

NO-COST CONTRACTS
FREQUENTLY ASKED QUESTIONS
March 13, 2008

1. Can an agency use a no-cost contract to acquire something for which its appropriation is not otherwise legally available?

There is no GAO case law addressing a situation like this. If an agency enters into a no-cost contract that permits the vendor to provide a service for which the agency's appropriation is not otherwise legally available, the no-cost contract would not violate the Antideficiency Act's voluntary services prohibition because the agency incurs no financial liability. However, the agency should take into consideration that it, indeed, does receive a service in return, for example, for permitting the vendor to provide food to the agency's guests even though the agency's appropriation is not legally available to pay for the food.

2. If we assume that the event and circumstances meet the criteria for using appropriated funds to provide food at an agency-sponsored conference, may an agency instead enter into a no-cost contract for conference services, including the provision of food?

Yes. The agency may contract for this service using a no-cost contract. For example, the contract could be structured such that providing food or refreshments to conference participants is part of an overall contract for planning and support services.

An agency may use appropriated funds to provide meals and light refreshments to federal government (as well as nonfederal) attendees and presenters at a formal conference that furthers the agency's statutory mission if the conference meets the following criteria: (1) meals and refreshments are incidental to the conference, (2) attendance at the meals and when refreshments are provided is important for the host agency to ensure attendees' full participation in essential discussions, lectures, or speeches concerning the purpose of the conference, and (3) the meals and refreshments are part of a formal conference that includes not just the discussions, speeches, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served. A formal conference typically involves topical matters of interest to, and participation of, multiple agencies and/or nongovernmental participants. In addition, other indicators of a formal conference include registration, a published substantive agenda, and scheduled speakers or discussion panels. *See* B-300826, Mar. 3, 2005.

In this situation, the agency could use a traditional contract in which it pays the contractor to provide lunch at no cost to the attendees, or it could use a no-cost contract where the attendees (or possibly their employers) would bear the cost. In B-308968, Nov. 27, 2007, GAO cautioned that in structuring a no-cost contract there

are other considerations beyond compliance with fiscal laws that an agency should take into account so that the effectiveness of the conference is not compromised, including, for example, who may approve and sign such contracts, the ultimate cost to the government as a whole, and possible conflicts of interest.

3. May an agency use a no-cost contract to acquire property as opposed to a service?

The no-cost contracts GAO has addressed have been for various types of services, including real estate brokerage, travel, conference planning, concession, relocation assistance, haircuts for military recruits, ferryboat transportation, and workers compensation insurance coverage. GAO reviewed many of these contracts in the context of our bid protest function. GAO has also issued a number of appropriations law decisions involving no-cost contracts. At issue in the decisions was whether the no-cost contract violated the Antideficiency Act's voluntary services prohibition. The voluntary services prohibition, by its own terms, would not be applicable if property, rather than services, were being provided. GAO has not issued a decision involving a no-cost contract to acquire property.

4. May an agency use a no-cost contract to accomplish an activity or function that is mission-related or specifically required by the agency's appropriations act or authorizing legislation?

GAO has not specifically looked at no-cost contracts from this perspective. However, based on B-308968, Nov. 27, 2007, we would find it difficult to make a distinction between mission-related or required statutory activities and other agency activities.

As discussed in B-308968, when an agency enters into a no-cost contract it does not violate the Antideficiency Act's voluntary services prohibition because the agency incurs no financial liability and there is no expectation of payment on the part of the vendor. If an agency enters into a no-cost contract for the provision of a service, whether the service is mission related or statutorily required, or is another type of agency activity, the agency does not incur a financial liability for the service and thus does not violate the voluntary services provision. Of course, an agency, as a matter of policy, can decide the situations in which it is willing to entertain a no-cost contract.

5. How do the federal procurement laws apply to an agency's use of a no-cost contract?

Statutory requirements for competition, such as the Competition in Contracting Act (CICA), apply to procurements by federal agencies for property or services. 10 U.S.C. § 2303; 41 U.S.C. § 253. Thus, as a threshold matter, to be subject to these requirements, the agency must be acquiring property or services. Determining whether competition requirements apply to a particular procurement

for a no-cost contract for property or services will depend on the agency involved. CICA does not apply to no-cost contracts of military agencies, see 10 U.S.C. § 2303; *Century 21—AAIM Realty, Inc.*, B-246760, Apr. 3, 1992, 92-1 CPD ¶ 345; *Gino Morena Enterprises*, B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121, but it does apply to no-cost contracts of civilian agencies. See 41 U.S.C. § 253; *Gourmet Distributors*, B-259083, Mar. 6, 1995, 95-1 CPD ¶ 130. Federal Acquisition Regulation (FAR) requirements apply only to acquisitions by the government of supplies or services with appropriated funds. *Fidelity and Casualty Co. of New York*, B-281281, Jan. 21, 1999, 99-1 CPD ¶ 16; FAR, 48 C.F.R. §§ 1.104, 2.101. Consequently, the FAR does not apply to no-cost procurements conducted by either a defense or civilian agency.

Regardless of the applicability of CICA or FAR, GAO's jurisdiction to consider protests by interested parties challenging procurements conducted by federal agencies extends to all procurements for property or services. In the context of challenges to no-cost contracts for concession services at the National Parks, we have found that in some cases the procurement action was outside of our jurisdiction. Specifically, we have held that concession contracts that do not require the delivery of goods or services to the government (or that require the delivery of goods or services of only *de minimis* value to the government) are not contracts for the procurement of property or services within the meaning of CICA and do not fall within our Office's bid protest jurisdiction. *White Sands Concessions, Inc.*, B-295932, Mar. 18, 2005, 2005 CPD ¶ 62, *recon. denied*, B-295932.2, Apr. 12, 2005 (concession contract for the operation of a gift shop and snack bar at a National Park Service visitor center); *Crystal Cruises, Inc.*, B-238347, Feb. 1, 1990, 90-1 CPD ¶ 141 at 2, *aff'd*, B-238347.2, June 14, 1990, 90-1 CPD ¶ 560 (concession permits for five cruise ship entries into Glacier Bay National Park and Preserve). Where a contract authorizing the provision of concession services also requires the delivery of goods or services of more than *de minimis* value to the government, however, the contract is one for the procurement of property or services within the meaning of CICA, and, as such, is encompassed within our bid protest jurisdiction. *Great South Bay Marina, Inc.*, B-293335, July 13, 2005, 2005 CPD ¶ 135.

6. May an agency play a role in determining the fee the no-cost contractor charges its customers?

Yes, agencies may play a role in determining fees charged by contractors acting under authority of a no-cost contract. Agencies should not “lose sight of [their] objectives for a particular event,” and should ensure that in minimizing costs, they do not act to “compromise the effectiveness of [a] conference,” or “undermine the achievement of agency goals.” B-308968, Nov. 27, 2007. Although utilizing a no-cost contract may alleviate financial burdens and may not violate the Antideficiency Act, agencies contemplating use of such contracts should consider the cost to the government as a whole, especially when many attendees to a conference will be government employees. *Id.*

In practice, agencies may have several options in playing a role in fee determination. For example, an agency may negotiate with the contractor to ensure that fees charged to third parties are reasonable. Alternatively, an agency employing a competitive selection process when seeking a contractor may include as one of its selection criteria the cost imposed upon third parties.

