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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: National Science Foundation—Potential Antideficiency Act Violation by the National Science Board Office

File: B-317413

Date: April 24, 2009

DIGEST

The National Science Board Office's (NSBO) fiscal year 2006 appropriation is not available to fund cost overruns incurred during performance of a contract that was settled by a modification to the contract in fiscal year 2007. This settlement represents a new obligation properly chargeable to fiscal year 2007. NSBO can correct this improper recording through an account adjustment by deobligating the amounts that were improperly charged to fiscal year 2006 appropriations and charging these amounts to the fiscal year 2007 appropriation. If after NSBO adjusts its accounts it has insufficient funds in its fiscal year 2007 appropriation, it should report an Antideficiency Act violation in accordance with 31 U.S.C. § 1351.

DECISION

The National Science Foundation (NSF) has requested a decision about whether an Antideficiency Act violation occurred regarding the National Science Board's (NSB) fiscal year 2006 appropriation. Letter from Lawrence Rudolph, General Counsel, National Science Foundation (NSF), to Gary Kepplinger, General Counsel, GAO, Oct. 17, 2008 (NSF Letter). At issue in this decision is whether the National Science Board Office (NSBO) incurred an obligation during fiscal year 2006 for cost overruns under a NSBO contract and whether a fiscal year 2007 settlement of the cost overrun claim could be paid using fiscal year 2006 funds. The cost overruns were the result of changes to the deliverable schedule under NSBO's contract with Strategic Analysis, Inc. (SAI).

Our practice when rendering decisions is to obtain the views of the relevant agency to establish a factual record and the agency's legal position on the subject matter of

the request.¹ NSF included in its request for a decision in this matter its legal views and relevant factual material. To supplement the record, we held a telephone conference call with NSF officials on March 10, 2009.² We requested NSF Office of Inspector General's (OIG) legal position on these issues and NSF OIG replied by letter on January 30, 2009. Letter from Thomas Cross, Interim Inspector General, NSF, to Neill Martin-Rolsky, Senior Attorney, GAO, *Re: National Science Foundation—Potential Antideficiency Act Violation by the Office of the National Science Board*, Jan. 30, 2009 (NSF OIG Letter).

BACKGROUND

NSF is an executive branch agency and consists of a Director and the NSB. 42 U.S.C. § 1861. NSBO establishes the policies of the NSF within the framework of applicable national policies set forth by the President and Congress. 42 U.S.C. § 1863(a).

For fiscal year 2006, NSBO received a \$4 million appropriation for necessary expenses in carrying out section 4 of the National Science Foundation Act of 1950, 42 U.S.C. § 1863. Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, title III, 119 Stat. 2290, 2319 (Nov. 22, 2005). The NSBO's obligations and expenditures are recorded in NSF's financial system. NSF contracting staff assists NSBO staff with contract solicitation, award, and administration. Attachment to NSF Letter, at 1.

In September 2003, NSF issued a cost reimbursement level-of-effort contract to SAI for science and engineering policy support to NSBO (Contract No. NSB-0353575). The contract was a one-year base contract with three 1-year options. On August 26, 2005, NSF issued Task Order No. 4 (Task Order) to SAI, entitled *Metrics of Dissemination and Impact*. The Task Order required SAI to develop and implement an electronic Web based process to assess the impact of NSB policy recommendations, activities, and other products. During February and March of 2006, an NSBO Senior Scientist directed SAI to change the order of deliverables under the Task Order and SAI agreed to adjust the schedule to accommodate such changes. Neither NSF nor NSBO had granted the NSBO Senior Scientist, who initiated these changes, the authority to enter into contracts on behalf of NSBO or to modify or amend contracts.³ On March 1, 2006, SAI's Program Manager e-mailed a

¹ GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal/resources.html.

² Telephone Conversation between Greg Steigerwald, Contracting Officer, NSF; Sandy Scholar, Assistant General Counsel, NSF; Sandy Wozniak, Assistant General Counsel, NSF; Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO; and Monica Anatalio, Senior Staff Attorney, GAO, Mar. 10, 2009 (NSF Conversation).

³ The contract stated that the contracting officer is the only person authorized to approve changes or modify any of the requirements under the task order and that

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summary of the contract changes and associated action items, including timelines, to the Senior Scientist and the NSBO IT Specialist. The NSBO IT Specialist responded by e-mail that he concurred with the timelines and action items. E-mail from NSBO IT Specialist to SAI Program Manager and NSBO Senior Scientist, *Subject: RE: Action Items and Next Steps for SA IT Team*, Mar. 1, 2006 (NSBO E-mail).

On January 10, 2007, SAI submitted a Request for Equitable Adjustment/Certified Claim (REA), pursuant to the Contract Disputes Act (41 U.S.C. § 605), to NSF's contracting officer requesting \$188,640 for additional costs incurred because of changes to the contract initiated by the NSBO Senior Scientist in February and March 2006, and referenced in the NSBO E-mail. *See* Attachment I to REA (Jan. 8, 2007). There is no disagreement between SAI and NSF that a cost overrun occurred. NSF Office of General Counsel Memorandum for Greg Steigerwald, Branch Chief, DACS, *Strategic Analysis, Inc.—Request for Equitable Adjustment*, Aug. 14, 2007, at 4 (NSF OGC Memorandum).

