

FEDERAL LAWS
AFFECTING GSA'S GOOD NEIGHBOR PROGRAM
AND
URBAN DEVELOPMENT AND LIVABILITY INITIATIVES

Revised DRAFT

INTRODUCTION

Under the Good Neighbor Program, GSA has become an active participant in the civic life of cities throughout the country and a partner in downtown revitalization efforts. Recently, PBS formed the Center for Urban Development and Livability to help leverage Federal real estate actions in ways that bolster community efforts to encourage smart growth, economic vitality, and cultural vibrancy.

This overview supplements the guidance provided in PBS Commissioner Peck's December 27, 1996 Memorandum for Regional Administrators and Assistant Regional Administrators on GSA's Good Neighbor Program. Like the Commissioner's memorandum, it provides general parameters to lend consistency to GSA's decision making while preserving each Region's ability to make the right judgments in their communities. Because the facts and circumstances may vary from one community to another, Regional officials should seek the advice of their Regional Counsel before making commitments to local communities or others.

This overview is divided into four parts: I. Federal Appropriations Law; II. Federal Procurement Laws and Regulations; III. GSA's Basic Statutory Authorities; and IV. GSA's District of Columbia Authorities.

I. FEDERAL APPROPRIATIONS LAW

The U.S. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (2d ed. 1991) (hereafter "APPROPRIATIONS LAW PRINCIPLES"), provides extensive guidance on the laws relating to the expenditure of appropriated funds by Federal agencies. The decisions of the Comptroller General (GAO) also provide useful guidance on this subject. The following laws and related rules are of primary importance.

Purpose Statute--31 U.S.C. § 1301(a) requires that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." Thus, public funds may be used only for the purpose or purposes for which they were appropriated.

Necessary Expense Rule--The purpose statute does not require, nor would it be reasonably possible to specify every item of expenditure in an appropriation act or other statute. GAO has long recognized that where an appropriation is made for a particular object, by implication it confers authority to incur expenses that

are necessary or proper or incident to proper execution of the object. This concept is called the “necessary expense rule.” Each year in GSA’s appropriations act, Congress recognizes the applicability of the necessary expense rule to PBS activities by providing that the Federal Buildings Fund “shall be available for necessary expenses of real property management and related activities not otherwise provided for....” See Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 450 (1999).

The spending agency has reasonable discretion in determining how to carry out the objects of its appropriations. For an expenditure to be justified under the necessary expense rule, three conditions must be met:

1. The expenditure must bear a logical relationship to the appropriation to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available;
2. The expenditure must not be prohibited by law; and
3. The expenditure must not be otherwise provided for. That is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

GSA is responsible for providing safe, healthy, high quality work environments for Federal employees. Subject to the three foregoing conditions and the principles discussed in this overview, GSA generally can expend appropriated funds to directly benefit the health, safety, welfare, productivity, morale, or mission of Federal employees, or to support the maintenance or enhancement of Federal facilities.

See APPROPRIATIONS LAW PRINCIPLES, Chapter 4, at 4-14 to 4-22, 4-103 to 4-109.

Municipal Services--As a general rule, if a state, city, or political subdivision is required by law to render a service (e.g., fire protection or police protection), the United States cannot make additional payments in any form (by contract or otherwise) to underwrite that legal responsibility. A charge to appropriated funds under these circumstances would amount to a tax or a payment in lieu of taxes, which would, absent specific statutory authority, violate the Federal Government’s immunity from taxation. (There are statutory exceptions that provide limited reimbursement authority for fire and police protection.)

The United States may pay for services, over and above the ordinary level, where a state or local government is not required by law to provide such extraordinary services and where the same charge would be imposed on non-

Federal users in like circumstances. See Part II below, concerning contracts with State or local governments.

See APPROPRIATIONS LAW PRINCIPLES, Chapter 4, at 4-119 to 4-126.

Improvements to Non-Federal Property--GAO's longstanding position has been that agencies may not use appropriated funds to make permanent improvements to private property unless specifically authorized by law. This rule is based on the fact that no Federal official, in the absence of specific statutory authority, is authorized to give away Government property. However, GAO has recognized that this rule is not a statutory prohibition, but one of public policy. Therefore, GAO's decisions have recognized exceptions based on the facts and circumstances of each case.

GAO consistently has held that the following factors should be present before an agency expends appropriated funds to make permanent improvements to private property: 1) the improvements must be incidental and essential to accomplishing the purposes of the appropriation; 2) the costs must be reasonable; 3) the Federal Government must be the primary beneficiary of the improvements; and 4) the agency must protect the Federal Government's interest in the improvements. See 71 Comp. Gen. 4 (1991); 55 Comp. Gen. 872 (1976). This four-part test is a logical extension of the necessary expense rule.

