

FISCAL LAW

Purpose

GAO Red Book Updating Update

The Government Accountability Office's (GAO's) *Principles of Federal Appropriations Law*,¹ more commonly known as the Red Book, has been an excellent reference for appropriations law for nearly twenty-five years. Volume I, Chapter 4, *Availability of Appropriations: Purpose*, provides a comprehensive examination of the Purpose rules, and application of those principles to specific categories of expenditures, incorporating all relevant Comptroller General opinions and other authorities. This year, the GAO has begun its process of annual updates to the third edition of the Red Book. Because the third edition of Volume II was just released this year,² this first annual update included only an update of Volume I, which includes last year's GAO opinions.³ Next year's update will include both Volume I and Volume II updates.⁴ When the third edition of Volume III is published, subsequent annual updates will update all three volumes.⁵

On 7 November 2006, the GAO reposted Adobe Acrobat portable document file (.pdf) versions of both Volumes I and II on their website,⁶ including within those versions updated electronic links to the GAO decisions cited therein. Clicking on the links will take you directly to the Comptroller General decision on the GAO website. The GAO has also released a new Index and Table of Authorities for the third edition of the Red Book.⁷

Conference Registration Fees

One hot issue this year was the issue of defraying conference expenses by charging attendees a conference registration fee. Agencies have often collected registration fees to help offset the cost of hosting conferences, but have not necessarily been doing so in accordance with the law. The new interest in conference registration fees arose following a GAO opinion cited in last year's *Year in Review*.⁸ Last year, in *National Institutes of Health—Food at Government-Sponsored Conferences*,⁹ the GAO enunciated a new food exception permitting the National Institutes of Health (NIH) to use appropriated funds to pay for meals and refreshments for conference attendees—including non-agency and non-government personnel—under certain circumstances as an expense of hosting the conference.¹⁰

However, a secondary issue in that opinion, which did not represent a new development in fiscal law, generated the most interest by agencies this year. The NIH asked the GAO the follow-up question of whether it may collect conference fees

¹ OFF. OF THE GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFF., *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* (3d ed. 2004).

² OFF. OF THE GEN. COUNSEL, U.S. GOV'T ACCOUNTABILITY OFF., *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, VOL. II* (3d ed. 2006).

³ OFFICE OF THE GENERAL COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, ANNUAL UPDATE OF THE THIRD EDITION* (Apr. 2006).

⁴ *Id.* at i.

⁵ *Id.*

⁶ The Red Book is located online at <http://www.gao.gov/legal.htm>.

⁷ OFFICE OF THE GENERAL COUNSEL, U.S. GOV'T ACCOUNTABILITY OFFICE *Principles of Federal Appropriations Law, Index and Table of Authorities* (Sept. 2006).

⁸ See Major Andrew S. Kantner et al., *Contract and Fiscal Law Developments of 2005—The Year in Review*, *ARMY LAW.*, Jan. 2006, at 151 [hereinafter *2005 Year in Review*].

⁹ B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

¹⁰ *Id.* at *3. Specifically, once the agency hosting a formal conference makes an administrative determination that the attendance of the non-agency personnel is "necessary to achieve the conference objectives," appropriated funds may be used to purchase meals and refreshments if:

(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.

Id. at *13. To use this exception, the government-sponsored conference must also "involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants." *Id.* at *13-14. Additionally, the conference must have sufficient indicia of formality, including "registration, a published substantive agenda, and scheduled speakers or discussion panels." *Id.* at *14.

from the attendees to defray the costs of the food it wanted to provide to the conference attendees. The GAO explained that an agency must have statutory authorization in order to charge a fee for one of its programs or activities.¹¹ Even if the NIH had statutory authority to collect such a fee,¹² it would still not be able to retain and use the collected fees, but would instead have to deposit that money into the general fund of the Treasury as miscellaneous receipts.¹³ In the absence of statutory authority to retain the amounts collected, which the NIH did not have,¹⁴ retaining the fees to offset conference costs would constitute an improper augmentation of the agency's appropriations and would violate the Miscellaneous Receipts Statute.¹⁵ This is true regardless of whether the agency collects and uses the fees directly, or does it indirectly by having a contractor receive the money for the government to pay for the conference costs.¹⁶

This year, Senator Barbara A. Mikulski, on behalf of the National Security Agency, asked the GAO to reconsider its *National Institutes of Health* opinion prohibiting collecting conference fees. In *Contractors Collecting Fees at Agency-Hosted Conferences*,¹⁷ Senator Mikulski noted that agencies have for many years specifically sought to avoid violating the Miscellaneous Receipts Statute by having contractors collect fees from conference attendees to defray conference expenses,¹⁸ and prohibiting this practice would hinder the ability of agencies to conduct important conferences.¹⁹

Upon considering the request, the GAO reiterated its decision in *National Institutes of Health* that an agency cannot collect fees to offset the costs of the conference unless Congress provides statutory authority to do so.²⁰ The GAO explained that “[a] government agency that lacks the authority to charge and retain fees may not cure that lack of authority by engaging a contractor to do what it may not do.”²¹ On the other hand, if Congress were to grant an agency authority to collect and retain a conference fee, the agency could then allow a contractor to do it on behalf of the agency.²² Without a statutory exception to the Miscellaneous Receipts Act, a contractor collecting such fees would be “receiving money for the Government,” and that money must be deposited in the Treasury.²³

The GAO also noted that “Congress, of course, may enact legislation authorizing an agency hosting a conference on behalf of the government to collect and retain an attendance fee,”²⁴ and suggested that Congress could accomplish that on a

¹¹ *Id.* at *16-17 (citing B-300248, Jan. 15, 2004).

¹² The GAO did not resolve that issue, but noted:

In a recent decision we explained that the Independent Offices Appropriations Act, 31 U.S.C. § 9701, known as the user fee statute, provides general authority for an agency to impose a fee if certain conditions are met. *Id.* The user fee statute authorizes an agency to charge recipients of special benefits or services a user fee. 62 Comp. Gen. 262 (1983). Our decisions have not addressed specifically whether the user fee statute authorizes an agency to charge a conference registration or attendance fee, and we need not address that question here.

Id. at *17-18.

¹³ *Id.* at *18.

¹⁴ *Id.*

¹⁵ 31 U.S.C. § 3302(b) (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.*

¹⁶ National Institutes of Health—Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 at *18 (citing B-300248, Jan. 15, 2004)

¹⁷ B-306663, 2006 U.S. Comp. Gen. LEXIS 2 (Jan. 4, 2006).

¹⁸ *Id.* at *2.

¹⁹ *Id.* at *1. The opinion indicates that Senator Mikulski “expressed concern that this conclusion would reduce federal efforts to bring experts together at federally hosted conferences, particularly conferences hosted by the National Security Agency (NSA), to address evolving threats to the nation.” *Id.*

²⁰ *Id.* at *3.

²¹ *Id.* at *4.

²² *Id.* at *5.

²³ *Id.* at *4.

²⁴ *Id.*

broad scale,²⁵ such as by amending the Government Employees Training Act,²⁶ or on an individual agency basis, through an agency's authorization legislation or through its appropriation act.²⁷

With respect to the DoD at least, Congress has recently done just that in the Fiscal Year 2007 Defense Authorization Act.²⁸ Section 1051 of the Act amends Title 10 by creating a section 2262, specifically authorizing the Secretary of Defense to collect fees, directly or through a contractor, from participants at conferences or similar events.²⁹ This legislation further specifies that the collected fees "shall be available to pay the costs of the Department of Defense with respect to the conference or to reimburse the Department for costs incurred with respect to the conference."³⁰ If the amount of fees collected exceed the actual cost of the event, "the amount of such excess shall be deposited into the Treasury as miscellaneous receipts."³¹ The law also contains an annual reporting requirement, requiring the Secretary of Defense to submit to Congress "a budget justification document summarizing the use" of the new authority.³²

By its express language, the statute gives this new authority to "the Secretary of Defense." The Department of Defense has not yet published policy on the use of this authority.

