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A Lawyer's View of Franchise Funds

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Franchise Funds: Boon or Bust

By Terry Lee

Establishment of the Franchise Funds

The Government Management Reform Act of 1994 (GMRA), 31 U.S.C. § 501 (Note), Pub. L. 103-356, 108 Stat. 3410, authorized establishment of a franchise fund in each of six executive agencies, on a pilot program basis. The Director of the Office of Management and Budget (OMB) was authorized to designate the agencies after consultation with Congressional committees. In March 1995, the Department of Commerce (Office of the Chief Financial Officer) ("Department" or "DoC") submitted an application to OMB for designation of the Department to participate in the pilot program. This application specifically described the Administrative Support Centers (ASC's) and the Computer Center as the entities within the agency which would conduct business under the auspices of a franchise. On May 20, 1996, OMB designated DoC to be one of the agencies to participate in the program.[1]

The purpose, or use, of the franchise fund is to provide "such common administrative support services to the agency and to other agencies as the head of such agency,…,determines can be provided more efficiently through such a fund than by other means...." GMRA §403(b). Section 403(e) of the statute states, "Nothing in this section shall be construed as relieving any agency of any duty under applicable procurement laws."

In June 1996, the Chief Financial Officers (CFO) Council published the draft of a booklet entitled "Pilot Program Implementation Guidance" (hereinafter "Implementation Guidance"). In explaining the franchise fund legislation, the CFO Council stated:

> Each franchise under the fund must conduct business on a reimbursable basis offering services to other agencies and/or to components of its own agency, in a manner that fosters competition, and within appropriate standards and legal authorities for both the service rendered and the method for accounting for franchise expenditures and charges.

Id. at 7.

As envisioned by Congress, a franchise fund or activity may offer one or more common administrative support services. Sen. Rep. No. 103-281, 103rd Cong., 2nd Sess., *reprinted in* 1994 U.S.C.C.A.N. 2674 (1994). The term "common administrative services" is defined as "[s]upport services that most agencies need in order to operate efficiently and effectively." "Implementation Guidance", *supra*, at 6. They are generally services that do not fall within an agency's programmatic mission and can be performed by any agency of the federal government. *Id*. Examples include accounting and financial management; personnel, payroll and training; printing, graphics and reproduction; and travel processing. Fees charged for services are to cover the total estimated costs of operating the franchise(s). Additionally, the franchise(s) may use government employees to provide services to their clients, or they may contract for such services with private contractors. However, agencies participating in the pilot program are not exempt from applicable employment or procurement laws. GMRA § 403(e).

Operation of the Franchise Fund

The GMRA does not provide specific statutory authority to enter into intra- or interagency work agreements. In the absence thereof, one statutory vehicle to do so and to collect reimbursements from other federal agencies is the Economy Act of 1932, *as amended*, 31 U.S.C. §§ 1535 to 1536.[2] From a reading of the statute, it is clear that Congress enacted the statute in order to more fully utilize Government agency resources and avoid duplicative or overlapping activities. However, it requires that such work will have to be cheaper or more conveniently provided by Federal agencies than by commercial vendors. *Id*. §1535(a)(4). *See* "Implementation Guidance", *supra*, at 78.

The franchise fund is designed to emulate the business process; and as such, it is a revolving, self-sustaining fund that recovers its costs by charging customers for the services they receive.[3] Under the guidance provided by the CFO Council, a franchise fund must be operated in accordance with FASAB, OMB, JFMIP and Treasury financial management standards; and the fund accounting system must meet federal financial management standards.[4]

Before entering into an agreement to provide goods and services, franchise activities should have in place a written Memorandum of Understanding (MOU), signed by representatives of both the servicing and customer agencies. The CFO Council suggests that the MOU fully disclose costs and should also cite, *inter alia*, the authority under which the goods or services are provided.

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A Lawyer's View is a periodic publication of the Contract Division designed to provide practical advice to the Department's procurement officers. Comments, criticisms and suggestion for future topics are welcome.—Call Jerry Walz at 202-482-1122, or via e-mail to Jerry Walz@FinLit@OGC or jwalz@sage.ogc.doc.gov.

Current Issues Relating to Franchise Fund Activities

Because of the novelty of franchise funds and activities within the federal government, many questions are being asked concerning all aspects of their operation. Recently, franchise activities were advised that they are not permitted to contract with state and local governments (or with federal entities which contract with state or local governments) for common administrative support services, although they may contract for provision of specialized and technical services pursuant to the Intergovernmental Cooperation Act of 1968, Pub. L. 90-577, 82 Stat. 1102 (ICA).[5]

Another issue has arisen concerning whether the DoC ASC's, as part of an appropriated fund agency, may contract with a non-appropriated fund instrumentality (NAFI), where the NAFI does not wish to obligate the entire funding for the particular projects.[6] Other issues concern authority to contract with other agencies, adherence (or not) to other agencies' contracting policies and procedures, *e.g.*, appeal and bid protest regulations and development of standard MOU language or provisions for franchise activities.

One issue that we are certain to continue to see (and possibly face challenges on) is that of the private sector disgruntlement with contract awards by the pilot program federal agencies to other federal agencies.[7] In order to better meet these challenges, it is imperative that these intra- and interagency procurements with franchise activities meet both the letter and spirit of applicable procurement laws and regulations.

Summary

The primary purpose of the franchise fund legislation and program is to promote entrepreneurial business activities *in common administrative support services* in the federal government arena. These "businesses" are to be self-sustaining and competitive, thus promoting greater economy and efficiency in government services and reducing redundancy of functions. Additionally, competition is expected to reduce costs, promote economies of scale and increase efficiency and productivity. As stated by the CFO Council, "Gradually, the more successful activities will handle more and more business and eventually drive less effective activities out of business. The end result will be a government that works better, costs less, and provides better service."[8]

Notes

[1]The pilot program is a test to determine if market forces can help create a more effective government. Chief Financial Officers' Council, "Pilot Program Implementation Guidance," p. 4.

[2]In addition to the Economy Act, other statutes authorize inter- and intradepartmental work. Examples are: Presidential Protection Assistance Act of 1976, Pub. L. 94-524, the Government Employees Training Act, 5 U.S.C. § 4101, *et seq*. and the Intergovernmental Personnel Act of 1970, Pub. L. 91-648.

[3]They should charge the full cost of providing the goods and services within their activities, consistent with statutes and regulations pertaining to recovery of costs for administrative services. *See e.g.*, OMB Circular A-130.

[4]Section III of the "Implementation Guidance" booklet is devoted exclusively to Fund Financial Policies. Section IV is devoted to Fund Financial Operations.

[5] This statute was enacted for the purpose of strengthening state and local governments and "to improve relations between those governments and the Federal Government through closer cooperation and coordination and policies and activities, particularly in the administration of Federal grant and loan programs for development assistance and by other means." H.R. Rep. No. 90-1845, 90th Cong., 2nd Sess., reprinted *in* 1968 U.S.C.C.A.N. 4220 (1968).

[6]There is some authority for the proposition that NAFI contractual obligations are generally not considered government obligations. *See Borden v. United States*, 116 F.Supp. 873 (CT. Cl. 1953).

[7]In May of this year, the Federal Aviation Administration awarded, after competition, a contract for the operation of its computer system for payroll, personnel and flight safety to the Department of Agriculture. It is one of the largest ever awarded to a government agency in a contest with industry. *See Washington Post*, May 22, 1997.

[8]"Implementation Guidance," p. 4.