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Fiscal Law Deskbook

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The Judge Advocate General's Legal Center and School
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Charlottesville, Virginia

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Our Predecessors on the Faculty of the Contract and Fiscal Law Department

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Chapter 1:

Introduction to Fiscal Law

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, § 8, grants Congress the ". . . power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."

2. U.S. Constitution, Art. I, § 9, provides that "[N]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."

B. The Supreme Court's Fiscal Philosophy: "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317 (1976).

C. Historical Perspective.

1. For many years after the adoption of the Constitution, executive departments exerted little fiscal control over the monies appropriated to them. During these years, departments commonly obligated funds in advance of appropriations, commingled funds and used funds for purposes other than those for which they were appropriated, and obligated or expended funds early in the fiscal year and then sought deficiency appropriations to continue operations.

2. Congress passed the Antideficiency Act (ADA) to curb the fiscal abuses that frequently created "coercive deficiencies" that required supplemental appropriations. The Act actually consists of several statutes that mandate administrative and criminal sanctions for the unlawful use of appropriated funds. *See* 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519.

II. KEY TERMINOLOGY.

A. Fiscal Year. The Federal Government's fiscal year begins on 1 October and ends on 30 September.

B. Period of Availability. The period of time in which budget authority is available for original obligation. DoD Financial Management Regulation 7000.14-R, Glossary, p. 22 [hereinafter DoD FMR]. Most appropriations are available for obligation for a limited period of time, *e.g.*, one fiscal year for operation and maintenance appropriations. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for new obligations thereafter.

C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations are amounts representing orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. This includes payments for which obligations previously have not been recorded and adjustments for differences between obligations previously recorded and actual payments to liquidate those obligations. The amount of obligations incurred is segregated into undelivered orders and accrued expenditures - paid or unpaid. For purposes of matching a disbursement to its proper obligation, the term obligation refers to each separate obligation amount identified by a separate line of accounting. DoD FMR, Glossary, p. 21.

D. Budget Authority. Budget authority means "the authority provided by Federal law to incur financial obligations . . . ." 2 U.S.C. § 622(2). It is the authority provided by law to enter into obligations that will result in immediate or future outlays involving Federal Government funds. The basic forms of budget authority are appropriations authority to borrow, and contract authority. Budget authority relates to direct programs. *See also*, DoD, DoD FMR, Glossary, p. 6-7.

1. Examples of budget authority include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Circular A-11, Preparation, Submission and Execution of the Budget (2013), § 20.4(b) [hereinafter OMB Cir. A-11].

2. "Contract Authority" is a limited form of budget authority. It is a statutory authority to incur obligations but with liquidation of obligations dependent upon future actions of the Congress. This authority permits agencies to obligate funds in advance of appropriations, but not to pay or disburse those funds absent some additional appropriations authority. DoD FMR, Glossary, p. 10. *See, e.g.*, 41 U.S.C. § 11 (Feed and Forage Act); DoD FMR, vol. 3, ch. 19, para. 190206 (contract authority with respect to Working Capital Fund).

E. Authorization Act.

1. An authorization act is a statute, passed annually by Congress, which authorizes the appropriation of funds for programs and activities.

2. An authorization act does not provide budget authority. That authority stems from the appropriations act.

3. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority.

2. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes." The Army receives the bulk of its funds from two annual appropriations acts:

a. The Department of Defense Appropriations Act; and

b. The Military Construction Appropriations Act.

3. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. *Principles of Fed. Appropriations Law*, Vol. I, p. 2-16, GAO-04-261SP (2006).

G. Comptroller General and Government Accountability Office (GAO).

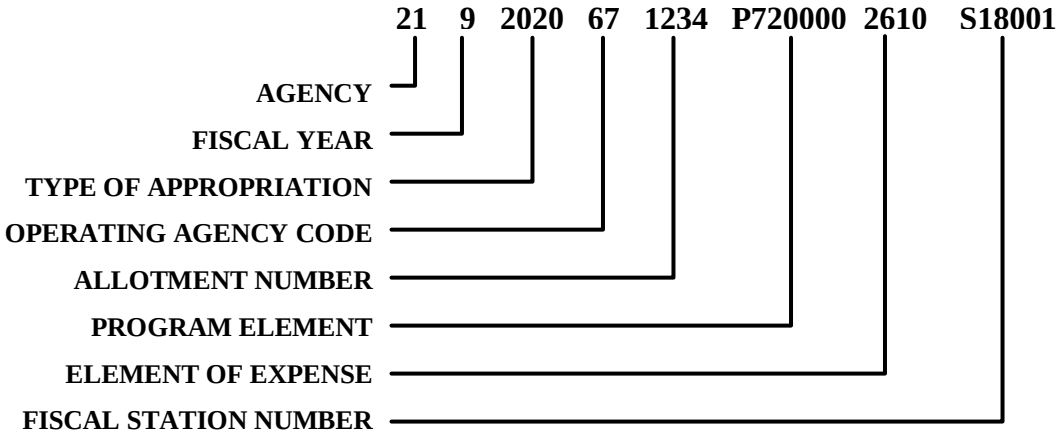
1. The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. Until 6 July 2004, "GAO" stood for General Accounting Office. http://www.gao.gov/about/index.html.

2. GAO was established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.

3. GAO issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

4. Comptroller General decisions and opinions are identified by a B-number and date (e.g., B-324214, January 27, 2014). Some decisions predating 1995 were published in Decisions of the Comptroller General of the United States. Those decisions have B-numbers but are generally identified by volume, page number, and the year the decision was issued (e.g., 73 Comp. Gen. 77 (1994)).

H. Legacy Accounting Classification (Fund Cites). Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to ensure that funds are used correctly. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-12, *The Army Management Structure*, provides a detailed breakdown of Army accounting classifications. The following is an example of a fund cite:



1. The first two digits represent the military department. In the example above, the "**21**" denotes the Department of the Army. For the Air Force, these two digits will be **57**; for the Navy, **17**; and for the Department of Defense, **97**.

2. The third digit shows the fiscal year/period of availability of the appropriation. The "9" in the example shown indicates FY 2009 funds. Installation contracting typically uses annual appropriations. Other fiscal year designators encountered less frequently include:

a. Third Digit = X = No year appropriation. This appropriation is available for obligation indefinitely.

b. Third Digit = 9/0 = Multi-year appropriation. In this example, funds were appropriated in FY 2009 and remain available through FY 2010.

3. The next four digits reveal the type of the appropriation. The following designators are used within DoD fund citations:

Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	**21*2010**	**17*1453**	**17*1105**	**57*3500**	**N/A**
Reserve Personnel	**21*2070**	**17*1405**	**17*1108**	**57*3700**	**N/A**
National Guard Personnel	**21*2060**	**N/A**	**N/A**	**57*3850**	**N/A**
Operations & Maintenance	**21*2020**	**17*1804**	**17*1106**	**57*3400**	**97*0100**
Operations & Maintenance, Reserve	**21*2080**	**17*1806**	**17*1107**	**57*3740**	**N/A**
Operations & Maintenance, National Guard	**21*2065**	**N/A**	**N/A**	**57*3840**	**N/A**
Procurement, Aircraft	**21*2031**	**17*1506**		**57*3010**	**N/A**
Procurement, Missiles	**21*2032**	**17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)**	**17*1109**	**57*3020**	**N/A**
Procurement, Weapons & Tracked Vehicles	**21*2033**			**N/A**	**N/A**
Procurement, Other	**21*2035**	**17*1810**		**57*3080**	**97*0300**
Procurement, Ammunition	**21*2034**	**17*1508**		**57*3011**	**N/A**
Shipbuilding & Conversion	**N/A**	**17*1611**		**N/A**	**N/A**
Res., Develop., Test, & Eval.7	**21*2040**	**17*1319**		**57*3600**	**97*0400**

Military Construction	**21*2050**	**17*1205**		**57*3300**	**97*0500**
Family Housing Construction	**21*0702**	**17*0703**		**57*0704**	**97*0706**
Reserve Construction	**21*2086**	**17*1235**		**57*3730**	**N/A**
National Guard Construction	**21*2085**	**N/A**	**N/A**	**57*3830**	**N/A**

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year. For example, Operations & Maintenance, Army funds for FY2009 would be depicted as 2192020.

** A complete and updated listing of these and other fund account symbols and titles assigned by the Department of the Treasury are contained in *Federal Account Symbols and Titles: The FAST Book*, which is a supplement of the Treasury Financial Manual. The FAST Book is available online and may be downloaded in Word or pdf format, at http://www.fms.treas.gov/fastbook/index.html

III. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

A. General Limitations on Authority. The authority of executive agencies to spend appropriated funds is limited.

1. An agency may obligate and expend appropriations only for a proper **purpose**.

2. An agency may obligate only within the **time** limits applicable to the appropriation (*e.g.*, O&M funds are available for obligation for one fiscal year).

3. An agency must obligate funds within the **amounts** appropriated by Congress and formally distributed to or by the agency.

B. Limitations -- Purpose.

1. The "Purpose Statute" requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. *See* 31 U.S.C. § 1301. *See also* DoD FMR, vol. 14, ch. 2, para. 020202.B.

2. The "Necessary Expense Doctrine." Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The GAO applies a three-part test to determine whether an expenditure is a "necessary expense" of a particular appropriation:

a. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.

b. The expenditure must not be prohibited by law.

c. The expenditure must not be otherwise provided for; that is, it must not be something that falls within the scope of some other appropriation or statutory funding scheme.

Principles of Fed. Appropriations Law, vol. I, ch. 4, 4-21, GAO-04-261SP (3d ed. 2004). *See Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services*, B-306424, 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006).

C. Limitations -- Time.

1. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within an appropriation's period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.

a. Expired funds retain their "fiscal year identity" for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations or to liquidate prior valid obligations, but are not available for new obligations.

b. Five years after the funds have expired, they become "cancelled" and are not available for obligation or expenditure for any purpose. 31 U.S.C. § 1552(a); DoD FMR, vol. 3, ch. 10, para. 100201.

2. Appropriations are available only for the bona fide need of an appropriation's period of availability. 31 U.S.C. § 1502(a). *See Magnavox -- Use of Contract Underrun Funds*, B-207433, Sept. 16, 1983, 83-2 CPD ¶ 401; *To the Secretary of the Army*, B-115736, 33 Comp. Gen. 57 (1953); DoD FMR, vol. 14, ch. 2, para. 020202.F.

D. Limitations -- Amount.

1. The Antideficiency Act, 31 U.S.C. §§ 1341-42, 1511-19, prohibits any government officer or employee from:

   a. Obligating, expending, or authorizing an obligation or expenditure of funds <u>in excess</u> of the amount available in an appropriation, an apportionment, or a formal subdivision of funds. 31 U.S.C. § 1341(a)(1)(A). *See also*, DoD FMR, vol. 14, ch. 2, para. 020202.D.

   b. Incurring an obligation <u>in advance of</u> an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B). *See also*, DoD FMR, vol. 14, ch. 2, para. 020202.E.

   c. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342. *See also*, DoD FMR, vol. 14, ch. 2, para. 020202.I.

2. Formal subdivisions of funds are subdivisions of appropriations by the executive branch departments and agencies. These formal limits are referred to as apportionments, allocations, and allotments.

3. Informal subdivisions are subdivisions of appropriations by agencies at lower levels, *e.g.,* within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets, or "allowances." These limits are **<u>not</u>** formal subdivisions of funds, and incurring obligations in excess of an allowance is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation occurs and the person responsible for exceeding the target may be held liable for the violation. DFAS-IN Reg. 37-1, ch. 3, para. 031402. For this reason, Army policy requires reporting such overobligations. DFAS-IN Reg. 37-1, ch. 4, para. 040204.L.1.

IV. CONCLUSION.

A. The current fiscal law framework is a result of the appropriations process, judicial interpretation, and historical underpinnings. While the core tenants of fiscal law are founded in the base concepts of purpose, time, and amount (PTA), the remainder of this work will explore these concepts in much greater detail, as well as other more nuanced topics, thereby revealing a rather complex set of laws and guidance.