7. May either the agency or the no-cost contractor bar a person from attending a conference if the person has not paid the contractor?

The collection of a fee charged by the vendor is a matter between the vendor and the individual. However, the conference is, in fact, the agency's conference, not the vendor's, and the agency is the host, not the vendor. For the same reasons why we suggest that an agency should play a role in determining the fee that the vendor charges, we would suggest that an agency should have some influence in acceptable collection tools.



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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

B-308968

November 27, 2007

The Honorable Barbara A. Mikulski
United States Senate

Subject: *No-Cost Contracts for Event Planning Services*

Dear Senator Mikulski:

This opinion responds to your letter of January 26, 2007, requesting that we “clarify the suitability of using no-cost contracts to obtain conference, event and trade show planning services.” Specifically, you asked us to review a model contract supplied to us by National Conference Services, Inc.’s (NCSI) counsel.¹ Letter from Antonio R. Franco and Jonathan T. Williams, Piliero Mazza, to Thomas H. Armstrong, Assistant General Counsel, GAO, *Re: No Cost Contract for Conference Services*, Jan. 23, 2007 (NCSI Letter). In its model contract, NCSI offers to provide conference planning services with no financial obligation to the government; NCSI would recoup its costs by charging exhibitors, sponsors, and attendees of the conference. *Id.*

We conclude that the NCSI contract is a valid, binding no-cost contract that agencies may utilize to obtain conference planning services without violating the voluntary services prohibition of the Antideficiency Act, 31 U.S.C. § 1342. Because of the terms and conditions of the NCSI contract, an agency would incur no financial liability and NCSI would have no expectation of payment from the government. Before engaging in no-cost contracts, however, agencies should address several considerations to balance the financial flexibility of no-cost contracts with achievement of agency objectives in hosting a conference.

¹ Our practice when rendering legal opinions is to obtain the views of the relevant agency to establish a factual record and to elicit the agency’s legal position on the subject matter of the request. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006) *available at* www.gao.gov/congress.html (last visited Oct. 16, 2007). In this instance, your letter did not identify an agency that had contracted with NCSI. At your request, NCSI provided us with a copy of its model contract and its explanation of the contract.

BACKGROUND

NCSI provides “event planning, production and support services.” NCSI, *About NCSI—Who We Are*, available at www.ncsievents.com/aboutncsi/who_we_are.aspx (last visited Oct. 16, 2007). NCSI reports that it has conducted business with various government agencies, including those within the intelligence community and the Department of Defense, by facilitating “information technology conferences, industry days, [and] meetings and technology expositions . . .” *Id.*

NCSI’s services include: “Planning; Selecting venues; Negotiating contracts; Marketing; Coordinating logistics; Taking registrations; Processing payments; [and] Post-event reporting.” NCSI, *Federal, Intelligence Community and Department of Defense Services—Conferences*, available at www.ncsievents.com/federal/federal_conferences.aspx (last visited Oct. 16, 2007) (NCSI Conferences). NCSI offers to plan “Sponsored receptions;” “Break-out meetings; Seminars; Working luncheons;” and “Workshops.” NCSI, *Events—Conferences*, available at www.ncsievents.com/event/conferences.aspx (last visited Oct. 16, 2007). In contracting with its clients, “NCSI is able to . . . offer its event planning services to government hosts at zero cost . . .” NCSI Conferences.

The proposed NCSI contract provides:

“The Contractor may choose to provide for all services as required by the task order at no cost to the Government. The Contractor is entitled to all of the registration, exhibition, sponsorship and/or other fees collected as payment for performance under the task order if there is no cost to the Government. In this case, the Contractor is liable for all costs related to the performance of the task order as defined in the task order and the government’s liability for payment of services under this task order is ‘zero.’”

NCSI Letter, Exhibit E. NCSI explained that it recoups its costs by “charging the attendee and exhibitor participants of the event.” NCSI Letter.

DISCUSSION

Generally, a no-cost contract is a formal arrangement between a government entity and a vendor under which the government makes no monetary payment for the vendor’s performance. B-302811, July 12, 2004. “Under a typical no-cost contract, a vendor provides a service that [an] agency would otherwise perform, but instead of receiving compensation from the agency, the vendor charges and retains fees [assessed against third parties] for its services.” B-300248, Jan. 15, 2004. *See also Ober United Travel Agency, Inc. v. United States Department of Labor*, 135 F.3d 822, 823 (D.C. Cir. 1998). In the instant case, NCSI intends to recoup its costs, and

presumably earn a profit, by charging conference attendees and other participants.² At issue when a federal agency agrees to a no-cost contract and receives services without having to pay is whether the agency has violated the Antideficiency Act's voluntary services prohibition, 31 U.S.C. § 1342.

The Antideficiency Act prohibits federal agencies from accepting voluntary services without specific statutory authority.³ 31 U.S.C. § 1342. The purpose of the prohibition is to preclude situations that might generate claims for compensation that might exceed an agency's available funds. *See, e.g.*, B-211079.2, Jan. 2, 1987.

We have previously examined no-cost contracts in the context of the voluntary services prohibition.⁴ In 1928, we concluded that the Federal Trade Commission (FTC) was not prohibited from entering into a no-cost contract for stenographic services. 7 Comp. Gen. 810 (1928). There, FTC gave the contractor the exclusive right to report FTC proceedings and to sell copies of transcripts to the public at rates specified in the contract; in return, the contractor would furnish copies to FTC without cost. *Id.* We determined that FTC did not violate the prohibition because "services furnished pursuant to a formal contract are not voluntary within the meaning" of the statute. *Id.* at 811.

More recently, we found no violation when the General Services Administration (GSA) proposed a no-cost contract with real estate brokers. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. The contract awarded four real estate brokers "exclusive rights to represent the United States with respect to all GSA real property leases" in exchange for the brokers' lease acquisition services. B-302811, July 12, 2004. Reflecting industry practice, the real estate brokers would stipulate in the contract that they had no expectation of payment from the government and GSA had no financial liability to the brokers. B-302811, July 12, 2004; B-291947, Aug. 15, 2003. Nor would any other party pay the brokers on the government's behalf. Instead, consistent with industry norms, the brokers would receive commissions from landlords with whom they did business. B-302811, July 12, 2004; B-291947, Aug. 15,

² To be enforceable, a contract with the United States government requires an offer, acceptance of the offer, and consideration. *Rick's Mushroom Service, Inc. v. United States*, 76 Fed. Cl. 250, 259 (2007), *citing Total Medical Management, Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997). A no-cost contract "raises the question . . . whether it is void for lack of consideration." 7 Comp. Gen. 810, 811 (1928). A federal agency accepting the NCSI-proposed contract would provide as consideration exclusive access to a group from which the contractor may earn income. Concurrently, the federal agency would receive NCSI's services in planning a conference.

³ The Act makes an exception "for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342.

⁴ GAO has also considered award of various no-cost contracts in the context of bid protests. *See, e.g.*, B-283731.2, Dec. 21, 1999.

