



Decision

Matter of: U.S. Department of Energy—Uranium Down-Blending Services

File: B-329605

Date: June 2, 2022

DIGEST

The Department of Energy (DOE) procured services to “down-blend” highly enriched uranium to low-enriched uranium. The recording statute required DOE to record against available appropriations an obligation for the contract price of about \$334 million. 31 U.S.C. § 1501. The contract permitted DOE to satisfy its obligation to the contractor either through cash payment or by transferring specified amounts of low-enriched uranium to the contractor. Under the USEC Privatization Act, Congress authorized DOE to “transfer” uranium “for national security purposes, as determined by the Secretary.” Because the Secretary of Energy determined that transferring low-enriched uranium to the contractor was in the interest of national security, the uranium transfers were permissible. As DOE made the uranium transfers to the contractor, the recording statute required DOE to reduce its recorded obligation to properly reflect its remaining liability.

DECISION

This responds to a request for our decision concerning whether a Department of Energy (DOE) contract was consistent with appropriations law.¹

¹ Letter from Senator John Barrasso, M.D., then-Chairman, Senate Committee on Environment and Public Works, to General Counsel, GAO (Nov. 17, 2017). This letter also requested our decision on whether DOE properly filed its returns reporting any income that its contractors received as compensation for down-blending services, as required under the Internal Revenue Code. In its response letter, DOE acknowledged that while it had correctly reported the value of cash paid to the contractor, it had not reported the value of uranium paid to the contractor, as it was required to do. Letter from Deputy General Counsel, DOE, to Assistant General Counsel, GAO, at 1 (July 18, 2018) (Response Letter). The agency stated that it would work expeditiously to correct the situation, and as agreed upon with our requestor this decision is limited to the appropriations law issues.

Under this contract, DOE procured down-blending services in order to convert highly enriched uranium to low-enriched uranium. The contract permitted DOE to satisfy its obligation to the contractor through cash payment or by transferring low-enriched uranium to the contractor. The USEC Privatization Act granted DOE authority to “transfer” uranium “for national security purposes, as determined by the Secretary.” Pub. L. No. 104-134, title III, § 3112, 110 Stat. 1321-344 (Apr. 26, 1996), as amended, 42 U.S.C. § 2297h-10(e)(2) (USEC Privatization Act). We conclude that (1) under the recording statute, 31 U.S.C. § 1501, DOE was required to record an obligation for the contract price of nearly \$334 million against appropriations available at the time; and (2) because the Secretary of Energy determined that transferring low-enriched uranium to the contractor was in the interest of national security, the uranium transfers were permissible. As DOE made the uranium transfers to the contractor, the recording statute required DOE to reduce its recorded obligation to properly reflect its remaining liability.

In accordance with our regular practice, we contacted DOE to seek factual information and its legal views on this matter.² In response, DOE provided a copy of the contract, a brief explanation of the pertinent facts, and references to prior DOE legal analysis on its authority to transfer uranium.³

BACKGROUND

The USEC Privatization Act authorizes DOE to “transfer or sell enriched uranium . . . to any person for national security purposes, as determined by the Secretary.” USEC Privatization Act, § 3112(e)(2). Pursuant to this statute, on December 2, 2016, the Secretary of Energy determined that down-blending highly enriched uranium to low-enriched uranium would promote national security by ensuring that the highly enriched uranium could never again be used in a nuclear weapon.⁴ Because the transfer of low-enriched uranium was to be used to fund the down-blending services, the Secretary also determined that the prospective transfer was also justified.⁵

² GAO, Procedures and Practices for Legal Decisions and Opinions, [GAO-06-1064SP](#) (Washington, D.C.: Sept. 2006), available at www.gao.gov/products/GAO-06-1064SP; Letter from Assistant General Counsel, GAO, to Acting General Counsel, DOE (May 29, 2018).

³ Response Letter. See also GAO, *Excess Uranium Inventories: Clarifying DOE’s Disposition Options Could Help Avoid Further Legal Violations*, [GAO-11-846](#), Sept. 26, 2011, at 51–56.

⁴ DOE, *Secretarial Determination of a National Security Purpose for the Sale or Transfer of Enriched Uranium* (Dec. 2, 2016) (Secretarial Determination).

