

## FISCAL LAW

### Purpose

#### *Food at Formal Meetings and Conferences—Not Just for Employees Anymore, Under New GAO Rule*

In the past, the Government Accountability Office (GAO) has allowed the payment of meals for civilian employees attending formal meetings or conferences under the authority of section 4110 of the Government Employees Training Act, which permits the government to pay for “expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.”<sup>1</sup> This exception to the general rule that food for government employees is a personal expense is commonly known as the “formal meetings and conferences” exception. Because it is based on Title 5, United States Code, rather than under Title 10, this exception applies only to civilian employees and not to military members. Under a separate “training” exception, the GAO has also allowed agencies to pay for employee meals when “necessary to achieve the objectives of a training program,”<sup>2</sup> under the authority of 5 U.S.C. § 4109.<sup>3</sup>

This year, in *National Institutes of Health—Food at Government-Sponsored Conferences*,<sup>4</sup> the GAO created a new exception for that would permit agencies to pay for meals of attendees at government-sponsored conferences. In response to a certifying officer at the National Institutes of Health (NIH), the GAO opined that the agency may, under certain conditions, provide food to conference attendees at a NIH-sponsored conference on Parkinson’s disease.<sup>5</sup> The significance of this decision is not that the conference was hosted by the government,<sup>6</sup> rather, it is that agencies may now provide meals to both its own attendees and non-agency attendees, to include non-government attendees, paid for with the agency’s appropriated funds. The GAO reasoned that under some circumstances meals “are not significantly different” from other legitimate conference expenses. After discussing the criteria under which meals for employees attending formal conferences or training programs have been deemed “necessary expenses” of their attendance at conferences or training, the GAO opined that “similar criteria should apply to determining whether the costs of meals or refreshments are allowable expenses of the agency hosting a formal conference.”<sup>7</sup> Under appropriate circumstances, meals for attendees—even if the attendees are non-government personnel—may be deemed allowable conference expenses:

We think the presence of private citizens or federal employees from other agencies who are essential to achieve the program or conference objectives should not change the character of the expense from allowable to unallowable. The fact that the meals and refreshments also are available to private citizens and employees of other agencies should not be an obstacle so long as an administrative determination is made that their attendance is necessary to achieve the conference objectives.<sup>8</sup>

The GAO stated that once the agency hosting the conference makes the administrative determination that the attendance of the non-agency personnel is “necessary to achieve the conference objectives,” the criteria for determining

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<sup>1</sup> Government Employees Training Act, 5 U.S.C.S. §§ 4101-4118 (LEXIS 2005).

<sup>2</sup> See, e.g., *Coast Guard—Meals at Training Conference*, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992). Under this exception, finding that the provision of meals to employees is “necessary to achieve the objectives of a training program” generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. See *Coast Guard—Coffee Break Refreshments at Training Exercise—Non-Federal Personnel*, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (June 16, 1993).

<sup>3</sup> 5 U.S.C.S. § 4109 (LEXIS 2005). While Title 5 applies only to civilian employees, the “training” exception also applies to service members under the authority of 10 U.S.C.S. § 4301, 10 U.S.C.S. § 9301, or 14 U.S.C.S. § 469.

<sup>4</sup> B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

<sup>5</sup> *Id.* at \*3.

<sup>6</sup> While the “formal meetings and conferences” exception does not apply to “purely internal” government meetings/conferences, see, e.g., *Meals for Attendees at Internal Government Meetings*, B-230576, 68 Comp. Gen. 604 (Aug. 14, 1989), nothing precludes its application to government-sponsored meetings/conferences per se, so long as the formal meeting/conference involves “topical matters of general interest to governmental and nongovernmental participants.” *Pension Benefit Guarantee Corporation—Provision of Food to Employees*, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996). In contrast, the “training” exception is not limited in this manner, and applies to even purely internal training programs.

<sup>7</sup> *National Institutes of Health—Food at Government-Sponsored Conferences*, 2005 U.S. Comp. Gen. LEXIS 42, at \*11.

<sup>8</sup> *Id.* at \*12.

whether the cost of the meals are allowable expenses are essentially the same as for conferences sponsored by nongovernmental entities.<sup>9</sup> Specifically, the criteria are:

- (1) the meals and refreshments are incidental to the formal conference, (2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendees' full participation in essential discussions, lectures, or speeches concerning the purpose of the formal conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, lectures, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served.<sup>10</sup>

This three-part test is a near-verbatim adaptation of the criteria for the "formal meetings and conferences" exception, though it does represent a new, improved articulation of that criteria, applicable to both government sponsored and non-government sponsored conferences. Under the "formal meetings and conferences" exception, the criteria was that: (1) the meals are incidental to the conference or meeting; (2) attendance at the meals is necessary to full participation in the meeting; and (3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.<sup>11</sup> Arguably, the second and third prongs of that test were redundant. To clarify that "stand-alone" luncheons do not meet the three-part test, the GAO has also previously clarified that the meal must be "part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial functions that take place separate from the meal."<sup>12</sup> In 1993, that clarification appeared as an enumerated fourth prong to the test in another GAO opinion.<sup>13</sup> In adapting the criteria for the newly-enunciated exception for food at government-sponsored conferences, the GAO in this recent decision refined the criteria, eliminating the redundancy and restoring it to a three-part test.

The GAO also noted that the "level of formality required is the same as what one would expect of a conference sponsored by a nongovernmental entity."<sup>14</sup> In order to be deemed a "formal" conference, the government-sponsored conference "must involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants."<sup>15</sup> The conference must also have sufficient indicia of formality, including "registration, a published substantive agenda, and scheduled speakers or discussion panels."<sup>16</sup>

On its face, this new GAO decision may appear to be a natural extension of prior decisions. However, it actually represents a departure from past decisions. In the past, the GAO sanctioned paying for meals only where there was a specific statutory basis for doing so.<sup>17</sup> For example, in 1993, the GAO considered the payment for refreshments at a Coast Guard emergency response training exercise in which federal and non-federal personnel participated as a group.<sup>18</sup> Under the facts of that case, the provision of refreshments was found to have been "necessary to achieve the objectives of the training program," so payment for the refreshments for the federal personnel were appropriate under the applicable training statutes.<sup>19</sup> The GAO noted that "an agency may provide refreshments only when expressly authorized by statute,"<sup>20</sup> and found no express statutory

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*13.

<sup>11</sup> *See, e.g.*, Gerald Goldberg, B-198471, 1980 U.S. Comp. Gen. LEXIS 3212 (May 1, 1980); Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992). The third prong of this test is sometimes articulated as: "the employees are not free to take meals elsewhere without missing essential formal discussions, lectures, or speeches concerning the purpose of the meeting." *See, e.g.*, Corps of Engineers—Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (May 12, 1993).

<sup>12</sup> Randall R. Pope & James L. Ryan—Meals at Headquarters Incident to Meetings, B-215702, 64 Comp. Gen. 406 (Mar. 22, 1985). *See also* J.D. MacWilliams, B-200650, 65 Comp. Gen. 508 (Apr. 23, 1986).

<sup>13</sup> Corps of Engineers—Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (May 12, 1993).

<sup>14</sup> National Institutes of Health—Food at Government-Sponsored Conferences, 2005 U.S. Comp. Gen. LEXIS 42, at \*13.

<sup>15</sup> *Id.* at \*13-14.

<sup>16</sup> *Id.* at \*14.

<sup>17</sup> Decisions addressing food at conferences and training are typically based on section 4109 or 4110 of Title 5, United States Code.

<sup>18</sup> Coast Guard—Coffee Break Refreshments at Training Exercises—Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (June 15, 1993).

<sup>19</sup> For Coast Guard personnel, the applicable training statute is 14 U.S.C.S. § 469 (LEXIS 2005). For federal civilian personnel, the applicable statute is 5 U.S.C.S. § 4109.

<sup>20</sup> Coast Guard—Coffee Break Refreshments at Training Exercises—Non-Federal Personnel, 1993 U.S. Comp. Gen. LEXIS 639, at \*7.

authority that would cover the refreshments for the non-federal personnel participating in the exercise.<sup>21</sup> Recognizing that the Coast Guard “had cogent reasons for providing the refreshments to all attendees on the same basis, and might reasonably have assumed that it was authorized to do so,” the GAO elected not to object to payment of the voucher in that particular case.<sup>22</sup> “However,” the GAO warned, “future conferences should not include providing refreshments at government expense to non-federal personnel.”<sup>23</sup> Thus, the GAO’s past insistence that food may only be provided under express statutory authority is difficult to reconcile with this year’s decision in *National Institutes of Health—Food at Government-Sponsored Conferences*, which does not cite statutory authority for providing meals to the non-government personnel attending the government-sponsored conferences.

This new decision also explains that while agencies may now provide food to both government and non-government attendees under certain circumstances, they still may not charge the attendees for it and retain the money collected. The GAO advised that in addition to needing statutory authority in order to charge a fee, agencies would also need statutory authority to retain the amounts collected.<sup>24</sup> Otherwise, the GAO explained,<sup>25</sup> the amounts collected would constitute an improper augmentation of its appropriations and violate the Miscellaneous Receipts Statute.<sup>26</sup>

To assist agencies in sorting out the current rules on meals and refreshments, the GAO recently added a “decision tree” on meals and refreshments to its website, identifying the various exceptions that may allow an agency to purchase food with appropriated funds, as well as the applicable statutory authority and GAO decisions on which the exceptions are based.<sup>27</sup> The “decision tree” incorporates this new GAO decision. As of 1 June 2005, the Joint Travel Regulation has also been updated, to include a digest of this GAO decision, to be used as guidance on conference expenses.<sup>28</sup>

#### *What “Expenses” Fall Under Procurement Appropriation?*

In a recent GAO decision,<sup>29</sup> the U.S. Army Medical Research and Material Command properly purchased medical support items using FY 2004 Other Procurement, Army (OPA) funds, and needed logistical support for that equipment.<sup>30</sup> The OPA appropriation provided funds for “construction, procurement, production, and modification of . . . and other expenses necessary for the foregoing purposes . . . .”<sup>31</sup> The issue was whether that appropriation’s “other expenses necessary for the foregoing purposes” language included the logistics support services required for the equipment. The GAO concluded that it did not.<sup>32</sup> The GAO read the OPA appropriation’s “other expenses necessary” language as covering “expenses incurred in acquiring, or procuring, equipment.”<sup>33</sup> The logistics support services for the equipment were not “procurement activities,” because they had nothing to do with procuring the equipment.<sup>34</sup> Instead, those services were operational

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<sup>21</sup> *Id.* at \*6.