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²⁵ *Id.*

²⁶ Government Employees Training Act, 5 U.S.C.S. §§ 4101-18 (LEXIS 2006).

²⁷ Contractors Collecting Fees at Agency-Hosted Conferences, B-306663, 2006 U.S. Comp. Gen. LEXIS 2, at *6.

²⁸ John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (Oct. 17, 2006).

²⁹ 10 U.S.C. § 2262(a) (LEXIS 2006).

³⁰ *Id.* § 2262(b).

³¹ *Id.* § 2262(c).

³² *Id.* § 2262(d).

Time

Final Rule on Incremental Funding of Fixed-Price Contracts—Finally!

The Department of Defense adopted as final, with changes, an interim rule, published in September 1993,¹ amending the *Defense Federal Acquisition Regulation Supplement*, regarding incremental funding of fixed-price contracts.² The interim rule provided a standardized clause and guidance on the situations in which this incremental funding is permissible.³ Changes were made to the interim rule in response to several comments submitted.⁴

The final rule adds new *paragraph 232.703-1(i)*, addressing the use of incremental funding for severable services.⁵ The new paragraph allows a fixed-price severable services contract to be incrementally funded if the contract period is one year or less and the contract is “funded using funds available (unexpired) as of the date the funds are obligated.”⁶ The final rule also eliminated the requirement for the head of the contracting activity to approve the use of incremental funding for base services or hazardous/toxic waste remediation contracts.⁷ The final rule also clarifies that “[t]he contractor is not authorized to continue work” beyond the amount actually funded.⁸ Finally, new paragraph 252.232-7007(i) states that nothing in the clause should be construed to authorize otherwise prohibited voluntary services.⁹

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¹ Defense Federal Acquisition Regulation Supplement; Incremental Funding of Fixed-Price Contracts, 58 Fed. Reg. 46,091 (Sept. 1, 1993) (to be codified at 48 C.F.R. pts. 232 and 252).

² Defense Federal Acquisition Regulation Supplement; Incremental Funding of Fixed-Price Contracts, 71 Fed. Reg. 18,671 (Apr. 12, 2006) (to be codified at 48 C.F.R. pts. 232 and 252).

³ *Id.* at 18,672.

⁴ *Id.* at 18,673.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 18,672.

⁸ *Id.* at 18,673.

⁹ *Id.*

Antideficiency Act

Armed Services Board of Contract Appeals (ASBCA) Has Jurisdiction Over Claim Involving Open-Ended Indemnification Clause

In *The Boeing Co.*,¹ the ASBCA determined that the Antideficiency Act (ADA)² did not bar its jurisdiction to hear a claim involving contracts containing open-ended indemnification clauses.³ In this appeal of a sponsored claim, Boeing alleged that the Air Force was contractually liable to indemnify Boeing for its subcontractor's (the predecessor of Lockheed Martin Corporation, hereinafter Lockheed) costs for environmental investigation, remediation, and litigation.⁴ Both Boeing's contracts with the Air Force and Lockheed's subcontracts with Boeing contained indemnification clauses for "unusually hazardous risks" citing either 10 U.S.C. § 2354⁵ or Public Law Number 85-804 (codified at 50 U.S.C. § 1431)⁶ or both, which permit agencies, under limited circumstances, to insert indemnification clauses into their contracts.⁷ After Boeing filed its appeal, the ASBCA denied the Air Force's motion to dismiss on jurisdictional grounds finding that the board did, in fact, have jurisdiction to hear the case⁸ under the Contract Disputes Act (CDA).⁹

The subject appeal arose out of a series of contracts the Air Force awarded to Boeing from 1966 to 1973 for the development and production of short range attack missiles.¹⁰ Both the development contract and the subsequent four production contracts contained nearly identical indemnification clauses obligating the Air Force to indemnify Boeing for specified losses to Boeing and also for certain claims filed against Boeing by third persons.¹¹ The contracts limited the Air Force's indemnification obligation to claims for loss or damage arising "out of the direct performance of the contract" which was "not compensated by insurance" and which "results from a risk defined in [the] contract to be unusually hazardous."¹² The contracts also authorized Boeing to insert similar indemnification language into its subcontracts so long as Boeing received prior written approval from the contracting officer; Boeing relied upon this authority and inserted this indemnification language into its related subcontracts with Lockheed.¹³ As a result, the Air Force's contracts with Boeing stated that the Air Force would indemnify Boeing for certain losses to Boeing and also for claims filed against Boeing by third parties. Similarly, Boeing's subcontracts with Lockheed stated that Boeing would indemnify Lockheed for certain losses to Lockheed and also for claims filed against Lockheed by third parties.¹⁴

¹ ASBCA No. 54853, 6-1 BCA ¶ 33,270.

² The Antideficiency Act (ADA) is actually a series of statutes codified at 31 U.S.C. § 1341 *et seq.* The ADA prohibits an officer or employee of the government from obligating in excess or in advance of available appropriations. *Id.* The United States Supreme Court has stated, "the Antideficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation." *Hercules, Inc. v. United States*, 516 U.S. 417 (1996). Both the federal courts and the GAO have held that absent statutory authority, open-ended indemnification clauses violate the ADA's prohibition against obligating appropriations in excess or in advance of their availability because such clauses potentially obligate the government to unlimited liability. *E.I. Du Pont De Nemours v. United States*, 365 F.3d 1367 (2004); Honorable Alan K. Simpson, B-197742, 1986 U.S. Comp. Gen. LEXIS 758 (Aug. 1, 1986).

³ *Boeing*, 6-1 BCA ¶ 33,270 at 164,890.

⁴ *Id.* at 164,887.

⁵ 10 U.S.C.S. § 2354 (LEXIS 2006). This statute authorizes the military services, with the approval of the military service secretary concerned, to insert indemnification clauses into "unusually hazardous" research and development contracts. *Id.* Such clauses state that the military service will indemnify the contractor for certain property losses or damages to the contractor and also for certain third party claims filed against the contractor. *Id.*

⁶ 50 U.S.C.S. § 1431 (LEXIS 2006). This statute permits the President to authorize an agency to enter into contracts "without regard to other provisions of law. . . whenever he deems that such action would facilitate the national defense." *Id.*

⁷ *Boeing*, 6-1 BCA ¶ 33,270 at 164,883-86. These statutes permitting indemnification are implemented by FAR 50.403-2 wherein it allows the agency secretary to approve the insertion of indemnification clauses into contracts which are "unusually hazardous or nuclear." GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 50.403-2 (July 2006) [hereinafter FAR]. STOP

⁸ *Boeing*, 6-1 BCA ¶ 33,270 at 164,890.

⁹ 41 U.S.C.S. §§ 601-613 (LEXIS 2006).

¹⁰ *Boeing*, 6-1 BCA ¶ 33,270 at 164,883.

¹¹ *Id.* at 164,883-86.

¹² *Id.* at 164,883-84. The indemnification clauses in Boeing's contracts and Lockheed's subcontracts appears to be the FAR contract clause located at FAR 52.250-1. See U.S. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION REG. pt. 50.403-2 (July 2006).

¹³ *Boeing*, 6-1 BCA ¶ 33,270 at 164,884-86.