⁵ *Id.*

On December 3, 2015, DOE awarded a contract for the down-blending of highly enriched uranium to low-enriched uranium.⁶ The contract was a firm fixed-price contract for nearly \$334 million.⁷ As compensation for the down-blending services, the contractor agreed to accept either cash, low-enriched uranium, or a combination thereof.⁸ The contract reserved to DOE the right to determine the method of compensation.⁹ If DOE elected to compensate the contractor using low-enriched uranium, the contract set out a formula to determine the appropriate amount of low-enriched uranium based on its spot-market value at the time of the billing.¹⁰

DISCUSSION

In this decision we address three issues: first, the proper recording of an obligation when DOE entered into a contract for down-blending services; second, DOE's authority to transfer low-enriched uranium to the contractor; and third, the proper obligational adjustments DOE was required to make as its outstanding liability changed. We also address the applicability of the miscellaneous receipts statute.

Recording the Obligation

As a threshold matter for determining the proper recording of DOE's obligations under the contract, we first consider whether DOE had legal authority to enter into the down-blending services contract. Here, DOE has specific statutory responsibility to manage its uranium stockpile and promote international nuclear safety and nonproliferation. See *generally* Atomic Energy Act of 1954, Pub. L. No. 83-703, title I, §1, 68 Stat. 919 (Aug. 30, 1954), *as amended*, 42 U.S.C. § 2011; Department of Energy Organization Act, Pub. L. No. 95-91, title I, § 102, 91 Stat. 567 (Aug. 4, 1977), *as amended*, 42 U.S.C. § 7112; Energy Policy Act of 1992, Pub. L. No. 102-486, title X, § 1012, 106 Stat. 2948 (Oct. 24, 1992), *as amended*, 42 U.S.C. § 2296b-1; National Nuclear Security Administration Act, Pub. L. No. 106-65, div. C, title XXXII, § 3211, 113 Stat. 957 (Oct. 5, 1999), *as amended*, 50 U.S.C.A. § 2401. Through this contract, DOE managed its stock of uranium in support of its nonproliferation goals as the down-blending services resulted in a reduction in the existence of weapons-grade nuclear material. Accordingly, DOE had authority to enter into this contract.

⁶ DOE Contract No. DE-NA0003094, Dec. 3, 2015 (Contract).

⁷ The total contract price was \$333,814,716. Contract, at 6.

⁸ Contract, at 16–17.

⁹ *Id.*

¹⁰ Contract, at 16. The contract also stated that the appropriate amount of low-enriched uranium to transfer would vary based on a recalculation of this formula for every invoice with invoice frequency at a maximum of once per month. *Id.*

The recording statute requires an agency to record the entire amount of the government's liability against funds available at the time the contract is executed. 31 U.S.C. § 1501(a)(1); B-327242, Feb. 4, 2016; B-322160, Oct. 3, 2011. For a firm fixed-price contract, the agency must record the total amount of its possible liability. B-328450, Mar. 6, 2018.

Even if intervening events or future agency action mean the agency may not ultimately pay out the full amount, the agency must still record its total liability at the time it is incurred. For instance, the Air Force entered into an operations contract under which it obligated limited amounts to fund performance for specific time increments. B-238581, Oct. 31, 1990. If it decided not to further fund the contract, the Air Force was liable to the contractor for "special termination" costs. *Id.* Even though the choice between funding and terminating the contract remained with the government, the Air Force was still required to record the full amount of the "special termination" costs because it was liable for those costs until the contract was fully funded. *Id.*, see also B-328450, Mar. 6, 2018; B-320091, July 23, 2010.

Here, the contract plainly states the government's liability at nearly \$334 million.¹¹ The contract notes the "value of the ordered services" are "fixed at the time of award."¹² Accordingly, DOE should have recorded this amount. Like the Air Force, DOE maintained some control over the amount of its ultimate liability. However, even though DOE retained the right to satisfy its obligation through the transfer of low-enriched uranium rather than by a cash payment, it continued to be liable to the full extent of the \$334 million until such transfers were made. Thus, DOE was required to record an obligation of the contract price of nearly \$334 million against funds that were properly available as to purpose, time, and amount.

DOE's Authority to Transfer Uranium

Section 3112(e) of the USEC Privatization Act grants DOE authority to "transfer or sell" enriched uranium "to any person for national security purposes, as determined by the Secretary." Key to the interpretation and application of DOE's authorities under section 3112(e) is an understanding of the phrase "transfer or sell."

Generally, when we interpret a statute, we read the statute as a whole. See 2A Sutherland, *Statutes and Statutory Construction* § 46:5 (7th ed. 2014); *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 132 (2000) (the meaning "of certain words or phrases may only become evident when placed in context"). We presume that Congress uses words and phrases to have consistent meaning throughout the statute. 29 Comp. Gen. 143, 145 (1949). Conversely, where Congress uses a different word, it intends a different meaning. See B-329603, Apr. 16, 2018. We also interpret words and phrases so that each of them has operative meaning. See

¹¹ The exact contract price was \$333,814,716. Contract, at 6.