<sup>22</sup> *Id.* at \*7.

<sup>23</sup> *Id.*

<sup>24</sup> *National Institutes of Health—Food at Government-Sponsored Conferences*, 2005 U.S. Comp. Gen. LEXIS 42, at \*16-17.

<sup>25</sup> *Id.* at \*17

<sup>26</sup> 31 U.S.C.S. § 3302(b) (LEXIS 2005). The Miscellaneous Receipts Statute provides: “Except as [otherwise provided], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without any deduction for any charge or claim.” *Id.*

<sup>27</sup> That meals and refreshments decision tree is located at: <http://www.gao.gov/special.pubs/appforum2005/approffunds/index.html>.

<sup>28</sup> U.S. DEP’T OF DEF., JOINT TRAVEL REG., vol. 2, ch. 4, pt. S., para. C4955-H (June 1, 2005).

<sup>29</sup> *Army—Availability of Army Procurement Appropriation for Logistical Support Contractors*, B-303170, 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005).

<sup>30</sup> The Command needed contractors to develop and implement Integrated Logistics Support Plans for the equipment and to assist in the operation of the equipment. *Id.* at \*2-3.

<sup>31</sup> Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87, 117 Stat. 1054, 1063 (Sept. 30, 2003).

<sup>32</sup> *Army—Availability of Army Procurement Appropriation for Logistical Support Contractors*, 2005 U.S. Comp. Gen. LEXIS 71, at \*10.

<sup>33</sup> *Id.* at \*6.

<sup>34</sup> *Id.*

activities, and therefore must be funded with Army Operation and Maintenance appropriations.<sup>35</sup>

Major Michael L. Norris

## Time

### *Final Rule on Multiyear Contracting*

The Department of Defense (DOD) has adopted as final, without change, an interim rule<sup>36</sup> which added restrictions to the funding of multiyear contracts.<sup>37</sup> The rule requires the DOD to notify the congressional defense committees in writing concerning any multiyear contract with a cancellation ceiling exceeding \$100 million that is not fully funded.<sup>38</sup> Also, the DOD may not award a multiyear contract unless the Secretary of Defense has submitted a budget request for full funding of procured units.<sup>39</sup> A multiyear contract may also not be awarded if cancellation provisions include consideration of recurring manufacturing costs related to unfunded unit production; the contract provides for payment in advance of incurred costs on funded units; and there is a provision for a price adjustment due to a failure to award a follow-on contract.<sup>40</sup> The rule implements Section 8008 of the Defense Appropriations Act of 2005<sup>41</sup> and Section 814 of the National Defense Authorization Act for Fiscal Year 2005.

Major Andrew S. Kantner

## Anti-Deficiency Act

### *Fringe Benefits Violate Antideficiency Act*

In *Architect of the Capitol*, the GAO found that a federal agency's participation in an employee fringe benefit plan would violate the Antideficiency Act (ADA).<sup>42</sup> In this case, the Architect of the Capitol (AOC)<sup>43</sup> asked the GAO if its taking part in such an employee benefit plan would violate the ADA.<sup>44</sup> The GAO found that the AOC's participation in the plan would violate the ADA because it would commit the government to an indefinite future liability.<sup>45</sup>

The AOC attempted to provide fringe benefits<sup>46</sup> to its temporary employees<sup>47</sup> in a manner similar to its federal wage grade employees.<sup>48</sup> After the AOC negotiated with the temporary employees' unions, the unions informed the AOC that the employees would only accept these benefits if "AOC entered into a participation agreement and became a member of their

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<sup>35</sup> *Id.* at \*7.

<sup>36</sup> Defense Federal Acquisition Regulation Supplement; Multiyear Contracting, 70 Fed. Reg. 24,323 (May 9, 2005) (to be codified at 48 C.F.R. pt. 217).

<sup>37</sup> Defense Federal Acquisition Regulation Supplement; Multiyear Contracting, 70 Fed. Reg. 54,651 (Sept. 16, 2005) (to be codified at 48 C.F.R. pt. 217).

<sup>38</sup> *Id.* Multiyear contract authority is a statutory exception to the requirement to obligate only current funds for contracts on a yearly basis. 10 U.S.C.S. § 2306c (LEXIS 2005). A cancellation ceiling is the maximum a contractor can receive in the event of a termination of the contract. See U.S. GEN. SVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 17.103 (July 2005) [hereinafter FAR].

<sup>39</sup> 70 Fed. Reg. at 54,651.

<sup>40</sup> *Id.*

<sup>41</sup> Pub. L. No. 108-297, 118 Stat. 1095 (2004).

<sup>42</sup> Architect of the Capitol, B-303961, 2004 U.S. Comp. Gen. LEXIS 257 (Dec. 6, 2004).

<sup>43</sup> The Architect of the Capitol, <http://www.aoc.gov/aoc/responsibilities/index.cfm> (last visited Nov. 6, 2005). The Architect of the Capitol is a federal agency whose mission is to operate and maintain certain federal buildings designated by Congress. *Id.*

<sup>44</sup> *Id.* at \*1. The purpose of the Employee Retirement Income Security Act (ERISA) is to protect the integrity of employee pension plans insuring that employers pay vested pension benefits to their employees. 29 U.S.C.S. § 1001(a) (LEXIS 2005).

<sup>45</sup> *Architect of the Capitol*, 2004 U.S. Comp. Gen. LEXIS 257, at \*1.

<sup>46</sup> *Id.* at \*2. The fringe benefits included life insurance, health insurance, and retirement.

<sup>47</sup> *Id.* at \*2-3. The Architect of the Capitol traditionally hired temporary employees, represented by trade unions, to perform much of the construction or repair work involved in carrying out its mission. These temporary employees were ineligible for federal benefits. At the time the agency requested the GAO's opinion, it employed eighty-five temporary employees including masons, plumbers, electricians, carpenters, and ironworkers. *Id.*

<sup>48</sup> *Id.* at \*3-4. Congress required the Architect of the Capitol to provide fringe benefits to its temporary employees that were similar to federal civilian employees. See Legislative Branch Appropriations Act, Fiscal Year 2002, Pub. L. No. 107-68, § 133(a), 115 Stat. 560, 581-2 (Nov. 12, 2001).

multiemployer defined benefit plans.<sup>49</sup> These multiemployer benefit plans are governed by the Employee Retirement Income Security Act (ERISA).<sup>50</sup>

The AOC was concerned that its participation such a benefit plan could subject the AOC to “withdrawal liability” and consequently, would violate the ADA.<sup>51</sup> Under ERISA, “withdrawal liability” is the amount of money that an employer must pay to fund its employees’ benefits if that employer later withdraws from a multiemployer benefit plan.<sup>52</sup> Effectively, this means that an employer’s obligation to such an employee benefit plan continues even after the employer withdraws from the plan.<sup>53</sup> Thus, the AOC’s potential withdrawal liability would be indefinite at the time that the AOC entered into an agreement to participate in such an employee benefit plan.<sup>54</sup> Because of this concern, the AOC asked the GAO if its participation in this benefit plan would violate the ADA.<sup>55</sup>

Generally speaking, the ADA prohibits federal officials from obligating funds in advance or in excess of an appropriation.<sup>56</sup> For example, the GAO has interpreted the ADA to prohibit agencies from entering into contracts where termination costs are uncertain, or from entering into contracts with open-ended indemnification agreements.<sup>57</sup> Such contracts violate the ADA because they potentially commit the government to an indefinite future liability.<sup>58</sup>

Likewise, in *Architect of the Capitol*, the GAO found that the AOC could not enter into the agreement to participate in the multiemployer-defined benefit plan without violating the ADA.<sup>59</sup> The GAO stated that the possibility of withdrawal liability exposed the AOC to an obligation of undetermined amount at an undetermined time in the future.<sup>60</sup> If the AOC entered into this agreement and then later withdrew from the plan, then the AOC would be required to fund its proportionate share of the employees’ benefits.<sup>61</sup> As such, the AOC’s responsibility under the agreement could obligate funds in advance or in excess of an appropriation.<sup>62</sup> The GAO concluded that “since AOC has no assurance that appropriations will be available to cover this liability, the ADA would prohibit entering into a participation agreement that could subject the government to an indefinite withdrawal liability.”<sup>63</sup>

*Architect of the Capitol* illustrates a potential ADA pitfall of which federal agency practitioners should be aware. Obligation of appropriated funds in advance of or in excess of their availability violates the ADA. Because withdrawal liability is a type of indefinite future liability that could obligate funds in advance of or in excess of their availability, the ADA clearly prohibits an agency from agreeing to an arrangement.

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<sup>49</sup> *Id.* at \*5. A “multiemployer defined benefit plan” is a type of benefit plan that guarantees a fixed return on the employee’s investment; thus, the employer bears the risk of loss. In this case, a group of “employers” (the five unions representing the eighty-five employees and some other private employers) maintained five separate benefit plans in which they asked the agency to participate. The unions wanted the agency to make a “lump sum contribution for each of the temporary employees” to the unions who would then distribute the funds into each employee’s benefit plan.

<sup>50</sup> *Id.* at \*6 (citing 29 U.S.C.S. § 1001-1461). The purpose of the Employee Retirement Income Security Act (ERISA) is to protect the integrity of employee pension plans by insuring that employers pay vested pension benefits to their employees. *See* 29 U.S.C.S. § 1001(a) (LEXIS 2005).

<sup>51</sup> *Id.* at \*7.

<sup>52</sup> *Id.* (citing 29 U.S.C.S. § 1381, 1391). The ERISA requires an employer, like the Architect of the Capitol, to continue funding a multiemployer benefit plan if that employer withdraws from the plan. Thus, an employer’s liability under such a plan continues even if that employer withdraws from the plan. *See* 29 U.S.C.S. § 1381, 1391 (LEXIS 2005).

<sup>53</sup> *Id.* at \*7-8

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*9.

<sup>56</sup> 31 U.S.C.S. § 1341. The “Antideficiency Act” (ADA) is a series of statutes starting at 31 U.S.C.S. § 1341. It provides that an officer or employee of the United States government may not “make. . .an expenditure or obligation *exceeding* an amount available in an appropriation. . .” and may not involve the government “in a contract or obligation for the payment of money *before* an appropriation is made. . .” [italics added] *Id.*

<sup>57</sup> *Architect of the Capitol*, 2004 U.S. Comp. Gen. LEXIS 257, at \*10.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*11.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at \*23.

<sup>63</sup> *Id.*

*GAO: There Are No Federal Funds for Publicity and Propaganda*

On 17 February 2005, the GAO issued a memorandum to the heads of all federal agencies advising that expenditure of appropriated funds for publicity or propaganda purposes violates the ADA.<sup>64</sup> The objective of GAO's memorandum was to emphasize the publicity and propaganda prohibition—especially with regard to prepackaged news stories.<sup>65</sup> The GAO stated that during the year preceding its memorandum, it found some federal agencies violated the publicity and propaganda prohibition and also the ADA by obligating appropriated funds to purchase prepackaged news stories.<sup>66</sup> Nevertheless, the GAO further advised that agencies could avoid violating the ADA if the news stories contained an appropriate disclaimer.<sup>67</sup>

Congress has prohibited the use of appropriated funds for publicity or propaganda in each of its annual appropriations acts since 1951.<sup>68</sup> Consequently, because there are no appropriated funds available for this purpose, any expenditure of appropriated funds—even one dollar—would necessarily violate the ADA's prohibition against obligating funds in excess of the amount available in an appropriation.<sup>69</sup>

Prepackaged news stories are made-for-television audio or video presentations intended to appear as if they had been prepared by independent news organizations.<sup>70</sup> In these news stories, actors reading scripts portray “reporters” who look and sound like actual news reporters.<sup>71</sup> These news stories are then broadcast on television or radio, oftentimes without referring to the source of the presentations.<sup>72</sup>

Some federal agencies have commissioned private contractors to develop prepackaged news stories promoting the agencies' official functions.<sup>73</sup> When an agency spends appropriated funds for such a prepackaged news story, the GAO considers the expenditure violative of the “publicity and propaganda” prohibition, unless the story contains a clear disclaimer that it was prepared by the particular agency.<sup>74</sup> The GAO considers the absence of the disclaimer in a pre-packaged news story promoting a particular agency to constitute “covert propaganda” because the news story could mislead the audience regarding the source of the presentation.<sup>75</sup> Thus, since Congress has appropriated no funds for “covert propaganda,” an agency's expenditure of appropriated funds for prepackaged news stories also violates the ADA, unless the news story contains the above-described disclaimer.<sup>76</sup>

The GAO stated that in a single year, it issued two opinions finding that agencies violated the “publicity and propaganda” prohibition by improperly obligating appropriated funds for pre-packaged news stories.<sup>77</sup> In the first case, the GAO stated that the Centers for Medicare and Medicaid Services' expenditure of funds for the production of prepackaged

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<sup>64</sup> Prepackaged News Stories, B-304272, 2005 U.S. Comp. Gen. LEXIS 29 (Feb. 17, 2005).

<sup>65</sup> *Id.* at \*1.

<sup>66</sup> *Id.* at \*3-4.

<sup>67</sup> *Id.* at \*1.

<sup>68</sup> *Id.* at \*3-4 (citing Pub. L. No. 108-447, § 601, 118 Stat. 2809 (2004) [hereinafter FY 2005 Consolidated Appropriations Act]. The FY 2005 Consolidated Appropriations Act states, “No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes within the United States not authorized by the Congress.” The FY 2005 Department of Defense Appropriations Act contains identical language. See Pub. L. No 108-287, § 8001, 118 Stat. 951 (2004).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at \*2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at \*3-4.

<sup>74</sup> *Id.* at \*2.

<sup>75</sup> *Id.* See also Office of National Drug Control Policy—Video News Release, B-303495, 2005 U.S. Comp. Gen. LEXIS 8 (Jan. 4, 2005) (explaining that “covert propaganda” violates the publicity and propaganda prohibition because it conceals the source of the information).

<sup>76</sup> *Prepackaged News Stories*, 2005 U.S. Comp. Gen. LEXIS 29, at \*2.

<sup>77</sup> Department of Health and Human Services, Centers for Medicare & Medicaid Services (Medicare and Medicaid Svs.)—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004); Office of National Drug Control Policy—Video News Release, B-303495, 2005 U.S. Comp. Gen. LEXIS 8 (Jan. 4, 2005).

new stories promoting changes to Medicare violated the publicity and propaganda prohibition.<sup>78</sup> In the second case, the GAO opined that the Office of National Drug Control Policy's expenditure of funds to produce eight prepackaged news stories aimed at dissuading viewers from illicit drug use also violated the publicity and propaganda prohibitions.<sup>79</sup> In both cases, the news stories failed to disclose the fact that the news stories were produced by the very agencies upon which the stories focused.<sup>80</sup> The GAO cautioned agency officials to carefully examine such prepackaged news stories to ensure that the agency is making the necessary disclaimers before expending appropriated funds.<sup>81</sup>

*...But Department of Justice Disagrees*

In a memorandum dated 1 March 2005, Mr. Steven Bradbury, Principal Deputy Assistant Attorney General, instructed executive branch general counsels that the Department of Justice (DOJ) disagrees with the GAO's position<sup>82</sup> regarding the publicity and propaganda prohibition as it applies to prepackaged news stories.<sup>83</sup> The DOJ reminded agencies that GAO opinions are not binding on executive branch agencies because the GAO is a legislative branch organization.<sup>84</sup> Specifically, although the DOJ agrees that a prepackaged news story could violate the publicity and propaganda provisions of the appropriations acts, the controlling factor is whether the story advocates a particular viewpoint—not whether the story notifies the audience of the source of the story.<sup>85</sup> Therefore, a purely informational prepackaged news story (versus one advocating a particular opinion), would not violate the publicity and propaganda prohibition, even if the story did not contain a notice that an agency prepared it.<sup>86</sup>

Thus, although the DOJ agrees with the GAO that purchasing prepackaged news stories with appropriated funds could violate the publicity and propaganda prohibition, unlike the GAO, the DOJ does not contend that the absence of a disclaimer is the key issue. The DOJ argues that the central issue is whether the news story advocates a particular position—regardless of whether it contains a disclaimer. When reviewing the use of appropriated funds for prepackaged news stories, agency practitioners should proceed with caution due to opposing views from the GAO and from DOJ.

Major Marci Lawson, USAF

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<sup>78</sup> Department of Health and Human Services, Centers for Medicare & Medicaid Services—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004), at \*35.

<sup>79</sup> *Office of National Drug Control Policy*, 2005 U.S. Comp. Gen. LEXIS 8, at \*36-37.

<sup>80</sup> *Medicare and Medicaid Servs.*, 2004 U.S. Comp. Gen. LEXIS 102, at \*35 and *Office of National Drug Control Policy*, 2005 U.S. Comp. Gen. LEXIS 8, at \*36-37.

<sup>81</sup> *Prepackaged News Stories*, 2005 U.S. Comp. Gen. LEXIS 29, at \*3.

<sup>82</sup> *Id.* at \*2. As stated above, the GAO contends that an agency's use of appropriated funds to purchase prepackaged news stories promoting the agency's mission violates the publicity and propaganda prohibition unless the story contains a notice that it was prepared by the agency. *Id.*

<sup>83</sup> Memorandum, Principal Deputy Assistant Attorney General, to General Counsels of Executive Branch, subject: Whether Appropriations May Be Used for Informational Video News Releases (1 Mar. 2005). The DOJ memo is available at <http://omb.gov>. The DOJ memo was disseminated throughout the federal executive branch by the OMB as an attachment to a letter dated 11 Mar. 2005. Memorandum, Office of Management and Budget, subject: Use of Government Funds for Video News Releases (11 Mar 2005). The OMB memo containing the DOJ memo is also available at <http://omb.gov>.

<sup>84</sup> *Id.* at 1.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.*

## Construction Funding

### *Contract and Fiscal Law Collide, Contract Survives*

In an interesting case arising out of a construction default termination case, the Court of Federal Claims (COFC) considered a surety's claim for expenses incurred following a takeover agreement entered into with the government.<sup>87</sup> In that case, a construction contract for three buildings at McGuire Air Force Base was terminated for default, and the surety completed the work pursuant to a takeover agreement. The surety incurred costs far exceeding the amounts it received from the government, and its subsequent Request for Equitable Adjustment was denied by the contracting officer. Consequently, the surety argued, it is entitled to recover the costs it incurred on a *quantum meruit* basis, under a variety of theories.<sup>88</sup> The surety based its argument on the premise that the original contract was voidable based on illegality of the contract because the Air Force had incorrectly funded the contract with operations and maintenance funds instead of military construction appropriations as required by The Purpose Statute<sup>89</sup> and the Military Construction Codification Act.<sup>90</sup> The surety alleged that the Air Force had illegally split one project into three projects in order to avoid the O&M construction funding cap contained in 10 U.S.C. 2805 (which was \$300,000 at the time the contract was awarded).<sup>91</sup>

Citing *American Telephone & Telegraph Company v. United States*,<sup>92</sup> the court observed that the precedent does not favor the invalidation of contracts that have been fully performed, and that to find the appropriate remedy for violation of a statute it was necessary to consider the public policy underlying the statute.<sup>93</sup> The court considered the policy underlying the enactment of the separate appropriations acts for larger military construction projects appropriations and minor military construction which can be funded with operations and maintenance funds. The court determined that the purpose of the statutes and appropriations "appears to be balancing agency flexibility in planning construction projects and legislative oversight of spending decisions."<sup>94</sup> Invalidating the fully-performed contract would not be essential to that public policy embodied in those statutes, but in fact would be contrary to it—if the agency already spent money on this construction project contrary to the will of Congress, giving the surety even more money for the same construction project without Congressional approval would hardly further the public policy.<sup>95</sup>

After finding that invalidation of the fully-performed contract was inappropriate,<sup>96</sup> the court turned to theories that did not require invalidation of the contract, such as reformation. The court found that Congress did not intend the statutes to provide a private cause of action for their violation,<sup>97</sup> and in fact there was "no nexus between the harms sought to be avoided and the harms suffered by the plaintiff here; the only harm Congress sought to avoid was the harm to itself or to the public when appropriated funds are obligated for military construction projects without its oversight."<sup>98</sup> The remedy for that harm is reimbursement from the correct appropriated funds, not a private cause of action by the surety.<sup>99</sup> The court held, therefore, that the surety failed to state a claim upon which relief may be granted.<sup>100</sup>

Major Michael S. Devine

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<sup>87</sup> *United Pac. Ins. Co. v. United States*, 2005 U.S. Claims LEXIS 289 (Sept. 28, 2005).