B. This work will begin with the core concepts of PTA, explore areas ranging from operation funding authority to continuing resolution authority, and also provide practical information for areas such as performing fiscal law legal research.

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Chapter 2:

Availability of Appropriations as to Purpose

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CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

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CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. REFERENCES.

A. U.S. Constitution, Art. I, § 9.

B. 31 U.S.C. § 1301. The Purpose Statute.

C. Department of Defense Appropriations Acts and National Defense Authorization Acts (annual legislation found at: http://thomas.loc.gov/home/thomas.php).

D. DOD 7000.14-R, Financial Management Regulations (hereinafter "DOD FMR," found at: http://www.dod.mil/comptroller/fmr/).

E. Department of Air Force, Instr. 65-601, Budget Guidance and Procedures (16 August 2012), available at http://www.e-publishing.af.mil.

F. Principles of Fed. Appropriations Law, (commonly referred to as the "Red Book") 3d ed., vol. I, chapters. 2-4, GAO-04-261SP (January 2004), found at: http://gao.gov/legal/index.html.

G. A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Sept. 2005) found at: http://www.gao.gov/products/GAO-05-734SP.

H. OMB Cir. No. A-11, Preparing, Submitting, and Executing the Budget (July 2013), available at: http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2013.pdf

II. CONSTITUTIONAL, STATUTORY AND OTHER BACKGROUND.

A. U.S. Constitution.

1. Art. I, § 9 provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." This establishes Congress has having the "power of the purse." As a result, Congress must annually pass and the President must sign Appropriations Acts before agencies can expend any money.

2. In applying this provision of the constitution, the Supreme Court has said, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." US v. MacCollom, 426 U.S. 317 (1976). In other words, we must look for specific congressional authority prior to the expenditure of public funds.

B. The Purpose Statute.

1. 31 U.S.C. § 1301(a) provides: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

2. Congress enacted this statutory control in the Act of March 3, 1809, 2 Stat. 535, as part of a reorganization of the War, Navy, and Treasury Departments to limit the Executive Branch in spending appropriations.

C. The "Necessary Expense Doctrine" (a.k.a. The 3-part Purpose Test). The purpose statute does not require every expenditure to be specified in an appropriation act. That is not possible or feasible. "The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation."[1] Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a "necessary expense" of a particular appropriation:

[1] *See* PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, THIRD EDITION, VOLUME I, p.4-20, GAO-04-261SP (January 2004)

1. The expenditure must be necessary and incident to the purposes of the appropriation. In other words, the expenditure must bear a logical relationship to the appropriation sought to be charged, and it must make a direct contribution to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other, more specific appropriation or statutory funding scheme.

   a. What if you have two equally available appropriations to fund an acquisition? I.e., neither appropriation is more specific?

   b. Election Doctrine: The GAO's Election Doctrine states that if two or more appropriations are equally available, then the agency may choose which appropriation to use. *Once the agency chooses a certain appropriation for that type of acquisition, however, the agency must continue to use the same appropriations for all acquisitions of that type* – i.e., once the agency makes its choice of appropriation, they are bound by that choice. See section V.B. below for further discussion.

Principles of Fed. Appropriations Law, vol. I, ch. 4, 4-21, GAO-04-261SP (3d ed. 2004). *See* Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services, B-306424, 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006).

III. THE APPROPRIATION ACTS

A. Overview. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes."[2] Generally, an "obligation" is a legal liability that arises from a mutual exchange of promises, or consideration (usually a government promise to pay money in exchange for goods and/or services), between the U.S. Government (USG) and a contractor.[3]

B. Normally, Congress has, on an annual basis, passed thirteen appropriations acts.[4] Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. *See generally*, Principles of Fed. Appropriations Law, 3d ed., vol. I, ch. 1, 1-26 – 1-27, GAO-04-261SP (Jan. 2004). These annual appropriation acts are typically broken down as follows:

1. Department of Defense.

2. Military Construction.

3. Agriculture, Rural Development, Food and Drug Administration and Related Agencies.

4. Commerce, Justice, and State, the Judiciary and Related Agencies.

5. District of Columbia.

6. Energy and Water Development.

7. Foreign Operations and Export Financing and Related Programs.

8. Interior and Related Agencies.

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[2] *See* A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, p.13-14, GAO-05-734SP (September 2005).

[3] *Id.* at 70; *see also* 2013 Fiscal Law Deskbook, Chapter 5: Obligations.

[4] As of late, Congress has relied upon an Omnibus, Continuing Resolutions or Consolidated Appropriation Act. E.g., Consolidated Appropriations Act, 2015, Pub. L. No. 113-235 [hereinafter *2015 CAA*].

9. Labor, Health and Human Services, and Education, and Related Agencies.

10. Legislative Branch.

11. Transportation and Related Agencies.

12. Treasury and General Government Appropriations.

13. Veterans Affairs and Housing and Urban Development, and Independent Agencies.

C. Optimally, each appropriation act is enacted by the President prior to the end of the preceding fiscal year. When the fiscal year begins, if there is no appropriation act for the Department of Defense (DOD), then the DOD may have to stop (or "shut down") its operations because there is a "funding gap," or a period of time when it it does not have any appropriated funds to obligate. Congress and the President, however, normally avoid this DOD "shut down" by passing and enacting a Continuing Resolution Authority (CRA), which authorizes DOD to continue obligating funds – under certain conditions – until the President can enact the fiscal year's appropriation act.[5]

D. Researching Appropriation Acts. In addition to LexisNexis™ Westlaw™ based research, Judge Advocates (JA's) can use the Thomas website (http://thomas.loc.gov/home/thomas.php) of the Library of Congress or congress.gov to conduct research on legislation enacted since 1973.

[5] *See* 2015 Fiscal Law Deskbook, Chapter 9: Continuing Resolution Authority (CRA).

IV. EXPRESS STATUTORY PURPOSE: THE DEPARTMENT OF DEFENSE APPROPRIATIONS

A. The Purpose Analysis Flowchart[6] may provide a useful visual tool that JA's may use to conceptualize the different statutory and regulatory fiscal law requirements that apply to DOD appropriations.

B. In each of the two annual appropriations acts devoted to DOD, Congress grants multiple appropriations for different types of purchases that DOD needs to make to successfully execute its mission. *See* e.g., Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, Division C, (providing over 50 separate appropriations to DOD).

C. Who is the purchase for? Congress appropriates funds for DOD in the annual DOD Appropriations Act (DODAA). Congress intends for funds appropriated to the DOD to be used for the primary benefit of DOD. As a result, to understand whether a unit may obligate appropriated funds for a purchase, JAs must first determine the purchase's primary beneficiary.[7] Generally, there are three possible answers to this question: the primary beneficiary of the purchase is the agency (i.e., the JA's unit), the primary beneficiary of the purchase is a *different* U.S. Government (USG) agency, or the primary beneficiary of the purchase is a foreign government, military, or population.

1. Interagency Acquisitions (IA's): The IA fiscal law applies whenever the primary beneficiary of the purchase is a *different* USG agency. IA law is a specialized area of fiscal law and is explored in detail in chapter 6 of the Fiscal Law Deskbook.[8]

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[6] *See infra,* Appendix B: Purpose Analysis Flowchart.

[7] The answer to this question is extremely important, as it will drive the remainder of the JA's purpose analysis. If a unit is unable to answer this question, the JA cannot competently conduct a fiscal law review as to the legality of the purchase.

[8] *See* 2015 Fiscal Law Deskbook, Chapter 6: Interagency Acquisitions (IA's).

2. Operational Funding: Operational funding fiscal law applies whenever the primary beneficiary of the purchase is a foreign government, military or population. Operational funding is a specialized area of fiscal law and is explored in detail in chapter 10 of the Fiscal Law Deskbook.[9]

3. Basic Purpose: For most expenditures, the primary beneficiary of the purchase is the agency (i.e., the unit). The remainder of this outline will focus on these purchases by DOD, when the agency is the primary beneficiary. Once the JA determines that the primary beneficiary is the agency (i.e., the unit), then the JA must determine the nature of the supply item or service that the unit is purchasing.

D. Classifying the Acquisition: To determine the proper appropriation, a JA must also classify the acquisition. From a Purpose standpoint, DOD units make three types of acquisitions: DOD units acquire expense items ("expenses"), investment items ("investments"), and/or construction.[10]

1. Expenses are "the costs of resources consumed in operating and maintaining [DOD]," such as services, supplies, and utilities. Expenses are normally financed with ***Operations and Maintenance (O&M)***[11] ***appropriations.*** *See* DOD FMR, vol. 2A, ch. 1, para. 010201. Common examples of expenses include:

a. Services;

b. Supply items that will be consumed in the *current* period;[12]

c. Civilian employee labor;

[9] *See* 2015 Fiscal Law Deskbook, Chapter 10: Operational Funding.

[10] Note that the classification of an acquisition into expenses, investments, and construction is limited to the Purpose analysis. Under the Time portion of the fiscal analysis, the JA will classify the acquisition in a different manner to analyze the Bona Fide Need; see 2015 Fiscal Law Deskbook, Chapter 3: Time.

[11] Another common acronym for O&M is OMA, Operations and Maintenance, Army. OMA is more common for organizations that utilize operations and maintenance funds from multiple services (e.g., Operations and Maintenance, Air Force.)

[12] In a prior version of Vol. 2A Chapter 1, the DOD Financial Management Regulation (DOD FMR) defined the "current period" as 2 years or less. Although this is no longer the rule, it may be useful for JAs to use this definition of expenses as supply items that will last 2 years or less as a 'rule of thumb' to communicate the expense-investment distinction to their commanders.

d. Rental charges for equipment and facilities;

e. Fuel;

f. Maintenance, repair, overhaul, and rework of equipment; and

g. Utilities.

2. Investments are costs that result in the acquisition of, or an addition to, end items. These end items benefit *current and future periods* and generally are of a long-term character. Investments include the "costs to acquire capital assets such as real property and equipment" or assets which will benefit both current and future periods and generally have a long life span. DOD FMR, vol. 2A, ch. 1, para. 010201.D.2., . ***Investments are normally financed with Procurement appropriations.*** Common examples of investments include:

a. All items of equipment, including assemblies, ammunition and explosives, modification kits (the components of which are known at the outset of the modification)….

b. The costs of modification kits, assemblies, equipment, and material for modernization programs, ship conversions, major reactivations, major remanufacture programs, major service life extension programs, and the labor associated with incorporating these efforts into or as part of the end item are considered investments. All items included in the modification kit are considered investment even though some of the individual items may otherwise be considered as an expense. Components that were not part of the modification content at the outset and which are subsequently needed for repair are expenses. The cost of labor for the installation of modification kits and assemblies is an investment.

c. A major service-life extension program, financed in procurement, extends the life of a weapon system beyond its designed service life through large-scale redesign or other alteration of the weapon system.

3. Construction is the erection of a complete and useable facility, or a complete and useable improvement to an existing facility.[13] Once a DOD unit classifies a project as a construction project, then that construction project includes all the expense and investment items necessary to erect a complete and useable facility or a complete and useable improvement to an existing facility. Construction is funded using Construction Funding rules and is a specialized area of fiscal law explored in detail in chapter 8 of the Fiscal Law Deskbook.[14]

E. Overview of the Major Defense Appropriations. The following is a list of the larger and more important defense appropriations followed by a general description, extracted from the appropriations acts themselves, of the purposes to which these appropriations may be applied.

1. Military Personnel (MILPER). Used for "pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations . . . ."[15] In effect, MILPER pays for all the allowances that service-members receive on their Leave and Earnings Statement (LES). Government civilian salaries, on the other hand, are paid with the service Operations and Maintenance (O&M) appropriations.

2. Operations and Maintenance (O&M). Used for "expenses, not otherwise provided for, necessary for the operation and maintenance of the [Service], as authorized by law . . . ." O&M appropriations pay for the current operations of the force, and for the maintenance of all the Armed Services' equipment, including base maintenance services, vehicle maintenance services, civilian salaries, and all expenses[16] required to operate the force. For most DOD units and organizations, O&M is the only type of appropriation that they can access without higher-level approval.

