a consequence of the law that . . . has 'no legal significance.'"²⁰

In 2009, the GAO provided its opinion to Congress on a novel issue with regard to 2410a: in light of the statute's one year limitation, may an agency use multiple-year or no-year funds to secure severable services contract for periods of performance exceeding one year?²¹ The GAO analyzed the statute, its legislative history, and its implementing provisions in the Federal Acquisition Regulation.²² The GAO concluded that the language in 2410a ". . . clearly indicates that the [statute] cover[s] contracts funded by annual funds," and was not intended to limit an agency using multiple-year or no-year funds from entering into severable service contracts lasting more than one year.²³

The most recent question answered by GAO is whether 2410a authority applies to interagency acquisitions.²⁴ In

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3. The certifying official was also concerned about a possible violation of the Anti-Deficiency Act (ADA), but GAO concluded that the Air Force had not violated the ADA. *Id.* at 3, 6-7.

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 4-5.

²⁰ *Id.* at 5.

²¹ U.S. GOV'T ACCOUNTABILITY OFFICE, B-317636, SEVERABLE SERVICE CONTRACTS 1 (2009), available at <http://www.gao.gov/assets/390/385620.pdf>.

²² *Id.* at 4-6.

²³ *Id.* at 4.

²⁴ Matter of USAREUR, *supra* note 4.

early September 2011, United States Army Europe (USAREUR) contracted, via an interagency acquisition, with the Government Services Agency (GSA) for GSA to provide a series of training classes to USAREUR from 12 September 2011 until 16 December 2011.²⁵ The GAO opined that USAREUR could rely upon 2410a and use fiscal year 2011 funds to pay for the training.²⁶

In arriving at its conclusion, GAO noted that it had previously held "that a series of training courses are continuing and recurring in nature and are severable, representing a bona fide need of the time period in which each individual training course is delivered."²⁷ It noted that 2410a provides the military with a mechanism to fund a severable services contract in one fiscal year even if the contract crosses into the next fiscal year.²⁸ The GAO concluded that interagency acquisitions are akin to contractual transactions, and 2410a is sufficiently broad to cover certain types of them.²⁹

Importantly, GAO notes that 2410a would not provide authority to cross fiscal years in an interagency acquisition entered into under the authority of the Economy Act.³⁰ The Economy Act requires an ordering agency using one-year funds to deobligate the funds at the end of the fiscal year to the extent the performing agency has not performed.³¹ This requirement is unique to the Economy Act and "does not apply to transactions governed by statutory authority such as the GSA Acquisition Services Fund, which has no such deobligational requirement."³² Therefore, practitioners must look to the statutory authority upon which an interagency acquisition was entered to determine 2410a's applicability.

IV. Conclusion

The statutory exception to the bona fide needs rule contained in 2410a has remained relatively unchanged in the last thirty years. Very few legal opinions discuss its application, but the ones that do provide practitioners with a clear picture of its current limits. Now that it may be used for interagency acquisitions outside of the Economy Act,

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 3.

²⁸ *Id.*

²⁹ *Id.* at 3-4 ("In our view, given the contractual nature of interagency agreements, an agency should not be disadvantaged when acquiring goods or services from another agency as compared to acquiring goods or services from a private vendor.").

³⁰ *Id.* at 4 n.3 (citing the Economy Act at 31 U.S.C. § 1501(a)(1)).

³¹ Matter of USAREUR at 4 n.3 (citing the Economy Act at 31 U.S.C. § 1535(d)(additional citations omitted)).

³² Matter of USAREUR at 4 n.3.

commanders have even more flexibility with regard to severable service contracts.

—Major John H. Montgomery