2003. We reiterated our long-standing rule that “services received . . . free of cost pursuant to a formal contract or agreement do not constitute ‘voluntary services’” within the meaning of the Antideficiency Act, and determined that GSA did not violate the voluntary services prohibition.⁵ B-291947, Aug. 15, 2003.

Critical in the GSA case were the terms and conditions of the contract and the attendant expectations of each party regarding payment. We emphasized, “Because the contract was constructed as a no cost contract, GSA will have no financial liability to [the] brokers, and [the] brokers will have no expectation of a payment from GSA.” B-302811, July 12, 2004. As a consequence, even if the third parties making remuneration to the real estate brokers failed to pay, “the broker would have no claim against GSA.” *Id.* Cf. B-300248, Jan. 15, 2004. We concluded that “accept[ing] services without payment pursuant to a valid, binding no-cost contract does not augment an agency’s appropriation nor does it violate the voluntary services prohibition.” B-302811, July 12, 2004.

In its contract, NCSI would stipulate that it will provide its services “at no cost to the Government,” specifying that “the government’s liability for payment of services under this task order is ‘zero.’” NCSI Letter, Exhibit E. NCSI expects to retain “all of the registration, exhibition, sponsorship and/or other fees collected as payment for performance.” *Id.* As with the FTC and GSA contracts, an agency agreeing to the NCSI contract would have no financial liability to NCSI, nor would NCSI have any expectation of payment from the government. Consequently, an agency entering into the NCSI contract would neither augment its appropriation nor run afoul of the voluntary services prohibition.

In 2006, the Department of Justice’s Office of Legal Counsel (OLC) addressed a Department of Commerce proposal asking whether an agency, when hosting a conference, may permit its contractor “(1) to provide meals, lodging, refreshments, and other goods and services to conference attendees and (2) to charge the attendees a ‘personal convenience’ fee to cover the costs of these items.” Memorandum Opinion for the General Counsel, Department of Commerce, *Applicability of the Miscellaneous Receipts Act to Contractors Receiving Personal Convenience Fees from Attendees at an Agency-Sponsored Conference*, OLC Opinion, Nov. 22, 2006. OLC did not object to the proposal because the personal convenience fees “are not used, and are not intended to be used, by or for the benefit of the host agency that hires the event planner.” *Id.* OLC noted that collected amounts do not “compensate the event planner for any contractual obligation that the host agency owes to it, or enable the agency to avoid expending appropriations” *Id.* We agree with OLC’s distinction and the rationale OLC applied to the issue before it.

⁵ In our decision, we did not evaluate “the soundness of the terms of the contract or advisability of entering into” no-cost contracts. B-291947, Aug. 15, 2003. In January 2007, GAO reported on the first contract year of GSA’s no-cost leasing contracts with the brokers. GAO, *GSA Leasing: Initial Implementation of the National Broker Services Contracts Demonstrates Need for Improvements*, GAO-07-17 (Washington, D.C.: Jan. 31, 2007).

Notably, the scenario presented by the Department of Commerce to OLC differs from scenarios that we have considered previously regarding agency attempts to collect fees from conference participants. In 2005, we advised the National Institutes of Health (NIH) that absent statutory authority to charge a fee and retain the proceeds, neither NIH, *nor a contractor on its behalf*, may charge a registration or other fee to defray the costs of providing meals or light refreshments integral to a conference. B-300826, Mar. 3, 2005. Doing so would impermissibly augment NIH's appropriation. *Id.* In January 2006, we reiterated the holding in B-300826 – an agency may no more engage a contractor to charge and retain a fee than the agency itself may charge and retain fees for its own benefit without specific statutory authority. B-306663, Jan. 4, 2006. In its request to OLC, the Department of Commerce represented that the department did not intend to provide meals, refreshments, and lodging to conference participants. Nov. 22, 2006, OLC Opinion. In both B-300826 and B-306663, however, we addressed a scenario where the host agency provided food as part of the conference with the purpose of ensuring full participation in the conference. In that situation, an agency may not charge participants to offset the agency's costs without statutory authority.

As with the no-cost contract GSA employed with real estate brokers, we do not opine on the wisdom of such arrangements for conference planning services.⁶ Although a no-cost contract such as that offered by NCSI does not violate the Antideficiency Act, there are other considerations beyond compliance with fiscal laws that an agency should take into account before agreeing to a no-cost contract. An agency contemplating use of a no-cost contract for conference planning services should weigh the value of the services received from the contractor with that of the concession offered by the contractor. Important considerations include, for example, who may approve and sign such contracts, registration procedures and collection of fees, and, particularly where many, if not most, attendees are expected to be government employees, the ultimate cost to the government as a whole. Agency officials also should consider possible conflicts of interest before signing a no-cost contract, keeping in mind that control of the agenda, selection of speakers, and other matters concerning content should serve the government's, not the contractor's, purpose. In addition, agencies should ensure an open, transparent selection process before entering into no-cost contracts. Ultimately, an agency must not lose sight of its objectives for a particular event and should ensure that in avoiding costs to the

⁶ An agency, of course, may request legislation authorizing the agency to charge an attendance fee at conferences and use the fees to offset conference costs. B-306663, Jan. 4, 2006. Last year, Congress enacted authority for the Department of Defense to collect and retain conference fees for the purpose of crediting the appropriation charged to pay conference costs. National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, div. A, title X, subtitle F, § 1051, 120 Stat. 2083, 2395–96 (Oct. 17, 2006), *codified at* 10 U.S.C. § 2262. *See* S. Rep. No. 109-254, at 385-86 (2006). The same provision also allows the department to permit a contractor to collect fees on the department's behalf. *Id.*

agency, it does not take actions that compromise the effectiveness of its conference, undermine the achievement of agency goals, or violate ethics rules.

CONCLUSION

The NCSI contract is a valid, binding no-cost contract. An agency may enter into such a contract without violating the Antideficiency Act's voluntary services prohibition, 31 U.S.C. § 1342. Services performed pursuant to a formal contract, in which the agency has no financial obligation and the contractor has no expectation of payment from the government, are not "voluntary" within the meaning of the prohibition. *Id.*

Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel

been specifically fixed by law but simply that additional funds have been provided to increase their salaries for the fiscal year 1929. The act of March 7, 1928, 45 Stat. 240, limits the payment of salaries under the appropriation "Government in the Territories, Territory of Alaska," to \$3,520 per annum.

The provisions of the act of May 28, 1928, do not automatically increase the rates of compensation of any field employees whether their salary rates have or have not been specifically fixed or limited by other law but the adjustment of rates of compensation for field employees "to correspond, so far as may be practicable," to the rates established by the classification act of 1923, as amended by the act of May 28, 1928, for similar positions in the District of Columbia, is for the consideration of the administrative office, without regard to salary limitations and restrictions fixed in the appropriation acts. Your second question is answered accordingly.

(A-23262)

**PERSONAL SERVICES—STENOGRAPHIC REPORTING—FEDERAL
TRADE COMMISSION**

The Federal Trade Commission having been authorized by the act of May 16, 1928, 45 Stat. 579, to obtain stenographic reporting service by contract, a contract for such service should be let to the lowest responsible bidder.