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[13] *See* United States Code, Title 10 [hereinafter 10 U.S.C. §2801; *see also* 2013 Fiscal Law Deskbook, Chapter 8: Construction Funding.

[14] *See* 2015 Fiscal Law Deskbook, Chapter 8: Construction Funding.

[15] *2015 CAA, supra* note 4 at Div. C., Title I.

[16] *2014 CAA, supra* note 4, at Div. C., Title II.

3. Research, Development, Test and Evaluation (RDT&E). Used for "expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment . . . ."[17] Congress provides DOD Research and Development (R&D) organizations (e.g., Defense Advanced Research Projects Agency – DARPA)[18] with its own appropriation to fund the scientific research and development of new technologies with military applications. Congress provides these R&D organizations with this appropriation to fund not only the scientific research and military development of new technologies, but also their normal operation and maintenance. As a result, these DOD R&D organizations do not receive O&M funds – they must fund their O&M-type expenses with the RDT&E appropriation.

4. Procurement (Various). Congress provides various different Procurement appropriations in the annual DOD Appropriations Act for different categories of investment items. Procurement appropriations include: Ammunition Procurement, Missile Procurement, Aircraft Procurement, Weapons and Tracked Vehicle Procurement, Wheeled Vehicle Procurement, and Other Procurement.[19] The Other Procurement appropriation is a "catch-all" appropriation for investment items that are not purchased with the more specific Procurement appropriations.

a. Ammunition Procurement. Used for "construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned

[17] *2015 CAA, supra* note 4, at Div. C., Title IV.

[18] *See* Defense Advanced Research Projects Agency (DARPA), *available at:* http://www.darpa.mil (last accessed January 22, 2014). DARPA, one of the major DOD R&D organizations, funds unique and innovative research through the private sector, academic and other non-profit organizations, as well as government labs. DARPA research runs the gamut from conducting scientific investigations in a laboratory, to building full-scale prototypes of military systems. They fund research in biology, medicine, computer science, chemistry, physics, engineering, mathematics, material sciences, social sciences, neuroscience, and other projects.

[19] *2015 CAA, supra* note 4, at Div. C., Title III.

equipment layaway; and other expenses necessary for the foregoing purposes . . . ."[20]

b. Missile Procurement: Used for the "construction, procurement, production, modification, and modernization of missiles, equipment, including ordnance, ground handling equipment, spare parts, and accessories therefor . . . . " [21]

(1) Note that missiles are a type of ammunition. DOD, however, may not use the Ammunition Procurement appropriation to buy missiles because Congress provides a more specific appropriation to buy missiles – the Missile Procurement appropriation.

(2) Additionally, if DOD were to obligate all of the funds in the Missile Procurement appropriation, it would still be unable to use the Ammunition Procurement appropriation to buy missiles, because Congress has specified the maximum amount of money that DOD may obligate for missiles in the Missile Procurement appropriation.

c. Other Procurement. There are several other procurement appropriations given to the various services, including one for each of the following: aircraft, missiles, Weapons & Tracked Vehicles, and Shipbuilding and Conversion (Navy only). The language utilized in each of these appropriations is similar to that utilized in the Ammunition Procurement Appropriation above. There is also a residual catch-all procurement appropriation entitled "Other Procurement" which is used for "construction, procurement, production, and modification of vehicles; . . . communications and electronic equipment; other support equipment; spare parts, ordnance, and accessories therefor; specialized equipment and training devices . . . ."[22]

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[20] *Id.*

[21] *Id.*

[22] *Id.*

5. Military Construction (MILCON). Used for "acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property . . . ."[23]

6. Other Appropriations. Other than the 5 base DOD appropriations (MILPER, O&M, RDT&E, Procurement, and MILCON), Congress creates additional appropriations for other purposes on an annual basis. For example, Congress annually provides a Family Housing appropriation. This is used for "expenses of family housing for the [Service] for construction, including acquisition, replacement, addition, expansion, extension and alteration, as authorized by law . . . ."[24] Family housing has its own separate appropriation and is not paid for with the Service MILCON used to pay for construction related to the DOD training and war-fighting missions. There are numerous additional appropriations not discussed in this outline.

F. Investment/Expense Threshold: In each year's DODAA, Congress provides an exception to the normal fiscal law that dictates that investment items must be purchased with procurement appropriations. The Investment/Expense Threshold exception ***allows*** (not "requires" but see F.2. below) the DOD to purchase investment items, not exceeding a certain threshold, with Operations and Maintenance funds.[25]

1. The current threshold is $250,000.[26] (Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, Div. C., tit. VIII, §8031 (Dec. 16, 2014). *See also* 10 U.S.C. 2245a (DOD may not use O&M to purchase any item with a unit cost that is greater than $250,000).

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[23] *2015 CAA, supra* note 4, at Div. I., Title I.

[24] *Id.*

[25] *2015 CAA, supra* note 4, at Div. C., Title VIII, Sec. 9010.

[26] Since 2008, Congress has allowed for an increase to $500,000 for Combatant Commanders engaged in contingency operations overseas upon SECDEF approval. *See, e.g. 2014 CAA, supra* note 4, at Div. C., Title VIII Sec. 9011. CENTCOM has historically received approval to use the $500,000 threshold in support of contingency operations. However, this increased threshold requires a determination by SECDEF each fiscal year and the determination does not always happen contemporaneously with the passage of the Appropriations Act. JAs must verify that SECDEF has made the determination before advising that the increased threshold is in effect.

2. As a result of this congressional authorization, there were two appropriations equally available to fund investment items with a unit cost of $250,000 or less – O&M or the respective Procurement appropriations. The Election Doctrine of GAO's 3-part Purpose test required DoD to choose which appropriation to use – and be bound by that choice. In the DOD Financial Management Regulation (FMR), DoD elected the respective appropriation (O&M or Procurement),[27] but with distinctions depending on the type of investment item. The chart below summarizes DOD's election:[28]

Expense/Investment Cost Determination						
Is the item a	**If**	**Then**	**If**	**Then**	**If**	**Then**
Centrally Managed/ Asset Controlled Item?	Yes	Is this item purchase from DWCF?	Yes	Is the item part of a full funding effort?*	Yes	Classify as Investment
					No	Classify as Expense
			No	Classify as Investment		
	No	Is the unit cost more than $250,000	Yes	Classify as Investment		
			No	Classify as Expense		
* When intended for use in weapon system outfitting, government furnished material on new procurement contracts or for installation as part of a weapon as part of a weapon system modification, major reactivation or major service life extension.						

[27] Department of Defense Financial Management Regulation [hereinafter DOD FMR], vol. 2A, ch. 1, para. 010201. D. Although the statute permits DOD to purchase investment items valued at $250,000 or less with O&M funds, the DOD FMR goes a step further by re-defining items costing less than $250,000 as "expenses," and directs the use of O&M funds. For fiscal purposes, however, this re-definition has no practical effect on the fiscal analysis. Note that the Appropriations Act states the threshold is "not more than $250,000" whereas the DOD FMR includes items that "cost less than . . . $250,000."

[28] DOD FMR, vol. 2A, ch. 1, para. 010201. F., *available at:* http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_02a.pdf; *see also* DFAS-IN Manual 37-100-13.

3. Centrally Managed Items/Asset Control Items. The DOD FMR makes an exception for equipment that is designated for centralized item management and asset control.[29] The type of funding used for centrally managed items will depend on the item and program.

4. Defense Working Capital Funds (DWCF): A DWCF is a "revolving fund," a type of fund that Congress authorizes DoD to finance a cycle of operations through amounts received by the fund.[30] A DWCF allows DOD (and subordinate units) to continually fund the DWCF from its base appropriations, and the DWCF to use those funds permanently to make purchases of certain equipment and spare parts for equipment maintenance. Generally, DOD uses a separate DWCF for each type of recurring equipment (and related spare parts). When a DOD unit orders DWCF equipment, they pay their O&M to the DWCF. The DWCF uses these unit O&M funds to purchase a stock level of equipment and parts.

G. Systems and the Expense/Investment Threshold. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold.[31] This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

1. Agencies must consider the "system" concept when evaluating the purchase of investment items (the system concept does not apply to the purchase of expense items which are purchased with O&M regardless of cost.) The determination of what constitutes a "system" must be based on the ***primary function*** of the items to be acquired, as stated in the approved requirements document.

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[29] The DOD FMR defines Centralized Item Management and Asset Control as:

> The management in the central supply system or a DoD-wide or Service-wide acquisition and control system in which the manager has the authority for management and procurement of items of equipment. This includes such functions as requirement determination, distribution management, procurement direction, configuration control, and disposal direction. Asset control includes the authority to monitor equipment availability and take such actions as necessary to restock to approve stock levels.

DOD FMR, vol. 2A, ch. 1, para. 010224. Examples of Centrally Managed Items have included weapon systems, vehicles, spare parts, etc. To find out if an item is centrally managed, check with your supply section.

[30] DOD FMR, vol. 2A, ch. 1, para. 010107.B.54; *see also* 2015 Fiscal Law Deskbook, Chapter 7: Revolving Funds.

[31] DOD FMR, vol. 2A, ch. 1, para. 010201.D.2.b.

2. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.

3. Agencies may purchase multiple investment end items (e.g., computers), and treat each end item as a separate "system" for funding purposes, only if the primary function of the end item is to operate independently.

4. Do not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.

5. Example: An agency is acquiring 200 stand-alone computers and software at $2,000 each (for a total of $400,000). The appropriate color of money for the purchase of the 200 computers is determined by deciding whether the primary function of the computers is to operate as independent workstations (i.e., 200 systems) or as part of a larger system. If the computers are designed to primarily operate independently, they should be considered as separate end items and applied against the expense/investment criteria individually. If they function as a component of a larger system (i.e., interconnected and primarily designed to operate as one), then they should be considered a system and the total cost applied against the expense/investment criteria.

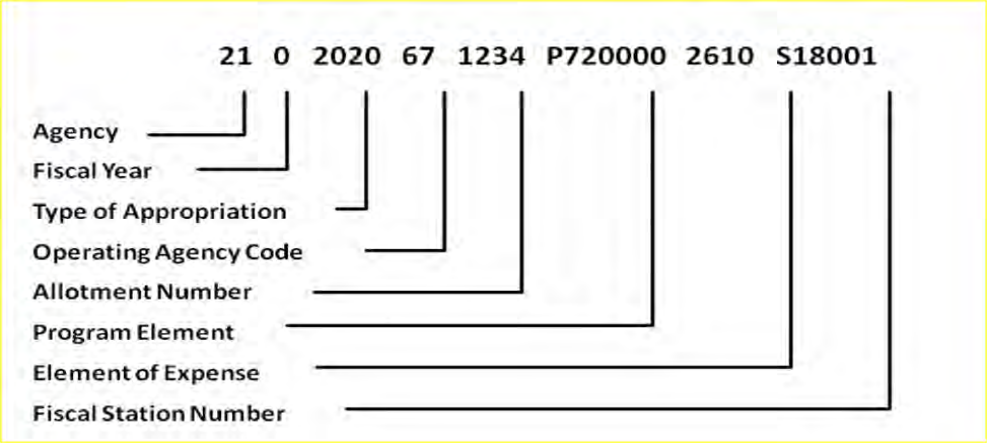
H. Accounting Classifications: The DoD Financial Managers (accountants) assign accounting classifications to each appropriation type to manage the DOD funds.[32]

Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	21*2010	17*1453	17*1105	57*3500	N/A
Reserve Personnel	21*2070	17*1405	17*1108	57*3700	N/A
National Guard Personnel	21*2060	N/A	N/A	57*3850	N/A
Operations & Maintenance	21*2020	17*1804	17*1106	57*3400	97*0100
Operations & Maintenance, Reserve	21*2080	17*1806	17*1107	57*3740	N/A

