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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** National Labor Relations Board—Funding of Subscription Contracts

**File:** B-309530

**Date:** September 17, 2007

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### DIGEST

The National Labor Relations Board (NLRB) did not violate the *bona fide* needs rule when, in September 2006, it obligated fiscal year (FY) 2006 funds for five Web site database subscription renewals that it needed to have in place on October 1, 2006, the first day of FY 2007. Even though delivery of the renewed subscriptions would occur entirely in FY 2007, to ensure continued receipt of the subscriptions, NLRB reasonably determined that the renewal orders needed to be placed in FY 2006, before the expiration of the existing subscriptions on September 30, 2006. However, NLRB violated the *bona fide* needs rule when it obligated FY 2006 funds to renew two Web site database subscriptions that were not due to expire until October 31, 2006. These subscription renewals were a *bona fide* need of FY 2007, and NLRB should have purchased these subscriptions using its FY 2007 appropriation.

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### DECISION

The Office of Inspector General, National Labor Relations Board (NLRB), has requested a decision on whether obligating fiscal year (FY) 2006 funds to pay for seven Web site database subscription renewals that began in FY 2007 violates the *bona fide* needs rule. Letter from David Berry, Counsel to the Inspector General, NLRB, to Gary L. Kepplinger, General Counsel, GAO, May 9, 2007 (Request Letter). As explained below, because five of the subscriptions were due to expire on September 30, 2006, NLRB placed its renewal orders in September in order to ensure that they continued uninterrupted on October 1, 2006, the first day of FY 2007. Despite the fact that the subscriptions would be provided entirely in FY 2007, the *bona fide* need arose in FY 2006, and NLRB's FY 2006 appropriation was available to pay for these FY 2007 subscriptions. For two of the subscription renewals, however, delivery was not needed until November 2007, and NLRB has not explained why these orders could not have been placed in October 2007 using FY 2007 funds.

Therefore, the agency violated the *bona fide* needs rule when it obligated funds from its FY 2006 appropriation to pay for these two subscriptions.

Our practice when rendering decisions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position in the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* [www.gao.gov/legal.htm](http://www.gao.gov/legal.htm). In response to questions regarding these subscriptions, in June 2007 Counsel to the Inspector General provided us with written responses and supporting documentation. Letter from David Berry, Counsel to the Inspector General, NLRB, to Susan A. Poling, Associate General Counsel, GAO (June 25, 2007) (IG Letter). The NLRB's Office of the General Counsel also provided us with factual information about the purchases and its legal opinion. Letter from Joseph M. Davis, Special Counsel to the General Counsel, NLRB, to Gary L. Kepplinger, General Counsel, GAO (Aug. 6, 2007) (GC Letter).

## BACKGROUND

NLRB consists of a five-member Board and a General Counsel. GC Letter, at 1. The mission of the NLRB is to conduct secret ballot elections of employees in a bargaining unit and prevent any person from engaging in any unfair labor practices. *Id.* In general, the Board acts as a quasi-judicial body that decides cases based upon formal records in administrative proceedings. *Id.* The General Counsel prosecutes cases before the Board and has final authority with respect to the investigation of charges and the issuances of complaints alleging unfair labor practices. *Id.* at 2. The General Counsel also litigates cases before federal district courts, bankruptcy courts, courts of appeal, and the Supreme Court. *Id.*

NLRB purchases a number of Web site databases to support the work of the attorneys and other professionals in the office. NLRB states that these databases are essential legal research tools and that it is crucial that the Web site databases be available on a continuing basis. *Id.* Specifically, the databases in question are the following: Westlaw, LexisNexis Online Service, BNA, PACER, GalleryWatch, LexisNexis Shepard's Online Service, and Dun & Bradstreet. IG Letter, at 2. On September 6, 2006, NLRB placed orders to renew each of these subscriptions with the respective vendors. IG Letter, attachment 1. NLRB states that it needed to have the orders placed for the renewal before the existing subscriptions expired in order to ensure uninterrupted delivery. GC Letter, at 5. Five of the subscriptions—Westlaw, Lexis Nexis Online Service, BNA, PACER, and GalleryWatch—were due to expire on September 30, 2006. IG Letter, attachment 2. Two of the subscriptions, LexisNexis Shepard's Online Service and Dun & Bradstreet, were not scheduled to expire until October 31, 2006. *Id.* Each order placed was for a period of 1 year beginning on the day following the expiration of the existing subscription and, for

each, the agency obligated its FY 2006 annual appropriation.<sup>1</sup> IG Letter, at 1, and attachment 1. Thus, for five subscriptions, the performance period was from October 1, 2006, to September 30, 2007; for two subscriptions, the performance period was from November 1, 2006, to October 31, 2007. IG Letter, attachment 1.