Stenographic service to be rendered under a formal contract free of cost to the United States does not constitute voluntary service within the purview of section 3679, Revised Statutes, as amended.

The fact that stenographic reporting service under a formal contract is to be rendered free of cost to the United States does not render the contract void for lack of a consideration when the contract also contains mutual promises of the contracting parties by which each contracting party obtains a substantial benefit; i. e., a stenographic reporting contract under which the contractor promises to do all the reporting to be required by the Federal Trade Commission under the conditions specified in the contract and the Federal Trade Commission promises to give the contractor the exclusive right to do such reporting together with the exclusive right to sell copies of transcripts to private individuals constitutes mutual promises sufficient to support a binding contract.

Comptroller General McCarl to the Chairman of the Federal Trade Commission, June 26, 1928:

There has been received your letter of June 8, 1928, inclosing a list of bids received for stenographic reporting for your commission for the fiscal year 1929, and requesting decision whether acceptance of the bid of the Sidney C. Ormsby Co. is prohibited by the provisions of section 3679, Revised Statutes.

The act of May 16, 1928, 45 Stat. 579, making appropriations for the expenses of the Federal Trade Commission for 1929, provides:

For * * * contract stenographic reporting services to be obtained on and after the approval of this act by the commission, in its discretion through the civil service or by contract, or renewal of existing contract, or otherwise * * *

Section 3679, Revised Statutes, as amended by the act of March 3, 1905, 33 Stat. 1257, and the act of February 27, 1906, 34 Stat. 48, provides:

* * * Nor shall any department or officer of the Government accept voluntary service for the Government or employ personal service in excess of that authorized by law, except in cases of sudden emergency involving the loss of human life or the destruction of property * * *.

The voluntary service referred to in said statute is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section. 3 Comp. Gen. 117; 4 *id.* 967; 27 Comp. Dec. 131.

Your submission also raises the question whether a contract for rendering service to the United States without any cost whatever to the United States constitutes an enforceable contract or whether it is void for lack of consideration, as the Ormsby bid proposes to furnish copies to the commission without charge.

It is a well-established principle of contract law that a valuable consideration is necessary to support a contract. However, the consideration need not necessarily be a monetary one. Under the contract proposed to be entered into with the successful bidder for stenographic reporting services the United States would undertake to give the contractor the exclusive right to report all public proceedings of the Federal Trade Commission, under the conditions recited in the contract, together with the exclusive privilege of selling copies of the transcripts to the public at the rates specified in the contract, and the contractor would undertake to report all the public proceedings of the commission, under the conditions specified in the contract, and to furnish to the commission, without cost, all copies required by it. These mutual promises constitute a sufficient consideration to support the contract without the recitation of any monetary consideration.

This leaves for consideration only the question of which is the lowest responsible bidder. 6 Comp. Gen. 158, 430; A-15867, October 28, 1926. It appears from the papers accompanying the submission that the award is to be made only for Schedule A, that is, for reporting public hearings, and that the private hearings and conferences will continue to be handled by the commission's own stenographers. As to the said Schedule A, there are only three bidders among whom there is any question as to which is entitled to the award. The Sidney C. Ormsby Co. proposes to render the required service without any cost whatever to the Government and to sell copies to the public at 30 cents per page for ordinary copy and 40 cents per page

for daily copy. Day & Stewart propose to render the service at a cost of 1 cent per page for all copies required by the commission, or, as an alternative bid, three copies free of charge and 1 cent per page for subitem 1 of item 5 and subitem 1 of item 6, with a charge to the public of 30 cents per page for either ordinary or daily copy. Walton, Rehfeld & Ross propose to charge one-half a cent per page for all copies desired by the Government and 22 cents per page for all copies furnished the public.

It is evident that, of the three bids, the bid of the Ormsby Co. is the one which will result in the least expenditure of public funds. The price to be charged the public for copies is not for consideration, if not exorbitant. A-19040, June 30, 1927. The prices of 30 and 40 cents per page quoted by the Ormsby Co. for public copies do not appear to be so exorbitant as to warrant rejection of this bid, as at least one other bidder quoted a still higher rate and several bidders quoted rates only slightly less.

In view of all the circumstances, therefore, there would appear to be no legal objection to acceptance of the bid of the Sidney C. Ormsby Co. for stenographic reporting service for the fiscal year 1929 as proposed.

(A-23282)

PAY—WITHHOLDING—NAVY ENLISTED MAN

Where an enlisted man of the Navy has made necessary expenses to secure his return to his duty station, he is chargeable with all expenses incurred by the United States to secure his return, including payment of reward, expenses of transportation, and subsistence, etc.

Where an enlisted man of the Navy has been found by a medical board or boards or by other competent authority to be suffering from a mental derangement rendering him not responsible for his acts and pending action on his case he leaves the custody of the naval authorities, any expenses authorized to be paid from appropriated funds incurred in connection with securing his return to the custody of the naval authorities are not chargeable to the man.

Comptroller General McCarl to the Secretary of the Navy, June 26, 1928:

There has been received your letter of June 8, 1928, reading as follows:

Under date of September 28, 1927, James Nelson Whitley, seaman, first class, U. S. Navy, was examined by a board of medical survey at the naval hospital, Norfolk, Va., which found him to be suffering from dementia precox and recommended his transfer to the naval hospital, Washington, D. C., for further observation and treatment. On October 28, 1927, Whitley absented himself from the naval hospital, Washington, D. C., and remained so absent until he surrendered himself at the navy yard, Portsmouth, N. H., on April 21, 1928. Because of his previous mental condition, the Bureau of Navigation, Navy Department, directed his transfer to the naval hospital, Chelsea, Mass., and that he be again examined by a board of medical survey. On May 4, 1928, the latter board of medical survey found that Whitley was suffering from dementia precox, origin in the line of duty, and recommended his transfer to the naval hospital, Washington, D. C., for treatment and final disposition of his case.

Pursuant to the recommendation of the board of medical survey, Whitley was transferred to and received at the naval hospital, Washington, D. C., on May



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**Comptroller General
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**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: General Services Administration: Real Estate Brokers' Commissions

File: B-291947

Date: August 15, 2003

DIGEST

The General Services Administration (GSA) may enter into proposed contracts with real estate brokers without augmenting its appropriations since the proposed contracts do not contemplate the government receiving funds from the brokers. Services rendered under a formal contract at no cost to the United States do not constitute an acceptance of voluntary services under 31 U.S.C. § 1342.

DECISION

The Associate General Counsel, Office of General Counsel, Real Property Division of the General Services Administration (GSA) requests a decision from this Office regarding GSA's proposal to enter into a contract with real estate brokers to represent GSA's interests in lease acquisition and related services for which GSA would not pay the brokers. Instead, GSA proposes to offer the brokers the right to represent GSA in their respective real estate markets and brokers would receive commissions from owners and landlords of real estate in accordance with industry practice.

As we understand GSA's proposal, we conclude that it may contract with brokers for lease acquisition and related services at no cost to the government without augmenting its appropriations. Also, the services contemplated to be rendered under the brokers' contract at no cost to the government would not constitute an acceptance of voluntary services under 31 U.S.C. § 1342. This decision does not address the soundness of the terms of the contract or advisability of entering into such contracts.