The same general principles apply to improvements to property owned by a municipality. For example, in 61 Comp. Gen. 501 (1982), GAO held that appropriated funds could be used to pay for the installation of a new traffic signal on city property at the intersection of a state highway and the entrance to a Federal facility. The agency determined that the lack of a traffic signal interfered with access to the Federal facility and caused a safety hazard to travelers in the intersection. GAO's approval was based on the fact that 1) the city had no legal obligation to provide financing for the traffic signal and 2) the installation of the light was for the primary benefit of the Federal Government. GAO reached a similar conclusion in 65 Comp. Gen. 847 (1986).

See APPROPRIATIONS LAW PRINCIPLES, Chapter 4, at 4-127 to 4-128.

Miscellaneous Receipts Statute--31 U.S.C. § 3302(b) requires that "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 deduction for any charge or claim." This means money must be deposited into the general fund of the Treasury as "miscellaneous receipts," not into the agency's own appropriations, even though the agency's appropriations technically may be "in the Treasury" until the agency actually spends them.

Exceptions to the miscellaneous receipts statute fall into two broad categories:

1. Specific Statutory Authority--An agency may retain monies it receives if it has statutory authority to do so. In other words, the miscellaneous receipts statute will not apply if there is specific statutory authority for the agency to retain the funds. For example, in accordance with 40 U.S.C. § 490(f), GSA is required to deposit rent charges made pursuant to 40 U.S.C. § 490(j), into the Federal Buildings Fund.
2. Non-statutory Exceptions--In accordance with Treasury Department-GAO Joint Regulations, "refunds" may be credited to appropriations if they "represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances."

See APPROPRIATIONS LAW PRINCIPLES, Chapter 6, at 6-105 to 6-112.

Augmentation of Appropriations--An agency may not augment its appropriations from outside sources without specific statutory authority. This rule against augmentation is derived primarily from the "purpose statute" and the "miscellaneous receipts statute." The objective of this rule is to prevent a Federal agency from undercutting the congressional power of the purse by circuitously exceeding the amount that Congress has appropriated for that activity. An augmentation of appropriations is legal if specifically authorized by law.

See APPROPRIATIONS LAW PRINCIPLES, Chapter 6, at 6-103 to 6-105.

II. FEDERAL PROCUREMENT LAWS AND REGULATIONS

When GSA contracts for property or services with State or local governments or other non-Federal entities, GSA must comply with all applicable laws and regulations. These laws include, but are not limited to, the Competition in Contracting Act (CICA), 41 U.S.C. §§ 251-265; the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401-436; the Service Contract Act, 41 U.S.C. §§ 351-358; and the Davis-Bacon Act, 40 U.S.C. §§ 276a-276a-7.

These laws are implemented in Federal Acquisition Regulation (FAR) Part 5--Publicizing Contract Actions; Part 6--Competition Requirements; Part 13--Simplified Acquisition Procedures; Part 15--Contracting by Negotiation; Part 22--Application of Labor Laws to Government Acquisitions; Part 36--Construction and Architect-Engineer Contracts; and Part 37--Service Contracting.

For example, if a contracting officer intends to award a sole source contract to a non-Federal entity:

- The contracting officer must document the contract file with 1) a written CICA justification required by 41 U.S.C. § 253(f) and FAR Part 6, if the procurement is in excess of the simplified acquisition threshold (\$100,000) or 2) a

statement required by FAR Part 13 explaining the basis of the contracting officer's determination, if the procurement does not exceed \$100,000.

- If the contract price is expected to exceed \$25,000, the contracting officer must publish the procurement notices required by 41 U.S.C. §§ 253(f)(1)(C), 416 and FAR Part 5.
- If this is a service contract in excess of \$2,500, the contracting officer must include the mandatory provisions regarding minimum wages and fringe benefits and other provisions required by the Service Contract Act, 41 U.S.C. § 351, and FAR Subpart 22.10.
- If this is a contract in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of a public building or public work of the United States or the District of Columbia, the contracting officer must include the prevailing wage rate provisions required by the Davis-Bacon Act and FAR Subpart 22.4.
- The contracting officer must comply with all other applicable FAR requirements.
- If the contract is for improvements to non-Federal property or services to be performed by a municipality or a business improvement district (BID), the contracting officer should document the contract file to explain how this expenditure meets the necessary expense rule.

Federal Grant and Cooperative Agreements Act--31 U.S.C. § 6303 requires that “[a]n executive agency shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient when (1) the principle purpose of the instrument is to acquire ... property or services for the direct benefit or use of the United States Government; or (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.”