<sup>88</sup> *Id.* at \*6-7.

<sup>89</sup> 31 U.S.C.S. § 1301(a) (LEXIS 2005).

<sup>90</sup> 10 U.S.C.S. §§ 2801- 2885.

<sup>91</sup> *United Pac. Ins. Co.*, 2005 U.S. Claims LEXIS 289, at \*6.

<sup>92</sup> 177 F.3d 1368 (Fed. Cir. 1999) (en banc).

<sup>93</sup> *United Pac. Ins. Co.*, 2005 U.S. Claims LEXIS 289, at \*19.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at \*23.

<sup>97</sup> *Id.* at \*28.

<sup>98</sup> *Id.* at \*33.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*34.

## Intragovernmental Acquisitions and Revolving Funds

FY 2005 was marked by intense scrutiny of the intragovernmental acquisition process, particularly with actions involving revolving funds.<sup>101</sup> Both the DOD Inspector General (IG)<sup>102</sup> and the GAO, in three separate reports,<sup>103</sup> identified significant problems with the DOD's use of revolving funds and other intragovernmental acquisitions over the past year.

The year in intragovernmental acquisitions got off to a dubious start with a GAO report in January that identified the "management of interagency contracting" as one of the twenty-seven federal programs and operations that are "high-risk" areas because of their greater vulnerability to fraud, waste, abuse, and mismanagement.<sup>104</sup> The purpose of the "high-risk" designation is to focus urgent attention on the problem in order to ensure that our government functions as economically, efficiently, and effectively as possible.<sup>105</sup>

The GAO recognized that in recent years, "federal agencies have been making a major shift in the way they procure many goods and services."<sup>106</sup> Government agencies have replaced the time and resources they used to spend on the contracting process by making use of "existing contracts already awarded by other agencies. These interagency contracts are designed to leverage the government's aggregate buying power and provide a much needed simplified method for procuring commonly used goods and services."<sup>107</sup> The GAO recognized that "these types of contracts have allowed customer agencies to meet the demands for goods and services at a time when they face growing workloads, declines in the acquisition workforce, and the need for new skill sets."<sup>108</sup>

However, the GAO decided to classify interagency contracting as "high-risk" because it found that in certain circumstances intragovernmental contracts are "(1) attracting rapid growth of taxpayer dollars; (2) are being administered and used by some agencies that have limited expertise with this contracting method; and (3) they contribute to a complex environment in which accountability has not always been clearly established."<sup>109</sup>

### *New GAO Reports on DOD's Use of Intragovernmental Acquisitions—We Are Not Getting It Right*

In response to the criticism of an interrogation services contract performed in Iraq, and to learn more about the interagency contracting process in general, the GAO completed a highly anticipated report reviewing the process that the DOD used to acquire the interrogation and other services through the Department of the Interior.<sup>110</sup> The GAO found that "numerous breakdowns occurred in the issuance and administration of Interior's task orders to include: orders being placed for services beyond the scope of the contract in violation of the competition rules; the DOD failing to properly justify the decision to use interagency contracting; and all parties failing to adequately monitor contract performance."<sup>111</sup> The GAO further reported that "because DOD and Interior officials effectively abdicated certain contracting responsibilities, the

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<sup>101</sup> *Revolving funds*, sometimes also known as *working capital funds* or *franchise funds*, rely on sales revenue instead of direct appropriations to finance their operations. These funds receive reimbursements from another organization for goods purchased or services rendered. Revolving funds generally operate on a break-even basis and rates are adjusted annually to maintain that status. Most large agencies have one or more revolving funds which are all created, individually, by statute.

<sup>102</sup> See U.S. DEP'T OF DEF., OFF. OF THE INSPECTOR GEN., DOD PURCHASES MADE THROUGH THE GENERAL SERVICES ADMINISTRATION, D-2006-096 (July 29, 2005) [hereinafter DOD IG GSA PURCHASES REPORT].

<sup>103</sup> See generally U.S. GOV'T ACCOUNTABILITY OFF., HIGH RISK SERIES: AN UPDATE, GAO-05-207 (Jan. 2005) [hereinafter HIGH RISK SERIES REPORT]; U.S. GOV'T ACCOUNTABILITY OFF., INTERAGENCY CONTRACTING: FRANCHISE FUNDS PROVIDE CONVENIENCE, BUT VALUE TO DOD IS NOT DEMONSTRATED, GAO-05-456 (July 2005) [hereinafter FRANCHISE FUND REPORT]; and U.S. GOV'T ACCOUNTABILITY OFF., INTERAGENCY CONTRACTING: PROBLEMS WITH DOD'S AND INTERIOR'S ORDERS TO SUPPORT MILITARY OPERATIONS, GAO-05-201 (April 2005) [hereinafter MILITARY OPERATIONS REPORT].

<sup>104</sup> HIGH RISK SERIES REPORT, *supra* note 103.

<sup>105</sup> *Id.* at 1.

<sup>106</sup> *Id.* at 24.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 26.

<sup>109</sup> *Id.* at 25.

<sup>110</sup> MILITARY OPERATIONS REPORT, *supra* note 103.

<sup>111</sup> *Id.* at 3.

contractor was allowed to play a large role in aspects of the procurement process normally performed by government personnel.”<sup>112</sup>

The GAO report recognized, of course, that the wartime environment created an urgent situation but found, nevertheless, that a lack of management controls led to the contract process breakdowns.<sup>113</sup> The GAO report notes that when proper management controls are not in place, “particularly in a fee-for-service contract environment, more emphasis can be placed on customer satisfaction and revenue generation than on compliance with sound contracting policy and required procedures.”<sup>114</sup> Interestingly, the Department of the Interior made a conscious decision to bypass an internal legal review requirement because the contracting office believed the reviews took too long.<sup>115</sup>

In another report critical of the DOD’s use of the interagency process, the GAO assessed: whether franchise funds,<sup>116</sup> a type of revolving fund, ensured fair and reasonable prices for goods and services provided; whether the DOD analyzed purchasing alternatives; and whether DOD and franchise funds ensured value by defining contract outcomes and overseeing contract performance.<sup>117</sup> The GAO analyzed DOD purchases from GovWorks and FedSource, two of the franchise funds that the DOD has relied on for contracting services.<sup>118</sup> Identifying the fundamental problem with franchise fund contracting, the GAO found that the “fee for service arrangement provides incentives to emphasize customer service to ensure sustainability of the contracting operation at the expense of proper use of contracts and good value.”<sup>119</sup> The GAO went on to find that “DOD, GovWorks, and FedSource paid little attention to sound contracting practices for which they shared responsibility to help ensure value.”<sup>120</sup> The report states that DOD customers reported that “they were under the impression that franchise funds ensure competition and analyze prices,” but the GAO found numerous cases in which these practices did not occur.<sup>121</sup>

The GAO concluded that the franchise funds assessed have streamlined the contracting process to provide customers with greater flexibility and convenience, but have not always adhered to competitive procedures and other sound contracting practices to ensure that taxpayer dollars are spent wisely.<sup>122</sup> The GAO recommended that DOD customers “be cautious when deciding whether franchise fund contracting services are the best available alternative . . . should ensure that taxpayer dollars are widely spent by sharing in the responsibilities of developing clear contract requirements and oversight mechanisms.”<sup>123</sup>

#### *DOD Inspector General Weighs In*

The DOD IG also got into the act of investigating and criticizing the DOD’s use of interagency acquisitions. The IG audited DOD purchases of information technology products and services through the General Service Administration’s (GSA’s) Federal Technology Service which uses a revolving fund called the Information Technology (IT) Fund to fund its

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 15.

<sup>115</sup> *Id.*

<sup>116</sup> *Franchise funds* are a type of intragovernmental revolving fund, all of which have similar legal authority and operations, and are generally created to provide common administrative services. The funds are “government-run, self supporting business like enterprises managed by federal employees. Franchise funds provide a variety of common administrative services, such as payroll processing, information technology support, employee assistance programs, public relations, and contracting.” FRANCHISE FUND REPORT, *supra* note 103, at 4.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* GovWorks is a franchise fund run by the Department of the Interior and FedSource is a franchise fund run by the Department of the Treasury. “In fiscal year 2004, DOD paid these franchise funds more than \$1.2 billion for purchases of goods and services.” *Id.* at 1.

<sup>119</sup> *Id.* at 3.

<sup>120</sup> *Id.* at 21.

<sup>121</sup> *Id.* at 8.

<sup>122</sup> *Id.* at 28.