BACKGROUND

The General Services Administration awarded the National Real Estate Services (NRES) contract in 1997. Under that contract, GSA paid real estate brokers a fee from appropriated funds in exchange for their performance of a variety of lease acquisition and other services. The NRES contract prohibited brokers from receiving any compensation for these services from sources other than GSA.

However, GSA explains that this method of paying brokers directly and not allowing brokers to receive commissions from landlords or owners is not common practice in the real estate industry. GSA advises that real estate brokers are customarily considered the agents of sellers and landlords, and while buyers and tenants certainly benefit from brokers' services, sellers and landlords, not buyers and tenants, pay the brokers. The payment is usually in the form of a commission for finding a suitable and willing buyer or tenant for the property in question. The commission is typically a percentage of the value of the lease. The landlords factor the commissions into the rent charged to the tenants. The tenants indirectly pay the commission through their rent payments. Payment of commissions, according to GSA, is typically regulated by State regulatory bodies and governed by various state laws that may require disclaimers to the purchaser.

GSA now proposes to enter into a new contract with brokers to reflect traditional industry practices. Under the proposed terms of this contract, instead of paying brokers directly GSA would grant contract awardees the right to represent GSA in their respective geographic markets in exchange for the brokers' lease acquisition services in these markets. The services the brokers would perform would be at "no cost to the government." The property owners and landlords would pay broker commissions in accordance with common industry practice.

DISCUSSION

The main issue presented is whether GSA will improperly augment its appropriation if it receives the benefit of the brokers' services without paying for that benefit, thus making the appropriated funds that would have been used under the previous arrangement to pay brokers available for other purposes. We conclude that GSA's receipt of services under the proposed contract without financial cost to the government ("no cost contract") would not constitute an improper augmentation of its appropriation.¹

¹ The term "no cost contract" is somewhat of a misnomer, since there would be no valid contract without mutual consideration. We note that there is ample consideration to support this arrangement. See *T.V. Travel Inc.*, 65 Comp. Gen. 109, 113 (1985) and 7 Comp. Gen. 810 (1928) (services rendered under a formal contract free of cost to the United States do not cause the contract to be void for lack of

(continued...)

It is unconstitutional for money to be drawn from the Treasury without an appropriation, U.S. Const. Art. I, § 9, cl. 7. By virtue of the “miscellaneous receipts” statute, 31 U.S.C. § 3302(b), an official or agent of the government receiving money for the government from any source, absent statutory authority to the contrary, must deposit the money into the general fund of the Treasury. As a necessary corollary to these well-established principles, government agencies are prohibited from improperly augmenting their appropriation from outside sources without specific statutory authority. B-286182, Jan. 11, 2001. The proposed NRES contract, however, does not directly implicate these concerns.

First, we have held that agencies may receive the benefit of services without obligating appropriated funds. B-281281, Jan. 21, 1999 (citations omitted). Second, some of our cases have distinguished between the receipt of money and the receipt of services, dealing with the former under the augmentation rule and the latter under the voluntary services prohibition. See B-13378 (November 20, 1940). For example, in 63 Comp. Gen. 459, the Federal Communication Commission accepted donated space and services at an industry trade show. The question was whether the Commission could accept donated space and services rather than using its own appropriations to pay for them. *Id.* at 460. We concluded that there was no augmentation because the Commission accepted no funds. The Commission’s exhibit, we noted, was one of the drawing cards that resulted in increased admission revenues for the promoters. For this reason, it was to the advantage of the promoters to solicit the Commission’s participation and to waive the usual fees. In return, the Commission’s acceptance of the free space and services afforded it an additional opportunity to inform the public about radio technology at no increased cost to the agency. *Id.* at 461. Since GSA is receiving services and is not receiving money for the government from the brokers under the proposed NRES contract, the requirements of the miscellaneous receipts statute (to deposit money for the United States into the Treasury) and the corollary rule against augmentation of appropriations are not implicated.

Similarly, we do not believe GSA’s proposed contract with brokers would violate the limitation against voluntary services in 31 U.S.C. § 1342. That statute prohibits federal officers and employees from accepting voluntary services except in certain emergencies, and is intended to prevent agencies from forcing the Congress to appropriate funds to pay volunteers who later submit claims for payment. 23 Comp. Gen. 272, 274 (1943). We have held that services received by an agency free of cost pursuant to a formal contract or agreement do not constitute “voluntary services”

(...continued)

consideration when the contract also contains mutual promises of the contracting parties by which each contracting party obtains a substantial benefit).

within the meaning of section 1342. 7 Comp. Gen. 810, 811 (1928)(services rendered under a formal contract free of cost to the United States do not constitute voluntary services); B-13378, supra (Secretary of Commerce could accept services from private agency rendered under a cooperative agreement which specified that services would be free of cost to the government). It would be difficult to characterize the services contemplated from the brokers in the NRES contract as “voluntary,” since the brokers’ services would be rendered under a formal contract that would presumably specify the no-cost nature of the contract and contain mutually binding rights and obligations in the parties including the exact services to be delivered thereunder in return for the right to represent GSA in their respective markets. Thus, any potential future claims for payment from the brokers would be defined by the scope of the contractual agreement.

CONCLUSION

As we understand the proposal, GSA may enter into proposed contracts with real estate brokers without augmenting its appropriations since the contract does not contemplate the government receiving funds from the brokers. Furthermore, services rendered under a formal contract at no cost to the United States would not constitute an acceptance of voluntary services under 31 U.S.C. § 1342.²

/signed/

Anthony Gamboa
General Counsel

² As noted earlier, this decision does not address the soundness of the terms of the contract or advisability of entering into such contracts. Also, GSA’s submission indicates a possible issue of conflict of interest between the government getting the best value and the brokers’ interest in getting the highest commission. Given the present request, we leave these matters to GSA to resolve.



G A O

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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: National Institutes of Health - Food at Government-Sponsored Conferences

File: B-300826

Date: March 3, 2005

DIGEST

The National Institutes of Health (NIH) may pay for legitimate, reasonable conference costs, including meals and light refreshments, of a formal conference pertaining to Parkinson's disease subject to the conditions outlined herein. A formal conference typically involves topical matters of interest to, and participation of, multiple agencies and/or nongovernmental participants. In addition, other indicators of a formal conference include registration, a published substantive agenda, and scheduled speakers or discussion panels. An agency hosting a formal conference may consider the cost of providing meals and refreshments to conference attendees an allowable conference cost so long as (1) meals and refreshments are incidental to the conference, (2) attendance at the meals and when refreshments are provided is important for the host agency to ensure full participation in essential discussions, lectures, or speeches concerning the purpose of the conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served. The NIH conference here satisfies these three criteria.

Without statutory authority to charge a fee and retain the proceeds, NIH may not charge a registration or other fee to defray the costs of providing meals or light refreshments. An appropriation establishes a maximum authorized program level, and an agency, without specific statutory authority, may not augment its appropriations from sources outside the government.