¹⁴ *Id.*

After Lockheed performed its subcontracts in Redlands, California from 1966 to 1975, Lockheed incurred financial losses for environmental investigation, remediation, and litigation for activities directly related to its subcontracts.¹⁵ During performance of the subcontracts, Lockheed used trichloroethylene (TCE) and ammonium perchlorate (perchlorate) as the subcontracts required.¹⁶ In 1997, the Santa Ana Regional Water Quality Control Board discovered TCE and perchlorate in the groundwater.¹⁷ As a result, the water control board required Lockheed to perform environmental investigation and remediation at the site.¹⁸ Between 1996 and 1999, Lockheed was named as a defendant in multiple lawsuits alleging its responsibility for the presence of TCE and perchlorate in the groundwater.¹⁹ Although Lockheed attempted to recover its financial losses from its insurance carriers, Lockheed has been only partially indemnified.²⁰

In February 2004, after Boeing submitted a sponsored claim on behalf of Lockheed pursuant to the indemnification clauses of its prime contracts, the contracting officer denied the claim.²¹ Subsequently, Boeing appealed to the ASBCA arguing that the Air Force is contractually obligated to indemnify Boeing for Lockheed's financial losses directly resulting from Boeing's contracts with the Air Force and from Lockheed's subcontracts with Boeing. Because the Air Force denied Boeing's sponsored claim, Boeing further argued that the Air Force breached its contracts with Boeing by refusing to honor the contracts' indemnification provisions.²²

The Air Force argued in its motion to dismiss that the ASBCA did not have jurisdiction to hear this claim because it was based on the contracts' "open ended indemnification clauses."²³ The ASBCA disagreed.²⁴ The Air Force contended that the ASBCA lacks jurisdiction because the Congress has not waived sovereign immunity in such indemnification cases. The Air Force argued that neither 50 U.S.C. § 1431 nor 10 U.S.C. § 2354 constitutes a waiver of sovereign immunity and further, that Boeing's and Lockheed's sole remedy under these open-ended indemnification clauses is to seek relief from the Secretary of the Air Force—vice from the ASBCA. Additionally, the Air Force contended that the ASBCA's exercise of jurisdiction in this case involving open-ended indemnification clauses would violate the ADA.²⁵

In denying the motion to dismiss, the ASBCA held that the CDA clearly grants it jurisdiction to hear breach of contract appeals and further, that the ADA does not bar its exercise of jurisdiction in this case.²⁶ The ASBCA responded to the Air Force's ADA argument challenging jurisdiction to hear this appeal because it was based upon "open-ended indemnification clauses" by finding that the ADA is a "valid affirmative defense [and] . . . does not oust a tribunal of jurisdiction."²⁷ Thus, while the ASBCA may exercise jurisdiction in cases involving alleged open-ended indemnification clauses, the government may nevertheless prevail on the merits of the case if it presents its ADA argument as an affirmative defense.²⁸

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

Last year, the *Year in Review*²⁹ discussed a series of GAO opinions stating that the expenditure of appropriated funds for publicity or propaganda purposes violates the ADA.³⁰ The GAO addressed this issue again in a 6 July 2006 letter to the

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 164,887.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 164,888.

²⁷ *Id.* at 164,890 (citing *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637, 639 (Fed. Cir. 1989)).

²⁸ *Id.*

²⁹ See Major Andrew Kantner et al., *Contract and Fiscal Law Developments of 2005—Year in Review*, ARMY LAW., Jan. 2006, at 156-57.

³⁰ The GAO has held in numerous cases that obligating and expending funds for publicity or propaganda purposes violates the ADA's prohibition against obligating and expending funds in excess of their availability. *Id.* The GAO reasons that where an agency's appropriations act contains the typical

Department of Education's General Counsel Office.³¹ The GAO's letter responded to the Department of Education's transmission of its ADA report for "No Child Left Behind Act promotional activities, including a prepackaged news story and the Armstrong Williams subcontract."³² The GAO stated plainly that the Department of Education violated that ADA.³³

The GAO's letter referenced two separate cases involving the Department of Education's expenditure of appropriated funds for producing promotional materials.³⁴ In the first case, the GAO found that the agency violated the ADA by using appropriated funds for the production and distribution of prepackaged news stories promoting the activities of that agency.³⁵ Specifically, the agency contracted for the production of audio and video news stories which explained the agency's programs pursuant to the No Child Left Behind Act; these news stories did not disclose that the source of the stories was the Department of Education.³⁶ The GAO stated that these expenditures violated the ADA by obligating appropriations (for publicity and propaganda) in excess of their availability, because no funds were available for this purpose. Significantly, the GAO opined that if these news stories had clearly disclosed that their source was the Department of Education, then the GAO would not have considered the stories to violate the publicity and propaganda prohibition or the ADA.³⁷ It is significant that the Department of Justice recently issued a memorandum³⁸ stating that it disagreed, in part, with GAO's focus on disclosure of the source as the key to determining whether an agency had violated the publicity and propaganda prohibition.³⁹

In the second case, the GAO found that the agency violated the ADA by using appropriated funds for a contract to pay an individual to comment on the agency's programs pursuant to the No Child Left Behind Act during his weekly television and radio programs.⁴⁰ Again, the GAO stated this contract violated the ADA by obligating and expending appropriations (for publicity and propaganda) in excess of their availability. As in the earlier related case, the GAO opined that if this contract had required the commentator to disclose that the agency was funding his comments, then the GAO would not have considered the comments to violate the publicity and propaganda prohibition. Expenditure of funds, in that case, would not have violated the ADA.⁴¹ While this July 2006 GAO letter does not raise any unexplored issues, the fact that agencies

Congressional prohibition against the use of funds for publicity or propaganda, there are no federal funds available for publicity or propaganda purposes. *See* Dep't of Health and Human Serv., Ctrs. for Medicare & Medicaid Servs.—Video News Releases, B-302710, 2004 U.S. Comp. Gen. LEXIS 102 (May 19, 2004); Office of Nat'l Drug Control Policy—Video News Release, B-303495, 2005 U.S. Comp. Gen. LEXIS 8 (Jan. 4, 2005). Thus, the expenditure of even one federal dollar for publicity and propaganda purposes would violate the ADA because the agency expended in excess of funds available. *Office of Nat'l Drug Control Policy*, 2005 U.S. Comp. Gen. LEXIS 8, at * 37.

³¹ Dep't of Educ.—No Child Left Behind Newspaper Article entitled "Parents Want Science Classes That Make the Grade," B-307917, 2006 U.S. Comp. Gen. LEXIS 136 (July 6, 2006).

³² *Id.* at *1.

³³ *Id.*

³⁴ *Id.* In both cases, the agency obligated funds appropriated to it pursuant to the 2004 Consolidated Appropriations Act. This Act states, "No part of any appropriation contained in this or any other Act shall be used for publicity or propaganda purposes within the United States not heretofore authorized by the Congress." Pub. L. No. 108-199, § 624, 118 Stat. 3 (2004). Thus, Congress has made no funds available in this appropriations act for publicity and propaganda purposes. Congress has prohibited the use of appropriated funds for publicity or propaganda purposes in each of its annual appropriations acts since 1951. Prepackaged News Stories, B-304272, 2005 U.S. Comp. Gen. LEXIS 29 (Feb. 17, 2005).

³⁵ Dep't of Educ.—No Child Left Behind Act Video News Release and Media Analysis, 2006 U.S. Comp. Gen. LEXIS 171 (Sept. 30, 2005).

³⁶ *Id.* at *2.

³⁷ *Id.* at *15.