<sup>123</sup> *Id.* at 29.

acquisitions before billing the requesting agency.<sup>124</sup> The IG found that in FY 2004, the DOD sent approximately 24,000 Military Interdepartmental Purchase Requests to the GSA totaling approximately \$8.5 billion in purchases for purchases of technology related products and services.<sup>125</sup> The IG reviewed a sampling of these orders and found that over ninety percent lacked proper acquisition planning; over ninety-eight percent did not have adequate interagency agreements sufficiently outlining the terms and conditions of the purchases; and over fifty percent were improperly funded due to either lack of a bona fide need for the requirement in the year of the appropriation or use of an incorrect appropriation to fund the requirement.<sup>126</sup> The IG found that failures and mismanagement of funds over the last five years has caused “from \$1 billion to \$2 billion of DOD funds to either expire or otherwise be unavailable to support DOD operations.”<sup>127</sup> Critically, the DOD IG Report indicts both the GSA and their DOD customers were misreading a statutory provision in order to “park” or bank” funds at the GSA for future purchases.<sup>128</sup> The report states that:

[b]ecause 40 U.S.C. 757, the law that establishes the IT fund, states that the fund ‘shall be available without fiscal year limitation,’ both GSA and DOD officials thought that funds accepted by GSA into the revolving IT Fund were available without limitation by fiscal year or use. This led to the idea that expiring funds could be ‘parked’ or banked’ at GSA for future purposes. To the contrary, the statement, “shall be available without fiscal year limitation’ applies to the capitalized fund itself. The funds reimbursing the capitalized funds [by the customer] must follow appropriation law. By not following the legal restrictions on appropriations to have a bona fide need for the funds in the year appropriated, GSA and DOD organizations incorrectly used the GSA IT Fund to extend the time periods of availability for use.<sup>129</sup>

### *The DOD Reacts to the Criticisms*

This intense scrutiny from both internal and external sources contributed to the DOD issuing a clarifying memorandum on the proper use of non-DOD contracts and required each military department “to establish procedures for reviewing and approving the use of non-DOD contract vehicles when procuring supplies and services . . . for amounts greater than the simplified acquisition threshold.”<sup>130</sup> This rule applies to direct and assisted acquisitions that use DOD funds.<sup>131</sup> The required procedures are evaluating whether using a non-DOD contract for such actions is in the best interest of the DOD,<sup>132</sup> determining that the tasks to be accomplished or supplies to be provided are within the scope of the contract to be used; reviewing funding to ensure it is used in accordance with appropriation limitations; providing unique terms, conditions and requirements to the assisting agency for incorporation into the order or contract as appropriate to comply with all applicable DOD-unique statutes, regulations, directives and other requirements; and, collecting data in the use of assisted acquisitions for analysis.<sup>133</sup>

The memorandum recognized the work by the DOD IG in discovering that “some interagency agreements continue to be used in attempt to keep funds available for new work after the period of availability for those funds has expired” and further recognized, by reference to an earlier DOD memorandum that “every order under an interagency agreement must be based upon a legitimate, specific, and adequately documented requirement representing a bona fide need of the year in which

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<sup>124</sup> DOD IG GSA PURCHASES REPORT, *supra* note 102, at 1. The Information Technology (IT) Management Reform Act of 1996, also known as the Clinger-Cohen Act assigns responsibility for the acquisition and management of IT to the Director, Office of Management and Budget, and specifically authorized the GSA’s IT Fund.

<sup>125</sup> *Id.* at ii.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 5.

<sup>128</sup> *Id.* at 13.

<sup>129</sup> *Id.*

<sup>130</sup> Memorandum, Under Secretary of Defense (Acquisition, Logistics, and Technology), to Chairman of the Joint Chiefs of Staff, subject: Fiscal Principals and Interagency Agreements (25 Sept. 2003).

<sup>131</sup> *Id.* Direct buys are orders placed by DOD. Assisted acquisitions are contracts awarded or orders placed by non-DOD entities, include franchise funds, using DOD funds. *Id.*

<sup>132</sup> *Id.* Factors to consider include satisfying customer requirements; schedule; cost effectiveness; and, contract administration. *Id.*

<sup>133</sup> *Id.*

the order is made.”<sup>134</sup> Each of the military departments complied with the DOD requirement and issued their own guidance over the past year.<sup>135</sup>

It is a critical that contracting officers, resource managers and attorneys in the field all work together to ensure compliance with the new policies. Given the intense scrutiny that intragovernmental acquisitions have been under for the past year, it is foreseeable that without strict compliance to the statutory and regulatory framework in place for such acquisitions, Congress may rescind, or at least further restrict, the authorities agencies currently rely on to make such acquisitions.

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## Obligations

### *The Air Force Issues Reminder Concerning ID/IQ Obligations*

The Air Force issued a reminder that the government must record an obligation for the minimum order quantity once an indefinite quantity contract is awarded.<sup>136</sup> The DOD Financial Management Regulation (FMR) requires that obligations be recorded at the time a legal obligation is incurred.<sup>137</sup> In the case of an indefinite quantity contract, the legal obligation would be the cost of the specified minimum quantity in the contract.<sup>138</sup> The memorandum stressed that the contracting officer should not be satisfied with only receiving a certification of availability of funding from the finance office, but should verify that an obligation in the appropriate amount is recorded.<sup>139</sup>

### *Multiple Year Versus Multiyear*

In *Bureau of Customs and Border Protection—Automated Commercial Environment Contract*,<sup>140</sup> the GAO reviewed a dispute between the Bureau of Customs and Border Protection (Customs) and the Department of Homeland Security (DHS) Office of the IG concerning the contract type classification of a contract pursuant to 31 U.S.C. § 3529.<sup>141</sup> The DHS IG conducted two audits of Customs’s Automated Commercial Environment (ACE) contract. In its second audit, the DHS IG found that the ACE contract was both a multiyear and an Indefinite Delivery / Indefinite Quantity (ID/IQ) contract, and that Customs had failed to obligate the required estimated termination costs under the relevant regulations concerning multiyear contracts.<sup>142</sup> The DHS IG found that it was a multiyear contract because Customs prepared the required determination and findings (D&F) for multiyear contracts and included the required multiyear contract clause in both the solicitation and the awarded contract.<sup>143</sup> Customs disagreed, instead contending that the plain language of the contract made it an ID/IQ contract and not subject to the § 254c requirements.<sup>144</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> See Memorandum, Acting Assistant Secretary of the Air Force (Financial Management and Comptroller), to ALMAJCOM-FOA-DRU/CV/LG/FM/PK, subject: Military Interdepartmental Purchase Request (MIPR) Revised Procedures (4 Apr. 2005); Memorandum, Assistant Secretary of the Army (Acquisition, Logistics, and Technology), to MACOM Commanders, subject: Proper Use of Non-Department of Defense (Non-DOD ) Contracts (12 July 2005); and Memorandum, Assistant Secretary of the Navy, Financial Management and Comptroller, to Department of the Navy Staff Offices, subject: Proper Use of Non-DOD Contracts (20 Dec. 2004).

<sup>136</sup> Memorandum, Associate Deputy Assistant Secretary (Contracting) & Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM/FOA/DRU (Contracting), subject: Obligation of Funds Upon Award of Indefinite-Quantity Contracts (29 Mar. 2005) [hereinafter ID/IQ Memo].

<sup>137</sup> U.S. DEPT. OF DEF., DOD 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION para. 080301 (Sept. 2005) [hereinafter DOD FMR].

<sup>138</sup> *Id.* para. 080504

<sup>139</sup> ID/IQ Memo, *supra* note 136.

<sup>140</sup> Comp. Gen. B-302358, 2004 U.S. Comp. Gen. LEXIS 271 (Dec. 27, 2004).

<sup>141</sup> Disbursing or certifying officials, and heads of agencies, may ask the Comptroller General for decisions potential payments or question concerning the proper certification of vouchers. 10 U.S.C.S. § 3529 (LEXIS 2005).

<sup>142</sup> *Bureau of Customs and Border Protection*, 2004 U.S. Comp. Gen. LEXIS 271, at \*6.

<sup>143</sup> *Id.* at \*7. The contract file also repeatedly referred to multiyear contracting, which the GAO prescribed to “imprecise usage and apparent confusion.” *Id.* at \*27.

<sup>144</sup> *Id.* at \*8. As a multiyear contract, Customs was required to comply with 41 U.S.C.S. § 254c allowing agencies to enter into contracts for five years but requirement them to obligate funds at contract award for the estimated cost of termination. 41 U.S.C.S. § 254c (LEXIS 2005).

The GAO agreed with Customs that a reading of the plain language of the contract, particularly the inclusion of various ID/IQ clauses, resulted in the finding that the contract was an ID/IQ contract.<sup>145</sup> The GAO found, however, that Customs failed to record an obligation for that minimum order at the time the contract was awarded.<sup>146</sup>

### *The Obligations of Obligations*

The GSA Board of Contract Appeals (GSBCA) rejected a contractor's attempt to convert the obligation of funds for option years into a constructive exercise of options in *Integral Systems, Inc. v. Dep't of Commerce*.<sup>147</sup> The Department of Commerce, at the time of the award of the Geostationary Operation Environmental Satellite Backup Acquisition, Command and Control Station contract,<sup>148</sup> obligated funds for the contract which included the two option contract line item numbers (CLINs).<sup>149</sup> Since an obligation could only be recorded when supported by documentary evidence of a binding agreement, the contractor argued that the act of obligation indicated that Commerce exercised the option CLINs.<sup>150</sup> While denying summary judgment, the GSBCA noted the general rule which states that the recording of an obligation, which is an internal government matter, does not create contractual rights for the contractor.<sup>151</sup>

### *Matching Obligations to Disbursements*

The GAO issued a report calling for the strengthening of the annual review process of military personnel (MILPERS) appropriations to better match disbursements with obligations, particularly during the five years after the obligations were made.<sup>152</sup> MILPERS appropriations are available for up to six years,<sup>153</sup> but review at the line item level was only done for the first year.<sup>154</sup> Because of data limitations, review of obligations past the first year can only be done at the budget and subactivity level, but not at the line item level.<sup>155</sup>

The GAO recommended that the Office of the Secretary of Defense add explicit instructions in the Financial Management Regulation to better guide services in their year-end reviews and better monitor compliance by the services.<sup>156</sup> The GAO also recommend that the Defense Finance and Accounting Service (DFAS) provide better data to help track the appropriation until the appropriation cancels.<sup>157</sup>

Major Andrew S. Kantner

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<sup>145</sup> The contract contained FAR clause 52.216-22, Indefinite Quantity; a minimum order clause; a Contract Type clause which stated that the government contemplated the award of an ID/IQ contract; and ordering procedures typical of ID/IQ contract. *Id.* at \*15.

<sup>146</sup> *Id.* at \*29.

<sup>147</sup> GSBCA 16321-COM, 05-1 BCA ¶ 32,946.

<sup>148</sup> See section labeled Contract Types, at 19, for a later ruling in the same case.

<sup>149</sup> *Integral Systems*, 05-1 BCA ¶ 32,946, at 163,228.

<sup>150</sup> *Id.*

<sup>151</sup> The GSA BCA referred to a GAO case and the GAO Redbook. *Id.* at 163,229.

