



Legal Opinion L-2003-04
May 7, 2003

U.S. Railroad Retirement Board
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TO : Kenneth J. Zoll
Chief Information Officer

FROM : Steven A. Bartholow
General Counsel

SUBJECT : E-Government Act of 2002
P.L. 107-347

This is in reply to your memorandum dated April 2, 2003, regarding section 210 of the E-Government Act of 2002. That section amends title III of the Federal Property and Administrative Services Act of 1949 by adding a new section 317 thereto which authorizes share-in-savings contracts for information technology. Pursuant to such a contract, a contractor receives a share of cost savings realized by the Government. It also amends chapter 137 of title 10 regarding military procurement.

Section 317(b)(3)(B) of the amended Federal Property and Administrative Services Act of 1949 limits the number of such contracts which may be entered into "by all executive agencies to which this chapter applies" to five. It should be noted that, although this language is ambiguous as to whether each agency is limited to five such contracts or all agencies are limited to a total of five Government-wide, the legislative history of the amendment indicates that each agency would be authorized to enter into five such share-in-savings contracts (H.R. Rep. No. 787, 107th Cong., 2d Sess., pt. 1, at 74 (2002)).

The House of Representatives report states that the amendment would:

authorize government-wide the use of share[-]in[-]savings contracts for information technology. These contracts represent an innovative approach to encourage industry to share creative technology solutions with the Government. Through these contracts agencies can lower their costs and improve service delivery without large "up front" investments as the contractor provides the technology and is compensated by receiving a portion of savings achieved. The [amendment] is based upon a provision contained in the Services Acquisition Reform Act of 2002, H.R. 3832.

The [amendment] would authorize agencies to enter into share-in-savings contracts for information technology for a term of 5 years, and with the appropriate approval for up to 10 years, to pay contractors from the savings realized, and to retain those savings that exceed the amount paid to the contractor. The section would permit agencies to use various options for funding cancellation or termination costs and would permit the cancellation or termination amount to be negotiated by the parties. The section would require that contracts awarded pursuant to this section include a provision containing a quantifiable baseline for savings that is approved by the agency's senior procurement executive. Currently, agencies subject to title 10 of the U.S. Code would be permitted to enter into an aggregate of up to 5 contracts each during fiscal years 2003, 2004, and 2005 where funds are only available for the first fiscal year of the contract and certain conditions met. The same number would be authorized for the same period for agencies under title 41 of the U.S. Code. The number of such contracts authorized would increase to an aggregate of ten for agencies



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under each title starting 2006. Further, the [amendment] would require that the Federal Acquisition Regulation (FAR) be revised to implement this section and to provide for such matters as the use of competitive procedures and innovative provisions for technology refreshment, [and] appropriate regulatory flexibility to facilitate the use of such contracts.

Further, GSA is to provide additional guidance to agencies in identifying additional opportunities for the use of these contracts and for determining baselines and saving share ratios. Finally, the section would require the Director of OMB to report to Congress two years after enactment describing the number of share-in[-] savings contracts entered into and making recommendations for changes in law needed to encourage their use and the GAO would review the OMB report. The provisions would sunset in September 2009.

While it does not appear to be required that the regulatory amendments mentioned above be in place before agencies may make use of this legislation, it is unclear from the legislation itself, absent such regulations, how a baseline is to be determined. See section 317(a)(4) which provides in pertinent part that, "Contracts awarded pursuant to the authority of this section shall include a provision containing a quantifiable baseline that is to be the basis upon which a savings share ratio is established that governs the amount of payment a contractor is to receive under the contract. * * *"

It should also be noted that there are a number of limitations regarding procurement in connection with share-in-savings contracts. Section 317(b)(2) requires that the "amount payable in the event of cancellation or termination of a share-in-savings contract shall be negotiated with the contractor at the time the contract is entered into." If funds are not available for the full costs of cancellation or termination, an agency may still enter into a share-in-savings contract under certain conditions: the amount of unfunded contingent liability does not exceed the lesser of 25 percent of the estimated costs of a cancellation or termination, or \$5,000,000, and the unfunded contingent liability in excess of \$1,000,000 has been approved by the Office of Management and Budget.

Regarding the utilization of the funds saved by an agency through successful use of share-in-savings contracts, section 317(a)(5)(A) provides in pertinent part that, "* * * Except as provided in subparagraph (B), savings shall be credited to the appropriation or fund against which charges were made to carry out the contract and shall be used for information technology." Subparagraph B provides that:

Amounts retained by the agency under this subsection shall –

- (i) without further appropriation, remain available until expended; and
- (ii) be applied first to fund any contingent liabilities associated with share-in-savings procurements that are not fully funded.

It should be noted that no share-in-savings contract may be entered into after September 30, 2005 (see section 317(d)).

You inquire whether the share-in-savings provisions apply to the RRB. The definition of "agency" which applies to title III of the Federal Property and Administrative Services Act of 1949 is sufficiently broad so as to apply to virtually any Federal agency, including the RRB; "As used in titles I through VI of this Act –(a) The term 'executive agency' means any executive department or



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independent establishment in the executive branch of the Government, including any wholly owned Government corporation.”
40 U.S.C. § 472. In light of this definition, it is our opinion in that the share-in-savings provisions do apply to the RRB. However, it may be advisable to wait for the issuance of regulations and guidance before pursuing this type of contract.