¹² Contract, at 16.

Sutherland § 46:6 (“Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally”).

In accordance with these principles, we note that Congress intended for the terms “transfer” and “sell” to each have distinct operative effect. Not only did Congress choose to include separate terms, but in using “or” to separate them, Congress created a disjunctive list. See *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir. 1975) (“[a]s a general rule, the use of a disjunctive in a statute indicates alternatives and requires that they be treated separately”). Here the “or” establishes two separate authorities under which DOE can convey uranium upon the Secretary’s determination that doing so is in the interest of national security. Thus, DOE’s authority to “transfer” is distinct from DOE’s authority to “sell” uranium under section 3112.

In addition to presuming that each word has meaning, we also presume Congress was aware of such meaning when it included each term in the legislation. B-331888, June 11, 2020, and cases cited therein. And, we interpret terms that are not otherwise defined in statute according to their ordinary meaning. *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); B-330776, Sept. 5, 2019.

The ordinary meaning of the verb “sell” is “to transfer (property) by sale.” *Black’s Law Dictionary* (11th ed. 2019) (definition of “sell”). In turn, the noun “sale” refers to “the transfer of property or title for a price.” *Id.* (definition of “sale”). In light of these definitions, Congress’s use of the term “sell” in section 3112(e) granted DOE authority to convey uranium in exchange for money. This interpretation is consistent with the use of the term “sell” in other sections of the USEC Privatization Act. See USEC Privatization Act, § 3112(b)(2) (“the Secretary shall *sell, and receive payment for*, the uranium hexafluoride”) (emphasis added).

In contrast, the ordinary meaning of the verb “transfer” is “to change over the possession or control of.” *Black’s Law Dictionary* (11th ed. 2019) (definition of “transfer”). Unlike the term “sell”, there is no requirement that a “transfer” involve the exchange or payment of money. The term “transfer” instead grants DOE a separate conveyance authority in which DOE need not receive money in exchange for the uranium. The only prerequisite to utilizing this transfer authority is that the Secretary make the requisite determination that the transfer is in the interest of national security. USEC Privatization Act, § 3112(e)(2).

Here, DOE did indeed transfer uranium following the Secretary’s determination that the transfer furthered national security. We acknowledge that the Secretary followed multistep logic to make this determination: the transfer of low-enriched uranium to the contractor was necessary to “fund” the down-blending of highly enriched

uranium, and the down-blending then resulted in the reduction of weapons-grade nuclear material, thereby benefiting national security.¹³

Given the statute's broad language vesting the Secretary with authority to make this determination and the lack of any other specific statutory constraints over the use of the transfer authority, we see no basis to disagree with the Secretary's determination or with DOE's authority to transfer uranium pursuant to the determination. Thus, DOE's transfer of low-enriched uranium to the contractor was permissible under the USEC Privatization Act.¹⁴

Adjusting the Obligation

As an agency's liability becomes clear in the course of contract performance, the agency should adjust the amount of its obligation. B-328450, Mar. 6, 2018; B-300480, Apr. 9, 2003. For instance, the Commodity Futures Trading Commission (CFTC) entered into lease agreements in which the definite sum of CFTC's liability was unknown, but for which there was a fixed maximum ascertainable in the agreements. B-328450, Mar. 6, 2018. Under the recording statute, CFTC was required to record the maximum amount of the government's liability. *Id.* As the actual amount of the obligation became clear over the course of the lease, CFTC was required to adjust the amount of the obligation to reflect the amount for which the agency was ultimately liable. *Id.*

In another decision, the Corporation for National and Community Service (Corporation) made grant awards to state corporations to fund education benefits for participants of the AmeriCorps Program. B-300480, Apr. 9, 2003. The Corporation initially committed to fund a specified number of participants and therefore had to record an obligation for the corresponding amount. *Id.* As the number of actual participants became known, the Corporation was required to adjust its obligation to either increase the obligation or deobligate funds as necessary. *Id.*

Here, the contractor agreed to accept either low-enriched uranium or cash, at the government's option, to satisfy the government's liability. As DOE transferred low-enriched uranium to the contractor, the government's outstanding total legal liability was reduced. Thus, with each uranium transfer, DOE was required to deobligate a corresponding amount from its appropriated balance.

¹³ See Secretarial Determination.

