



CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of Procurement with Nonappropriated Funds

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Nonappropriated Fund Procurements

by Stacia D. Le Blanc and Steven Carrara

The FAR or not the FAR?

By definition, the FAR applies to the acquisition of goods and services by the government through the obligation of appropriated funds. FAR 2.101. We must first determine whether the funds are "appropriated".

The Comptroller General takes a broad view of the term "appropriated." In *A Letter to the Secretary of Labor*, 55 Comp. Gen. 436, (January 30, 1956) the Department of Labor funded labor processing centers for migratory workers. Labor's expenses were reimbursed by those companies that hired laborers through the centers. *Id.* Even though Labor was fully reimbursed for the cost of the centers, the Comptroller General found those funds to be appropriated. The Comptroller General has found that "[w]here Congress has authorized the collection or receipt of certain funds by an agency and has specified or limited the purposes of those funds, the authorization constitutes a "continuing appropriation" regardless of the funds private origin." *Monarch Water Systems, Inc.*, 85-2 CPD ¶ 146. Consequently, procurements made with such funds are subject to the FAR.

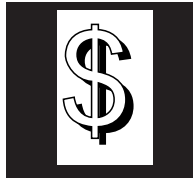
Even procurements using donated funds, if used to satisfy a statutory purpose, are subject to the FAR. "As a general rule, when a Federal entity expends both appropriated and donated funds to accomplish a statutory purpose, the expenditures from both sources are viewed as appropriated fund expenditures subject to all statutes and regulations governing such expenditures." *Letter to the Honorable Constance A. Morella* B-211149 68 Comp. Gen. 237 (February 9, 1989). But see *Letter to Honorable Sidney R. Yates*, B-211149 (December 12, 1985) (where statute

specifically exempted gift fund expenditures from the procurement regulations). Given these determinations, it will probably be unlikely that many of the Department's acquisitions are not paid for with "appropriated funds." But, in those rare instances, what rules do you follow when the FAR doesn't apply?

If Not the FAR, What then?

First of all, just because the FAR does not apply, do not assume that the Competition in Contracting Act (CICA) doesn't apply either. The General Accounting Office (GAO) makes that clear in several of its decisions.

CICA, which gives GAO the statutory authority to decide protests, defines a protest as a written objection by an interested party to a solicitation by a federal agency for bids or proposals for a proposed contract for the procurement of property or services, or a written objection by an interested party to the award of such a contract. 31 U.S.C. § 3551 (1). The GAO interprets its protest authority under CICA to authorize the review of agency actions in the award of any "contract" for property or services, even if the basic procurement statutes are not applicable. See *Fluid Engineering, Inc.*, B-234540, 89-1 CPD ¶ 520. The GAO shall impose CICA's requirement that the acquisition be conducted using full and open competition and review an agency's actions to determine whether they were reasonable. See *Flexsteel Industries, Inc., et al.*, B-22192, 86-1 CPD ¶ 337. The



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GAO has also broadly interpreted "contracts for property and services" under 31 U.S.C. § 3551(a) and 41 U.S.C. 252(a) to include many services that the government arranges for but doesn't necessarily pay for, such as travel agency services, barber shops, and cafeterias. In fact, under some of these arrangements the government may actually be making money.

GAO Protest Jurisdiction

The GAO has declared that its "jurisdiction under CICA does not depend on the intended use of the items being acquired or the source of the funds for the acquisition."

Professional Pension Termination Associates, B-230007.2, 88-1 CPD ¶ 498 (contract was funded by the Pension Benefit Guaranty Corporation trust funds); *CPT Text-Computer*, B-222037.2, 86-2 CPD ¶ 437 (end user was a nonappropriated fund activity and no appropriated funds involved); and *Artisan Builders*, B-220804, 86-1 CPD ¶ 85 (golf course construction was nonappropriated fund activity).

GAO's jurisdiction does not depend upon whether there is consideration or a direct contractual benefit to the government. *Spectrum Analysis & Frequency Engineering*, B-222635, 86-2 CPD ¶ 406. In *Spectrum Analysis*, the Federal Communications Commission (FCC) issued a solicitation for the installation and maintenance of the FCC data base on an interactive computer system for access by the public through connection to a public telephone network. The public user purchased the services directly from the contractor. Even though no appropriated funds were used and the services were provided for the public and paid by the public, the GAO found it to be a procurement by a federal agency. Consequently, GAO will consider protests of selections of no cost, no fee travel management contractors (*T.V. Travel, Inc.*, 85-1 CPD ¶ 640) and barber shop services

provided on government sites (*Geno Morena Enterprises*, B-224235, 87-1 CPD ¶ 121). Note, however, that the GAO will not review nonappropriated fund activities which are not performed by a federal agency contracting office since a federal agency solicitation must be issued before jurisdiction vests. *Brunswick Bowling*, B-224280, 86-2 CPD ¶ 295.

What To Do?

Based upon these decisions, we offer the following advice. All property and services desired by any of the bureaus within the Department, whether involving the expenditure of appropriated funds or not should be obtained by open competition in accordance with CICA. The Department's actions will be reviewed on a "rational basis" standard and therefore all those competing for the "agreement" or "contract" must be treated equally and fairly. For these reasons, general adherence to the FAR is well-advised since it is these underlying principles that will likely be the basis of the GAO's review. Please consult our office for any additional or specific guidance.

