

APPENDIX B

ETA'S RESPONSE


U.S. Department of Labor

Employment and Training Administration
200 Constitution Avenue, N.W.
Washington, D.C. 20210



SEP 20 2017

MEMORANDUM FOR: ELLIOT P. LEWIS
Assistant Inspector General for Audit

FROM: BYRON ZUIDEMA 
Deputy Assistant Secretary

SUBJECT: Response to the Office of Inspector General (OIG) Draft Report
No. 26-17-002-03-370, *ETA Violated the Bona Fide Needs Rule
and Antideficiency Act*

Thank you for the opportunity to review the above referenced Office of Inspector General (OIG) Draft Report. As noted below, this response addresses the OIG's findings and summarizes the Employment and Training Administration's (ETA's) position on the complex procurement and appropriations law issues raised by the OIG. ETA had discussed its views with the OIG during the course of its work, and in light of the disagreement between ETA and the OIG, ETA may seek resolution from an authoritative third party.

In the Draft Report, the OIG stated that:

- ETA improperly obligated \$22.1 million in Job Corps' operations funds available for Program Years (PYs) 2012 and 2013 for services provided in PYs 2013 and 2014, respectively. These actions violated both the bona fide needs rule and the Antideficiency Act.
- An additional \$24.6 million in other Job Corps contract modifications lacked timeframes for the services being funded (i.e., start and end dates), which were necessary to measure ETA's compliance with the bona fide needs rule and the Antideficiency Act.
- ETA also allowed \$11.2 million in Job Corps' operations funds to expire that could have been used for critical program needs.

ETA disagrees with the OIG's conclusion that "ETA Violated the Bona Fide Needs Rule and Antideficiency Act," and disagrees with the premise underlying the finding that "ETA allowed \$11.2 million in Job Corps' operations funds for PYs 2012 and 2013 to expire without being used."

The Draft Report appears to rely primarily on the OIG’s interpretation of the applicable statutory provisions, rather than any binding third party opinion from authoritative tribunals or subject matter experts regarding compliance with 31 U.S.C. § 1502(a) and 41 U.S.C. § 3902 in the context of the ETA funding modifications at issue.¹ Fundamental differences between ETA’s and the OIG’s views on the requirements of 31 U.S.C. § 1502(a) and 41 U.S.C. § 3902 exist.

1. ETA did not violate the bona fide needs rule or the Antideficiency Act.

The “bona fide needs rule” is a concept developed over the years by the Government Accountability Office (GAO) as a short-hand reference to 31 U.S.C. § 1502(a). Section 1502(a) requires that the balance of an appropriation “limited for obligation to a definite period” -- such as a particular PY -- be used to “complete contracts properly made” within that period of availability and properly obligated consistent with 31 U.S.C. § 1501 (the recording statute). In other words, section 1502(a) contains two requirements: first, that the contract be “properly made” within the fiscal year being charged and, second, that the contract be “obligated” -- i.e., recorded as an obligation -- consistent with the recording statute. In addition, 41 U.S.C. § 3902 authorizes an agency to obligate current year funds under a contract for severable services that begin in one PY and extend into the next PY not to exceed 12 months of performance. Because ETA complied with the recording statute and the requirements of 41 U.S.C. § 3902 outlined above, ETA submits that the four contract modifications identified by the OIG were properly executed and document a proper obligation within the meaning of 31 U.S.C. § 1502(a).

With respect to the alleged Antideficiency Act violations, ETA did not obligate PY funds in advance or in excess of a PY appropriation. As noted in the Draft Report, the subject modifications pertain to two Job Corps contracts: one with the Home Builders Institute (HBI Contract) and the other with the United Brotherhood of Carpenters (United Brotherhood Contract.) Each of these cost-reimbursement contracts is for a period of one year with four one-year options. Each of the four contract modifications was executed by Job Corps during the period of availability of the PY charged, and funded services delivered during a 12-month option period that commenced in one PY and extended into the next PY. As a result, ETA did not incur obligations in excess of the amount of the PY appropriation, nor did it incur obligations in advance of a PY appropriation. Therefore, ETA did not violate the Antideficiency Act, 31 U.S.C. § 1341(a).

2. Neither the inclusion nor the absence of dates in the unilateral contract modifications that the OIG reviewed constitute evidence of non-compliance with the bona fide needs rule.

In the Draft Report, the OIG has, on one hand, concluded that the inclusion of dates in some of the contract modifications it reviewed constituted a violation of 31 U.S.C. § 1502(a), but on the

¹ See, Draft Report, at 5-9. Further, we note that the four Job Corps contract modifications at issue predate the Comptroller General’s decision in *Department of Health and Human Services (HHS)—Multiyear Contracting and the Bona Fide Needs Rule*, B-322455 (August 16, 2013) cited in the Draft Report. See Draft Report, at 4 n. 4. In addition, based on the information available in that Comptroller General decision, ETA believes the facts surrounding the Job Corps contract modifications are distinguishable from the HHS contract at issue there. Accordingly, B-322455 is of limited precedential value, if any.

other hand, implied that the *absence* of the dates in the other contract modifications is improper. The OIG's contradictory assessment of the dates as legally significant is misplaced.