¹⁴ The Secretary made the requisite national security determination on December 2, 2016, nearly one year after DOE awarded the contract for down-blending services. Under section 3112 of the USEC Privatization Act, the Secretary's determination was a necessary predicate to the transfer's permissibility. We presume that the Secretary's determination became effective before DOE carried out any uranium transfers.

Applicability of the Miscellaneous Receipts Statute

The miscellaneous receipts statute requires 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). This requirement advances the primary purpose of the statute, which is to ensure that Congress retains control of the public purse, thereby protecting Congress’s constitutional power to appropriate public money. B-327830, Feb. 8, 2017; B-325396, Feb. 23, 2015; B-322531, Mar. 30, 2012. Funds constitute “money for the Government” if they are to be used to bear the expenses of the government or to pay its obligations. B-321729, Nov. 2, 2011.

Where an agency structures a transaction so that a third party instead of the government receives the money, this can violate the miscellaneous receipts statute. For example, CFTC entered into lease contracts in which its landlords agreed to satisfy CFTC obligations. B-327830, Feb. 8, 2017. In one lease, the landlord agreed to pay CFTC’s existing rent owed to a previous landlord. In another lease, the landlord agreed to make payments to third-party contractors in satisfaction of CFTC’s liabilities for building construction. Although CFTC did not receive money directly from the landlord, the landlord’s use of funds to satisfy CFTC obligations made those funds “money for the Government.” *Id.*

In a similar decision, the Small Business Administration (SBA) used a contractor to assist in the performance of statutorily-required oversight of private lenders. B-300248, Jan. 15, 2004. Rather than paying the contractor from its appropriations, SBA arranged for private lenders to pay a fee to the contractor. *Id.* SBA maintained that the fee proceeds did not constitute “money for the Government” since they were paid directly to the contractor as compensation for the contractor’s work. *Id.* We disagreed and noted that a “government official or agent is deemed to receive money for the government under the Miscellaneous Receipts Statute if the money is to be used to bear the expenses of the government or pay government obligations.” *Id.* at 7. *See also* B-265727, July 19, 1996 (concluding that the sublessee’s payment to the landlord was money for the government and, therefore, must be deposited in the Treasury as miscellaneous receipts).

We have also considered the miscellaneous receipts statute in the context of previous DOE uranium transfers. In 2006, we concluded that DOE violated the miscellaneous receipts statute when it transferred low-enriched uranium to a contractor in exchange for uranium decontamination services. B-307137, July 12, 2006. DOE had created a principal/agent relationship with the contractor by instructing it to sell the transferred uranium. *Id.* Because proceeds from the sale were then used to compensate the contractor for expenses it incurred on behalf of DOE, we concluded that DOE violated the miscellaneous receipts statute. *Id.* Similarly, in 2011, we concluded that DOE “constructively received money for the government” when it authorized and partially controlled a contractor’s sale of DOE uranium in partial payment for services rendered. GAO, *Excess Uranium Inventories: Clarifying DOE’s Disposition Options Could Help Avoid Further Legal*

Violations, GAO-11-846, Sept. 26, 2011. Again, DOE's agreement violated the miscellaneous receipts statute because it directed the contractor to sell uranium and retain the proceeds to pay for services rendered to DOE. *Id.*

The critical factor in these decisions is that the government arranged for a third party to make payments in satisfaction of the government's liability. CFTC arranged for landlords to make payment to CFTC's third-party contractors; SBA arranged for lenders to make payment to SBA contractors; and DOE, in our prior decisions, arranged for its contractor to sell uranium and then use the proceeds to satisfy DOE liabilities. In the present case, DOE did not make such an arrangement. DOE did not have a third party make payment to the contractor in satisfaction of DOE's outstanding liability, nor did DOE orchestrate the sale of uranium through its contractor in order to use the proceeds to satisfy DOE's liability. Instead, DOE satisfied its own liability through the transfer of low-enriched uranium to the contractor. Because DOE did not receive "money for the Government" or structure the transaction to have a third party satisfy its liability, the miscellaneous receipts statute is not at issue here.

CONCLUSION

DOE permissibly entered into a contract to obtain down-blending services for its uranium stockpile. Upon entering into the contract, DOE was required to record against available appropriations an obligation for the contract price of about \$334 million. Consistent with a determination by the Secretary of Energy, DOE permissibly transferred low-enriched uranium to the contractor. Because the contractor agreed to accept low-enriched uranium as compensation, with each uranium transfer DOE was required to deobligate amounts to properly reflect its remaining liability.



Edda Emmanuelli Perez
General Counsel