<sup>152</sup> U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO-05-87R, MILITARY PERSONNEL: DOD NEEDS TO STRENGTHEN THE ANNUAL REVIEW AND CERTIFICATION OF MILITARY PERSONNEL OBLIGATIONS (Nov. 29, 2004).

<sup>153</sup> *Id.* at 3.

<sup>154</sup> *Id.* at 4.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 11.

<sup>157</sup> *Id.*

## Operational Funding

### *Congress Increasing Reporting Requirements on CERP Spending*

In 2003, the Coalition Provisional Authority established the Commanders' Emergency Response Program (CERP). The CERP was originally funded with assets seized during Operation Iraqi Freedom and was established "to respond to urgent humanitarian relief and reconstruction requirements by allowing military commanders to carry out programs and projects that would immediately assist the Iraqi people and support the reconstruction of Iraq. Projects funded through the program were for immediate requirements of relatively small dollar-value procurements."<sup>158</sup>

As the seized assets dwindled, Congress was faced with the question of whether to provide appropriations to continue the program. In the Emergency Supplemental Appropriations Act, 2004, Congress answered that question and provided \$180,000,000 in a specific appropriation for the continued funding of the CERP.<sup>159</sup> In the appropriation, Congress also dictated that a similar program be set up in Afghanistan. In the DOD Appropriations Act of 2005, Congress provided \$300,000,000 of appropriated funds for CERP,<sup>160</sup> and then increased the total amount available to \$500,000,000 in the Consolidated Appropriations Act.<sup>161</sup> This total amount increased to \$854,000,000 through an additional appropriation in the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief for Fiscal Year 2005.<sup>162</sup> The DOD Appropriations Act of 2006, provides only \$500,000,000; however, if the past year is any indicator, Congress would likely increase that amount through additional appropriations if the DOD requires it.<sup>163</sup>

Originally, Congress had not imposed any strict reporting requirements for appropriated CERP spending. Congress has, however, become increasingly interested in how the funds are being spent. The purpose of CERP, as articulated in the Emergency Supplemental for FY 2004, was "notwithstanding any other provision of law . . . [to enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people."<sup>164</sup>

In Section 1201 of the Ronald W. Reagan National Defense Authorization Act, 2005, Congress deleted the "notwithstanding any other provision of law language" and replaced it with what Congress termed "waiver authority."<sup>165</sup> The language in the Authorization Act states that,

[f]or purposes of the exercise of the authority provided by this section or any other provision of law making funding available for the Commanders' Emergency Response Program . . . the Secretary may waive any provision of law not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of that authority.<sup>166</sup>

Section 1202 of the National Defense Authorization Act of 2006 has the same language and requires a report to be submitted to Congress detailing which, if any, provisions of law would be waived.<sup>167</sup> In addition, Congress requires quarterly

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<sup>158</sup> Memorandum, Special Inspector General for Iraq Reconstruction, to Deputy Secretary of Defense, subject: Management of Commanders' Emergency Response Program for Fiscal Year 2004 (Report No. SIGIR 05-014) (13 Oct. 2005); see also Major Kevin J. Huyser et al., *Contract and Fiscal Law Developments of 2004—Year in Review*, ARMY LAW., Jan. 2005, at 185 [hereinafter *2004 Year in Review*].

<sup>159</sup> Emergency Supplemental Appropriations Act for Defense and the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1215 (2003) [hereinafter *Emergency Supplemental, FY 2004*].

<sup>160</sup> Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951, 1007 (2004).

<sup>161</sup> Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3341 (2004).

<sup>162</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231, 243 (2005).

<sup>163</sup> Department of Defense Appropriations Act, FY 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

<sup>164</sup> Emergency Supplemental, FY 2004, *supra* note 159.

<sup>165</sup> Ronald W. Reagan National Defense Authorization Act, 2005, Pub. L. No. 108-375, 118 Stat. 1811, 2077-78 (2004).

<sup>166</sup> *Id.*

<sup>167</sup> National Defense Authorization Act, 2006, Pub. L. No. 109-163, 119 Stat. 3136 (2006).

reports.<sup>168</sup> The Senate Armed Services Committee explained its expectations in the report accompanying the draft of the Authorization Act before passage, as follows:

The provision would require the Secretary to provide quarterly reports to the congressional defense committees on the source, allocation, and use of funds pursuant to this authority. The committee expects the quarterly reports to include detailed information regarding the amount of funds spent, the recipients of the funds, and the specific purposes for which the funds were used. The committee directs that funds made available pursuant to this authority be used in a manner consistent with the CERP guidance that the Under Secretary of Defense (Comptroller) issued in a memorandum dated February 18, 2005. This guidance directs that CERP funds be used to assist the Iraqi and Afghan people in the following representative areas: water and sanitation; food production and distribution; agriculture; electricity; healthcare; education; telecommunications; economic, financial and management improvements; transportation; irrigation; rule of law and governance; civic cleanup activities; civic support vehicles; repair of civic and cultural facilities; and other urgent humanitarian or reconstruction projects.<sup>169</sup>

On 27 July 2005, the Under Secretary of Defense (Comptroller) issued an update to the 18 February 2005 memorandum cited by the Senate Armed Services Committee in their report.<sup>170</sup> The new guidance added in four representative areas for which CERP can be used, as follows:

- (15) Repair of damage that results from U.S., coalition, or supporting military operations and is not compensable under the Foreign Claims Act;
- (16) Condolence payments to individual civilians for death, injury, or property damage resulting from U.S., coalition, or supporting military operations;
- (17) Payments to individuals upon release from detention;
- (18) Protective measures, such as fencing, lights, barrier materials, berming over pipelines, guard towers, temporary civilian guards, etc., to enhance the durability and survivability of a critical infrastructure site (oil pipelines, electric lines, etc.). . . .<sup>171</sup>

Additionally, the guidance added new areas in which the CERP can NOT be used, as follows:

- (2) Providing goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces.<sup>172</sup>

Further, the newly issued guidance includes language that makes it apply “to all organizational entities within DoD,”<sup>173</sup> and all of these entities are now required to incorporate the guidance into “contracts, as appropriate.”<sup>174</sup>

In the initial guidance, the Army was required to notify the Undersecretary of Defense (Comptroller) (USD(C)) and the Central Command (CENTCOM) J8 of all CERP projects that were “\$1,000,000, or greater.”<sup>175</sup> The current guidance tightens the requirement, requiring a report for all individual projects that are \$500,000 or greater.<sup>176</sup> Additionally, CERP Project Status Reports are now required to be submitted to the USD(C) and the CENTCOM J8 and the Joint Staff, J8, “as of the last day of the preceding month.”<sup>177</sup> The reporting requirement must include the name of the unit, the project number, the

<sup>168</sup> *Id.*

<sup>169</sup> Senate Armed Service Committee Report No. 109-69, at 383 (2005).

<sup>170</sup> Memorandum, Under Secretary of Defense (Comptroller), to Secretaries of the Military Departments, et. al, subject: Commanders’ Emergency Response Program Guidance (27 July 2005) [hereinafter July 2005 CERP Guidance].

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Memorandum, Under Secretary of Defense (Comptroller), to Secretaries of the Military Departments et. al, subject: Commanders’ Emergency Response Program Guidance (18 Feb. 2005)

<sup>176</sup> July 2005 CERP Guidance, *supra* note 170.

<sup>177</sup> *Id.*

payment date, the description and location of the project, and “[t]he amount committed, obligated and disbursed for the project.”<sup>178</sup> The reporting requirement applies only to appropriation-funded CERP.<sup>179</sup>

*I'll tell you if you pay me . . .*

In April 2005, the Multinational Corps - Iraq (MNC-I) issued new guidance in its Rewards Program Standard Operation Procedures (SOP).<sup>180</sup> The program is funded with regular operations and maintenance funds.<sup>181</sup> Three types of awards are authorized in the battle space: micro, small, and large rewards.<sup>182</sup> Of note is the micro reward, which is a reward that a company commander can pay out immediately to get immediate information, such as the location of an improvised explosive device or a witness.<sup>183</sup> Company level commanders have the authority to pay out less than \$20 per reward, up to a total of \$125 per month.<sup>184</sup>

Rewards funds cannot be used for weapons buyback and generally cannot be used to pay U.S. personnel, allied or coalition forces, Iraqi Security Forces, deceased persons, and individuals claiming inhumane treatment during capture.<sup>185</sup>

Major Jennifer C. Santiago

### Foreign Military Sales

#### *Mind the Act*

In a case involving the United Kingdom’s purchase of items under a Foreign Military Sales case,<sup>186</sup> the Court of Appeals for the Fourth Circuit addressed the issue of whether a third-party beneficiary to a contract covered by the Contract Disputes Act (CDA) can bring an action under the CDA.<sup>187</sup> In 1998, the DOD entered into a Letter of Offer and Acceptance with the United Kingdom (UK) Ministry of Defence (MOD) to sell “more than 2,000 GPS-related ‘auxiliary output chips’ manufactured by [the contractor], an approved US company.”<sup>188</sup> The UK later reported that the chips did not conform to “the applicable military specifications or standards and were returned for repair or replacement.”<sup>189</sup> The contractor repaired the chips, but the MOD contended that the chips were still defective. The MOD then solicited the assistance of the United States for help in recovering its alleged losses. The Air Force, with the Air Force General Counsel’s concurrence, responded in an opinion stating “that it could not recommend any action against [the contractor],” but that the Air Force would continue to “fully monitor” the issue.<sup>190</sup>

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> MULTI-NATIONAL CORPS—IRAQ, MNC-I REWARDS PROGRAM STANDARD OPERATING PROCEDURES (SOP), 1 Apr. 2005 (on file with the author).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> The foreign military sales program provides authority for the Government sell defense articles and services to foreign countries or entities. Before defense articles and/or services can be sold under a foreign military sales case, an LOA must be executed in accordance with the provisions of a base Memorandum of Understanding (MOU). U.S. DEP’T OF DEFENSE, DIR. 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL (3 Oct. 2003), available at <http://www.dscs.mil/samm/>.

<sup>187</sup> United Kingdom Ministry of Defence et al. v. Trimble Navigation, Ltd, No. 04-1129, 2005 U.S. App. LEXIS 19221 (4th Cir. Sept. 6, 2005). The UK and fourteen other NATO countries were parties to the base MOU that created the FMS case.