In applying this decision, NIH should develop an agency policy specifying the types of formal conferences at which NIH may consider providing food. NIH also should develop procedures to ensure that the provision of meals and refreshments meet the criteria listed above. We expect agency counsels, as well as certifying officers, agency auditors, and Inspectors General, to apply these criteria. To the extent that agency officials are uncertain as to the applicability of the criteria in particular circumstances, they may request a decision from this office, pursuant to 31 U.S.C. § 3529, before proceeding.

DECISION

Pursuant to 31 U.S.C. § 3529(a), a certifying officer at the National Institutes of Health (NIH) requested an advance decision regarding the use of appropriated funds to provide meals and light refreshments to federal government and nonfederal attendees and presenters at an NIH-sponsored conference. The certifying officer also asked whether NIH may charge a registration or other fee to defray the costs of any food provided.

NIH may pay for all legitimate, reasonable costs of hosting a formal conference pertaining to Parkinson's disease. A formal conference typically involves topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants. In addition, other indicators of a formal conference include registration, a published agenda, and scheduled speakers or discussion panels. An agency may consider the cost of providing meals and refreshments to conference attendees an allowable conference cost so long as (1) meals and refreshments are incidental to the conference, (2) attendance at the meals and when refreshments are provided is important to ensure full participation in essential discussions, lectures, or speeches concerning the purpose of the conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served.

Agencies must have specific statutory authority to charge a fee for their meetings or programs and to retain the proceeds. NIH has no such specific authority and therefore may not charge a registration or other fee to defray the costs of the conference, including providing meals or light refreshments.

BACKGROUND

NIH plans to hold a formal conference on the latest scientific advances in treating Parkinson's disease. NIH has designed the event to be of broad interest to a number of professional disciplines and to advance NIH's research and information sharing efforts. Attendees will include a mix of federal employees and nonfederal individuals. Nonfederal attendees will include grantees, contractors, and research/science advisors. Some of the nonfederal individuals will be presenters

who will receive honoraria, and some will be on invitational travel. NIH will engage a contractor to assist in organizing the conference. The conference will be held at a hotel in Maryland close to NIH headquarters. The cost of food will not be included in the fee NIH is paying for the conference space.¹ NIH would like to charge a fee for meals and light refreshments that it plans to provide at the conference.

NIH asked us if its appropriated funds are available to pay for food for the various attendees and whether NIH has the authority to charge the attendees a fee that could be used to recover the costs of the food.

ANALYSIS

Questions concerning the cost of food at a conference are often raised when an agency wants to know whether it may pay for food for an employee attending a formal conference. In this decision we address the question from a different perspective—that of the agency hosting a conference—and whether, as host, it may use its appropriation to provide food to conference participants. In our analysis we first discuss when an agency may sponsor a formal conference. Then, from the perspective of the agency as host, we analyze whether the agency may provide food, as a conference expense, to participants, and whether appropriated funds may be used to provide food for other federal agency and nonfederal attendees. We also analyze whether agencies must have specific authority to both charge a fee for conference-related expenses, including food, and retain the proceeds.

NIH's authority to host a formal conference

An agency, generally, does not need express statutory authority to host a conference, so long as the agency determines that a formal conference is reasonably and logically related to carrying out its statutory responsibilities and serves its statutory mission. It would not be inappropriate, for example, for an agency that is charged with promoting public health to organize a conference to bring together elected local officials, physicians, public health leaders and practitioners to identify precautions to avoid a possible influenza epidemic. Similarly, it is not inappropriate for NIH to

¹ In a 1999 decision, we concluded that the Nuclear Regulatory Commission (NRC) could pay an all-inclusive facility rental fee for a meeting of NRC employees to discuss internal NRC matters, even though the fee also covered the cost of food. B-281063, Dec. 1, 1999. The facility charged a fixed fee that included conference rooms, refreshments at breaks, lunch, equipment, and other supplies. We concluded that renting the facilities was a reasonable expense of NRC's Environmental Programs and Management appropriation. Because the fee would have remained the same to NRC whether or not it accepted, and its employees ate, the food, the harm that the general rule is meant to prevent (*i.e.*, expenditure of federal funds on personal items) was not present. *Id.*

organize a conference to coordinate and discuss Parkinson’s disease research efforts within the scientific community.²

NIH, an agency of the Public Health Service, is composed of 27 institutes and centers that were established “to conduct and support research, training, health information, and other programs with respect to any particular disease or groups of diseases or any other aspects of human health.” 42 U.S.C. § 281. Several of its research institutes, as well as a number of universities, medical centers, and pharmaceutical companies, conduct research to understand and find a cure for Parkinson’s disease. For the formal conference discussed in this decision, NIH has invited experts from the private sector as well as from other federal agencies, in addition to researchers from its own research institutes. Given NIH’s statutory mission “to conduct and support” research, it is well within NIH’s discretion, we believe, to organize a formal conference of interested researchers to discuss and coordinate research efforts to encourage efficient and productive research aimed at a common goal— understanding and curing Parkinson’s disease.³

Provision of food at an agency hosted formal conference

In hosting a formal conference, an agency incurs a number of expenses, many of which are discretionary but legitimate nonetheless so long as they serve the purposes of the conference. For example, a conference host typically incurs such obvious expenses as the cost of program materials, conference space, signage, the production of a video or other form of presentation, and personnel costs to administer the conference and conference registration. While meals and refreshments have not been obvious costs of government-sponsored conferences, meals or refreshments are not significantly different from these other expenditures and in some circumstances may be considered, like programs, videos, and signage, to be reasonable, legitimate expenses of the conference.

² Because several of NIH’s research institutes conduct Parkinson’s disease research, Congress has required NIH to coordinate their research efforts. 42 U.S.C. § 284f(b)(1). “Coordination shall include the convening of a research planning conference not less than once every 2 years.” 42 U.S.C. § 284f(b)(2).

³ From the perspective of participating or sponsoring federal agencies and their employees, many conferences similar to NIH’s proposed conference may qualify as “training” under the broad definition thereof in the Government Employees Training Act, 5 U.S.C. § 4101. Paragraph 4 of section 4101, title 5, United States Code, defines “training” to include “making available to an employee . . . a planned, prepared, and coordinated program . . . of instruction or education, in scientific, professional . . . fields which will improve individual and organizational performance and assist in achieving the agency’s mission and performance goals.” Although not crucial to our holding, the NIH conference, arguably, falls within this definition.

In determining when meals or refreshments are allowable expenses of an agency hosting a formal conference, we turn to earlier decisions dealing with the cost of food as an employee training expense. As noted earlier, the perspective of these decisions look at when an agency may pay for the costs of meals and refreshments incurred by an agency in providing training to its own employees or to an agency employee attending a conference. The Government Employees Training Act (Training Act), Pub. L. No. 85-507, 72 Stat. 327 (1958), authorizes an agency to pay the necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. We have held that the government can provide meals and light refreshments under this authority if the agency determines that providing the meals and refreshments to federal employees is necessary to achieve the objective of the training program. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959); B-247966, June 16, 1993; B-193955, Sept. 14, 1979. Similarly, the Training Act authorizes agencies to pay “for expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made.” 5 U.S.C § 4110. To be considered “expenses of attendance at meetings” under section 4110, we have held that the costs of meals and refreshments must be included as an incidental and nonseparable portion of a registration or attendance fee—B-288266, Jan. 27, 2003; 64 Comp. Gen. 406 (1985); 38 Comp. Gen. 134 (1958); B-233807, Aug. 27, 1990—or satisfy the following criteria: (1) the meals and refreshments are incidental to the conference or meeting, (2) attendance at the meals and when refreshments are served is important for the employees’ full participation in the conference or meeting, and (3) the meals and refreshments are part of a formal conference or meeting that includes not just the meals and refreshments and discussions, speeches, lectures, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served. 72 Comp. Gen. 178 (1993); B-233807, Aug. 27, 1990; B-198471, May 1, 1980.

