



U.S. General Services Administration
Office of General Counsel

May 9, 2000

MEMORANDUM FOR

Mark V. Ewing
Director
Energy Center Of Expertise

Virgil W. Ostrander
Director
Public Utilities

FROM:

Richard R. Butterworth, Jr.
Senior Assistant General Counsel
Real Property Division (Lr)

SUBJECT:

Authority for Extended Utility Agreements

The General Services Administration (GSA) is making a concerted effort to reduce its energy consumption. In order to reach its energy conservation goals, GSA has been evaluating a number of contracting options for energy management and demand-side management. Some of the measures being contemplated have payback periods over ten (10) years. It is clear that GSA has ten-year contracting authority for utility services under the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. Sec. 481(a)(3). You have asked, however, if GSA has the authority to enter into energy management contracts that extend beyond ten years. I believe GSA does have this authority.

The Office of General Counsel has issued a number of opinions that deal with this matter. Most recently, I issued an opinion to Ed Loeb, Director, Federal Acquisition Policy Division. In that memorandum, I stated that FAR Part 41 was not limited to regulated monopolistic utility services and could be applied to any company that provided services within the broad definition of "utility services." Further, I concluded that demand-side management or energy management services could be acquired as utility services under FAR Part 41. See Attachment A, Memorandum of Richard Butterworth, April 21, 1999.

As part of that opinion, I reference an earlier opinion issued by this office on the application of the Anti-Deficiency Act. Obviously, contracts entered into under the authority of 40 U.S.C. Sec. 481 (i.e., ten-year contracts) do not need to be funded up front, and contracts under 42 U.S.C. Sec. 8287 are specifically exempted from the requirement to fund cancellation charges. Therefore, contracts under these two authorities do not violate the Anti-Deficiency Act where there is only year-to-year funding.

The final area of concern is contracts that are entered under the authority of 42 U.S.C. Sec. 8256. This provision authorizes Federal agencies to enter contracts with utilities for energy conservation, accepting "financial incentives, goods, or services," 41 U.S.C. Sec. 8256(c)(2). According to the legislative history of this provision, Congress contemplated that agencies would be permitted to participate in utility incentive programs "to the same extent permitted other customers of the utility," H.R. Rep. No. 474(V), 102d Cong., 2d Sess. 42 (1992), reprinted in 1992 U.S.C.C.A.N. 2224. Therefore, to the extent a utility offers financing and multi-year contracting to its other customers, GSA may avail itself of these programs. Such agreements must be pursuant to a utility incentive program, must increase energy efficiency, and must be generally available to other customers of the utility. However, this provision does not indicate any limitation on the term of such agreements or contracts.

In a memorandum dated July 24, 1994, Harmon Eggers of this office reviewed the authority granted in 42 U.S.C. Sec. 8256. In reviewing this authority, he determined that the broad authority contained therein constitutes "contract authority," which is "a form of budget authority that permits contracts and other obligations to be entered into in advance of an appropriate or in excess of amounts otherwise available in a revolving fund." U.S. General Accounting Office, Principles of Federal Appropriations Law 2-4 to 2-6 (2d Ed. 1991). Therefore, 42 U.S.C. Sec. 8256 operates much the same as 40 U.S.C. Sec. 481 by granting multi-year authority; however, unlike 40 U.S.C. Sec. 481, 42 U.S.C. Sec. 8256 contracts are not limited to a certain number of years. In fact, the contract under review in the 1994 memorandum had a 14-year term. See Attachment B.

In conclusion, I believe 42 U.S.C. Sec. 8256 grants GSA multi-year contracting authority separate and apart from the ten-year authority in the Property Act. Therefore, I believe GSA is authorized to enter contracts as part of utility incentive programs for terms greater than ten years. For the same reasons that contracts entered under 40 U.S.C. Sec. 481 are not subject to the Anti-Deficiency Act, agreements reach under 42 U.S.C. Sec. 8256 are also not subject to the Act.