The Inspector General questions the propriety of obligating FY 2006 funds for subscriptions that will be delivered entirely in FY 2007 or later. He points out that under the *bona fide* needs rule, an appropriation that is limited in time may be obligated only to meet a legitimate need of the time period for which Congress provided the appropriation. The IG acknowledges that GAO decisions allow agencies to charge the appropriation current at the time a subscription is ordered even though the subscription contract may extend beyond the current fiscal year or cover more than one fiscal year. 24 Comp. Gen. 163 (1944); 23 Comp. Gen. 326 (1943). However, the IG notes that in those decisions, the subscription began and delivery occurred in the current fiscal year and carried forward into the following year. The IG states that our decisions do not address the situation where the delivery of the subscription is to begin in the year following the placement of the order. The IG states that this practice may be occurring at other agencies and requests that we issue a decision to address this issue. Request Letter, at 1.

## DISCUSSION

The General Counsel's office of the NLRB argues, as a threshold matter, that the *bona fide* needs rule does not apply to the purchases at issue because another statute, the advance payment statute, provides authority for agencies to purchase subscriptions without regard to the *bona fide* needs rule. GC Letter, at 3-4. (The advance payment statute generally prohibits agencies from paying for goods before they have been received or for services before they have been rendered. 31 U.S.C. § 3324(a).) NLRB relies on subsection (d) of this statute, 31 U.S.C. § 3324(d), which creates an exception to the advance payment prohibition for publications, allowing agencies to pay for subscriptions before they are received. NLRB points out that our Office has allowed agencies to purchase subscriptions that exceeded 1 year under this authority. *See* 23 Comp. Gen. 326. NLRB argues that since our Office has upheld the use of current year appropriations to pay for future year needs, we have created an exception to the *bona fide* needs rule. GC Letter, at 4.

We do not think that this is a correct reading of our case law or the advance payment statute. We have issued a number of cases in which we were asked to identify the proper appropriation to charge for periodicals that were to be delivered partially in

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<sup>1</sup> Congress appropriated \$252,268,000 to NLRB for salaries and expenses. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, 119 Stat. 2833, 2875 (Dec. 30, 2005). The appropriation was available for FY 2006, expiring on September 30, 2006.

the year in which the subscription was ordered and partially in a subsequent year. 24 Comp. Gen. 163; 23 Comp. Gen. 326; 2 Comp. Gen. 451 (1923); B-129390, Nov. 28, 1956. This line of decisions established the rule that the cost of a publication is to be charged to the appropriation current when the subscription was ordered, notwithstanding that deliveries may extend into the subsequent year. We have held that the advance payment statute's authorization for advance payments for publications authorizes obligating the whole cost of the subscription against the appropriation for the fiscal year in which the contract becomes effective. 24 Comp. Gen. at 164. In another decision, relied on by NLRB to support its position, we interpreted the advance payment statute as authorizing multiyear contracts for periodicals, pointing out that, in our view, Congress intended this so that agencies could take advantage of economies available to nonfederal subscribers. 23 Comp. Gen. 326. However, each case recognized the time limitation on agency funds and that the agency was not free to choose which year's appropriation to obligate. While the *bona fide* needs rule was not specifically discussed in those decisions, in each case the subscription was clearly a *bona fide* need of the appropriation year current at the time the order was placed, and delivery began in that same year. 24 Comp. Gen. 163; 23 Comp. Gen. 326; 2 Comp. Gen. 451.

In one case, however, we specifically addressed the *bona fide* needs question of which year's appropriation should be charged when a subscription is ordered in one year but not delivered until the next. B-129390, Nov. 28, 1956. In that case, we determined, based on the particular circumstances presented, that a need existed in the year that the order was placed, an unnecessary exercise if we were intending to dispense with the *bona fide* needs rule. *Id.* In sum, this line of decisions should not be understood to suggest that the advance payment authority negates application of the *bona fide* needs rule.<sup>2</sup> See 34 Comp. Gen. 432 (1955).

Thus, we view the issue as whether there was a *bona fide* need in FY 2006 for the database subscriptions which were to be delivered or made available beginning in FY 2007. The *bona fide* needs rule, derived from the time statute, 31 U.S.C. § 1502,<sup>3</sup> addresses the availability of an agency's appropriation as to time. 73 Comp. Gen. 77, 79 (1994). The rule is that an appropriation is available for obligation to fulfill a genuine or *bona fide* need of the period of availability for which it was made. B-308010, Apr. 20, 2007. It applies to all federal government activities carried out

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<sup>2</sup> For further discussion of the advance payment statute, see GAO, *Principles of Federal Appropriations Law*, vol. 1, 3<sup>rd</sup> ed., GAO-04-261SP (Washington, D.C.: Jan. 2004), at 5-50–5-54.

<sup>3</sup> “The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability.” 31 U.S.C. § 1502(a).

with appropriated funds enacted for a fixed period of time, including contract, grant, and cooperative agreement transactions. An agency's compliance with the *bona fide* needs rule is measured at the time the agency incurs an obligation, and whether there is a *bona fide* need at the point of obligation depends on the purpose of the transaction and the nature of the obligation being entered into. *Id.*

Determination of what constitutes a *bona fide* need of a fiscal year depends in large measure upon the facts and circumstances of the particular case. 37 Comp. Gen. 155 (1957). We have recognized that materials may be needed in the future when related work or processes currently under way may be completed. *Id.* at 159. If such material is not obtainable on the open market at the time needed for use, a contract for its delivery when needed may be considered a *bona fide* need of the fiscal year in which the contract is made, provided the time intervening between contracting and delivery is necessary. *See* 38 Comp. Gen. 628 (1959). Our Office has employed similar reasoning when reviewing an agency's placement of orders to replace stock items, allowing it to charge its current fiscal year appropriation even though the replacement items will not be used until the following fiscal year. 73 Comp. Gen. 259 (1994). We have upheld these charges provided that the delivery time frame was reasonable under the facts and circumstances presented. *See also* 70 Comp. Gen. 296 (1991).

Here, the record supports NLRB's assertion that in order to ensure that it would have continued delivery of the five subscriptions that were due to expire on September 30, 2006, NLRB needed to place the orders, and therefore obligate funds, in FY 2006. Specifically, it points to the continuing need to have the Web site databases available to perform the mission of the agency and the lead time required to place and coordinate the orders administratively within the agency. GC Letter, at 5. NLRB reasonably determined that it should place the renewal orders before the subscription ended, which would necessarily be FY 2006. It chose to do so on September 6, and we have no objection to this time frame. *See* B-129390, Nov. 28, 1956 (to receive periodical in the first month of the next fiscal year, the Commerce Department appropriately obligated current appropriations to cover order placed in the current fiscal year). While Web site database subscription renewals can be effectuated quickly, we do not believe that the agency should run the risk of the subscription lapsing by waiting until October 1 to renew the subscription that is to begin that same day. Thus, for the five subscriptions that were due to expire on September 30, we have no difficulty concluding that NLRB had a *bona fide* need for the subscription renewals in FY 2006 and could obligate its 2006 appropriation for that purpose.

However, the LexisNexis Shepard's Online Service and Dun & Bradstreet subscriptions were not due to expire until October 31, 2006. IG Letter, attachment 2. There is no indication that NLRB could not have chosen to renew these two subscriptions sometime in October 2006. While NLRB has justified placing renewal orders in the month of September to ensure continued delivery on October 1, NLRB has offered no reason why it could not place orders in October to ensure

uninterrupted delivery on November 1 for the remaining two subscriptions. Moreover, one of the vendors, LexisNexis, was apparently able to ensure that one of the subscriptions ordered in September would be available on October 1, and NLRB has not explained why an additional month of lead time would be required to activate another of that vendor's database subscriptions. We therefore find that NLRB did not have a *bona fide* need in September 2006 for the LexisNexis Shepard's Online Service and the Dun & Bradstreet subscriptions that would be delivered beginning in November 2006 (FY 2007). The agency should have obligated its FY 2007 appropriation to pay for these two subscriptions. Accordingly, NLRB should adjust its appropriation accounts to record obligations for these two subscriptions against its 2007 appropriation.<sup>4</sup>

## CONCLUSION

We concur with the NLRB General Counsel that the agency did not violate the *bona fide* needs rule when it obligated FY 2006 funds for the five subscriptions that it needed to have in place on October 1, 2006, the first day of FY 2007. However, NLRB violated the *bona fide* needs rule when it obligated FY 2006 funds for subscriptions that did not expire until October 31, 2006. These subscription renewals were not a *bona fide* need of FY 2006, and NLRB should have purchased these subscriptions using its FY 2007 appropriation. NLRB should adjust its accounts by obligating its 2007 appropriation and deobligating its 2006 appropriation in the amount of these two subscriptions.

Gary L. Kepplinger  
General Counsel

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<sup>4</sup> The Lexis-Nexis Shepard's Online Service renewal was in the amount of \$71,910.48; the Dun & Bradstreet renewal was in the amount of \$20,000. IG Letter, attachment 1.