We think similar criteria should apply to determining whether the costs of meals or refreshments are allowable expenses of the agency hosting a formal conference. As the discussion above indicates, we have long permitted agencies, under appropriate circumstances, to cover their employees’ costs of meals when attending formal conferences. 38 Comp. Gen. 134 (1958); B-198471, May 1, 1980; B-154912, Aug. 26, 1964. Further, we have permitted agencies that hold formal in-house training conferences for their employees to cover the cost of meals when necessary to achieve the program or conference objective. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959).⁴ We think the presence of private citizens or federal employees from other agencies who are essential to achieve the program or conference objectives should not change the character of the expense from

⁴ Federal employees who are in travel status, however, are required to reduce their allowances for meals by the amounts specified in the regulations for each meal furnished as part of the event. 41 C.F.R. § 301-74.21.

allowable to unallowable. The fact that the meals and refreshments also are available to private citizens and employees of other agencies should not be an obstacle so long as an administrative determination is made that their attendance is necessary to achieve the conference objectives.

The extension of the availability of appropriated funds to these circumstances should satisfy the criteria discussed earlier. In this regard, to determine whether the costs of meals and refreshments at an agency-hosted conference involving, in addition to its employees, other interested federal employees and private citizens administratively determined necessary to achieve the conference objectives, the criteria are as follows: (1) the meals and refreshments are incidental to the formal conference, (2) attendance at the meals and when refreshments are served is important for the host agency to ensure attendees' full participation in essential discussions, lectures, or speeches concerning the purpose of the formal conference, and (3) the meals and refreshments are part of a formal conference that includes not just the meals and refreshments and discussions, speeches, lectures, or other business that may take place when the meals and refreshments are served, but also includes substantial functions occurring separately from when the food is served.

The level of formality required is the same as what one would expect of a conference sponsored by a nongovernmental entity. *See* 64 Comp. Gen. 604 (1980); B-249795, May 12, 1993. Thus, a formal conference must involve topical matters of interest to, and the participation of, multiple agencies and/or nongovernmental participants. *See* B-249795, May 12, 1993. In addition, a formal conference would include, among other things, registration, a published substantive agenda, and scheduled speakers or discussion panels. Meetings discussing business matters internal to an agency or other topics that have little relevance outside of the agency do not constitute formal conferences. For example, day-long quarterly supervisors meetings discussing general business/management topics, suggestions, issues, and problems of the agency are not formal conferences. 68 Comp. Gen. 606 (1989); B-249749, May 12, 1993.

As NIH explained its conference to us, the conference has the indicia of a formal conference and will meet the three criteria described above. The conference will include a registration process, a published substantive agenda, and scheduled speakers or discussion panels. It is designed to be of broad interest to a number of professional disciplines, and attendees will include a mix of federal employees and nonfederal individuals. The conference will be organized to take full advantage of the participants' and presenters' time and availability and not to accommodate the provision of food. In order to make the best use of the participants' and presenters' time, essential discussions, panels, and speeches will occur at the time the meals and light refreshments are served. Finally, NIH also has scheduled substantive presentations and discussions separately from the time when the food is served.

Accordingly, based on the conference description NIH provided to us, we conclude that NIH may provide food at this formal conference.⁵

The purpose of the criteria we set out is to balance the legitimate benefits that accrue to an agency hosting a conference with the need to ensure that the agency is not expending public funds on a personal expense, food. It is important to note that these criteria necessarily apply on a case-by-case basis. Before implementing this decision, an agency should develop an agency policy specifying the types of formal conferences at which the agency may consider providing food, consistent with the criteria contained in this decision. An agency also should develop procedures to ensure that the provision of meals and refreshments meet the criteria listed above. We expect agency counsels, as well as certifying officers, agency auditors, and Inspectors General, to apply these criteria. To the extent that agency officials are uncertain as to the applicability of the criteria in particular circumstances, they may request a decision from this office, pursuant to 31 U.S.C. § 3529, before proceeding.

Registration fees to cover expenses of formal conferences

If an agency wishes to charge a fee for one of its programs or activities, it must have statutory authority to do so. B-300248, Jan. 15, 2004. In addition, even if an agency has authority to charge a fee, it may not retain and use the amounts collected without statutory authority. *Id.* An appropriation establishes a maximum authorized program level, meaning that an agency, absent statutory authorization, cannot operate beyond the level that can be paid for by its appropriations. *See* 72 Comp. Gen. 164, 165 (1993). An agency may not circumvent these limitations by augmenting its appropriations from sources outside the government, unless Congress has so authorized the agency. *Id.*

In a recent decision we explained that the Independent Offices Appropriation Act, 31 U.S.C. § 9701, known as the user fee statute, provides general authority for an agency to impose a fee if certain conditions are met. *Id.* The user fee statute authorizes an agency to charge recipients of special benefits or services a user fee. 62 Comp. Gen. 262 (1983). Our decisions have not addressed specifically whether

⁵ Because hosting this conference is reasonably related to NIH's statutory responsibilities and serves to advance its statutory mission, NIH is not barred by the prohibition of 31 U.S.C. § 1345 from providing food. Section 1345 prohibits the use of appropriated funds for "travel, transportation, and subsistence expenses for a meeting." Section 1345, however, has limited application, addressing only those conventions and other forms of assemblages or gatherings that private organizations seek to hold at government expense. *See* 72 Comp. Gen. 229, 231 (1993) (effectively overruling prior GAO decisions that applied section 1345 to meetings and conferences other than assemblages and gatherings that private organizations sought to hold at government expense).

the user fee statute authorizes an agency to charge a conference registration or attendance fee, and we need not address that question here. Even if we were to conclude that the user fee statute would permit NIH to charge a registration fee, we are aware of no specific authority that would permit NIH to retain the proceeds. Without such a specific authorization, agencies may not retain or use fees collected under the user fee statute or other laws but must deposit them in the general fund of the Treasury as miscellaneous receipts.⁶ B-300248, Jan. 15, 2004. Nor could NIH authorize its contractor to charge a fee to offset costs because, pursuant to 31 U.S.C. § 3302(b), a contractor receiving money for the government may not retain funds received for the government to pay for the conference costs. B-300248, Jan. 15, 2004.⁷

If a host agency concludes that it cannot use its appropriations to provide food to participants because the conference does not satisfy the criteria we discuss herein, or if the host agency otherwise decides not to provide food (for example, because of budgetary constraints), the participants may cover the costs of their food using their own personal funds.