<sup>188</sup> *Id.* at \*5.

<sup>189</sup> *Id.* at \*6.

<sup>190</sup> *Id.* at \*7.

The UK MOD then filed a breach of contract action in federal district court. The basis for its argument was that the contractor breached its contract with the U.S. and that the UK was harmed as a third-party. The contractor then moved to dismiss the case, arguing that the CDA “divested the court of subject-matter jurisdiction.”<sup>191</sup> The court agreed and dismissed the case. The UK MOD appealed, and argued, that “as a matter of law, the CDA does not apply to its claims against [the contractor] . . . [and] the CDA applies only to disputes between the U.S. Government and its contractors and not to third-party beneficiary suits brought by a foreign government against a contractor.”<sup>192</sup>

The court examined the issue of “whether a claim made by a third-party beneficiary that is related to a CDA-covered procurement contract must be resolved under the procedures established by the CDA,” and held that “the language and framework of the CDA require[d] [them] to answer that question in the negative.”<sup>193</sup> The court further held that the CDA, by its clear and unambiguous language, only applies to disputes between parties to a contract and the U.S. government.<sup>194</sup> In conclusion, since the CDA did not divest the district court of subject-matter jurisdiction, the case would be remanded for further proceedings as to the UK MOD’s third-party beneficiary argument.

Major Jennifer C. Santiago

## Liability of Accountable Officers

### *DOD Enlists in the Battle Against GAO Authority*

By statute, Congress vested the GAO with, among other things, the authority to settle all accounts of the U.S. government,<sup>195</sup> to render advance decisions to assist certifying officers and disbursing officers when they are in doubt as to the legality or propriety of certifying or paying certain questionable expenses,<sup>196</sup> and to relieve accountable officials from liability under certain conditions.<sup>197</sup> Ever since the GAO was established in 1921,<sup>198</sup> however, the DOJ has disputed the Comptroller General’s authority to make decisions that are binding on the executive branch.<sup>199</sup> In 1986, the Supreme Court added weight to DOJ’s concerns, holding that because the Comptroller General could be removed from office only by Congress, he is subservient to Congress, and that therefore a statute conferring upon him “executive” powers was unconstitutional as a separation of powers violation.<sup>200</sup>

Using similar reasoning, the DOJ, in a 1991 Office of Legal Counsel opinion,<sup>201</sup> concluded that “the statutory mechanism that purports to authorize the [Comptroller General] to relieve Executive Branch Officials from liability (see, 31 U.S.C. § 3527, 3528, and 3529) is unconstitutional. . . .”<sup>202</sup> Consistent with that legal conclusion, Attorney General Janet Reno issued a DOJ Order in 1995 advising DOJ accountable officers that “an opinion from the Comptroller General cannot itself absolve such officers from liability for the loss or improper payment of funds for which they are accountable,”<sup>203</sup> and that they should instead seek advance decisions from their component general counsel when they question the legality of

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at \*8.

<sup>193</sup> *Id.* at \*9.

<sup>194</sup> *Id.* at \*10-21.

<sup>195</sup> 31 U.S.C.S. § 3526(a). Further, the statute provides that “[o]n settling an account of the account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government.” *Id.* § 3526(d).

<sup>196</sup> *Id.* § 3529.

<sup>197</sup> *Id.* § 3527; *Id.* § 3528.

<sup>198</sup> The Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (1921).

<sup>199</sup> See Edward R. Murray, Note, *Beyond Bowsher: The Comptroller General’s Account Settlement Authority and Separation of Powers*, 68 GEO. WASH. L. REV. 161, 162, 169 (1999).

<sup>200</sup> *Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (invalidating portions of the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), 2 U.S.C. § 901 (1985)).

<sup>201</sup> Comptroller General’s Authority to Relieve Disbursing and Certifying Officials from Liability, 15 Op. Off. Legal Counsel 80 (1991).

<sup>202</sup> U.S. Dep’t of Justice, DOJ Order 2110.39A, Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (Nov. 15, 1995).

<sup>203</sup> *Id.*

authorizing an obligation or of making a disbursement.<sup>204</sup> The DOD and other Executive Branch agencies, however, continued to maintain relief procedures consistent with the statutory law, explicitly recognizing the Comptroller General's statutory authority to relieve accountable officers from liability and to render advance decisions that will shield them from liability.

In 2003, the Department of the Treasury revived the issue by requesting DOJ assistance in implementing the DOJ opinions.<sup>205</sup> In response, the DOJ Office of Legal Counsel advised the agency to adopt an internal order based on the 1995 DOJ Order, and provided a draft model.<sup>206</sup> This year, the DOD followed suit. The April and May 2005 revisions to the DOD FMR instruct "accountable officials"<sup>207</sup> to seek the advice of the Office of the Deputy General Counsel (Fiscal), rather than the Comptroller General, when they are in doubt as to the legality of a particular use of appropriated funds.<sup>208</sup> In so doing, the DOD FMR specifically makes clear that this change is based on the DOJ Office of Legal Counsel opinion as to the constitutionality (or lack thereof) of the relevant statutes:

While an opinion of the [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official . . . . The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the [Comptroller General] to relieve Executive Branch Officials from liability (i.e., 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the [Comptroller General], as an agent of Congress, may not exercise Executive power, and does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.<sup>209</sup>

To date, no court has decided on the constitutionality of the relief from liability statutes.<sup>210</sup> In any event, for the DOD, the practical effect of this change may be less significant than it may appear. The pre-2005 version of the DOD FMR had already required that all requests for advance decisions were first to be forwarded to the DOD Deputy General Counsel (Fiscal) before referral to the Comptroller General or other official outside the DOD.<sup>211</sup> Additionally, the GAO had already delegated the authority to issue advance decisions in some instances to the DOD, the Office of Personnel Management, and the General Services Administration Board of Contract Appeals.<sup>212</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> Letter, Kenneth Schmalzbach, Office of Gen. Counsel, U.S. Dep't of the Treasury, to Office of Gen. Counsel, U.S. Dep't of Justice (May 7, 2003) (cited in Memorandum, Jack L. Goldsmith III, Assistant Attorney General, U.S. Dep't of Justice, to Gen. Counsel, U.S. Dep't of Treasury, subject: Response to Department of Treasury (28 Jan. 2004)).

<sup>206</sup> Memorandum, Jack L. Goldsmith III, Assistant Attorney General, U.S. Dep't of Justice, to Gen. Counsel, U.S. Dep't of Treasury, subject: Response to Department of Treasury (28 Jan. 2004).

<sup>207</sup> "Accountable officials" include "[disbursing officers], certifying officers, cashiers, procurement officers, departmental accountable officials, and other employees who by virtue of their employment are responsible for the obligation, custody and payment of government funds." DOD FMR, *supra* note 137, at para. 010802.B. "Departmental accountable officials," in turn, are defined as "[i]ndividuals who are responsible in the performance of their duties for providing to a certifying officer information, data, or services that the certifying officer directly relies upon in the certification of vouchers for payment." *Id.* at vol. 5, ch. 33, para. 330812. The DOD FMR also uses the term "accountable individuals" as another general term apparently meaning the same thing as "accountable officials."

<sup>208</sup> *Id.* at vol. 5, ch. 1, para. 010801, and vol. 5, Appendix E.

<sup>209</sup> *Id.* at vol. 5, ch. 1, para. 010802.E.

<sup>210</sup> In a Department of Veterans Affairs case involving the issue of payment of attorney fees, the U.S. Court of Appeals for Veterans Claims expressly declined to decide whether Comptroller General opinions can be binding on the VA. The VA had argued consistent with the DOJ position and cited the 1991 DOJ Office of Legal Counsel opinion and the 1995 DOJ Order. The court acknowledged that the issue raised "serious separation-of-powers concerns," but stated:

[C]ontrary to the arguments raised by the Secretary, it is not a settled matter that the Comptroller General decisions cited by the Court are not binding on VA. The Supreme Court in *Bowsher* invalidated *legislation* that purported to give a particular decision of the Comptroller General the authority to bind the President. The Supreme Court did not, however, state that *any* decision of the Comptroller General could not have binding authority over an executive agency. Nor is there any authority binding on this Court to support such a conclusion. The only authority that the Secretary offers in this regard are the two Justice Department issuances cited above, both of which concluded that the Comptroller General, as an agent of Congress, does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch. Although these Justice Department issuances may be instructive, they are not binding on this Court and hence do not settle this issue.

*Snyder v. Principi*, 15 Vet. App. 285, 290 (2001) (citations omitted) (emphasis in original).

<sup>211</sup> DOD FMR, *supra* note 137, at vol. 5, ch. 25, para. 250302.B.

<sup>212</sup> The GAO delegated the authority to issue advance decisions to the DOD in cases of military pay allowances, travel, transportation costs, survivor benefits, and retired pay; to the Office of Personnel Management in cases regarding civilian employee compensation and leave; and to the General Services

With regard to relief from liability, the statute itself treats the DOD differently than other Executive Branch agencies. Under 31 U.S.C. § 3527(b), the Comptroller General is required to relieve DOD accountable officials from liability for physical losses when the military department makes the necessary findings, and those findings are “conclusive on the Comptroller General.”<sup>213</sup> Because the statute gives the Comptroller General no discretion as to relief from liability in such cases, the GAO had notified the military departments that there is no need to forward those requests for relief to the GAO at all.<sup>214</sup>

### *GAO Won't Overrule DOD on Relief Decisions for Physical Losses*

Regardless of whether the Comptroller General may constitutionally relieve Executive Branch accountable officials from financial liability at all, the GAO normally defers to the DOD on relief decisions. While 31 U.S.C. § 3527(b) requires the Comptroller General to relieve DOD accountable officials when the appropriate DOD official finds that the statutory criteria are satisfied,<sup>215</sup> the language of the statute arguably does not preclude the GAO from also granting relief in cases where the DOD makes an adverse determination.