³⁸ The Department of Justice (DOJ) disagrees with the GAO's opinion that an agency's mere failure to disclose the source of the prepackaged news story is the key factor in determining whether the agency has violated the publicity and propaganda prohibition. *See* Memorandum, Principal Deputy Assistant Attorney General to General Counsels of Executive Branch, subject: Whether Appropriations May Be Used for Informational Video News Releases (Mar. 1, 2005). The DOJ memo is available at <http://omb.gov>. DOJ opines that the central issue is whether the news story advocates a particular position—regardless of whether it discloses the news story's source. *Id.* Moreover, the DOJ memorandum clearly articulated that executive department agencies receive legal advice from DOJ and not from the GAO. *Id.* The DOJ memo was disseminated throughout the federal executive branch by the OMB as an attachment to a letter dated 11 March 2005. Memorandum, Principal Deputy Assistant Attorney General, to General Counsels of Executive Branch, subject: Whether Appropriations May Be Used for Informational Video News Releases (Mar. 1, 2005). The OMB memo containing the DOJ memo is also available at <http://omb.gov> (last visited Nov. 6, 2006). *See also* Memorandum, Office of Management and Budget, Use of Government Funds for Video News Releases (Mar. 11, 2005).

³⁹ Dep't of Educ.—No Child Left Behind Newspaper Article entitled "Parents Want Science Classes That Make the Grade," B-307917, 2006 U.S. Comp. Gen. LEXIS 136 (July 6, 2006). The GAO further commented in this letter to the Department of Education that Congress endorsed GAO's opinion in a conference report (unrelated to the Department of Education) accompanying the Emergency Supplemental Appropriations Act for FY 2005 specifically requiring an agency to disclose the source of the prepackaged new story. *Id.* *See also* H.R. Rep. No. 109-72 (2005). The Emergency Supplemental Appropriations Act for FY 2005 contains language similar to the language in the conference report. Pub. L. No. 109-13, § 6076, 119 Stat. 231 (2005).

⁴⁰ *Contract to Obtain Servs. of Armstrong Williams*, B-305368, 2005 U.S. Comp. Gen. LEXIS 173, at * 1.

⁴¹ *Id.* at *34.

continue to violate the ADA by expending large sums of appropriated funds for publicity and propaganda purposes⁴² is a sufficient reason for agency counsel to be aware of these cases. Moreover, agency counsel should also understand DOJ's differing view on what constitutes a violation of the publicity and propaganda prohibition.⁴³

GAO's Antideficiency Act Database

Two years ago, an amendment to the ADA first required agencies to submit completed ADA violation reports to the GAO, in addition to submitting such reports to the President and to Congress.⁴⁴ The amended reporting statute now states in pertinent part:

If an officer or employee of an executive agency. . .violates [the ADA], the head of the Agency. . .shall report immediately to the President and Congress all relevant facts and a statement of actions taken. A copy of each report *shall also be transmitted to the Comptroller General* on the same date the report is transmitted to the President and Congress.⁴⁵ (italics added)

The Senate Committee Report which accompanied the foregoing amendment also required the GAO to "establish a central repository of Antideficiency Act reports" for all federal agencies.⁴⁶ In response to this requirement, the GAO has created a publicly-accessible ADA database containing the agencies' letters to the President, Congress, and the GAO for each reported ADA violation.⁴⁷ The database also lists the agency involved, the appropriation, the amount of the violation, and the facts surrounding the violation. The GAO maintains a file for FY 2005 violations and a separate file for FY 2006 violations. These files do not include, however, the agency's entire investigative report explaining the details of the individuals involved or any disciplinary action taken.⁴⁸

For example, in the FY 2006 file on the website, the GAO lists thirteen ADA violations originating from both DOD and non-DOD organizations.⁴⁹ During this timeframe, nine of the reported ADA violations originated from DOD organizations.⁵⁰ Of these nine ADA violations originating from DOD, the type of appropriation misused most frequently was operations and maintenance (O&M). In one such case, the Army expended O&M funds to purchase commemorative coins to be used as gifts. In that case, no appropriation was proper because appropriated funds are generally unavailable to purchase gifts.⁵¹ In another case, the Air Force expended O&M funds for a lease with an option to purchase an "Explosive Ordinance Disposal Vehicle." In that case, the Air Force should have used Other Procurement, Air Force funds.⁵²

The GAO's ADA database is useful not only as a historical reference. It is also a practical resource that attorneys, commanders, service members and other government employees can use as a training tool. It is certainly less costly and less time-consuming to prevent ADA violations than it is to report and investigate them.

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⁴² In 2006, the GAO released a report concerning government contracts awarded for the purpose of advertising agencies' internal programs. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-305, at 2 and 23, *Media Contracts: Activities and Financial Obligations for Seven Federal Departments* (Jan. 13, 2006). While this report did not consider whether such contracts were permissible under the ADA, the report provides some perspective on the amount of money DOD spends on media advertising. *Id.* at 2-3. This report stated that from fiscal year 2003 to fiscal year 2005, DOD alone expended over \$1.1 billion on 152 media advertising contracts. *Id.* at 23.

⁴³ See explanation of DOJ's view at *supra* note 38.

⁴⁴ 31 U.S.C.S. § 1351 (LEXIS 2006). See also *Consol. Appropriations Act, Pub. L. No. 108-447, § 1401, 118 Stat. 2809, 3192 (2004)* (amending the ADA by requiring agencies to submit ADA reports to the GAO). Prior to the amendment, agencies were required to submit ADA reports to the President and to Congress, but not to the GAO. *Id.*

⁴⁵ 31 U.S.C.S. § 1351.

⁴⁶ S. REP. NO. 108-307, at 43 (2004). See also *Transmission of Antideficiency Act Reports, B-304335, 2005 U.S. Comp. Gen. LEXIS 47 (Mar. 8, 2005)*.

⁴⁷ Gov't Accountability Office, *Legal Products, Antideficiency Act Violations*, <http://www.gao.gov> (last visited 3 Dec. 2006).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* Of the nine DOD ADA violations listed on GAO's ADA website for FY 2006, six originated from Army organizations, two originated from Air Force organizations, and one originated from a Navy organization. *Id.*

⁵¹ *Id.*

⁵² *Id.* The Army reported a similar violation where it used O&M funds for the lease of armored vehicles where it should have used the Other Procurement, Army appropriation. *Id.*

Construction Funding

Military Contingency Construction Authority Levels

Congress made only limited changes to our construction funding authorities from previous years. Significant again this year is the one-year extension of the temporary, limited authority for DoD to use Operations and Maintenance (O&M) funds for contingency construction projects.¹ The funding authorization level remains \$100 million, consistent with last year's authorization.² Congress also increased the maximum annual amount authorized to be obligated for emergency military construction pursuant to 10 U.S.C 2803(c) from \$45 million to \$50 million.³

A significant change almost developed with regard to statutory cap on the authorization to use O&M funds for minor construction projects. The Senate version of the FY07 Authorization Act included provisions to amend 10 U.S.C. § 2805, Unspecified Minor Construction, to expand the threshold authority for the use O&M funds for construction projects to \$1.5 million⁴ and expand the threshold authority for the use of Unspecified Military Construction funding to \$3 million.⁵ Those provisions, however, did not survive the conference committee or make it into the final legislation.⁶ It is worth noting though, that at least the Senate considers the expansion of the minor construction thresholds to be important. It will be interesting to see if the whole Congress will come to that consensus next year.

Use of Wrong Appropriation Is Not a Ground for Protest

The Court of Appeals for the Federal Circuit (CAFC) affirmed a decision of the Court of Federal Claims (COFC)⁷ from late last year holding that the fact that the government may have used the wrong appropriation to fund a contract does not necessarily make the contract illegal.⁸

In this case, a Miller Act surety in a connection with a construction project sought to recover in *quantum meruit* the amount over the original contract price that it was required to pay in order to complete the project after the contractor defaulted. The Air Force in this case had used O&M to separately fund three buildings totaling over \$3 million. The surety argued that the government's expenditure of O&M funds, vice Military Construction funds (MILCON), was inappropriate for this construction project. The surety cited the statute generally requiring the use of MILCON for construction projects exceeding \$750,000.⁹ Consequently, the surety argued that the use of the wrong appropriation made the contract illegal and, therefore, voidable.¹⁰

The CAFC, citing its earlier decision in *AT&T III*,¹¹ stated that "invalidation of the contract is not a necessary consequence when a statute or regulation has been contravened, but must be considered in light of the statutory or regulatory purpose, with recognition of the strong policy of supporting the integrity of contracts made by and with the United

¹ National Defense Authorization Act for FY 2007, Pub. L. No. 109-364, § 2802 (2006).