“An executive agency shall use a cooperative agreement ... when (1) the principal purpose ... is to transfer a thing of value to the State, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring ... property or services for the direct benefit of the United States Government; and (2) substantial involvement is expected between the executive agency and the State, local government, or other recipient when carrying out the activity contemplated in the agreement.” 31 U.S.C. § 6305.

GSA's statutory authority to enter into cooperative agreements is extremely limited. Therefore, in most instances, a procurement contract will be the legal

instrument reflecting the legal relationship between GSA and a State, local government, or other non-Federal entity.

III. GSA's BASIC STATUTORY AUTHORITIES

GSA's basic statutory authorities include, but are not limited to:

- **Protection of Public Property Act**, 40 U.S.C. §§ 318-318d.
- **Federal Property and Administrative Services Act of 1949** (Property Act), 40 U.S.C. §§ 471 et seq.
- **Reorganization Plan No. 18 of 1950**, 40 U.S.C. § 490 note.
- **Public Buildings Act of 1959**, 40 U.S.C. §§ 601-619.

Collectively, the foregoing laws authorize GSA to design, construct, alter, acquire, lease, maintain, operate, and protect Federal buildings and to provide space and services to Federal agencies. In addition, GSA may use the following statutory authorities to provide quality work environments for Federal employees. These laws provide limited exceptions to some of the general rules discussed above.

Cooperative Use Act Leases and Permits--The Public Buildings Cooperative Use Act, 40 U.S.C. §§ 490(a)(16)-(19), 601a, 612a, encourages the location, by lease or permit, of commercial, cultural, educational, and recreational facilities and activities in certain parts of public buildings. The Cooperative Use Act (which amended the Property Act and the Public Buildings Act) provides for two general types of use:

1. "Conventional leases" of space on major pedestrian access levels, courtyards, and rooftops, for commercial, cultural, educational or recreational activities.

Conventional leases are not subject to the competition requirements of the Competition in Contracting Act. Instead, such leases "may be negotiated without competitive bids, but shall contain such terms and conditions and be negotiated pursuant to such procedures as the Administrator deems necessary to promote competition and to protect the public interest." GSA is required to "establish a rental rate for such leased space equivalent to the prevailing rate for comparable space devoted to a similar purpose in the vicinity of the public building."

2. "Permits" (and leases), or other arrangements for special purposes, generally of an occasional or intermittent nature, for cultural, educational, or recreational activities, in auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings.

Occasional use permits and leases for cultural, educational, or recreational activities are not subject to any competition requirements. Such permits and leases may be at such rates and on such other terms and conditions as the Administrator deems to be in the public interest, provided that such activities will not disrupt the operation of the building. See *Federal Property Management Regulations* (FPMR) Subpart 101-20.4--Occasional Use of Public Buildings, 41 C.F.R. Subpart 101-20.4.

All moneys received under the Cooperative Use Act shall be deposited into the Federal Buildings Fund and credited to the appropriation applicable to the operation of the building (Budget Activity 61--building operations).

Historic Preservation Act Leases--Section 111 of the National Historic Preservation Act, 16 U.S.C. § 470h-3, authorizes any Federal agency, after consultation with the Advisory Council on Historic Preservation, to lease (or exchange) an historic property owned by the agency and not needed for current or projected agency purposes to (or with) any person or organization, if the agency head determines that the lease or exchange will adequately insure the preservation of the historic property. Section 111 does not require competition.

Proceeds from leases of an historic property are retained by the agency to defray the cost of administering, maintaining, repairing, or otherwise preserving the leased property or other agency properties on the National Register of Historic Places. Proceeds are deposited into the Federal Buildings Fund, credited to Budget Activity 64--outleasing of historic properties, and are available to spend for the statutorily designated purposes. At the end of the second fiscal year following the fiscal year in which such proceeds were received, any remaining proceeds must be deposited into the Treasury as miscellaneous receipts.

Child Care--40 U.S.C. § 490b authorizes Federal agencies to provide space and services (including furniture and equipment) for child care services in Federal buildings, without charge to the child care provider for rent or services. Competition is not required. Up to 50% of the children in the child care facilities may be the children of parents who are not Federal employees.

Sidewalk Installation and Repairs--Subsection 210(i) of the Property Act, 40 U.S.C. § 490(i), authorizes any executive agency to "install, repair, and replace sidewalks around buildings, installations, properties, or grounds under the control of such agency and owned by the United States ... by reimbursement to [the State or local government], or otherwise. ... Funds appropriated to the agency for installation, repair, and maintenance, generally, shall be available for expenditure to accomplish the purposes of this subsection." As provided in FPMR Subpart 101-20.5, the property-holding agency may reimburse the State or a political subdivision for this work or the agency may contract with and pay others directly for such work. 41 C.F.R. § 101-20.501.