In *Decision of Managing Associate General Counsel Poling*,<sup>216</sup> however, the GAO reiterated that it defers to the DOD's adverse determinations as well. In that case, a DOD disbursing officer had attempted to deposit funds by mail, but the deposit was never located.<sup>217</sup> After the DFAS found the disbursing officer negligent and denied his request for relief, the disbursing officer appealed to the GAO. The GAO noted that that the disbursing officer had not provided a “basis to suggest that DFAS's decision was improper,”<sup>218</sup> and declined to consider the request. The GAO explained that it will not review military physical loss relief requests “where the determinations and the subsequent decision to grant or deny relief appear to be properly considered.”<sup>219</sup>

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Administration Board of Contract Appeals for civilian employee travel, transportation, and relocation allowances. See The General Accounting Act of 1996, Pub. L. 104-316, § 204, 110 Stat. 3826, 3845-46.

<sup>213</sup> Title 31, section 3527(b) states, in its entirety:

(b) (1) The Comptroller General shall relieve an official of the armed forces referred to in subsection (a) responsible for the physical loss or deficiency of public money, vouchers, or records, or a payment described in section 3528(a)(4)(A) of this title, or shall authorize reimbursement, from an appropriation or fund available for reimbursement, of the amount of the loss or deficiency paid by or for the official as restitution, when—

(A) in the case of a physical loss or deficiency—

(i) the Secretary of Defense or the appropriate Secretary of the military department of the Department of Defense (or the Secretary of Transportation, in the case of a disbursing official of the Coast Guard when the Coast Guard is not operating as a service in the Navy) decides that the official was carrying out official duties when the loss or deficiency occurred;

(ii) the loss or deficiency was not the result of an illegal or incorrect payment; and

(iii) the loss or deficiency was not the result of fault or negligence by the official; or

(B) in the case of a payment described in section 3528(a)(4)(A) of this title, the Secretary of Defense or the Secretary of the appropriate military department (or the Secretary of Transportation, in the case of a disbursing official of the Coast Guard when the Coast Guard is not operating as a service in the Navy), after taking a diligent collection action, finds that the criteria of section 3528(b)(1) of this title are satisfied.

(2) The finding of the Secretary involved is conclusive on the Comptroller General.

31 U.S.C.S. §3527(b) (LEXIS 2005).

<sup>214</sup> U.S. GOVT. ACCOUNTABILITY OFF., OGC-91-5, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 9-34 (2d ed. 1992) (citing circular letter B-198451, Feb. 5, 1981).

<sup>215</sup> The Secretary of Defense has delegated relief authority under that statute to DFAS. DFAS Regulation No. 005, Delegation Statutory Authority, 5 Apr 1991 (cited in *Decision of Managing Associate General Counsel Poling*, B-303671, 2004 U.S. Comp. Gen. LEXIS 262 (Dec. 3, 2004), at n.2).

<sup>216</sup> *Decision of Managing Associate General Counsel Poling*, B-303671, 2004 U.S. Comp. Gen. LEXIS 262 (Dec. 3, 2004).

<sup>217</sup> *Id.* at \*4.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* In discussing 31 U.S.C. § 3527(b), the GAO first noted that if DFAS had found that the three requirements for relief had been met, then “the granting of relief follows automatically.” *Id.* at \*3. But “[w]here the Secretary, or DFAS in his behalf, is unable to agree with any one of the three considerations, relief is not available.” *Id.* From this language, it is unclear whether GAO believes it lacks authority to grant relief where DFAS makes an adverse finding.

*“Departmental Accountable Officials”—DOD Gets Right and VA Gets Schooled*

A few years ago, the DOD revised the DOD FMR in an attempt to impose pecuniary liability on “accountable officials,” other than certifying and disbursing officers, who negligently provide inaccurate information relied upon by certifying or disbursing officers.<sup>220</sup> The rationale was that it is extremely difficult for any single official to ensure the accuracy, propriety, and legality of every payment, and therefore certifying officers and disbursing officers as a practical matter must rely upon information provided by others in performing this difficult task.<sup>221</sup> However, the GAO held that this was improper because, unlike for certifying and disbursing officers, there was no statutory basis for imposing liability against “accountable officials,” and agencies may not impose pecuniary liability on employees in the absence of statutory authority.<sup>222</sup> In response to that decision, the DOD sought the statutory authority, which Congress provided in the 2003 National Defense Authorization Act,<sup>223</sup> codified at 10 U.S.C. § 2773a.

The DOD FMR was recently revised to implement this law,<sup>224</sup> and now provides that “[d]epartmental accountable officials shall be pecuniarily liable for illegal, improper or incorrect payments that result from information, data or services they negligently provide to a certifying officer, and upon which, the certifying officer directly relies in accordance with the provisions of 10 U.S.C. 273a.”<sup>225</sup> The definition of “departmental accountable officials” itself sheds no further light on this statement.<sup>226</sup>

The revised DOD FMR provides a partial list of functional areas in which departmental accountable officials may have responsibilities, including functions relating to the Government Purchase Card program, temporary duty travel, contract and vendor pay, civilian and military pay, permanent change of station processing, and Centrally Billed Accounts.<sup>227</sup> This can include, but is not limited to, persons such as Agency Program Coordinators, approving officials, authorizing officials, cardholders, resource managers, fund holders, Automated Information System administrators, contracting officers, receiving officials, personnel officers, employees’ supervisors, and supervisors of time and attendance clerks.<sup>228</sup>

Departmental accountable officials must be designated as such in writing, and apprised by letter of their potential pecuniary liability for “illegal, improper, or incorrect payments that result from negligent performance of duties.”<sup>229</sup> Like DOD certifying officers, departmental accountable officials are appointed on a Department of Defense (DD) Form 577 (“Appointment/Termination Record/Authorized Signature”).<sup>230</sup> The formal written designation is a statutory requirement,<sup>231</sup>

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However, the GAO qualified that statement by saying that GAO would not review such requests where the DFAS relief decision is “properly considered,” thus suggesting that the GAO would consider the request if the DFAS decision had been improperly considered.

<sup>220</sup> U.S. DEPT. OF DEF., DoD 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION para. 080301 (Aug. 1998).

<sup>221</sup> *Id.* para. 330102.

<sup>222</sup> Department of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

<sup>223</sup> Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 1005, 116 Stat. 2458, 2631 (2002).

<sup>224</sup> DOD FMR, *supra* note 137, at vol. 5, ch. 33.

<sup>225</sup> *Id.* para. 3307.

<sup>226</sup> The DOD FMR defines “departmental accountable officials” as:

Individuals who are responsible in the performance of their duties for providing to a certifying officer information, data, or services that the certifying officer directly relies upon in the certification of vouchers for payment. They are pecuniarily liable for erroneous payments resulting from their negligent actions in accordance with section 2773a of title 10, United States Code.

*Id.* para. 330812.

<sup>227</sup> *Id.* para. 330302.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* para. 330505.

<sup>230</sup> *Id.*

<sup>231</sup> 10 U.S.C.S. § 2773a(a) (LEXIS 2005).

and a fair reading of the statute compels a conclusion that a person not formally designated as a “departmental accountable official” cannot be held pecuniarily liable under the statute.<sup>232</sup>

Recently, the Department of Veterans Affairs (VA) learned a similar lesson. In *Veterans Affairs—Liability of Alexander Tripp*,<sup>233</sup> the GAO considered a request for relief from a VA employee who had approved payment for a “sunset cruise” as part of a staff retreat.<sup>234</sup> The VA held the employee financially liable for the payment of this improper entertainment expense after he had “certified” in writing that the payment was proper.<sup>235</sup> The employee held “a position of senior stature with responsibility for compliance with applicable laws,”<sup>236</sup> but had not been formally designated in writing as a certifying officer.<sup>237</sup> Consequently, the GAO held that the employee was not a certifying officer, but was essentially an “approving” official.<sup>238</sup> Citing the DOD’s previous unsuccessful attempt to impose pecuniary liability against departmental accountable officials prior to the enactment of 10 U.S.C. § 2773a,<sup>239</sup> the GAO explained that agencies may not impose pecuniary liability on employees in the absence of statutory authority, and that there was no statutory basis for holding VA “approving” officials financially liable for improper payments.<sup>240</sup> Accordingly, the GAO found no need to consider the employee’s request for relief from liability, because he had no financial liability from which to be relieved.<sup>241</sup> But that doesn’t necessarily mean that the employee is completely off the hook. The GAO informed the employee, “Because federal officials are responsible for ensuring that federal funds are not used improperly, VA, within its discretion, may still impose administrative sanctions against you for your role in approving the improper payment.”<sup>242</sup>

Major Michael L. Norris

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<sup>232</sup> The statute permits the Secretary of Defense to subject only a “departmental accountable official” to pecuniary liability under certain conditions. 10 U.S.C.S. § 2773a(c). Subsection (a) of the statute makes clear that an employee cannot be a “departmental accountable official” unless he is designated in writing:

(a) Designation by Secretary of Defense. The Secretary of Defense may designate any civilian employee of the Department of Defense or member of the armed forces under the Secretary’s jurisdiction who is described in subsection (b) as an employee or member who, in addition to any other potential accountability, may be held accountable through personal monetary liability for an illegal, improper, or incorrect payment made [by] the Department of Defense described in subsection (c). *Any such designation shall be in writing.* Any employee or member *who is so designated* may be referred to as a “departmental accountable official.”

*Id.* (emphasis added).

<sup>233</sup> *Veterans Affairs—Liability of Alexander Tripp*, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005).

<sup>234</sup> *Id.* at \*4.

<sup>235</sup> The employee had signed the voucher, which contained the sunset cruise charge and the accompanying statement, “I certify that the articles or services listed hereon . . . are proper for payment . . .” *Id.* at \*6.

<sup>236</sup> *Id.* at \*10 (quoting a reply to GAO from the Office of Gen. Counsel, Dep’t of Veterans Affairs, dated Jan. 28, 2005). The employee served as the director of the Financial Assistance Office of the Veterans Health Administration. *Id.* at \*3.

<sup>237</sup> *Id.* at \*10.

<sup>238</sup> *Id.* at \*7.

<sup>239</sup> *Department of Defense—Authority to Impose Pecuniary Liability by Regulation*, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

<sup>240</sup> *Veterans Affairs—Liability of Alexander Tripp*, 2005 U.S. Comp. Gen. LEXIS 158, at \*7.

<sup>241</sup> *Id.* at \*10-11.

<sup>242</sup> *Id.* at \*11-12.