² National Defense Authorization Act for FY 2006, Pub. L. No. 109-163, § 2809 (2005).

³ National Defense Authorization Act for FY 2007, Pub. L. No. 109-364, § 2801.

⁴ National Defense Authorization Act for Fiscal Year 2007, S. 2507 § 2901, 109th Cong. (2007) (introduced in Senate).

⁵ *Id.*

⁶ See National Defense Authorization Act for FY 2007, Pub. L. No. 109-364.

⁷ *United Pac. Ins. Co. v. United States*, 68 Fed. Cl. 152 (2005)

⁸ *United Pac. Ins. Co. v. United States*, 464 F.3d. 1325 (Fed. Cir. 2006).

⁹ See 10 U.S.C. § 2805 which generally requires the use of Military Construction Appropriations to be used for construction projects over a certain threshold. The current threshold is \$750,000, but at the time of this contract the limitation was \$500,000. 10 U.S.C.S. § 2805 (LEXIS 2006).

¹⁰ *United Pac.*, 464 F. 3d. at 1325.

¹¹ *Am. Telephone & Telegraph Co. v. Unites States*, 177 F.3d 1368, 1377 (Fed. Cir. 1999).

States.”¹² The Court found that the statutes in question did not specifically provide for the invalidation of contracts violating their provisions and further found that there was nothing in the relevant statutes or legislative history regarding military construction appropriations that supported the surety’s argument that this contract was voidable. Consequently, the CAFC affirmed the decision of the COFC and denied the surety’s appeal.¹³

Major Michael S. Devine

¹² *Id.* at 1332.

¹³ *Id.* at 1335.

Intragovernmental Acquisitions

The OFPP Creates Interagency Acquisition Working Group

With the ever-increasing need to increase interoperability, intragovernmental acquisitions have come under increasing scrutiny.¹ In November 2005, the Office of Federal Procurement Policy (OFPP) created a working group “to improve the management and use of interagency contracts,”² citing “a number of documented weaknesses in the management and use of interagency contracts [which] have prevented taxpayers from getting the best value in some cases.”³ The OFPP memo also notes that for the first time, interagency contracts have been put on the Government Accountability Office’s (GAO’s) “high-risk list.”⁴

The OFPP notes that the Department of Defense (DoD) is one agency with “large customers of interagency contracts,” and as such, is one of the required members of the new working group.⁵ The initial focus of the group will be to create “(1) guidance to clarify the roles and responsibilities of interagency contract managers and their customers; (2) program management reviews, including common metrics to benchmark results, quality assurance plans, and improved reporting on activities; and (3) training to address the challenges associated with interagency contracting.”⁶ Future goals for the group include improving “the governance structure for creating and renewing interagency contracts.”⁷

GSA Contracting Merger Finalized

On 6 October 2006, President Bush signed into law the new “General Services Administration Modernization Act,”⁸ which amends the U.S. Code “to establish a Federal Acquisition Service, to replace the General Supply Fund and the Information Technology Fund with an Acquisition Services Fund, and for other purposes.”⁹ Congress created a new position to head the new service, the Commissioner of the Federal Acquisition Service (FAS), who “shall be responsible for carrying out functions related to the uses for which the Acquisition Services Fund is authorized . . . including any functions that were carried out by the entities known as the Federal Supply Service and the Federal Technology Service and such other related functions as the [Administrator of General Services] considers appropriate.”¹⁰ The Administrator, currently Lurita Doan, “named Jim Williams commissioner of the division this summer . . . [and] said she would sign an order formally acknowledging the new law and finalizing changes to the FAS as recommended by Williams in September.”¹¹

¹ See generally JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERAGENCY, INTERGOVERNMENTAL ORGANIZATION, AND NONGOVERNMENTAL ORGANIZATION COORDINATION DURING JOINT OPERATIONS, VOLS. I & II (17 Mar. 2006).

² Memorandum, Office of Federal Procurement Policy, to Chief Acquisition Officers, Agency Senior Procurement Executives, subject: Establishment of Interagency Acquisition Working Group (21 Nov. 2005), available at http://www.whitehouse.gov/omb/procurement/publications/interagency_work_group.pdf [hereinafter OFPP Memo].

³ *Id.*

⁴ *Id.* The GAO’s high risk series is explained at: <http://www.gao.gov/docsearch/abstract.php?rptno=GAO-05-207>, and states:

GAO’s audits and evaluations identify federal programs and operations that, in some cases, are high risk due to their greater vulnerabilities to fraud, waste, abuse, and mismanagement. Increasingly, GAO also is identifying high-risk areas to focus on the need for broad-based transformations to address major economy, efficiency, or effectiveness challenges. Since 1990, GAO has periodically reported on government operations that it has designated as high risk. In this 2005 update for the 109th Congress, GAO presents the status of high-risk areas identified in 2003 and new high-risk areas warranting attention by the Congress and the administration. Lasting solutions to high-risk problems offer the potential to save billions of dollars, dramatically improve service to the American public, strengthen public confidence and trust in the performance and accountability of our national government, and ensure the ability of government to deliver on its promises.

U.S. GOV’T ACCOUNTABILITY OFFICE, REP. NO. GAO-05-207, HIGH RISK SERIES: AN UPDATE 1 (Jan. 2005).

⁵ OFPP Memo, *supra* note 2.

⁶ *Id.*

⁷ *Id.*

⁸ General Services Administration Modernization Act, Pub. L. No. 109-313, 120 Stat. 1734 (2006).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Rob Thormeyer, *Bush Signature Completes GSA Reorganization*, WASHINGTON TECHNOLOGY, Oct. 9, 2006, available at http://www.washingtontechnology.com/news/1_1/daily_news/29473-1.html.

Contracting with Federal Prison Industries

Recently, an official Army website indicated that UNICOR, which is the trade name for Federal Prison Industries (FPI), is the mandatory source for furniture. That means federal law prescribes the way we are to purchase furniture. The government (including all IMPAC purchase cardholders) must either (1) purchase furniture from UNICOR, or (2) obtain a waiver from UNICOR before purchasing furniture from any other source.”¹² This information is not correct, as “Congress eliminated FPI’s mandatory source statues with the enactment of section 811 of the National Defense Authorization Act for Fiscal Year 2002 . . . and section 819 of the Bob Stump National Defense Authorization Act for Fiscal Year 2003. . . . Under these provisions, [DoD] may not purchase any FPI product or service unless a contracting officer of [DoD] determines that the product or service is comparable to products or services available from the private sector, and meets [DoD] need in terms of price, quality and time of delivery.”¹³ No waiver is required if there are “better products or services [] available from the private sector.”¹⁴

Major Jennifer C. Santiago

¹² S. REP. NO. 109-254, at 370 (2006).