In negotiations that concluded on March 23, 2007, SAI and NSF agreed to settle SAI's claim for \$88,000. Letter from Greg Steigerwald, NSF Contracting Officer, to Angela Leno, SAI Contracts Manager, Sept. 14, 2007. In August 2007, NSBO, after reviewing its fiscal year 2006 contract obligations and actual expenditures to identify candidates for possible deobligation, identified available unexpended balances in several of those contracts and notified the NSF contracting office that those unexpended balances could be deobligated. NSF OIG Letter, at 6. On September 14, 2007, the NSF contracting officer executed Modification No. 3 to the contract to settle SAI's claim.⁴ Modification No. 3 states that its purpose is to settle the Request for Equitable Adjustment.

DISCUSSION

The issue is whether NSBO's fiscal year 2006 appropriation is available to fund Modification No. 3, issued on September 14, 2007, in settlement of SAI's January 2007 REA claim. Generally, costs of a settlement are to be paid using appropriations current at the time of settlement. For example, in B-255772, Aug. 22, 1995, we addressed whether the National Endowment for the Arts (NEA) could pay a settlement using unobligated appropriations from fiscal years prior to the fiscal year of the settlement agreement. We concluded that the agency could not use funds from

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change at the direction of any person other than the contracting officer would result in no adjustment in the task order price. MOBIS Contract No. GS-10F-0056L; NSF Contract No. NSB 0353575; National Science Foundation, Division of Acquisition and Cooperative Support Memorandum for SAI, *Contract Administration and Technical Direction*, Aug. 16, 2006.

⁴ Modification No. 3 was issued for the amount of \$90,763 representing the negotiated \$88,000 settlement plus requisite interest under the Contract Disputes Act.

a prior fiscal year because NEA became liable to pay the settlement only at that point in time when it agreed to pay claimants' claims, that is, when it entered into the settlement agreement. Therefore, NEA had to obligate the appropriation for the fiscal year in which the settlement was entered into. *Id.* In another decision addressing the administrative settlement of claims, we explained that payment is chargeable to appropriations current at the time of final action on the settlement because the settlement creates a new right in the successful claimant, giving rise to a new government liability. There is no obligation on the part of the United States for payment of any amount on a claim until a final determination of the government's liability is made by the designated authority. 63 Comp. Gen. 308 (1984).


NSBO became liable for the settlement only at that point when its liability to the claimant, SAI, was established in fiscal year 2007. Thus, when the NSF contracting officer issued Modification No. 3 on September 14, 2007, which settled the request for equitable adjustment, NSBO incurred a new legal liability. NSBO must use fiscal year 2007 funds for this liability. However, NSBO did not use fiscal year 2007 funds to pay the settlement. Instead, it reviewed its fiscal year 2006 contract obligations, deobligated amounts sufficient to pay the settlement, and improperly used expired fiscal year 2006 appropriations.

NSF could have used fiscal year 2006 funds to pay the settlement if it had ratified the Senior Scientist's unauthorized fiscal year 2006 action. Ratification of an unauthorized action of a prior fiscal year authorizes a charge to the prior year's funds because the ratification "relates back" to the time of the initial agreement. B-220527, Dec. 16, 1985; B-208730, Jan. 6, 1983. However, NSF did not ratify the unauthorized commitment. Modification No. 3 clearly states that its purpose is to settle the Request for Equitable Adjustment; it makes no statement about ratification. There is no basis to infer that the modification functioned as a ratification of the unauthorized commitment. Further, NSF officials told us that Modification No. 3 was intended as a settlement, not a ratification. NSF Conversation.

The settlement created a new obligation in fiscal year 2007. The fiscal year 2006 appropriation was no longer available for new obligations, and only remains "available for recording, adjusting, and liquidating obligations properly chargeable to that account." 31 U.S.C. § 1553(a). Agencies are required to record against expired appropriations obligations previously incurred that were not recorded when the obligation was incurred and to adjust recorded amounts to reflect the amount actually incurred. B-308026, Sept. 14, 2006. Here, NSBO would not be adjusting its fiscal year 2006 account to correct an under-recording, over-recording, or failure to record because the obligation was not incurred until fiscal year 2007. NSBO's fiscal year 2007 obligation was not properly chargeable to the fiscal year 2006 appropriation. NSBO must adjust its accounts, removing the obligation from its fiscal year 2006 accounts and recording the obligation in the accounts of its fiscal year 2007 appropriation.

NSF also asked whether an Antideficiency Act violation occurred regarding NSBO's fiscal year 2006 appropriation. The Antideficiency Act (the Act), codified in part at

31 U.S.C. § 1341, prohibits federal employees from incurring obligations in excess of available funds. The Antideficiency Act requires agencies to report such overobligations to Congress and the President and submit copies of reports to the Comptroller General. 31 U.S.C. § 1351. If after adjusting its accounts, NSBO finds that it has insufficient unobligated amounts in its fiscal year 2007 appropriation to cover the \$88,000 settlement, it must report that overobligation to the President and Congress and transmit a copy of the report to the Comptroller General. 31 U.S.C. § 1351.

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel