



# United States Department of the Interior

OFFICE OF THE SOLICITOR  
Washington, D.C. 20240

IN REPLY REFER TO:

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## MEMORANDUM

**TO:** David Sutfin, Chief *DS 4/9/2002*  
Procurement Operations Branch  
Minerals Management Service

**THRU:** Alton E. Woods, Assistant Solicitor *Alton Woods*  
Branch of Procurement and Patents  
Division of General Law

**FROM:** Jeanne A. Anderson, Attorney-Advisor *JAA*  
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**SUBJECT:** Request By MMS GovWorks for Legal Opinion Concerning Whether Fees Received From Customer Agencies Under the Pilot Franchise Fund Program May Properly be Retained in the Interior Franchise Fund (IFF) Until They are Expended for Fund Purposes

### I. INTRODUCTION

Minerals Management Service (MMS) Procurement Operations Branch (GovWorks) has requested a legal opinion on an issue raised by the Inspector General (IG) concerning MMS' operations under the pilot franchise fund program. The program was established by the Government Management Reform Act of 1994 (GMRA), Pub. L. No. 103-356 §403, 108 Stat. 3410 (1994).

MMS has requested that we address the following issue raised in a draft Inspector General's Issue Paper: "MMS advertises that once federal agencies deposit appropriated funds into the IFF, it [sic] can be held until expended without regard to fiscal year. a. Do appropriated annual funds deposited into the IFF lose their characteristic as such and become "no year" funds?" (Attachment 1 at 5-6).

The authorities relevant to this issue are set forth and analyzed below.

## II. BACKGROUND

### A. The Government Management Reform Act of 1994

The concept of a franchise fund pilot program began with the 1993 National Performance Review (NPR), which proposed that "The administration should encourage operations of one agency to compete with operations of another." Congress subsequently passed the GMRA,<sup>1</sup> establishing a franchise fund pilot program, as follows:

#### Sec. 403. FRANCHISE FUND PILOT PROGRAMS

(a) **ESTABLISHMENT** - There is authorized to be established on a pilot program basis in each of six executive agencies a franchise fund. The Director of the Office of Management and Budget, after consultation with the chairman and ranking members of the Committees on Appropriations and Governmental Affairs of the Senate, and the Committees on Appropriations and Government Operations of the House of Representatives, shall designate the agencies.

(b) **USES** - Each fund may provide, consistent with guidelines established by the Director of the Office of Management and Budget, such common administrative support services to the agency and to other agencies as the head of such agency, with the concurrence of the Director, determines can be provided more efficiently through such a fund than by other means. To provide such services, each such fund is authorized to acquire the capital equipment, automated data processing systems, and financial management and management information systems needed. Services shall be provided by such funds on a competitive basis.

(c) **FUNDING** - (1) **There are authorized to be appropriated to the franchise fund of each agency designated under subsection (a) such funds as are necessary to carry out the purposes of the fund, to remain available in other accounts for the purposes to be carried out by the fund, to remain available until expended.** To the extent that unexpended balances remain available in other accounts for the purposes to be carried out by the fund, the head of the agency may transfer such balances to the fund.

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<sup>1</sup> Because this provision is central to the issue presented, we have quoted significant portions of the GMRA here.

(2) Fees for services shall be established by the head of the agency at a level to cover the total estimated costs of providing such services. Such fees shall be deposited in the agency's fund to remain available until expended, and may be used to carry out the purposes of the fund.

(3) Existing inventories, including inventories on order, equipment, and other assets or liabilities pertaining to the purposes of the fund may be transferred to the fund.

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(e) PROCUREMENT - Nothing in this section shall be construed as relieving any agency of any duty under applicable procurement laws.

(f) TERMINATION - The provisions of this section shall expire on October 1, 1999. (Emphasis added).<sup>2</sup>

#### **B. The CFO Council Franchise Fund Work Group Pilot Program Implementation Guidance**

Subsequent to the passage of the GMRA, the NPR established a Chief Financial Officer's (CFO) Council Franchise Fund Work Group that issued pilot program implementation guidance. (Attachment 2). The guidance delineates the objectives of franchising as follows: (1) to provide the Federal Government departments and agencies with clear, uniform standards, as well as greater flexibility for setting up Franchise Funds: (2) to promote greater economy and efficiency in Government services and reduce redundancy of organizations performing like functions within agencies: (3) to reduce costs, promote economies of scale, and increase productivity and efficiency in the use of resources. The guidance states that "The end result will be a government that works better, costs less, and provides better service." *Id.* at 3.

The guidance defines a "franchise" as "An entrepreneurial government enterprise established by a department or agency of the Federal Government, to provide to other components within the agency and/or to outside agencies, common administrative support services, on a competitive and cost-reimbursable basis." *Id.* at 4. According to the guidance, "All costs, salary, expenses, overhead, management and administrative expenditures are recovered through customer charges." *Id.* at 5.

Under the guidance, and consistent with the GMRA: "**Fees charged for services are to cover the total estimated costs of operating the franchise(s) under the fund.** The fees

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<sup>2</sup> The Senate Report accompanying the GMRA mirrors the language utilized in the law itself. See S. Rep. No. 103-281 at 2683 (1994).

will be deposited in the fund and remain available until expended, and should be expended for purposes of the Fund." (Emphasis added) *Id.* at 6-7.

### C. DOI's Pilot Franchise Fund Program

#### 1. OMB's Approval of DOI for a Pilot Franchise Fund Program

The Office of Management and Budget (OMB) approved DOI's request to establish a franchise fund pilot program by letter signed by Alice Rivlin dated May 17, 1996. (Attachment 3). DOI became one of six Executive branch agencies authorized to establish a franchise fund in accordance with the GMRA. The OMB letter stated that "The Budget also contains a proposal that would modify GMRA's requirements to permit your agency's franchise fund to **retain a portion of the Fund's income for capital acquisition, among other features.**" (Emphasis added) *Id.* Attached to the May 17, 1996 letter were twelve operating principles for business-like organizations, which included the following pertinent principle: "Self-sustaining/Full Cost Recovery -- The operation should be self-sustaining. Fees will be established to recover the "full costs," as defined by standards issued in accordance with FASAB."

#### 2. Congressional Authorization for the DOI Pilot Franchise Fund Program

The legislation authorizing DOI's pilot franchise fund (IFF) includes the following statement concerning limitations on the amount of fees that may be retained in the IFF:

[A]n amount not to exceed four percent of the total annual income to such fund **may be retained** in the fund for fiscal year 1997 and each fiscal year thereafter, **to remain available until expended**, to be used for the acquisition of capital equipment, and for the improvement and implementation of Department financial management, ADP, and other support systems: *Provided further*, That no later than thirty days after the end of the fiscal year amounts in excess of this reserve limitation shall be transferred to the Treasury.

Pub. L. No. 104-208, 110 Stat. 3009-200.<sup>3</sup>

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<sup>3</sup> The CFO Council Franchise Fund Work Group guidance notes that "All Federal government departments and agencies which have established funds also have language which authorizes the fund. Each may have different characteristics, but in general, the authorizations are similar."

### 3. DOI IFF Handbook

The DOI Interior Franchise Fund Handbook (Attachment 4), dated February 25, 1998, states that Service providers for the IFF are the Washington Administrative Service Center (WASC), the Interior Service Center (ISC), and the Minerals Management Service (MMS) Office of the Assistant Director for Administration and Budget. Day-to-day management and administrative activities of the IFF are performed by selected service providers under reimbursable agreements with the IFF. The IFF has "virtual" franchise structure rather than a separate tangible organization" Id. at 5.

Further, the IFF Handbook states, with respect to annual appropriations issues that:

If a service provider is providing products or services on behalf of the IFF and it has not incurred any significant costs under the interagency agreement, no deobligations on the part of the customer is required because the transactions represented by the interagency agreements are not governed by the Economy Act. IFF transactions are authorized on a pilot basis by the Government Management Reform Act (PL 103-356 §403) and so the IFF, and thus the service provider, will have recognized unfilled customer orders on their books.

Id. at 14.

Similarly, the GovWorks "Agreement Format" states that: "We will bill your agency when we start work. All funds will be recorded under your agency' s name by project. The funds will remain available until spent." (Attachment 5).

#### D. GAO and the Pilot Franchise Fund Program

The United States General Accounting Office (GAO) describes the franchise fund program in a brief section, stating that "Subsection (c) addresses funding by providing those elements commonly found in revolving fund legislation. It authorizes the necessary start-up appropriations and the transfer of certain unexpended balances and inventories." Office of the General Counsel, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, Volume IV, (March 2001). GAO further states that "[A] franchise fund is basically a type of working capital fund, which in turn is a type of revolving fund, designed to compete with similar funds of other agencies to provide common administrative services." Id. Finally, the GAO concludes that: "The provisions [of the various franchise funds] are fundamentally similar, Each provision authorizes the rates to include depreciation and accrued leave. Each authorizes up to four percent of total annual income to be retained as a reserve for acquisition of capital equipment and enhancement of support systems, with any excess to be transferred to the Treasury...." Id. at 15-80.

### III. ANALYSIS

GovWorks currently offers services to customer agencies on a fee-for-service basis. GovWorks retains in the IFF fees in the form of appropriated funds received from its customer agencies without fiscal year limitation, until expended. The IG has questioned the correctness of this practice. After reviewing the authorities and guidance outlined above, we conclude that, under the GMRA, GovWorks may retain funds as "no year" money, subject to the limitation that GovWorks not retain more than 4 percent of its gross annual income in the fund.

The GMRA establishes two clear principles of operation for the pilot franchise fund program 1) broad funding leeway for franchise pilot fund operations, allowing the authority to retain franchise funds until expended for franchise purposes, and 2) clarity that "fees" charged a customer agency for services are to cover the total estimated costs of providing the service. Pub. L. No. 103-356 § 403, 108 Stat. 3410. These principles are reiterated in the OMB approved CFO Council Franchise Fund Work Group, "Pilot Program Implementation Guidance." However, amounts retained in the IFF may not to exceed four percent of the total annual income to the IFF, but must be returned to the Treasury no later than thirty days after the end of the fiscal year.

The Director of the IFF has stated to us that GovWorks interprets that provision contained in the authorizing legislation limiting the retention of annual income in the IFF to a 4 percent "reserve" as applying to "retained earnings," and does not impose a fiscal year limitation on the entire "fee" charged a customer agency for services provided by MMS.<sup>4</sup> The Director of the IFF states that GovWorks has not yet been required to return any funds to the Treasury, because it has not "retained earnings" in any year in excess of the 4 percent limitation imposed by law. By way of example, GovWorks had gross revenues of \$236 million in fiscal year 2001. The total amount of GovWorks "retained earnings" was \$335,000. This amount is far less than the 4 percent limitation level, and thus no funds were returned to the Treasury by GovWorks for fiscal year 2001. GovWorks does not expect to ever have "retained earnings" in excess of 4 percent of its gross revenues such that it would be required to return funds to the Treasury.

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<sup>4</sup> The following caveat applies to this legal opinion. Our opinion is based upon the GMRA, the legislative history of the GMRA and OMB approved guidance. No legal judgments are made about the pilot franchise fund program accounting practices utilized by MMS and the IFF.

#### IV. CONCLUSION

Under the GMRA, GovWorks is not required to deobligate annual funds received from customer agencies at the end of the fiscal year. The GMRA, the legislative history of the GMRA, and franchise fund guidelines approved by the OMB, all support the conclusion that funds received by GovWorks from customer agencies may be retained in the IFF until expended. Subject to the caveat noted in footnote 4 of this Memorandum, GovWorks is only required to return to the Treasury those "retained earnings" exceeding 4 percent of its annual gross revenues.