¹³ *Id.*

¹⁴ *Id.*

Obligations

The Spirit of the Law

In *National Labor Relations Board—Improper Obligation of Severable Service Contract*,¹ the Government Accountability Office (GAO) held that an agency may not correct an “inadvertent ministerial error” in obligation by adjusting a completed contract from a previous fiscal year.²

The National Labor Relations Board (NLRB) issued a service contract to the Electronic Data Systems for maintaining the Case Activity Tracking System (CATS), which is a database for tracking the NLRB caseload.³ The contract was from 1 October 2001 through 30 September 2002, with option years until 2015. The NLRB Inspector General (IG) audited the NLRB’s acquisition process for information technology services, and found that the NLRB inappropriately obligated fiscal year (FY) 2005 funds for the CATS contract’s fourth option year, which ran from 1 October 2005 through 30 September 2006.⁴

The NLRB responded by proposing to amend the contract by modifying the option years in question in order to comply with the severable service contract exception of 41 U.S.C. § 2531, i.e. resetting the contract so that it ran from 30 September 2005 to 29 September 2006.⁵ The agency’s argument was that the NLRB’s “intended actions were with the letter of the law and the actual actions were within the spirit of the law.”⁶

The GAO refused to allow an agency to “alter executed contracts in order to reach expired funds.”⁷ An agency is allowed to adjust obligations if an investigation shows that its records do not reflect what actually occurred during the period of the fund’s availability.⁸ In this case, however, the GAO felt that the NLRB would not be adjusting “an erroneous under-recording, over-recording, or failure to record,” but revising what actually occurred.⁹ Since those funds have expired, the agency lost its ability to fix the error; the GAO stated that, “(t)o ensure the reliability and accuracy of the accounting for obligations, the emphasis need to be on what actually happened, not on what one would have wished had happened.”¹⁰

Arbitrating the Obligations of Arbitrators

The GAO issued an obligations primer in *National Mediation Board—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act*.¹¹ The National Mediation Board (NMB) asked the GAO for guidance concerning obligating funds for neutral arbitrators. The NMB appoints arbitrators for grievance adjustment boards under section 3 of the Railway Labor Act.¹² Generally, the NMB issues a certificate of appointment to hear either a single case or a specified group of related cases.¹³ Before the arbitrator can work on a case, he or she must also receive approval from the NMB for expenses and compensation, which the NMB approves in advance on a month-to-month basis.¹⁴ The NMB pays arbitrators monthly for expenses, but pays for the work on the decision after the arbitrator submits the award.¹⁵

¹ B-308026, 2006 U.S. Comp. Gen. LEXIS 149 (Sept. 14, 2006).

² *Id.* at *8.

³ *Id.* at *3.

⁴ *Id.*

⁵ The Federal Acquisition Streamlining Act allows a federal agency to fund a severable service contract for up to twelve months using current year funds, even though a part of that contract may extend into the next fiscal year. 41 U.S.C. § 2531 (LEXIS 2006).

⁶ *Nat’l Labor Relations Bd.*, 2006 U.S. Comp. Gen. LEXIS 149, at *5-*6.

⁷ *Id.* at *10.

⁸ *Id.* at *11-*12.

⁹ *Id.* at *12.

¹⁰ *Id.*

¹¹ Comp. Gen. B-305484, June 2, 2006.

¹² 45 U.S.C. § 153 (LEXIS 2006).

¹³ *Nat’l Mediation Bd.*, Comp. Gen. B-305484, at 3.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

Since an obligation represents a legal liability, the GAO concluded that the NMB's moment of liability occurred when the NMB issues the certificate of appointment along with the compensation letter approving expenses.¹⁶ However, the GAO disapproved of the NMB's practice of only obligating funds on a month-to-month basis based on pre-approved expenses.¹⁷ The GAO felt that since the arbitration agreement was a non-severable service, the NMB should obligate funds for an appointed arbitrator based on an estimate of the total number of days the arbitrator is expected to work.¹⁸

As the GAO stated, when the NMB "appoints an arbitrator, it is the amount of the commitment, not the commitment itself, that is uncertain."¹⁹ Therefore, the key event was the appointment letter, and not necessarily the pre-approval of monthly expenses, which the NMB was using as the basis for obligating funds.²⁰ The proper method was for the NMB to obligate funds for the estimated cost of the arbitrator for the entire case or series of cases for which he or she was appointed.²¹

The NMB asked if language in the compensation letter which stated that "such compensation is subject to the availability of government funds" saved NMB from a potential Antideficiency Act (ADA) violation.²² The GAO replied in the negative, stating that it is only the act of recording an obligation which could protect NMB from an ADA violation.²³ The proper policy would be to obligate funds at the time the NMB issues the appointment certificate.²⁴

In addition, the NMB did not have to obligate funds for arbitrators for pending cases, since those were properly characterized as contingent liabilities.²⁵ The GAO made clear that the "obligating event" for the NMB was the appointment of the arbitrator by an authorized NMB official.²⁶ Finally, the NMB would have to issue a new certification letter and obligate new funds in order to add cases to an arbitrator's docket;²⁷ the NMB would be prohibited from issuing an open-ended agreement.²⁸

"You can learn a lot from a dummy."

The Special Inspector General for Iraq Reconstruction (SIGIR) also issued a good primer on obligations in an interim audit report on the Iraq Relief and Reconstruction Fund 2 (IRRF2).²⁹ The SIGIR found that the Army Corps of Engineers (COE) entered ninety-six obligations under the vendor name, "Dummy Vendor" in order to enter data into a data field for vendors when no specific vendor existed.³⁰ The SIGIR made it clear that there was no chicanery in this terminology, but that the COE intended to obligate in-scope modifications and estimated cost-to-complete projects.³¹

Congress appropriated the IRRF2 in November 2003 for three years; the funds were available for obligations until 30 September 2006.³² The SIGIR found that the COE inappropriately obligated \$362 million in five different categories:

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 8.

²⁰ *Id.* at 9.

²¹ *Id.* at 8.

²² *Id.* at 9.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 10.

²⁶ *Id.* at 14.

²⁷ *Id.* at 15.

²⁸ *Id.* at 14.

²⁹ OFF. OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, SIGIR-06-037, INTERIM AUDIT REPORT ON IMPROPER OBLIGATIONS USING THE IRAQ RELIEF AND RECONSTRUCTION FUND (IRRF 2) (22 Sept. 2006).

³⁰ *Id.* at 1.

³¹ *Id.*

³² *Id.* at 2.

Contingency; Design/Build Program Close Out; Public Works Center Costs; Supervision & Administration; and Claims & Unknown.³³ On 25 August 2006, the COE informed the SIGIR that the “dummy vendors” were miscellaneous obligation documents; on 7 September 2006, that the COE planned to use IRRF2 funds for in-scope modifications and close-out costs.³⁴

Since there was a chance that the COE could not complete this request prior to 30 September 2006 SIGIR found that the obligations in question were improper. The COE informed the SIGIR that the funds would be deobligated.³⁵ The SIGIR commented that the expired funds could be used “to liquidate obligations properly chargeable to the account prior to deobligation” and “to make legitimate obligations adjustments.”³⁶

Major Andrew S. Kantner

³³ *Id.* at 3.

³⁴ *Id.* at 4.

³⁵ *Id.* at 5.

³⁶ *Id.* at 6.

Operational Funding¹

“Train and Equip” Authority No Longer Available

Unlike past years, Congress did not include section 9006, or “train and equip” authority,” in this year’s Defense Appropriations Act.² Previously, Congress had authorized the use of up to \$500,000,000 in Department of Defense (DoD) Operation and Maintenance (O&M) funds to be used to “train, equip and provide related assistance only to military or security forces in Iraq and Afghanistan.”³ Historically, the DoD has not exercised its authority under this section, possibly because of the weighty notification requirements. The provision required the DoD to notify, before providing assistance, *all* of the Congressional Defense committees, as well as the Committee on International Relations and the Senate Committee on Foreign Relations.⁴ In the conference report accompanying the Appropriations Act for this year, Congress explained that, “[t]he conferees delete language as proposed by the House, which provided funds for support to the military and security forces of Iraq and Afghanistan. These matters are addressed in the relevant appropriations accounts.”⁵

Congress Facilitates Increased Interoperability with Coalition Partners

In the Authorization Act⁶ for this year, Congress included several provisions which will increase the DoD’s ability to transfer equipment and provide logistic support to allied forces. One change is the addition of a new section to Title 10, entitled, “Logistic Support for Allied Forces Participating in Combined Operations.”⁷ This section gives the Secretary of Defense (SECDEF) the authority to “provide logistic support, supplies, and services to allied forces participating in a combined operation with the armed forces.”⁸ Prior to using this authority, however, the SECDEF must obtain the concurrence of the Secretary of State.⁹ The authority is limited in scope and may only be used for combined operations:

that [are] carried out during active hostilities or as part of [] contingency operation[s] or [] noncombat operation[s] (including [] operation[s] in support of the provision of humanitarian or foreign disaster assistance, [] country stabilization operation[s], or peacekeeping operation[s] under chapter VI or VII of the Charter of the United Nations); and . . .

[where SECDEF] determines that the allied forces to be provided logistic support, supplies, and services (i) are essential to the success of the combined operation; and (ii) would not be able to participate in the combined operation but for the provision of such logistic support, supplies, and services by the Secretary.¹⁰

¹ See also *infra*, app. A.

² See Department of Defense Appropriations Act, 2007, Pub. L. No. 109-289, 120 Stat. 1257 (2006); Department of Defense Appropriations Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005); Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004).

³ Department of Defense Appropriations Act, 2006, § 9006 states in full:

SEC. 9006. Notwithstanding any other provision of law, of the funds made available in this title to the Department of Defense for operation and maintenance, not to exceed \$500,000,000 may be used by the Secretary of Defense, with the concurrence of the Secretary of State, to train, equip and provide related assistance only to military or security forces of Iraq and Afghanistan to enhance their capability to combat terrorism and to support United States military operations in Iraq and Afghanistan: *Provided*, That such assistance may include the provision of equipment, supplies, services, training, and funding: *Provided further*, That the authority to provide assistance under this section is in addition to any other authority to provide assistance to foreign nations: *Provided further*, That the Secretary of Defense shall notify the congressional defense committees, the Committee on International Relations of the House of Representatives, and the Committee on Foreign Relations of the Senate not less than 15 days before providing assistance under the authority of this section.

Id.

⁴ *Id.*

⁵ H.R. REP. NO. 109-676 (2006).

⁶ John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2007).

⁷ *Id.* § 1201.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

For this expanded new authority, Congress tied the definition of “logistic support, supplies, and services” to the one in the acquisition and cross servicing agreement (ACSA) statute, which allows the transfer of:

food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Such term includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act.¹¹

In a related action, Congress updated the definition of ammunition transfers under the ACSA authority.¹² Historically, certain ammunition was specifically excluded, including “demolition munitions and training ammunition; cartridge and propellant-actuated devices; [and] chaff and chaff dispensers,”¹³ which as a result of the change by Congress may now be transferred under an ACSA.¹⁴

Rewards Program Limits and Delegation Authority Increased

Rewards may be paid to individuals who provide U.S. government personnel with “information or nonlethal assistance that is beneficial to . . . an operation or activity of the armed forces conducted outside the United States against international terrorism; or . . . force protection of the armed forces.”¹⁵ This year, Congress amended the rewards statute (10 U.S.C. § 127B) to increase the monetary amounts available to commanders on the ground as well as the delegation authority of certain commanders.¹⁶ Before the amendment, the Secretary of Defense had authority to pay rewards up to \$200,000 and could delegate his authority to “the Deputy Secretary of Defense [DEPSECDEF] and an Undersecretary of Defense without further redelegation,” and to combatant commanders in an amount not to exceed \$50,000.¹⁷ Combatant commanders delegated this authority could then redelegate this authority to their deputy commanders for the same amount and as well as delegate the authority to subordinate commanders in an amount not to exceed \$2,500.¹⁸ This year’s amendment increases the \$2,500

¹¹ 10 U.S.C.S. § 2350(1) (LEXIS 2006).

¹² S. REP. 109-72 (2006). The Conference report states:

The conferees further note their agreement on the desirability of updating their understanding of the term “ammunition” under section 2350(1) of title 10, United States Code. The definition of “ammunition” provided in this conference report is meant to supersede the definition of ‘ammunition’ that was provided in Senate Report 96-842 and Senate Report 96-795, both of which accompanied the legislation (H.R. 5580) that first codified ACSA authority in title 10, United States Code.

Specifically, the conferees agree that the term “ammunition” in section 2350(1) of title 10, United States Code, includes: transfers of small arms ammunition between forces on exercises when one side runs low and another has sufficient supplies with repayment in cash or kind; replacement-in-kind of ammunition expended at allied ranges; exchange unit firing to determine compatibility of ammunition between nations and its suitability for use in different weapon systems; emergency acquisition of provisions of conventional ammunition (small arms, mortar, automatic cannon, artillery, and ship gun ammunition); bombs (cluster, fuel air explosive, general purpose, and incendiary); unguided projectiles and rockets; riot control chemical ammunition; land mines (ground-to-ground and air-to-ground delivered); demolition material; grenades; flares and pyrotechnics; and all items included in the foregoing, such as explosives, propellants, cartridges, propelling charges, projectiles, warheads (with various fillers such as high explosives, illuminating, incendiary, antimaterial, and anti-personnel), fuses, boosters, and safe and arm devices, in-bulk, combination, or separately packaged items of issue for complete round assembly; demolition munitions; training ammunition; cartridge and propellant-actuated devices; chaff and chaff dispensers; and expendable sonobuoys. Specifically excluded are the following: guided missiles; naval mines and torpedoes; nuclear ammunition and included items such as warheads, warhead sections, and projectiles; guidance kits for bombs or other ammunition; and chemical ammunition (other than riot control).

¹³ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 2120.01 27, ACQUISITION AND CROSS SERVICING AGREEMENTS (4 Apr. 2004). Note that the language in this instruction is based on the historical definition of ammunition, which is specifically overridden by the language in this year’s conference report. SEN. R. 109-702, *supra* note 12.

¹⁴ *Id.*

¹⁵ 10 U.S.C.S. § 127b.

¹⁶ 2007 Authorization Act § 1401.

¹⁷ 10 U.S.C.S. § 127b(c)(1).

¹⁸ *Id.* § 127b (c)(2).

amount to \$10,000.¹⁹ The provision will give increased flexibility to commanders on the ground. To illustrate, the authority for commanders to approve rewards may be raised from \$2,500²⁰ to \$10,000.

Reassignment and Designation of Army Reserve Civil Affairs and Psychological Operations Forces

On 14 November 2006, the DEPSECDEF directed that the Secretary of the Army (SECARMY) “assign all Army Reserve Component Civil Affairs and Psychological Operations units currently assigned to the Special Operations Command to the United States Joint Forces Command, effective 1 October 2006. . . and all . . . units in the continental United States . . . further assigned to the United States Army Reserve Command.”²¹ The official reassignment and designation will impact fiscal analysis because special operations forces (SOF), among other special funding provisions, have authority under Title 10, United States Code, § 2011, to fund the training of the “armed forces and other security forces of a friendly foreign country.”²² The provision currently defines SOF as including civil affairs forces and psychological operations forces, however, based on the guidance issued by DEPSECDEF, “[e]ffective immediately upon reassignment, the Army Reserve Civil Affairs and Psychological Operations forces will no longer be designated a Special Operations Force (SOF) for purposes of § 167, Title 10, United States Code.”²³

Major Jennifer C. Santiago

¹⁹ 2007 Authorization Act § 1401.

²⁰ MULTI-NATIONAL CORPS—IRAQ, MNC-I REWARDS PROGRAM STANDARD OPERATING PROCEDURES (1 Apr. 2005) (on file with the author). All brigade/regimental level commanders and Multinational Corps - Iraq separate brigade commanders are specifically included in the U.S. Central Command delegation. *Id.*

²¹ Memorandum, Deputy Secretary of Defense, to the Secretary of the Army and the Chairman of the Joint Chiefs of Staff, subject: Reassignment and Designation of Army Reserve Civil Affairs and Psychological Operations Forces (14 Nov. 2006) [hereinafter DEPSECDEF CA Memorandum].

²² 10 U.S.C.S. § 2011 (LEXIS 2006).

²³ DEPSECDEF CA Memorandum, *supra* note 21. See also 10 U.S.C.S. § 167, which establishes the Unified combatant command for special operations forces.

Liability of Accountable Officers

The Price of Bottled Water

The GAO refined the definition of “good faith” in analyzing the liability of disbursing and certifying officers in *Clarence Maddox—Relief of Liability for Improper Payment for Bottled Water*.¹ The GAO opined that the standard is whether a certifying officer “did not have, nor should reasonably have had, doubt regarding propriety of payment,” taking the totality of circumstances into account.²

The Administrative Office of the U.S. Courts (AOUSC) asked the GAO to relieve Mr. Maddox, its Clerk of Court for the U.S. District Court of the Southern District of Florida, of liability for improper payments for bottled water purchased for employees of the Fort Pierce Division courthouse. The GAO reiterated the general rule that bottled drinking water is a personal expense.³ The GAO treated Mr. Maddox, titled as a disbursing officer,⁴ as a certifying officer for the analysis of his potential liability for the improper payments.

The three-part test for reliving a certifying official from liability is: the obligation was incurred in good faith, no law specifically prohibited the payment, and the U.S. received value for payment.⁵ Mr. Maddox’s main theory to avoid liability was that he was not aware of the purchase of bottled water for employees.⁶ In addition, he cited the fact that the start of the practice of purchasing the bottled water for employees preceded his arrival as clerk of court. Also, he noted the high volume of vouchers in his office and the distance between his office and the Fort Pierce courthouse.⁷ Last, he pointed to audits which failed to catch the bottled water payments.⁸

The GAO felt that Mr. Maddox should have been in doubt regarding propriety of payment.⁹ Internal directives of the AOUSC specifically cited bottled water as an unauthorized purchase.¹⁰ The bottled water purchase came from a different fund than the authorized purchases of water for jurors.¹¹ Further, the GAO will not relieve an accountable officer solely due to a heavy workload.¹² In addition, a failure for an audit to catch an erroneous payment does not waive Mr. Maddox’s responsibility to properly certify the government payment.¹³

The GAO strongly underscored the importance of a certifying officer’s responsibility to accurately certify payments. The GAO’s ultimate conclusion was that Mr. Maddox should be personally liable for eleven payments totaling \$485.60 because he should have been aware that the payments were for unauthorized purchases of bottled water for employees.¹⁴

¹ Comp. Gen. B-303920, 2006 U.S. Comp. Gen. LEXIS 54 (Mar. 21, 2006).

² *Id.* at *9.

³ Appropriated funds may be used upon a showing of necessity, such as a health risk documented by expert analysis. *Id.* at *5. Although Mr. Maddox alluded to sewer and plumbing problems in his request, no analysis of the water had been performed. *Id.*

⁴ There appeared to be some question as to his role. The Administrative Office of the U.S. Courts told the GAO that Mr. Maddox certified the legal availability of appropriations prior to signing the relevant checks. *Id.* at *7.

⁵ 31 U.S.C.S. § 3528(b)(1)(B) (LEXIS 2006).

⁶ *Clarence Maddox*, 2006 U.S. Comp. Gen. LEXIS 54, at *10.

⁷ *Id.*

⁸ *Id.* at *12.

⁹ *Id.* at *10.

¹⁰ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES (Jan. 1, 2001).

¹¹ Water for jurors came out of a “Jurors and Commissioners” appropriation while the water for employees came from the “Salaries and Expenses of the U.S. Courts” fund. *Clarence Maddox*, Comp. Gen. B-303920, at *11.

¹² *Id.* at *12.

¹³ *Id.*

¹⁴ The GAO noted that twenty-seven payments, totaling \$947.60 were waived by operation of law because the purchases occurred more than three years after the time the agency identified the discrepancy in its account. *Id.* at *5.

The GAO held that the DoD may employ local nationals as Departmental Accountable Officers even though local laws may shield those employees from pecuniary liability under U.S. law.¹⁶ A certifying official at the U.S. Army Material Command submitted an advance decision on the question of using appropriated funds to hire foreign employees for this type of work, even though the traditional safeguards for the expenditure of government funds, the potential liability for improper purchases, would be absent.¹⁷

The DoD has statutory authority to create Departmental Accountable Officials which encompass various functions that provide “information, data or services that are directly relied upon by the certifying official in the certification of vouchers for payment.”¹⁸ These officials then possess joint and several liability with any certifying or disbursing officer who relies on the improper information.¹⁹

Local nationals overseas fill Departmental Accountable Official positions although some national laws may impose different standards of liability than U.S. law.²⁰ Even though this may result in a local national not being held liable for an erroneous payment, the GAO could find no prohibition against the practice of hiring local nationals for these positions.²¹ The GAO questioned the wisdom of the practice of hiring employees for a position for which they might not be held accountable.²²

A Self-Definitive Officer

In *United States Capitol Police—Waiver of Erroneous Salary Payments*,²³ the GAO stated that “waiving erroneous payments is not a statutory function, duty, or authority of a disbursing officer.”²⁴ In 2003, Congress designated the Chief of Police as the single disbursing officer of the United States Capitol Police (USCP).²⁵ The USCP asked the GAO if this designation allowed the Chief of Police to waive erroneous salary payments.

The GAO stated that there is no government-wide statutory definition of a disbursing officer, because it is “self-definitive,” i.e. an officer who disburses funds.²⁶ The GAO noted that Harvey C. Mansfield, a historian, noted that disbursing is a “clerical task whose virtues are accuracy, fidelity, and dispatch,” which would not encompass settling questions of law.²⁷

¹⁵ “No liability.” German language.

¹⁶ *Department of Defense Accountable Officers—Local Nationals Abroad*, Comp. Gen. B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006).

¹⁷ *Id.*

¹⁸ 10 U.S.C.S. § 2773a(b)(1) (LEXIS 2006).

¹⁹ *Id.*

²⁰ An example cited by the opinion is a German law which restricts liability for certain categories of “damage-prone” work. U.S. ARMY EUROPE, REG. 690-62, U.S. FORCES CLAIMS AGAINST LOCAL NATIONAL EMPLOYEES IN GERMANY para. 5b (30 Oct. 1984).

²¹ *Department of Defense Accountable Officers*, 2006 U.S. Comp. Gen. LEXIS 56, at *11.

²² *Id.* at *11-12.

²³ Comp. Gen. B-307529, Mar. 28, 2006.

²⁴ *Id.* at 1.

²⁵ 2 U.S.C.S. § 1907 (LEXIS 2006).

²⁶ *United States Capitol Police*, Comp. Gen. B-307529, at 3.

²⁷ *Id.* (quoting HARVEY MANSFIELD, THE COMPTROLLER GENERAL 123 (1939)).

The GAO concluded that, since the waiver involves the relinquishment of a government claim for funds, the waiver of an erroneous payment would require statutory authority.²⁸ Generally, this waiver authority lies with the head of the agency.²⁹ The GAO then found that the USCP had dual tracks to seek a waiver: from either the Speaker of the House or the Secretary of the Senate.³⁰

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²⁸ *Id.*

²⁹ *Id.* at 4.

³⁰ The Act which created the disbursing officer removed the designation of the USCP as either House or Senate employees. The GAO looked at the plain meaning of the statute to read that the act shifted waiver authority to either side of the bicameral legislature. *Id.* at 4-5.