The legislative history of subsection 210(i) recognized that Federal agencies generally had no authority to repair or replace sidewalks adjacent to Federal property. This was because sidewalks generally constituted a part of municipally owned streets; therefore, the municipality was responsible for their maintenance and repair. Under the constitutional doctrine of sovereign immunity, the Federal Government could not pay the taxes assessed by the municipality to cover this work. However, the Committee on Government Operations stated that it was important for the Federal Government to be a “good neighbor” and pay for the cost of sidewalks around its property. See S. REP. No. 811 (1965), *reprinted in* 1965 U.S.C.C.A.N. 4227. Thus, 40 U.S.C. § 490(i) is a specific statutory exception to the general rule discussed under “improvements to non-Federal property” above.

If a Federal property-holding agency such as GSA chooses not to reimburse a city for sidewalk work adjacent to GSA property and, instead, contracts for performance of the work by others, 40 U.S.C. § 490(i) does not specifically authorize the city to reimburse GSA for any portion of the work. Therefore, unless otherwise authorized by law, if the city provided funds to GSA to cover a portion of the work performed by GSA’s contractor, this could constitute an improper augmentation of GSA’s funds. In the unlikely event that the city provided the funds to GSA as an unconditional gift under 40 U.S.C. § 298a (discussed below), this would be a legal augmentation of GSA’s funds.

On the other hand, if a city wished to pay for the portion of the sidewalk work that was on city property, it could do so by performing and paying for that portion of the work itself or by contracting with a non-Federal entity for performance of the work.

Unconditional Gifts--40 U.S.C. § 298a authorizes the Administrator of General Services to “accept on behalf of the United States unconditional gifts of real, personal, or other property in aid of any project or function within [the jurisdiction of the Administrator].” The term “personal property” includes, but is not limited to, money. The Administrator has delegated this authority to the Commissioner of PBS but not to Regional Administrators. See GSA Delegations of Authority Manual, GSA Order ADM P 5450.39C, Chapter 17, paragraph 2.q.

Acceptance of a gift by an agency lacking statutory authority to do so is an improper augmentation. For example, if an agency does not have statutory authority to accept a gift of funds, it must deposit the money into the Treasury as miscellaneous receipts.

See APPROPRIATIONS LAW PRINCIPLES, Chapter 6, at 6-140 to 6-148.

IV. GSA's DISTRICT OF COLUMBIA AUTHORITIES

As explained above, as a general rule when GSA purchases property or services from sources outside of the Federal Government, including State or local governments, GSA must comply with the Competition in Contracting Act and related laws and regulations. Unless specifically authorized by law, GSA is not authorized to provide services to State or local governments and other non-Federal entities. The District of Columbia is a major exception. The laws which give GSA specific statutory authority to enter into agreements with and provide services to the District of Columbia include, but are not limited to:

- 31 U.S.C. § 1537--Authorizes the Federal Government to provide services to the District of Columbia and the District to provide services to the Federal Government (on an actual cost basis) under negotiated agreements. Agreements may provide for the delegation of duties and powers of officers and employees of the District to the Federal Government and vice versa. Costs incurred by the Federal Government may be paid from appropriations available to the District and costs incurred by the District may be paid from amounts available to the Federal Government.
- 40 U.S.C. § 122--Authorizes Federal and District authorities administering properties within the District of Columbia owned by the United States or the District to transfer jurisdiction over parts or all of such properties for purposes of administration and maintenance, under such conditions as may be mutually agreed upon.
- 40 U.S.C. § 490(a)(6)--Authorizes GSA "to obtain payments, through advances or otherwise, for services, space, quarters, maintenance, repair, or other facilities furnished, on a reimbursable basis, to any other Federal agency ... or the District of Columbia, and to credit such payments to the applicable appropriation of [GSA]."
- 40 U.S.C. § 490(c)--Authorizes GSA, at the request of any Federal agency or the District of Columbia, to (1) acquire land for buildings and projects authorized by Congress; (2) provide surveys, test borings, and plans and specifications for such buildings and projects; and (3) contract for and supervise the construction, development, and equipping of such buildings and projects. Any sum available to the Federal agency or the District for such projects may be transferred to GSA in advance for such purposes as GSA determines to be necessary to render any such service.

SUMMARY

This overview highlights the major laws and regulations affecting GSA's Good Neighbor Program and PBS's urban development and livability initiatives. The application of these laws and regulations will depend on the facts and circumstances of each case. The GSA Office of General Counsel and GSA's Regional Counsels will be pleased to work with PBS to help ensure the continued success of these programs.