CONCLUSION

NIH may pay for meals and light refreshments, for all conference participants including federal employees from other agencies and nonfederal participants, at a formal conference pertaining to Parkinson's disease, subject to the conditions outlined herein. However, without statutory authority to charge a fee and credit the proceeds to its appropriation, NIH may not charge a registration or other fee that can then be used to defray the costs of providing meals or light refreshments.

In applying this decision, NIH should develop an agency policy specifying the types of formal conferences at which NIH may provide food. NIH also should develop procedures to ensure that the meals and refreshments meet the criteria above. We expect agency counsels, as well as certifying officers, agency auditors, and

⁶ The "miscellaneous receipts" statute requires an official or agent of the government receiving money for the government from any source, absent statutory authority to the contrary, to deposit the money into the general fund of the Treasury. 31 U.S.C. § 3302(b).

⁷ The only other statute that would have bearing in this situation -- the Economy Act, 31 U.S.C. § 1535, which authorizes an agency to provide goods or services to another agency on a reimbursable basis -- is not applicable in these factual circumstances.

Inspectors General, to apply these criteria. To the extent that agency officials are uncertain as to the applicability of the criteria in particular circumstances, they may request a decision from this office, pursuant to 31 U.S.C. § 3529, before proceeding.

A handwritten signature in black ink, reading "Anthony H. Gamboa". The signature is written in a cursive style with a large initial "A".

Anthony H. Gamboa
General Counsel



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United States Government Accountability Office
Washington, DC 20548

B-306663

January 4, 2006

The Honorable Barbara A. Mikulski
United States Senate

Subject: *Contractors Collecting Fees at Agency-Hosted Conferences*

Dear Senator Mikulski:

We received your letter dated October 4, 2005, asking us to revisit our March 2005 decision, *National Institutes of Health—Food at Government-Sponsored Conferences*, B-300826, Mar. 3, 2005. In that decision, we addressed the availability to the National Institutes of Health (NIH) of its appropriation for the purpose of providing food to attendees at NIH-hosted conferences. *Id.* In addition, in response to a question from NIH, we concluded that NIH may not charge an attendance fee at conferences and retain the proceeds, nor permit its contractor to do so, because NIH lacks statutory authority. *Id.* You expressed concern that this conclusion would reduce federal efforts to bring experts together at federally hosted conferences, particularly conferences hosted by the National Security Agency (NSA), to address evolving threats to the nation.

We appreciate your interest in our March 2005 decision. However, we find no basis to change our conclusion that when an agency lacks statutory authority to charge a fee at a conference and retain the proceeds, neither the agency hosting a conference, nor a contractor on behalf of the agency, may do so. When entertaining a request for reconsideration of a decision, we consider whether the request demonstrates an error of fact or law in the earlier decision, or presents new information not considered in the earlier decision. B-271838.2, May 23, 1997. You do not assert that our March 2005 decision contained legal or factual errors. While you present information regarding agencies' practices that we did not address in our March 2005 decision, such information does not change our conclusion, as explained below.

In your letter, you state that for several years, agencies have engaged in the practice of allowing their contractors, on behalf of the agencies, to collect fees from conference participants to offset the costs of agency-hosted conferences. You explain that agencies initiated this practice after we determined that agencies themselves cannot collect such fees without statutory authority.

The miscellaneous receipts statute provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). In earlier decisions, we indeed have advised that an agency, in the absence of statutory authority, may not retain fees or other amounts paid to the government for activities relating to official duties, but must deposit such funds in the general fund of the Treasury. *E.g.*, B-302825, Dec. 22, 2004 (Office of Federal Housing Enterprise Oversight may not retain money collected from third party litigants for copying costs, but must deposit the money in the Treasury). Both GAO and federal judicial decisions have concluded that the miscellaneous receipts statute precludes an agency of the government diverting to a contractor of the government any amounts the contractor receives on behalf of the government. *See, e.g., Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1361-63 (D.C. Cir. 1996); *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958, 968 (4th Cir. 1984) (Federal Aviation Administration (FAA) cannot hold in a trust fund amounts paid by airlines to defray FAA’s cost of acquiring new shuttle buses for Dulles Airport); *cf.* B-300248, Jan. 15, 2004.

A government agency that lacks the authority to charge and retain fees may not cure that lack of authority by engaging a contractor to do what it may not do. A contractor in this situation is “receiving money for the Government,” and the miscellaneous receipts statute requires that such funds must be deposited in the Treasury. *Scheduled Airlines Traffic Offices*, 87 F.3d at 1361-62. Consequently, in our March 2005 decision, we advised NIH that it could not “authorize its contractor to charge a fee to offset costs because, pursuant to 31 U.S.C. § 3302(b), a contractor receiving money for the government may not retain funds received for the government to pay for the conference costs.” B-300826, Mar. 3, 2005.¹

Congress, of course, may enact legislation authorizing an agency hosting a conference on behalf of the government to collect and retain an attendance fee. Should Congress wish to grant agencies such authority, agencies may in turn permit their contractors to collect such a fee. Congress has available to it a number of options, each offering Congress different degrees of programmatic oversight. For example, Congress could amend the Government Employees Training Act, 5 U.S.C. §§ 4101-4118, to allow agencies to collect attendance fees for conferences. Under 5 U.S.C. § 4110, agencies may pay the expenses of their employees attending meetings and conferences related to agency functions and management. *See* B-288266, Jan. 27, 2003. Congress may choose to add language to section 4110 permitting agencies, when hosting a conference, to charge and retain attendance fees to cover the costs of hosting the conference.² As we stated in our March 2005 decision, if an agency has

¹ The facts present in B-300826, March 3, 2005, did not require us to consider whether an agency could structure a no cost contract to achieve its objective consistent with the miscellaneous receipts statute.

² The Government Employees Training Act permits agencies to provide training to employees of other agencies, and to collect and retain a fee to offset the costs associated with training the employees of other agencies. 5 U.S.C. § 4104. *See* B-241269, Feb. 28, 1991.

such authority, an agency may permit its contractor, hosting a conference on behalf of the agency, to collect and retain fees on the agency's behalf to offset the conference costs.

Rather than enacting a statutory change with governmentwide implications, if Congress preferred, it could enact statutory language either as part of the agency's authorizing legislation or its annual appropriation act, permitting a particular agency to charge an attendance fee at conferences and use the fees to offset conference costs. Congress, on occasion, has enacted legislation permitting an agency to charge and retain a fee. For example, Congress has authorized the National Park Service to charge entrance fees at some recreational lands and to retain the fees for expenditure, rather than depositing them in the Treasury. 16 U.S.C. §§ 6802, 6806. Similarly, Congress could enact legislation permitting an agency such as NSA to charge an attendance fee at conferences and use the proceeds to defray the cost of the conferences.

As we explained in our March 2005 decision, Congress has not provided NIH with authority to charge and retain a fee at conferences. We have not analyzed laws pertaining to NSA to determine whether NSA has authority to retain and use fees collected from its conference participants. If you decide to initiate legislative action to authorize NSA or other agencies to charge fees or allow contractors to charge fees to offset the cost of hosting a conference, we are available to assist your office. If you have any questions, please contact Tom Armstrong at 202-512-8257 or Susan Poling at 202-512-2667.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel