



441 G St. N.W.  
Washington, DC 20548

## Decision

**Matter of:** Department of Energy—Obligation of Appropriations for Indirect Costs of a Management and Operating Contract

**File:** B-333911

**Date:** August 15, 2024

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### DIGEST

The National Nuclear Security Administration, a separately organized agency within the Department of Energy (DOE), has a management and operating contract with Lawrence Livermore National Security, LLC (LLNS) through which LLNS manages the Lawrence Livermore National Laboratory (Livermore) in support of DOE's statutory missions. The amount that DOE obligates for this contract includes both the direct and indirect costs of the contract. At issue here are the indirect costs of the contract, which LLNS used, in part, to renovate and construct laboratory space at Livermore Warehouse Building 490, in support of DOE and Department of Defense (DOD) programs.

Under the purpose statute, appropriations are only available for the purposes for which Congress made them. Incurring costs properly chargeable to another agency for the value of services received may result in a violation of the purpose statute. The renovation costs attributable to DOD were funded by DOD appropriations pursuant to an interagency agreement. Because DOE did not obligate its appropriations to cover the portion of the renovation that would benefit DOD, DOE did not violate the purpose statute.

In addition, the *bona fide* needs statute, provides that a fixed-year appropriation is only available to fulfill a genuine or *bona fide* need of the time period of availability of the appropriation. The indirect costs at issue here are held in the contractor's indirect cost pool for its estimated current year expenses to enable the performance of its "direct charged" work. When DOE incurs obligations reflecting the amount of its indirect costs under the contract, it obligates currently available appropriations for current year needs. Therefore, DOE complied with the *bona fide* needs statute when it obligated appropriations for its indirect costs under the contract.

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## DECISION

The Department of Energy, Office of Inspector General (DOE IG) requests a decision under 31 U.S.C. § 3529 regarding whether the use of a contractor's indirect cost pool, which is funded by Department of Energy (DOE) appropriations, for the renovation of laboratory space violated the purpose statute and the *bona fide* needs statute, where the only initial identified users of the space were Department of Defense (DOD) programs.<sup>1</sup>

Our practice when rendering decisions is to contact the relevant agencies<sup>2</sup> to seek factual information and their legal views.<sup>3</sup> We contacted DOE to seek additional factual information and its legal views on this matter.<sup>4</sup> DOE responded with its explanation of pertinent facts and legal analysis.<sup>5</sup>

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<sup>1</sup> Letter from Inspector General, Department of Energy, to Managing Associate General Counsel for Appropriations Law, GAO (Dec. 1, 2021) (Request Letter).

<sup>2</sup> DOE IG's request letter and its July 2021 Audit Report on this matter provided factual information and its legal views. See Request Letter; DOE IG, *Management of Institutional General Plant Projects at Lawrence Livermore National Laboratory*, DOE-OIG-21-31 (July 2021) (Audit Report).

<sup>3</sup> GAO, *GAO's Protocols for Legal Decisions and Opinions*, GAO-24-107329 (Washington, D.C.: Feb. 21, 2024), available at <https://www.gao.gov/products/gao-24-107329>.

<sup>4</sup> Letter from Assistant General Counsel for Appropriations Law, GAO, to General Counsel, DOE (Feb. 2, 2022); Email from Senior Attorney, GAO, to Deputy General Counsel for General Law, DOE, *Subject: Lawrence Livermore Background & Additional Questions* (May 11, 2023); Email from Assistant General Counsel, GAO, to Deputy General Counsel for General Law, DOE, *Subject: Additional GAO Question Regarding Livermore* (Nov. 15, 2023); Email from Assistant General Counsel, GAO, to Deputy General Counsel for General Law, DOE, *Subject: Additional GAO Question Regarding Livermore* (Dec. 13, 2023); Email from Assistant General Counsel, GAO, to Deputy General Counsel for General Law, DOE, *Subject: Funding modifications and CAS Disclosure Statement, Livermore Lab* (Jan. 17, 2024).

<sup>5</sup> Letter from Deputy General Counsel for Business Transactions, DOE, to Assistant General Counsel for Appropriations Law, GAO (Response Letter); Telephone Conversation with Deputy General Counsel for General Law, DOE (July 21, 2022) (July Telephone Conversation); Letter; Email from Deputy General Counsel for General Law, DOE, to Assistant General Counsel for Appropriations Law, GAO (Dec. 13, 2022) (DOE Follow-up Response); Telephone Conversation with Deputy General Counsel for General Law, DOE (Dec. 20, 2022) (December Telephone Conversation); Email from Deputy General Counsel for General Law, DOE, to Senior  
(continued...)

## BACKGROUND

The National Nuclear Security Administration (NNSA), a separately organized agency within DOE, operates several research laboratories throughout the country, including the Lawrence Livermore National Laboratory (Livermore).<sup>6</sup> This site is federally owned, and operated by Lawrence Livermore National Security, LLC (LLNS), a private entity, pursuant to a management and operating contract with NNSA.<sup>7</sup>

NNSA's contract with LLNS is a cost-reimbursement contract through which LLNS "manage[s] Government-owned facilities and infrastructure . . . to further national interests and to perform NNSA/DOE statutory missions."<sup>8</sup> According to DOE, it funds this contract with multiple DOE appropriations because the contract supports various DOE programs.<sup>9</sup>

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Attorney, GAO, *Subject: Lawrence Livermore Background & Additional Questions* (June 12, 2023) (June Email); Telephone Conversation with Deputy General Counsel for General Law, DOE (December 15, 2023) (December Follow-up); Email from DOE Deputy General Counsel for Procurement, Intellectual Property and Technology Transfer, NNSA, to Assistant General Counsel for Appropriations Law, GAO (Jan. 9, 2024) (January Email); Email from DOE Deputy General Counsel for Procurement, Intellectual Property and Technology Transfer, NNSA, to Assistant General Counsel for Appropriations Law, GAO (Apr. 16, 2024) (April Email).

<sup>6</sup> Audit Report, at 1. NNSA is an agency within DOE responsible for enhancing national security through the military application of nuclear science. See Pub. L. No. 106-65, § 3211 (Oct. 5, 1999), *codified at* 50 U.S.C. § 2401.

<sup>7</sup> Request Letter; December Telephone Conversation. Livermore is composed of 686 buildings totaling 6.1 million square feet. Audit Report, at 1. A management and operating contract is an agreement under which the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency. 48 C.F.R. § 17.601.

<sup>8</sup> Response Letter, at 2. A cost-reimbursement contract provides for payment of allowable incurred costs, to the extent prescribed in the contract. Generally, a cost reimbursement contract provides an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed without the approval of the contracting officer. 48 C.F.R. § 16.301-1.

<sup>9</sup> Response Letter, at 4; July Telephone Conversation; December Telephone Conversation.

DOE incurs obligations for this contract monthly when it executes modifications to the contract.<sup>10</sup> The amount obligated includes LLNS's direct costs—those that can be directly identified with specific cost objectives—and indirect costs, which DOE describes as “expenses of the human and physical infrastructure underpinning and enabling the performance of the ‘direct charged’ work.”<sup>11</sup> The indirect costs are calculated as a percentage of the total costs under the contract.<sup>12</sup> Once obligated and expended by DOE, funds associated with the indirect costs of the contract are held by LLNS in its indirect cost pools and are used by LLNS to perform work that benefits multiple cost objectives under its contract with NNSA.<sup>13</sup>

Other federal agencies and nonfederal entities also provide funding for research conducted at Livermore through reimbursable work agreements with DOE.<sup>14</sup> Specifically, DOE executes Strategic Partnership Projects (SPP) with public and private entities on a reimbursable basis pursuant to its authorities under the Atomic Energy Act of 1954 and the Economy Act.<sup>15</sup> See 42 U.S.C. §§2011 *et seq.*; 31 U.S.C. § 1535.

In May 2016, DOE identified a need to renovate and construct laboratory space at Livermore Warehouse Building 490.<sup>16</sup> According to DOE, the renovation project was classified as an Institutional General Plant Project (IGPP)—a minor construction project benefiting multiple cost objectives—pursuant to a then-applicable DOE Order.<sup>17</sup> Consistent with this Order, LLNS funded the project with \$7.2 million from

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<sup>10</sup> December Follow-up; January Email.

<sup>11</sup> DOE Follow-up Response; see *also* B-328065, Oct. 27, 2016 (defining direct and indirect costs more generally). “Direct charged work” refers to the direct cost under the contract, which is identified specifically with a particular cost objective. 48 C.F.R. § 31.202(a).

<sup>12</sup> DOE Follow-up Response.

<sup>13</sup> DOE Follow-up Response; July Telephone Conversation; December Follow-up.

<sup>14</sup> June Email.

<sup>15</sup> Response Letter, at 3; April Email.

<sup>16</sup> DOE Follow-up Response, at 3; Request Letter, at 1.

<sup>17</sup> Response Letter; DOE Order 430.1B, Attachment 6, *Real Property Asset Management*, Sept. 24, 2003, at 1. DOE Order 430.1B was applicable at the time of classification but has since been canceled. See *also* 42 U.S.C. § 7257; 50 U.S.C. § 2748.

an indirect cost pool, the Site Support Overhead Pool.<sup>18</sup> In addition, DOD identified a need for space for its programs that could be addressed by LLNS's occupancy of space at Livermore under DOE's management and operating contract.<sup>19</sup> Pursuant to an existing SPP agreement with DOE, DOD provided DOE with approximately \$11.7 million to tailor the space for their needs.<sup>20</sup> LLNS will utilize the space to perform research and other activities on behalf of the DOD programs pursuant to its management and operating contract with NNSA.<sup>21</sup>

## DISCUSSION

At issue here is DOE's obligation of its appropriations for the indirect costs of its management and operating contract. As explained below, we conclude DOE did not violate the purpose statute or the *bona fide* needs statute when it incurred these obligations.<sup>22</sup>

### Application of the Purpose Statute

The purpose statute provides that appropriated funds may only be used for the purposes for which Congress appropriated them. 31 U.S.C. § 1301(a); B-333826, Apr. 27, 2022; B-329446, Sept. 17, 2020. When an agency uses an appropriation to cover costs properly attributable to another appropriation, the agency violates the purpose statute. 70 Comp. Gen. 592 (1991).

The purpose statute applies to an agency's use of its "appropriations," which are generally defined as "budget authority to incur obligations and to make payments from the Treasury for specified purposes."<sup>23</sup> Here, we assess DOE's compliance

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<sup>18</sup> Response Letter, at 2, 4. DOE notes that DOE's portion of the construction project cost \$7.2 million, which was below the minor construction authority threshold at the time of \$10 million. Response Letter, at 2.

<sup>19</sup> Response Letter, at 2; June Email.

<sup>20</sup> According to DOE, DOD and DOE entered into the SPP agreement pursuant to the Atomic Energy Act and the Economy Act. April Email.

<sup>21</sup> Response Letter, at 3.

<sup>22</sup> While DOE IG asked us to address DOE's compliance with the Antideficiency Act, because DOE's obligations for indirect costs complied with the purpose statute and the *bona fide* needs statute, we need not consider whether they complied with the Antideficiency Act. See Request Letter.

<sup>23</sup> GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 21.

with the purpose statute at the time it incurred obligations for the indirect costs of the management and operating contract with LLNS.<sup>24</sup>

We consider whether DOE incurred costs pursuant to NNSA's management and operating contract with LLNS that covered the needs of another agency, specifically DOD. Failure to properly charge an agency for the value of services received may result in a violation of the purpose statute. 70 Comp. Gen. 592. For example, the Department of Labor (Labor) violated the purpose statute when it used appropriated funds of nine agencies to purchase computer equipment for a shared communications system for executives, but then charged eight of the agencies amounts in excess of the actual costs of the equipment provided. *Id.* There, Labor's cost allocation methodology resulted in eight agencies subsidizing costs properly allocable to the ninth. *Id.*

According to DOE, it identified a need for the space at issue in May 2016, and the project was characterized as an indirect cost under a then-applicable DOE Order because the space at issue would benefit multiple cost objectives at DOE.<sup>25</sup> Because the project was characterized as an indirect cost under the management and operating contract, LLNS funded \$7.2 million of the project from an indirect cost pool, the Site Support Overhead Pool, which is funded by multiple DOE appropriations.<sup>26</sup>

In January 2019, DOD and DOE agreed to DOD's use of a portion of the Livermore space for its mission-related research, which would be carried out by LLNS.<sup>27</sup> According to DOE, none of its funds were obligated or expended for the portion of the renovation project needed to carry out DOD research.<sup>28</sup> Rather, DOD paid approximately \$11.7 million from its appropriations for the costs of the renovation

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<sup>24</sup> See B-305484, June 2, 2006. We do not assess whether LLNS complied with the purpose statute when it used amounts in its indirect cost pool to fund the renovation project because the purpose statute does not apply to a private party's use of non-federal funds.

<sup>25</sup> Response Letter, at 2; DOE Follow-up Response 3,4.

<sup>26</sup> Response Letter, at 2.

<sup>27</sup> Response Letter; Audit Report, at 5.

<sup>28</sup> April Email.

project that specifically benefitted DOD programs.<sup>29</sup> These funds were transferred to DOE pursuant to an SPP agreement.<sup>30</sup>

According to DOE, it entered into the SPP agreement pursuant to the Economy Act and the Atomic Energy Act.<sup>31</sup> The Economy Act is a statute applicable governmentwide that authorizes an agency to provide goods or services to another agency on a reimbursable basis. 31 U.S.C. § 1535; B-289380, July 31, 2002, at 1. Here, DOE could rely on the Economy Act to charge DOD for costs that were solely related to DOD's mission needs. Because DOE charged DOD for the costs that specifically benefitted DOD programs and no DOE appropriations were used for this purpose, DOE did not violate the purpose statute.

#### Application of the *Bona Fide* Needs Statute

Next, we consider whether DOE violated the *bona fide* needs statute when it obligated funds for the indirect costs of the management and operating contract.<sup>32</sup> The *bona fide* needs statute, 31 U.S.C. § 1502(a), provides that a fixed-year appropriation is only available to fulfill a genuine or *bona fide* need of the time period of availability of the appropriation.<sup>33</sup> Like with the purpose statute, we assess compliance with the *bona fide* needs statute at the time DOE incurred an obligation against appropriated funds. B-300480.2, June 6, 2003, B-325526, July 16, 2014.

DOE incurred obligations monthly for the management and operating contract with LLNS when it executed modifications to the contract.<sup>34</sup> The amount obligated

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<sup>29</sup> DOE Follow-up Response, at 3. According to DOE, it executed a memorandum of understanding with DOD in FY 2011 representing the standard terms through which LLNS would perform work on behalf of DOD at Livermore. According to DOE, DOD issues an interagency order to obligate funds to NNSA for its costs of the renovation project. April Email.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* The Atomic Energy Act, 42 U.S.C. § 2053, authorizes NNSA, in part, "to determine and make such charges as in its discretion may be desirable for the conduct of" certain research and other activities. Because the Economy Act provides sufficient authority for DOE to charge DOD for the DOD mission work discussed here, we do not consider whether this section of the Atomic Energy Act provides authority for NNSA to charge other federal agencies for activities and studies performed by NNSA.

<sup>32</sup> Request Letter, at 2.

<sup>33</sup> B-317139, June 1, 2009, at 4.

<sup>34</sup> December Follow-up.

includes both direct and indirect costs under the contract.<sup>35</sup> According to DOE, cost accounting standards require indirect costs of the management and operating contract to be allocated to costs incurred in the current fiscal year.<sup>36</sup> Therefore, the amount DOE obligated for these indirect costs constituted LLNS's estimated current year costs to enable its performance of its "direct charged" work. Because these indirect costs constituted a current year need and DOE obligated available appropriations for these costs, DOE complied with the *bona fide* needs statute when it incurred these costs.

## CONCLUSION

DOE did not violate the purpose statute or the *bona fide* needs statute when it obligated appropriations for the indirect costs of its management and operating contract with LLNS.



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<sup>35</sup> *Id.*

<sup>36</sup> Response Letter, at 2, 4.