As ETA explained in its discussions with OIG staff, the inclusion of the phrase "period of performance" in the four contract modifications identified was an administrative error, and was not intended to, nor did it have the legal effect of, modifying the period of performance in the underlying contract. There is no legal requirement that a contract modification to increase funding on a cost-reimbursement contract also modify the existing period of performance. Nor has the OIG provided any legal support for its conclusion that the inclusion of the dates operated to modify the existing period of performance.

We agree with the OIG that each unilateral contract modification is enforceable. In fact, for that very reason, as explained above, the modifications represent a proper obligation under 31 U.S.C. § 1502(a). However, ETA disagrees with the OIG's conclusion that the modifications also effected an enforceable change in the period of performance of the underlining contract. For the period of performance of a contract to be changed, both parties must mutually agree by signing a bilateral modification. None of the modifications at issue were bilateral.

3. The expiration of \$11.2 million of Job Corps' operations funds was not due to the improper management of funds.

Given the nature of the Job Corps program and the variables associated with funding Job Corps' operations (especially at the end of a PY), it is not always possible to precisely predict the level of funding needed over a specified period of time. As a PY progresses, conditions change and program priorities are reassessed. Ultimately, the money that had been obligated for a specific contract or need may not have been fully utilized.

Contrary to the OIG's assertion, the money is not lost. The unexpended funds remained available to properly liquidate obligations that were properly incurred during the period of availability (i.e., the payment of late invoices or expenses incurred as a result of contract claims or bid protests.) It is not uncommon to resolve a claim or receive a final invoice after the PY funds have expired.

Given the unresolved differences between the OIG and ETA regarding the procurement and accounting principles involved in both of the OIG findings, a definitive decision from an authoritative third party may be necessary to resolve these opposing views on the applicability of the above-referenced statutes, and the issues relating to expired funds. Such a decision may also assist the OIG in their continued efforts to protect the public financial interest.

Notwithstanding ETA's disagreement with the findings in the OIG Draft Report, ETA does recognize the importance of maintaining clear policies and procedures regarding Job Corps' contracting practices to avoid future administrative errors, such as occurred with regard to the transactions identified in the Draft Report. ETA's Office of Contracts Management (OCM), in coordination with its Office of Financial Administration (OFA), is providing OCM's Contracting Officers, OFA's Budget Analysts, and Job Corps' Contracting Officer Representatives with annual training on all requirements of appropriation laws, including the bona fide needs rule and the Antideficiency Act. Such training is detailed in our response to the OIG's Recommendations below.

OIG Recommendations

- 1. Develop and implement clear policies and procedures to prevent a recurrence of the bona fide needs and Antideficiency Act violations noted in this report. This includes establishing policies and procedures that direct compliance and detect and address potential violations.**

Response: Since Fiscal Year (FY) 2016, Job Corps has been reviewing and updating its Acquisition Handbook to address almost all aspects of the procurement process. When completed, the new Acquisition Handbook will include internal guidance related to "Time Availability of Appropriations."

- 2. Provide training to ETA contracting personnel on the bona fide needs rule and related Antideficiency Act requirements.**

Response: On October 12, December 13, and December 14, 2016, OFA provided regional Contracting Officer Representative staff with 3 hours of training related to the proper funding of contracts, which included training addressing the bona fide needs rule and the Antideficiency Act.

In March 2017, ETA's OCM provided 32 hours of appropriations law training to all OCM staff to reinforce the staff's knowledge of contract funding as it relates to incremental funding consistent with the bona fide needs rule and funding services delivered across PYs. An appropriation law expert consultant from Management Concepts, Inc. conducted the training. In addition, OCM implemented weekly Contracting Officer training sessions to discuss ongoing issues and share best practices. Compliance with the bona fide needs rule and related Antideficiency Act requirements are discussed during these meetings.

ETA is committed to continuous training of all procurement staff to increase staff awareness and compliance with all requirements related to the Antideficiency Act and the bona fide needs rule.

- 3. Provide regular oversight of contract modifications and obligated funds to ensure proper contracting actions are taken and documentation is complete and accurate.**

Response: The training noted in ETA's response to Recommendation 2 will enable Contracting Officers, Budget Analysts, and Contracting Officer Representatives to gain a better understanding of the requirements related to contract modifications and the funding of obligations.

- 4. Report, in accordance with 31 USC, §1351, §1517(b), the Antideficiency Act violations caused by the bona fide needs rule violations identified in this report.**

Response: ETA did not incur obligations in excess of the amount of the PY appropriation. Further, because 41 U.S.C. § 3902 authorizes the use of current PY funds for future needs, ETA was not required to charge the four contract modifications identified by the OIG in the Draft Report to the subsequent PY. Accordingly, ETA did not violate the Antideficiency Act and will not implement the OIG's recommendation. Rather, ETA may seek a third party

determination regarding the applicability of the Antideficiency Act and bona fide needs rule to the four contract modifications.

5. **Develop and implement clear policies and procedures to improve funds management, which should include regularly monitoring obligations to identify unexpended Job Corps' funds that can be deobligated during the periods of availability and used for program needs, instead of being left to expire.**

Response: In June 2014, the Department of Labor issued a Contracting Officer's Representative (COR) Handbook identifying and explaining the many responsibilities normally associated with a COR appointment. The Acquisition Handbook will be supplemented to provide additional guidance, including instructions to improve funds management and required monitoring activities to maximize the timely identification of unexpended Job Corps funds that can safely be deobligated during the periods of availability and used for other programmatic needs.