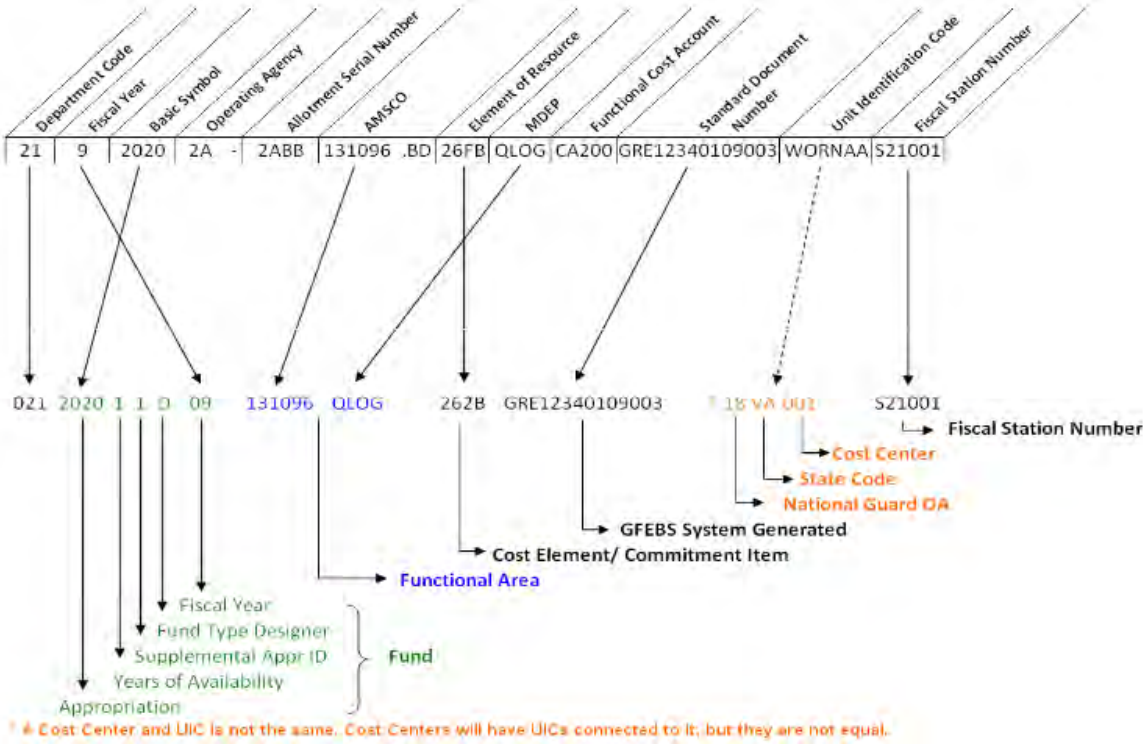
[32] This chart is derived from the archived version of the DOD FMR, vol. 6B, App. A. (October 2000).

Operations & Maintenance, National Guard	21*2065	N/A	N/A	57*3840	N/A
Procurement, Aircraft	21*2031	17*1506		57*3010	N/A
Procurement, Missiles	21*2032	17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)	17*1109	57*3020	N/A
Procurement, Weapons & Tracked Vehicles	21*2033			N/A	N/A
Procurement, Other	21*2035	17*1810		57*3080	97*0300
Procurement, Ammunition	21*2034	17*1508		57*3011	N/A
Research, Development, Test, & Evaluation	21*2040	17*1319		57*3600	97*0400
Military Construction	21*2050	17*1205		57*3300	97*0500
Reserve Construction	21*2086	17*1235		57*3730	N/A
National Guard Construction	21*2085	N/A	N/A	57*3830	N/A

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year (e.g., Operations & Maintenance, Army funds for Fiscal Year 2015 would be depicted as 2152020).



I. General Fund Enterprise Business System (GFEB). The Army has transitioned to GFEB, which will modify the way information is captured, summarized, reviewed, and presented. Among the changes is a new line of accounting (LOA). Information can be found in the FY 2013Army Funds Management Data Reference Guide, Ch. 4, available at the website for Office of the Assistant Secretary of the Army (Financial Management and Comptroller). Below is a comparison of the new LOA with the legacy LOA.



J. Earmarks. An earmark occurs when Congress designates a portion of an appropriation for a particular purpose by way of legislative language within the appropriation. *See* A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Sept. 2005).

1. 'Ceiling Earmarks': In the 2014 Consolidated Appropriations Act, in the Defense-Wide O&M appropriation, Congress gave the DOD $30,824,752,000 for non-department O&M activities. It also told the DOD that out of that amount, "not to exceed $15,000,000 can be used for the Combatant Commander Initiative Fund."[33]

[33] *2015 CAA*, *supra* note 4, at Div. C, Title II.

2. 'Floor Earmarks': "not less than $35,045,000 shall be made available for the Procurement Technical Assistance Cooperative Agreement Program."[34]

3. Both of these provisions are examples of earmarks. The first is a "ceiling" earmark, meaning the DOD may not spend more than $15,000,000 for the designated purpose (Combatant Commander Initiative Fund) but may spend less than that, whereas the second is a "floor" earmark, meaning the DOD must spend at least that amount on the designated purpose but may spend more.

V. IS THE EXPENDITURE OTHERWISE PROVIDED FOR IN A SEPARATE APPROPRIATION?

A. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. Use of Oil Spill Liability Trust Fund for Administrative Costs of Processing Oil Pollution Act Claims, B-289209, 2002 U.S. Comp. Gen. LEXIS 145 (May 31, 2002); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (may not use O&M funds when foreign assistance funds are available).

Example: The Air Force is planning to buy air-to-air missiles. Arguably, these missiles are a form of "ammunition" enabling it to purchase the missiles with its "Procurement, Ammunition, Air Force" appropriation. There is, however, a more specific appropriation that the Air Force receives called "Procurement, Missiles, Air Force" that should be used instead.

1. That a specific appropriation is exhausted is immaterial as to whether funds may be transferred to that appropriation. Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

2. General appropriations may not be used as a back-up for a more specific appropriation. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940); Architect of the Capital – Payment for Electrical and Security Improvements, B-306284, Jan. 5, 2006, 2006 U.S. Comp. Gen. LEXIS 5.

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[34] *Id.*

3. This limitation applies even if a specific appropriation is included in the more general appropriation or shares, in part, the same purpose as the general appropriation. Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941); Dept. of the Navy – Settling Claims on Fraudulently-Endorsed Checks, B-2422666, Aug. 31, 1993, 72 Comp. Gen. 295.

B. If there are two appropriations equally available:

1. The agency may choose either appropriation. Payment of SES Performance Awards of the R.R. Ret. Board's Office of Inspector Gen., B-231445, 68 Comp. Gen. 337 (1989); Dept. of Homeland Security – Use of Management Directorate Appropriations, B-307382, Sep. 5, 2006, 2006 U.S. Comp. Gen. LEXIS 138. The agency's discretion is generally not questioned. Secretary of Agric., A-96689, 18 Comp. Gen. 285, 292 (1938).

2. Once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other until the end of the current fiscal year. If the agency intends on changing the election, the agency, at the start of the fiscal year, must notify Congress of the intent to change for the subsequent fiscal year. *See* Funding for Army Repair Projects, B-272191, Nov. 4, 1997; Dept. of Homeland Security – Use of Management Directorate Appropriations, B-307382, Sep. 5, 2006, 2006 U.S. Comp. Gen. LEXIS 138. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

3. If Congress specifically authorizes the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. *See* Funding for Army Repair Projects, *supra*; *See also* 10 U.S.C. § 166a (Combatant Commander Initiative Funds are in addition to amounts otherwise available for an activity).

VI. LEGISLATION IMPACTING THE USAGE OF AN APPROPRIATION.

A. Impacts Found Within the Actual Appropriation.

1. Within the actual appropriation, Congress often provides specific direction on the uses to be made of that appropriation. For example, the language utilized in the "Ammunition Procurement, Army" appropriation, quoted on page 2-11 *supra*, narrowly defines the uses the agency can make of that appropriation. Clearly, we cannot use it to pay the salaries of military service members, even those who carry out the ammunition procurement. Likewise, we could not use those funds to buy engines for attack helicopters.

2. By contrast, the language utilized in the "Operation and Maintenance, Defense-Wide" appropriation,[35] only broadly prescribes the uses the agency can make of that particular appropriation. Thus, we can use it to pay any expense not covered by a more specific appropriation so long as we determine that expense is necessary and authorized by law.

B. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency. Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-40, GAO-040261SP (3d ed. 2004). While organic legislation provides the agency with authority to conduct a program, function, or mission and to utilize appropriated funds to do so, it rarely provides any money for the agency, program, or activity it establishes.

1. Organic legislation may be found in appropriation acts, authorization acts, or "stand-alone" legislation. It may also be codified or uncodified.

2. Example: 10 U.S.C. § 111 establishes the Department of Defense as an executive department. Various statutes scattered mainly throughout Title 10 of the United States Code establish programs or functions that the department is to carry out. *See e.g.*, 10 U.S.C. § 1090 (giving the Secretary of Defense the mission to "identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol").

[35] "For expenses, not otherwise provided for, necessary for the operation and maintenance of activities and agencies of the Department of Defense (other than the military departments), as authorized by law, $30,824,752,000: *Provided*, That not more than $15,000,000 may be used for the Combatant Commander Initiative Fund authorized under section 166a of title 10, United States Code[….]" *2015 CAA*, *supra* note 4, at DIV C, Title II.

C. Authorization Act.

1. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities.[36]

2. There is no general requirement to have an authorization in order for an appropriation to occur. By statute, Congress has created certain situations in which it must authorize an appropriation. For example, 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and/or research, development, test and evaluation "unless funds therefore have been specifically authorized by law." However, there are no practical consequences if Congress appropriates funds without an authorization anyway, as such a statute is "essentially a congressional mandate to itself." Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-41, GAO-04-261SP (3d ed. 2004).

3. An authorization act does not provide budget authority. That authority stems from the appropriations act.

a. However, Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide.

b. In the alternative, Congress may also authorize the appropriation of "such sums as may be necessary" for a particular program or function.

Example: In Section 1063 of the National Defense Authorization Act for Fiscal Year 2002, Congress provided as follows:

Section 3(e) of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) is amended to read as follows: ''(e) APPROPRIATION. — (1) IN GENERAL.— There are appropriated to the Fund, out of any money in the Treasury not otherwise appropriated, for fiscal year 2002 and each fiscal year thereafter through fiscal year 2011, ***such sums as may be necessary***, not to exceed the applicable maximum amount

[36] *E.g.*, National Defense Authorization Act for Fiscal Year 2015, Pub. L. No., 113-291.

specified in paragraph (2), to carry out the purposes of the Fund (emphasis added).

4. Resolving Conflicts Between an Appropriation Act and an Authorization Act. *See generally*, Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-42 to 2-50, GAO-04-261SP (3d ed. 2004).

a. The general rule regarding statutory construction is "that statutes should be construed harmoniously so as to give maximum effect to both whenever possible." Reduction of District of Columbia Superior Court's Appropriations, B-258163, 1994 U.S. Comp. Gen. LEXIS 746 (Sept. 29, 1994).

b. If there is an irreconcilable conflict between two statutes or if the latter of the two statutes is clearly intended to substitute for the prior statute, the more recent statute governs. The "intention of the legislature to repeal must be clear and manifest" in either case, however. Nat'l Assn. of Home Builders v. Defenders of Wildlife, 127 S.Ct. 2518 (2007); Posadas v. National City Bank, 296 U.S. 497, 503 (1936).

c. Differences in Amount. In general, Congress enacts authorization acts before it enacts appropriation acts. Application of the above rules will therefore usually result in the agency being able to use the amount specified in the appropriation act, regardless of whether it is more or less than what is in the authorization act.

Example 1: For FY 2012, Congress authorized the appropriation of $30,529,232 to the Army for Operations and Maintenance, but later actually appropriated $31,072,902 to the Army. The Army may spend the entire $31,072,902 for Operations and Maintenance.

Example 2: For FY 2002, Congress authorized the appropriation of $2,075,372,000 to the Army for the procurement of aircraft, but later actually only appropriated $1,984,391,000 for aircraft procurement. The Army may only spend the lower amount that was appropriated.

d. Differences in Purpose. An authorization act provision will not expand the scope of availability of a particular appropriation beyond what is permitted by the terms utilized in the appropriation act. *See generally*, Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-51 to 2-52, GAO-040261SP (3d ed. 2004). An authorization act may decrease the scope of availability of an appropriation by placing further restrictions on the use of those funds, however.

D. Miscellaneous Statutory Provisions.

1. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds.

Example of Prohibition: 10 U.S.C. § 2491a prohibits DOD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.

Example of Authorization: 10 U.S.C. § 2261 permits DOD to use its appropriated funds "to procure recognition items of nominal or modest value for the recruitment or retention purposes."

2. These permissions and restrictions may be either codified or uncodified.

3. The permissions and restrictions may also be either temporary or permanent. If the restriction arises out of a provision in an appropriation act that does not expressly state the duration of the restriction, an agency may presume the restriction is effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. *See* Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097, 65 Comp. Gen. 588 (1986) (indicating that a restriction applicable to "this Act or any other Act" does not indicate futurity).

4. Locating Pertinent Statutes.

a. The U.S. Code is broken down into titles which typically cover a given subject matter area.

Example: Statutes pertaining to DOD are typically found in Title 10, so if you want to find a statute dealing only with restrictions on DOD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5, so if you want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, you would probably start with Title 5.

b. You can run a general search on either a specialized legal database, such as Westlaw™, or on the U.S. Code website (located at http://uscode.house.gov/), or on Cornell University Law School's Legal Information Institute (located at http://www4.law.cornell.edu/uscode/).

c. U.S. Code Annotated Index. This index contains a listing arranged by subject of the codified U.S. statutes.

E. Legislative History.

1. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. In addition to the text of the bill itself, it includes conference and committee reports, floor debates, and hearings.

2. Legislative history can be useful for resolving ambiguities or confirming the intent of Congress. However, Congress's "authoritative statement is the statutory text, not the legislative history." Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005).

3. If the underlying statute clearly conveys Congress' intent, however, agencies will not be further restricted by what is included in legislative history. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); ANGUS Chem. Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127 (stating that "there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history

for the purpose of writing into law that which is not there"); Navy – Re-enlistment Gifts, 2006 U.S. Comp. Gen. LEXIS 165 (Use of legislative history to "illuminate intent," as opposed to "writing into the law that which is not there."); SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 (indicating that if Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (indicating the Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force's F-16 to enable it to be capable of carrier operations was the prerequisite for the Navy's use of $20 million in funds provided for a Navy fighter). See also Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006) (rejecting claims for expert fees which were based solely on legislative history and not mentioned in the statute under which the claims were brought).

4. Legislative history also may not support an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992, 1992 U.S. Comp. Gen. LEXIS 1104 (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

VII. OTHER DOCUMENTS IMPACTING THE USAGE OF AN APPROPRIATION.

A. Budget Request Documentation.

1. Agencies are required to justify their budget requests. OMB Cir. No. A-11, Preparing, Submitting, and Executing the Budget (August 2012).

2. Within DOD, Volumes 2A and 2B of the DOD FMR provides guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volume 2A and 2B:

   a. Chapter 2 deals with justification documents supporting the Military Personnel Appropriations ("M documents")(Vol. 2A).

   b. Chapter 3 deals with justification documents supporting the Operations and Maintenance Appropriations ("O documents")(Vol. 2A).

   c. Chapter 4 deals with justification documents supporting the Procurement Appropriations ("P documents")(Vol. 2B).

   d. Chapter 5 deals with justification documents supporting the Research, Development, Test and Evaluation Appropriations ("R documents") (Vol. 2B).

   e. Chapter 6 deals with justification documents supporting the Military Construction Appropriations ("C documents") (Vol. 2B).

3. The document is prepared by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government's overall budget request.

4. These justification documents contain a description of the proposed purpose for the requested appropriations. Unless otherwise prohibited, an agency may reasonably assume that appropriations are available for the specific requested purpose.

5. Agencies generally place their past and current year budget submissions onto the web.

   a. The President's overall budget materials can be found at: http://www.whitehouse.gov/omb/budget.

b. The Defense-wide budget materials can be found at: http://comptroller.defense.gov/budgetmaterials/budget2014.aspx

c. The Army's budget materials can be found at: http://asafm.army.mil/offices/BU/BudgetMat.aspx?OfficeCode=1200.

d. The Air Force's budget materials can be found at: http://www.saffm.hq.af.mil/budget

e. The Navy's budget materials (overview) can be found at: http://www.finance.hq.navy.mil/fmb/14pres/BOOKS.htm

f. The National Aeronautic and Space Administration's budget materials can be found at: http://www.nasa.gov/news/budget/index.html

g. The Federal Aviation Administration's budget can be found at: http://www.faa.gov/about/budget/

h. The Environmental Protection Agency's budget materials can be found at: http://www.epa.gov/ocfo/budget/index.htm

i. The Department of the Interior's budget materials can be found at: http://www.doi.gov/budget/.

B. Agency Regulations. See generally, Principles of Fed. Appropriations Law, vol. I, ch. 3, GAO-04-261SP (January 2004).

1. Background. When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily-delegated authority in agency-level regulations.

2. If an agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).

3. Agency-level regulations may also place restrictions on the use of appropriated funds.

Example: Although the GAO has determined that all federal agencies may purchase commercially-prepared business cards using appropriated funds, all of the military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially-prepared business cards (everyone else within DOD must produce their business cards in-house, using their own card stock and printers). *See* AR 25-30, The Army Publishing Program, para. 7-11 (March 2006); DoD Instruction 5330.03, Defense Logistics Agency (DLA) Document Services, (Feb. 8, 2006); AFI 65-601, vol. 1, para. 4.44 (Aug. 16, 2012); and Department of the Navy (Financial Management and Comptroller) Financial Policy Manual, NAVSO P-1000, Rev through Change 67, Dec 12, 2002.

4. By regulation, the DOD has assigned most types of expenditures to a specific appropriation. See, e.g. DOD 7000.14-R, Vol.1, Ch. 1, and DFAS-IN Manual 37-100-13, The Army Management Structure (August 2014). The manual is reissued every fiscal year.

5. Researching Defense Regulations.

a. The DOD and each of the services have a website containing electronic copies of most of their regulations.

(1) DOD Regulations: http://www.dtic.mil/whs/directives/.

(2) Army Regulations: http://www.apd.army.mil/

(3) Air Force Regulations: http://www.e-publishing.af.mil/.

(4) Navy Regulations: http://doni.daps.dla.mil/.

(5) Marine Corps Regulations: http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx.

b. JAGCNET. Those individuals with a Common Access Card may conduct a search of the text of all publications contained within the JAGCNET library of publications.

c. There is also a key word-searchable website dedicated to the DOD Financial Management Regulation, DOD 7000.14-R (found at: http://comptroller.defense.gov/fmr.aspx).

C. Case Law. Comptroller General opinions are a valuable source of guidance as to the propriety of appropriated fund obligations or expenditures for particular purposes. While not technically binding on the Executive Branch, these opinions are nonetheless deemed authoritative. http://gao.gov/legal/index.html

VIII. NECESSARY EXPENSE.

A. The Purpose Statute, 31 U.S.C. § 1301, does not require Congress to specify every item of expenditure in an appropriations act. Congress, by implication, authorizes an agency to incur expenses that are necessary and incident to the accomplishment of an appropriations purpose. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. U.S. Commodity Futures Trading Commission- Availability of the Customer Protection Fund, B-321788, 2011 WL 3510145 (Comp. Gen.) (2011); see also To The Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927); Department of Homeland Security – Use of Management Directorate Appropriations, B-307382, 2006 U.S. Comp. Gen. LEXIS 138.

B. In some instances, Congress has specifically authorized expenditures as "necessary expenses" of an existing appropriation. *See e.g.*, 10 U.S.C. § 2241(b) (authorizing DOD to use its appropriated funds for "all necessary expenses, at the seat of the Government and elsewhere, in connection with communication and other services and supplies that may be necessary for the national defense"); 10 U.S.C. § 1124 (authorizing the Secretary of Defense to "incur necessary expense for the honorary recognition of a member of the armed forces" who increases the efficiency or improves operations); 5 U.S.C. §§ 4503-4504 (authorizing same for civilian employees).

C. The GAO applies a three-part test to determine whether an expenditure is a "necessary expense" of a particular appropriation:

1. The expenditure must bear a ***logical relationship*** to the appropriation sought to be charged. In other words, it must make a ***direct contribution*** to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

D. Principles of Fed. Appropriations Law, vol. I, ch. 4, 4-21, GAO-04-261SP (3d ed. 2004). *See* Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services, B-306424, 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006). The first prong of the "necessary expense" test has been articulated in some other, slightly different ways as well. *See* Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) ("an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function"); Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005) ("the expenditure must be reasonably related to the purposes that Congress intended the appropriation to fulfill"). However, the basic concept has remained the same: the important thing is the relationship between the expenditure to the appropriation sought to be charged.

E. The concept of "necessary expense" is a relative one. The GAO has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a fact/agency/purpose/appropriation specific case-by-case basis. *See* Federal Executive Board – Appropriations – Employee Tax Returns – Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129; Use of Appropriated Funds for an Employee Electronic Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).

F. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).

G. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. *See* Customs and Border Protection—Relocation Expenses, B-306748, 2006 U.S. Comp. Gen. LEXIS 134 (July 6, 2006). An agency's determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO looks at "whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range." Implementation of Army Safety Program, B-223608 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

IX. TYPICAL QUESTIONABLE EXPENSES.

A. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency's mission performance. Therefore, clothing is generally considered a personal expense unless a statute provides to the contrary. *See* IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).

1. Statutorily-Created Exceptions. *See* 5 U.S.C. § 7903 (authorizing purchase of special clothing, for personnel, which protects them against hazards in the performance of their duties); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). *See also* Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (discussing the rules for purchasing clothing); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng's, B-289683, Oct. 7, 2002 (unpub.) (discussing all three authorities).

2. Opinions and Regulations On-point. *See also* White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).

B. Food. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency's mission performance. *See* 31 U.S.C. § 1345 stating that except as provided by law, an appropriation may not be used for subsistence expenses at a meeting, but that this prohibition does not apply to expenses of an employee of the government carrying out an official duty. As a result, food is generally considered a personal expense. *See* Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense).

1. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is permissible for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and competitively priced to the fees of other facilities that do not include food as part of their rental fee. *See* Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, 1999 U.S. Comp. Gen. LEXIS 249 (Dec. 1, 1999).

2. Regulatory-based "Light Refreshments" Exception.

a. In a 2003 opinion, the GAO all but eliminated the "Light Refreshment" exception by prohibiting agencies from paying for refreshments given to any personnel *NOT* on travel status. *See* Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 U.S. Comp. Gen. LEXIS 224, (Jan. 27, 2003).

b. This decision was somewhat reversed two years later in National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 03, 2005) ("NIH opinion"). In that case, the GAO authorized the use of appropriated funds for light refreshments, even for individuals *NOT* in travel status, under certain criteria.[37]

[37] 1)The meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42, at 3, (Mar. 03, 2005).

c. The Department of Justice, Office of Legal Counsel (OLC) prohibited the executive branch from following the NIH opinion. OLC opined that "meetings" as used in 31 U.S.C. § 1345 included formal conferences sponsored by government agencies and that "subsistence expenses" included meals and light refreshments.[38] Therefore the 31 U.S.C. § 1345 prohibits conference attendees, who are from the local PDS area, from utilizing "light refreshment exception." The OLC opinion controls the activities of agencies of the federal government even though it is more restrictive than the opinions given by the GAO.

3. Statutory-based Exceptions.

a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DOD may pay service members a basic allowance for subsistence.

b. Meetings and Conferences. Under the Government Employees Training Act, 5 U.S.C. § 4110, there is authority for the government to pay for "expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities."

(1) Conference Sponsored by Non-Federal Entities. Costs associated with meals included in a conference fee can be considered legitimate expenses of attendance under this statute if: 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. *See* National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

[38] Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 32 Op. Off. Legal Counsel 1, 5 (2007).

(a) For purposes of this exception, the conference or meeting ***must not be purely internal government business meetings/ conferences***. National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005). Moreover, luncheons disguised as meetings or conferences cannot utilize 5 U.S.C. § 4110. *See* B-215702, Mar. 22, 1985, 64 Comp. Gen. 406, 408. This authority does not specifically authorize agencies to pay the expenses, including food, of non-governmental employees.

(b) As this authority is based on 5 U.S.C. § 4110, it does not apply to military members (it applies only to civilian employees). But *see* JFTR, ch. 4, para. U4510, which authorizes military members to be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside the physical limits of the PDS.

(c) The OLC opinion may impact the ability of a civilian, who is not in a travel status, to utilize this authority. *See* Section IX.C.2.c. above.

(2) Government Sponsored Conference. As part of the NIH opinion, the GAO authorized agencies to pay for the expenses, including food, of conference attendees from other agencies, and even *non-governmental organizations*, at "formal conferences." National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

(a) As part of the decision, the GAO applied the same 5 U.S.C. § 4110 criteria[39] to "formal conferences," but also required sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and stated that the conference must

[39] *See* Section IX.C.3.b.

involve ***topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants***.

(b) The OLC opinion may impact the ability of an agency to utilize this authority. *See* Section IX.C.2.c. above.

(3) Army Directive 2014-01- Department of Army Conferences (18 December 2013) sets down bright line rules for conferences. Under these standards, it is much hard to pay for ***any*** food at an approved conference.

c. Training. Under 5 U.S.C. § 4109 (applicable to civilian employees), 10 U.S.C. § 4301, and 10 U.S.C. § 9301 (applicable to service members), the government may provide meals when it is "necessary to achieve the objectives of a training program." *See* U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mary 9, 2009), Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992); Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003, 2003 U.S. Comp. Gen. LEXIS 224 (including a discussion of providing food, in general, where it furthers the needs of the training program).

(1) This generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. *See* Coast Guard – Coffee Break Refreshments at Training Exercise – Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (Jun. 16, 1993). *See also* Pension Benefit Guar. Corp. – Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996) (food was not needed for employee to obtain the full benefit of training because it was provided during an ice-breaker rather than during actual training). In many GAO opinions, the application of this rule appears to be indistinguishable from the 3-part test for Formal Conferences and Meetings under 5 U.S.C. § 4110.

(2) This exception may even apply to non-federal employees if they are necessary to the training and taking a lunch break separately from the government employees would hurt the training. *See* U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mary 9, 2009) (stating that there was no objection if the Garrison Commander involved in an anti-terrorism training exercise determined that the provision of food to nonfederal participants, including host national first responders, allowed federal and nonfederal personnel to train to work in a coordinated fashion without separating for food breaks, as, most likely, they would in an actual antiterrorism response).

(3) The Training exception requires that the event be genuine "training," rather than merely a meeting or conference. The GAO and other auditors will not merely defer to an agency's characterization of a meeting as "training." Instead, they will closely scrutinize the event to ensure it was a valid program of instruction as opposed to an internal business meeting. *See* Corps of Eng'rs – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (1993) (determining that quarterly managers meetings of the Corps did not constitute "training").

(4) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. *See* Army – Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). *See also* U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program, B-301184 (January 15, 2004) ("samplings" of food cannot amount to a full buffet lunch and must be related to the culture being celebrated); AFI 65-601, vol. 1, para. 4.26.1.2.

d. Award Ceremonies (for Civilian Incentive Awards). Under 5 U.S.C. §§ 4503-4505 (civilian employees incentive awards), federal agencies may "incur necessary expenses" including purchasing food to honor an individual who is given an incentive award.

(1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending $20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies under 5 U.S.C. § 4503, which expressly permits agency to "incur necessary expense for the honorary recognition . . . .").

(2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DODI 1400.25, Volume 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (1 April 2014) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).

(3) Military Awards. Food may also be provided at ceremonies honoring military recipients of military cash awards under 10 U.S.C. §1124 (Military Cash Awards), which also contains the "incur necessary expenses" language. However, military cash awards are very rare. Typical military awards, such as medals, badges, trophies, etc., are governed by 10 U.S.C. § 1125 which ***does not*** have the express "incur necessary expenses" language. Therefore, food may ***not*** be purchased with appropriated funds for a typical military awards ceremony.

4. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. *See* discussion *infra* Part XI of this chapter for an overview.

C. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.

1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. *See* United States Agency for Int'l Dev. – Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).

2. GAO-Sanctioned Exception Where Duty is in Remote Area With No Access to Potable Water. Agencies (specifically the Army Corps of Engineers, in this instance) have the discretion to decide between providing water in coolers or jugs for transport or by providing bottled water at remote sites without access to potable water. The agency (CoE) must administratively determine that the best way to provide the water is by using bottled water. Dept. of the Army – Use of Appropriations for Bottled Water, B-310502, Feb. 4, 2008, 2008 U.S. Comp. Gen. LEXIS 38. *See also* Dept. of the Army, Military Surface Deployment and Distribution Command – Use of Appropriations for Bottled Water, B-318588, Sept. 29, 2009 (allowing purchase of bottled water for use at temporary work sites where potable water is not available).

3. GAO- Sanctioned Exception in Response to Legitimately Anticipated Emergencies. Aberdeen Proving Ground received permission from GAO to use appropriated funds to purchase bottled water for stockpiling in anticipation of interruptions to water service due to explosions and a water main break. Dept. of the Army – Use of Appropriated Funds for Bottled Water, B-324781, Dec 17, 2013.

4. Bottled Water as a Condition of Employment. Even if providing bottled water to union employees had become a condition of employment, once drinking water is potable, the agency does not have the authority to continue to provide bottled water. An agency cannot bargain over a matter that is inconsistent with federal law. United States Department Of The Navy, Naval Undersea Warfare Center Division Newport, Rhode Island v. Federal Labor Relations Authority, 665 F.3d 1339, 1347 (D.C. Cir. 2012)

5. Relevant Regulations. *See also* DOD FMR, vol. 10, ch. 12, para. 120324 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.58 (discussing the same); AR 30-22, para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, except in the context of a deployment / contingency).

6. Water Coolers. As distinguished from the water itself, which must be purchased with personal funds unless the building has no potable water, agencies may use appropriated funds to purchase water coolers as "Food Storage Equipment" (see discussion in next paragraph below), but only under limited circumstances. There is arguably no valid purpose for water coolers in buildings that are already equipped with chilled water fountains or with refrigerators that dispense chilled water or ice. Where the facility is not so equipped, water coolers may be purchased with appropriated funds so long as the primary benefit of its use accrues to the organization. Under those circumstances, the water in the cooler must be available for use by all employees, including those who did not chip in for the water.

D. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens, refrigerators, and coffee pots).

1. In June 2004 the GAO reversed its own precedent[40] and held that food storage/ preparation equipment reasonably relates to the efficient performance of agency activities, and thus appropriated funds could be spent for these items regardless of the availability of commercial eating facilities. *See* Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). The Comptroller General observed that food storage/ preparation equipment provided a benefit to the agency holding that they "increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment." Further, the opinion noted that such equipment "is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies."

[40] *See e.g.*, Central Intelligence Agency – Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (commercial facilities were not proximately available when the nearest one was a 15-minute commute from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (commercial facilities unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

2. Bottom line: Food preparation and storage equipment may be purchased with appropriated funds, so long as the primary benefit of its use accrues to the agency and the equipment is placed in common areas where it is available for use by all personnel. (Note: agency regulations and policies should be consulted prior to applying this decision.)

3. Disposable Cups, Plates, and Cutlery. The GAO determined that these items are primarily for the convenience of agency employees and constitute a personal expense. Department of Commerce—Disposable Cups, Plates, and Cutlery, B-326021 (23 Dec. 2014).

E. Personal Office Furniture and Equipment. Ordinary office equipment is reasonably necessary to carry out an agency's mission, so appropriated funds may be used to purchase such items so long as they serve the needs of the majority of that agency's employees. If the equipment serves the needs of only a single individual or a specific group of individuals, then it is considered a personal expense rather than a "necessary expense" of the agency. This is true even if the equipment is essential for a particular employee to perform his or her job. Under such a scenario, it is the needs of that particular individual that causes the item to be necessary. The item is not "essential to the transaction of official business from the Government's standpoint." Internal Revenue Service – Purchase of Air Purifier with Imprest Funds, B-203553, 61 Comp. Gen. 634 (1982) (disapproving reimbursement for air purifier to be used in the office of an employee suffering from allergies); *See also* Roy C. Brooks – Cost of special equipment-automobile and sacro-ease positioner, B-187246, 1977 U.S. Comp. Gen. LEXIS 221 (Jun. 15, 1977) (disapproving reimbursement of special car and chair for employee with a non-job related back injury); *Cf.* Office of Personnel Mgt. – Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (allowing reimbursement for air purifiers to be used in common areas, thus benefiting the needs of all building occupants).

1. Federal Supply Schedule Exception. If the desired equipment is available on the Federal Supply Schedule, the agency may use appropriated funds to purchase it even if the chair does not serve the needs of the majority of workers. *See* Purchase of Heavy Duty Office Chair, B-215640, 1985 U.S. Comp. Gen. LEXIS 1805 (Jan. 14, 1985) (allowing reimbursement for a heavy-duty office chair normally used only by air traffic controllers since the chair was available on FSS).

2. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., requires federal agencies to implement programs to expand employment opportunities for handicapped individuals. The regulations implementing this Act require agencies to make "reasonable accommodations" to include purchasing special equipment or devices in order to carry out these programs. *See* 29 C.F.R. 32.3 ("Definitions"). Thus, agencies may purchase equipment for its ***qualified handicap employees*** as a reasonable accommodation. *See* Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee, B-240271, 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990) (authorizing purchase); *see also* Equal Employment Opportunity Commission – Special Equipment for Handicapped Employees, B-203553, 63 Comp. Gen. 115 (1983) (agency could not purchase air purifier for person with allergies because the person did not meet the regulatory definition of a handicapped individual).

F. Entertainment. Entertaining people generally does not materially contribute to an agency's mission performance. As a result, entertainment expenses are generally considered to be a personal expense. *See* HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (determining fireworks to be unauthorized entertainment); Liability of Alexander Tripp, B-304233, Aug. 8, 2005, 2005 U.S. Comp. Gen. LEXIS 158 (Sunset dinner cruise in conjunction with staff retreat is a personal expense; official held not personally liable where he was not properly designated by the agency as a certifying officer).

1. Statutory-based Exceptions. Congress does occasionally provide authority to entertain. *See* Claim of Karl Pusch, B-182357, 1975 U.S. Comp. Gen. LEXIS 1463 (Dec. 9, 1975) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club -- *twice*); Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct "interpretive demonstrations" at the 1988 Annual Golden Spike Railroader's Festival).

2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv. – Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training); U.S. International Trade Commission – Cultural Awareness, B-278805, Jul. 1999, 1999 U.S. Comp. Gen. LEXIS 211 (Int'l Trade Comm'n funds were available to pay for musical performance at cultural awareness event, subject to time limits on reimbursement.).

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. *See* discussion *infra* Part XI of this chapter for an overview. *See also* To The Honorable Michael Rhode, Jr., B-250884, 1993 U.S. Comp. Gen. LEXIS 481 (March 18, 1993) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

G. Decorations. Under a "necessary expense" analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. *See* Department of State & Gen. Serv. Admin – Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But *see* The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining that Christmas cards and holiday greetings letters were not a proper expenditure because they were for personal convenience). *See also* AFI 65-601, vol. 1, para. 4.28.2. 41 C.F.R. § 101.26.103-2 (2003) governs the purchase decorative items for federal buildings. Note: Practitioners should also consider the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, etc.).

H. Business Cards. Under a "necessary expense" analysis, the GAO has sanctioned the purchase of business cards for agency employees. *See* Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds ***for government employees who regularly deal with public or outside organizations*** is a proper "necessary expense").

1. This decision reversed a long history of Comptroller General decisions holding that business cards were a personal expense because they did not materially contribute to an agency's mission accomplishment. *See, e.g.*, Forest Serv. – Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

2. *See* Section VII.B.3. for a discussion on the more restrictive agency regulations on purchasing business cards.

I. Telephones. Even though telephones might ordinarily be considered a "necessary expense," appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. *See* 31 U.S.C. § 1348; see also Centers for Disease Control and Prevention – Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director's residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).

1. Exceptions for DOD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. *See* 31 U.S.C. § 1348(a)(2) and (c). *See also* Timothy R. Manns – Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters of National Park Service employee allowed, using same rationale). DOD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. *See* 10 U.S.C. § 1588(f).

2. Exception for Data Transmission Lines. If the phone will be used to transmit data, the above prohibition does not apply. *See* Federal Commc'ns Comm'n – Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (Agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).

3. Cell Phones. The prohibition on installing telephones in a personal residence does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse ***their employees for the costs associated with any official government usage of personal*** cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. *See* Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate, B-287524, 2001 U.S. Comp. Gen. LEXIS 202 (Oct. 22, 2001) (agency may not pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data); *see also* Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, 2003 U.S. Comp. Gen. LEXIS 240 (March 6, 2003).

4. Exception for Teleworking. In 1995, Congress authorized federal agencies to install telephones and other ***necessary equipment*** in personal residences for purposes of teleworking. *See* Pub. L. No. 104-52, § 620 (Codified at 31 U.S.C., § 1348). Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: http://www.telework.gov/. The Air Force also has some additional guidance found in AFI 65-601, vol. I, sec. 4I.

J. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds. Alan Pacanowski - Reimbursement of Fines for Traffic Violations, B-231981, 1989 U.S. Comp. Gen. LEXIS 635 (May 19, 1989); To the Honorable Ralph Regula, B-250880, Nov. 3, 1992, 1992 U.S. Comp. Gen. LEXIS 1279 (Fines imposed on Government employees driving Government vehicles are also a personal expense). Where the fine itself is not reimbursable, related legal fees are similarly nonreimbursable. In the Matter of Attorney's Fees in Traffic Offense, B-186857, Feb. 9, 1978, 57 Comp. Gen. 270.

1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, 1992 U.S. Comp. Gen. LEXIS 1279 (Nov. 3, 1992) (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).

2. Agencies may also pay fines imposed upon the agency itself if Congress waives sovereign immunity. *See*, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

K. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that employees incur to obtain licenses or certificates enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. See A. N. Ross, Federal Trade Commission, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable); Colonel Dempsey, B-277033, Jun. 27, 1997, 1997 U.S. Comp. Gen. LEXIS 410 (Fee for a state physician's license, DEA certifications are not payable, even where advantageous for the Government). But *see* AFI 65-601, vol. 1, para. 4.60. (Payment for *certain* licenses and certificates, where not used to qualify individuals for employment, allowed).

1. GAO Sanctioned Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency – Request for Advance Decision, B-257895, 1994 U.S. Comp. Gen. LEXIS 844 (Oct. 28, 1994) (allowing drivers' licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations – Reimbursement for Costs of Licenses or Certificates, B-252467, 73 Comp. Gen. 171 (1994) (approving payment of licenses necessary to comply with state-established environmental standards); Dept. of the Army – Availability of Funds for Security Clearance Expenses, B-307316, Sep. 7, 2006, 2006 U.S. Comp. Gen. LEXIS 144 (agreeing that costs associated with a service-member renouncing foreign citizenship in order to obtain security clearance payable are allowable).

2. Professional Credentials. In 2001, Congress enacted legislation permitting agencies to use appropriations for "expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials." Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at 5 U.S.C. § 5757. The statutory language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them. *See* AFI 65-601, vol. 1, para. 4.47. But *see* Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (prohibiting payment for an employee's membership in a professional association not required for licensing). In 2006, the military received similar authority, which is codified at 10 U.S.C. § 2015.

3. On 20 June 2003, the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. http://cpol.army.mil/library/train/tld-062003.html This authority may be redelegated at the discretion of the MACOM Commanders. Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (GAO analysis of the scope of 5 U.S.C. § 5757).

L. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase "mementos" or personal gifts. *See* EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992) (requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds); *See also* Purchase of Baseball Caps by Dept. of Energy, B-260260, Dec. 28, 1995, 96-2 Com. Gen. Proc. Dec. ¶ 131 (disallowing the purchase of baseball caps where there was no direct link to the purpose of the appropriation established). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

1. Awards for Service Members. Congress has provided specific authority for the SECDEF to "award medals, trophies, badges, and similar devices" for "excellence in accomplishments or competitions." 10 U.S.C. § 1125.

a. The Army has implemented this statute in AR 600-8-22, Military Awards (24 June 2013). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, etc).

b. Chapter 11 of the regulation allows the presentation of nontraditional awards for "excellence in accomplishments or competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, for example, tank gunnery, weapons competition, and military aerial competition."

c. While the regulation discusses contests and events of a continuing nature, awards "may be made on a one-time basis where the achievement is unique and clearly contributes to increased effectiveness." *See* AR 600-8-22, para. 11-2b.

d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other "similar devices." However, the MACOM commander or head of the principal HQDA agency, or delegee, must approve the trophies and similar devices to be awarded within their command or agency. See AR 600-8-22, para. 1-7d. *See also* Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (belt buckles may be purchased as awards for the annual "Peacekeeper Challenge").

e. Specific Issues Concerning Unit or Regimental Coins.

(1) On 1 April 2013, the Secretary of the Army temporarily suspended the authority to purchase coins with appropriated funds. That suspension was rescinded on 10 December 2013 with instructions to reduce expenditures on coins by 25%.

(2) For a detailed discussion of the issues related to commanders' coins, *see* Major Kathryn R. Sommercamp, *Commanders' Coins: Worth Their Weight in Gold?*, ARMY LAW., Nov. 1997, at 6.

f. The Air Force and Navy/Marine Corps have similar awards guidance. *See generally* AFPD 36-28, Awards and Decorations Programs, (Jul 30, 2012); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). *See also* AFI 65-601, vol. 1, para. 4.31.2.

2. Awards for Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. *See* Chapter 45 of Title 5 of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503.

a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, (June 2010). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).

b. Non-Cash Awards. The statute technically states that the "head of an agency ***may pay a cash award*** to, and incur necessary expense for, the honorary recognition of one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. However, the agency regulations each expressly permit non-cash awards. The GAO has sanctioned the giving of non-cash awards to civilian employees. *See* Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, 1980 U.S. Comp. Gen. LEXIS (Aug. 27, 1980) (stating that desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements); Nat'l Security Agency – Availability of Appropriations to Purchase Food as a Non-Monetary Award, B-271511, Mar. 4, 1997, 1997 U.S. Comp. Gen. LEXIS 105 (deciding that food vouchers may be given to civilian employees as awards). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that could be necessary to honor the awardees accomplishments under 5 U.S.C. § 4503. In such circumstances, the award is not the food but rather it's an incidental expense incurred to honor the awardee.

3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors. *See* discussion *infra* Part XI of this chapter for an overview.

M. Use of Office Equipment. Governed by the Joint Ethics Regulation, DOD 5500.07-R (Nov. 17, 2011), Standards of Conduct, DOD Directive 5500.07 (Nov. 29, 2007), 5 C.F.R. § 2635, and 5. C.F.R. Part 3601 (available at http://www.dod.mil/dodgc/defense_ethics/). The use of government property to respond to National Guard and Reserve matters is authorized with certain restrictions. Lorraine Lewis, Esq., B-277678, 1999 U.S. Comp. Gen. LEXIS 104 (Jan. 4, 1999) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). *See* 5 C.F.R. § 251.202; *see also* Office of Personnel Management memorandum, Subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions.41 *See also* CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS'N L. REV., May 2001 (providing a good overview of this authority).

N. Expenditures for New or Additional Duties.

1. If during the middle of a fiscal year, legislation or an executive order imposes new or additional duties upon an agency and Congress does not provide that agency with a supplemental appropriation specifically covering that new function, may current appropriations be charged?

2. Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation? The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Director, Nat'l Sci. Found., B-158371, 46 Comp. Gen. 604 (1967).

41 An electronic copy of the memorandum is on file with the Contract and Fiscal Law Department.

X. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS.

A. General Rule - Augmentation of Appropriations Is Not Permitted.

1. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.

2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:

a. U.S. Constitution, Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

b. 31 U.S.C. § 1301(a) (Purpose Statute): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

c. 31 U.S.C. § 3302(b) (Miscellaneous Receipts Statute): "Except as [otherwise provided], 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 any deduction for any charge or claim."

3. Types of Augmentation.

a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991) (Noting prohibition against using appropriations to finance interagency boards, commissions, committees, etc.); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

Example: If the Air Force were to buy air-to-air missiles using its "Procurement, Ammunition, Air Force" appropriation instead of its more specific "Procurement, Missiles, Air Force" appropriation, this would enable it to purchase a greater overall quantity of missiles (some using the missile appropriation and some using the ammunition appropriation) than Congress desired.

b. Augmenting an appropriation by retaining government funds received from another source.

(1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). *See* Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at 10 U.S.C. § 2646 – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992); But *see* Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 ***only applies to monies received***, not to other property or services).

(2) Expending the retained funds generally violates the constitutional requirement for an appropriation. *See* Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988).

B. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

1. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. 31 U.S.C. § 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the "appropriation or fund against which charges were made to fill the order." *See also* 41 U.S.C. § 6307 (providing similar intra-DOD project order authority, and DOD FMR, Vol. 11A, Ch.3 (providing policies and procedures for Economy Act orders). Also, there are several statutes other than the Economy Act which provide specific statutory authority for interagency acquisitions which are also exceptions to the Miscellaneous Receipts Statute. *See* DOD FMR, Vol. 11A, Ch.18 for policies and procedures applicable to non-Economy Act orders. These differences are explained in further detail in the Interagency Acquisitions chapter of this deskbook.

2. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act. *See* DOD FMR, Vol. 15, Ch. 1 for policies and procedures.

3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. *See* 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960). *See also* DOD FMR, Vol. 3, Ch. 19 for policies and procedures.

4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. 16 U.S.C. § 579c; USDA Forest Serv. – Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv. – Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).

5. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress. *See* DOD FMR, Vol. 12, Ch. 3 for policies and procedures. (Additional gift authorities found at 10 U.S.C. § 2601(a) and § 2601(b), are implemented in DOD FMR, Vol. 12, Ch. 30)

6. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.

7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of Soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts "shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned." 42 U.S.C. § 2651. The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation's operation and maintenance account. *See* Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

8. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(e)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration. *See* DOD FMR, Vol. 12, Ch. 14, para. 140102 for policies and procedures.

9. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities. *See* DOD FMR, Vol. 12, Ch. 25, para. 250202 for policies and procedures.

11. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k. These contributions may only be used for costs incurred in connection with the relocation.

12. Government Credit Card and Travel Refunds. Section 8067 of the FY 2008 Defense Appropriations Act (Pub. Law 110-116) granted permanent authority ("in the current fiscal year and hereafter") to credit refunds attributable to the use of the Government travel card, the Government Purchase Card, and Government travel arranged by Government Contracted Travel Management Centers, to the O&M and RDT&E accounts of the Department of Defense "which are current when the refunds are received." *See* DOD FMR, Vol. 10, Ch. 2, para.020302.C for policies and procedures.

13. Conference Fees. 10 U.S.C. § 2262. In response to a GAO decision that prohibited the retention of conference fees without specific statutory authority, [42] Congress granted the Department of Defense the authority to collect fees from conference participants and to use those collected fees to pay the costs of the conference. Any amounts collected in excess of the actual costs of the conference must still be deposited into the Treasury as miscellaneous receipts.[43]

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[42] See National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005)

[43] This statutory authority has been implemented in DoD FMR vol. 12 ch. 32 (change 2009).

14. Authority to Retain Funds in Environmental Restoration Accounts. 10 U.S.C., § 2703, "Environmental Restoration Accounts," provides that DOD components are allowed to credit certain amounts to Environmental Restoration Accounts. These funds include those: 1) recovered under Comprehensive Environmental Response, Compensation, and Liability Act and 2) any other amounts recovered from a contractor, insurer, surety, or other person to reimburse the DOD or a military department for any expenditure for environmental response activities. *See* DOD FMR, Vol. 2B, Ch. 13.

C. GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the GAO recognizes other exceptions to the Miscellaneous Receipts Statute, including:

1. Replacement Contracts. An agency may retain recovered excess reprocurement costs to fund replacement contracts. Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).

a. This rule applies regardless of whether the government terminates for default or simply claims damages due to defective workmanship.

b. The replacement contract must be coextensive with the original contract, i.e., the agency may reprocure only those goods and services that would have been provided under the original contract.

c. Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

2. Refunds.

a. Refunds for erroneous payments, overpayments, or adjustments for previous amounts disbursed may be credited to the appropriation or fund charged by the original obligation. DOD FMR, Vol. 3, Ch. 15, para. 150204.A.1. Refunds of prior year obligations are not available for obligation until collected and reapportioned by OMB. DOD FMR, Vol. 4, Ch. 2, para. 020408.B. *See also* Department of Justice – Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/ insurers for damage to employee's property for which agency has paid employee's claim); International Natural Rubber Org. – Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1982); Appropriation Accounting Refunds and Uncollectibles, B-257905, Dec. 27, 1995, 96-1 Comp. Gen. Proc. Dec. ¶ 130 (recoveries of amounts under fraudulent contract may be deposited to the appropriation originally charged).

b. Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency – Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts). *See also* National Science Foundation- Disposition of False Claims Act Recoveries, B-310725, May 20, 2008 (the Inspector General (IG) of the National Science Foundation may not credit to its appropriation amounts recovered by the Justice Department under the False Claims Act to reimburse investigative costs incurred by the IG's office that are specifically provided for in its appropriation).

c. Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency – Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government's claim for damages must be deposited as miscellaneous receipts).

d. Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr. Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); To The Sec'y of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-174, GAO-06-382SP (3d ed. 2006); Appropriation Accounting—Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

3. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).

4. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

5. Nonreimbursable Personnel Details.

a. The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985); To the Hon. Robert W. Houk, B-247348, Jun. 22, 1992, 1992 U.S. Comp. Gen. LEXIS 837.

b. Exceptions.

(1) A law authorizes nonreimbursable details. *See*, e.g., 3 U.S.C. § 112 (non-reimbursable details to White House); The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1987 U.S. Comp. Gen. LEXIS 1695 (Jan. 30, 1987).

(2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. Details to Congressional Comm'ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334 (Apr. 11, 1988).

(3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Dept. of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

XI. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS.

A. Definition. Emergency and extraordinary expense funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.

B. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. *See* Act of March 3, 1795, 1 Stat. 438.

C. Appropriations Language.

1. For DOD, Congress provides emergency and extraordinary funds as a separate item in the applicable operation and maintenance appropriation.

Example: In FY 2015, Congress provided the following Operation and Maintenance appropriation to the Army: "For expenses, not otherwise

provided for, necessary for the operation and maintenance of the Army, as authorized by law; and not to exceed $12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes, $31,961,920,000."

2. Not all agencies receive emergency and extraordinary funds. If Congress does not specifically grant an agency emergency and extraordinary funds, that agency may not use other appropriations for such purposes. *See* HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989).

D. Statutory Background.

1. 10 U.S.C. § 127. Emergency and extraordinary expenses.

a. Authorizes the Secretary of Defense and the Secretary of a military department to spend emergency and extraordinary expenses funds for "any purpose he determines to be proper, and such a determination is final and conclusive."

b. Requires a quarterly report of such expenditures to the Congress.

c. Congressional notice requirement. In response to a $5 million payment to North Korea in the mid-90s using DOD emergency and extraordinary expense funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on our use of these funds:

(1) If the amount to be expended exceeds $1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.

(2) If the amount exceeds $500,000 (but is less than $1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.

2. Other executive agencies may have similar authority. *See*, e.g., 22 U.S.C. § 2671 (authorizing the State Department to pay for "unforeseen emergencies").

E. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DOD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:

1. Official Representation (Protocol). This subset of emergency and extraordinary expense funds are available to extend official courtesies to authorized guests, including dignitaries and officials of foreign governments, senior U.S. Government officials, senior officials of state and local governments, and certain other distinguished and prominent citizens. See DOD FMR, Vol. 10, Ch. 12, para. 120322.B.

a. DOD Publications: DOD Instruction 7250.13, Use of Appropriated Funds for Official Representation Purposes (30 June 2009).

b. Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (18 Sept. 2012).

c. Air Force Regulation: AFI 65-603, Official Representation Funds: Guidance and Procedures (24 Aug. 2011).

d. Navy Regulation: SECNAV 7042.7K, Guidelines for Use of Official Representation Funds (14 Mar 2006).

2. Criminal Investigation Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during criminal investigations or crime prevention.

a. Army Regulation: AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities (30 Aug. 2011).

b. Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations Program (4 Feb. 2015).

3. Intelligence Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during intelligence investigations.

a. Army Regulation: AR 381-141(C), Intelligence Contingency Funds (16 Jan 2004).

b. Air Force Regulation: AFI 71-101, vol. 4, Counterintelligence (8 Nov. 2011).

4. Other Miscellaneous Expenses (other than official representation). This subset of emergency and extraordinary expense funds is available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. AR 37-47, para. 1-5b.

5. Procedures for Use of Official Representation Funds.

a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. See, e.g., DODI 7250.13, Enc. 3; AR 37-47, paras. 2-1 and 2-2. Official courtesies are defined as:

(1) Hosting of authorized guests to maintain the standing and prestige of the United States;

(2) Luncheons, dinners, and receptions at DOD events held in honor of authorized guests;

(3) Luncheons, dinners, and receptions for local authorized guests to maintain civic or community relations;

(4) Receptions for local authorized guests to meet with newly assigned commanders or appropriate senior officials;

(5) Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and visits by foreign vessels to U.S. ports;

(6) Official functions in observance of foreign national holidays and similar occasions in foreign countries; and

(7) Dedication of facilities.

b. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.

(1) Gifts to non-DOD authorized guests may cost no more than $335.00. *See* DODI 7250.13, Enc. 3 (which cross references 22 U.S.C. § 2694 which, in turn, cross references 5 U.S.C. § 7342; the amount established in the latter statute is revised by GSA).

(2) If the guest is from within DOD and is one of the specified individuals listed in Enclosure 1 to DODI 7250.13, then the command may present him or her with only a memento valued at no more than $50.00. Enclosure 2 to DOD Directive 7250.13.

c. Levels of expenditures. Levels of expenditures are to be "modest." DODI 7250.13, para. Enc. 2; Army Regulation prohibits spending in excess of $20,000 per event (an entire visit by an authorized guest constitutes one event for purposes of this threshold). AR 37-47, para. 2-4b.

d. Prohibitions on Using Representational Funds. DODI 7250.13, Enc. 3; AR 37-47, para. 2-10; AFI 65-603, para. 7.2; SECNAVINST 7042.7K, para. 9.

(1) Any use not specifically authorized by regulation requires Service Secretary approval as an exception to policy. AR 37-47, para. 2-10; AFI 65-603, para. 7.2.

(2) Some examples that require the Secretarial approval are:

(a) Food for interagency working meetings;

(b) Entertainment of DOD personnel, except as specifically authorized by regulation;

(c) Membership fees and dues;

(d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);

(e) Gifts and mementos an authorized guest wishes to present to another;

(f) Personal items (clothing, cigarettes, souvenirs);

(g) Guest telephone bills;

(h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and

(i) Repair, maintenance, and renovation of DOD facilities.

See AR 37-47, para. 2-10.

e. Approval and accounting procedures. AR 37-47, Chapter 3; AFI 65-603, para 8; SECNAVINST 7042.7J, para 12.

(1) Fiscal year letters of authority.

(2) Written appointment of certifying and approving officer.

(3) Written appointment of representation fund custodian.

(4) Requests to expend ORFs must be submitted to the representation funds custodian in advance of an event. Any requests for an event that did receive prior approval must be submitted to the Secretary of the Army or his or her designee for retroactive approval. AR 37-47, para. 3-1e(1).

(5) Legal review.

6. Community Relations and Public Affairs Funds. AR 360-1, para. 4-5. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

XII. CONCLUSION.

APPENDIX A: ANALYZING A PURPOSE ISSUE

ANALYZING A PURPOSE ISSUE.

A. Determine Whether Congress Has Enacted any Statute on Point.

1. Your primary concern should be whether there is a statute or legislation that addresses your intended purchase.

2. Locating Codified Statutory Authority.

a. The U.S. Code is broken down into titles which typically cover a given subject matter area. You may be able to scan through appropriate volumes/chapters to see if there is something on point.

Example: Statutes pertaining to DOD are typically found in Title 10, so if you want to find a statute dealing only with a restriction on DOD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5, so if you want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, you would probably start with Title 5.

b. You can run a general search on either a specialized legal database, such as Westlaw™, or on the U.S. Code website. Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether "T-shirts" may be purchased, you may have to look under "Clothing," "Uniforms," etc).

c. U.S. Code Annotated Index. This index contains a listing arranged by subject of the codified U.S. statutes.

Example: I need to know whether I can use appropriated funds to operate golf courses. I would go to the latest index of the U.S. Code Annotated and look under the key word "Golf Courses" to find the cross-reference to 10 U.S.C. § 2491a. Note: once again you may have to run alternate searches utilizing synonyms for your topic.

d. Agency Regulations. Agencies will often (but not always) list the statutory authority(ies) upon which the regulation is based. If you can find a regulation dealing with your issue (*see* Part XI.C. *infra*.), you may be able to then locate the underlying statutory authority.

Example: I need to know when I can use appropriated funds to support my post chaplain. AR 165-1, para. 1-7 Chaplain Activities in the United States Army (3 Dec. 2009) contains cross-references to 10 U.S.C. §§ 3073, 3547, and 3581. 10 U.S.C. § 3547 contains some minimal guidance on resourcing chaplains.

e. GAO Opinions. You could go onto a legal database such as Westlaw™ to find GAO Opinions related to a given topic which often cross-reference the underlying statutory authority. The GAO Website allows for searches of the most recent decisions.

f. GAO Redbook. The GAO has issued a 3-volume treatise on fiscal issues called "Principles of Federal Appropriations Law." This set is commonly referred to as the "GAO Redbook." It contains examples and cross-references to underlying statutory authority throughout each of the topical discussions. The treatise can be found at: http://www.gao.gov/legal/redbook.html. The main volumes are supplement with annual updates.

3. Locating Legislation/Uncodified Authority.

a. Appropriation Acts. Congress typically passes 13 appropriations acts each year. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. In addition to Westlaw ™ -based research, one can use the Thomas website within the Library of Congress (http://thomas.loc.gov/home/thomas.php) or https://www.congress.gov/ to conduct research on legislation enacted since 1973.

b. Authorization Acts. Although there is no general requirement to have an authorization act, Congress has enacted a statutory requirement for DOD to have an authorization act each year. As with appropriations acts above, one can use Westlaw ™, the Thomas website, or Congress.gov to conduct research.

c. Other Legislation. Outside of the appropriation/ authorization process, Congress will often place statutory restrictions on our actions.

d. Issues in Researching Legislation. If Congress does not subsequently codify the legislation, it is often difficult to locate any legislation that restricts our ability to spend appropriated funds. Hopefully, at the head of the agency level, there has been some sort of regulatory or other policy guidance that has been promulgated covering the uncodified restriction.

4. Even assuming you find statutory/ legislative authority to conduct your intended acquisition, you must still determine whether there is a regulatory prohibition or other restriction covering that purchase. To do so, *see* Part VII. *infra*.

Example: Congress has given us express authorities to carry out procurements of various weapons programs, construction projects, and research projects. We still have various regulations that give us guidance on how we will carry out those programs and projects. For example, Army regulation and policy permits the installation commander to approve repair and/ or maintenance projects amounting to no more than $3 million. Congress permits us to carry out projects above this threshold, but by regulation, the agency has withheld the approval authority on such projects.

B. Necessary Expense Test.

1. If there is no statute that authorizes your intended purchase, you will have to apply the necessary expense test to determine if you have authority to carry out your intended purchase. *See* Part VIII *supra* for an overview of this test.

2. If your research uncovers an agency level regulation that addresses your intended purchase (*see* Part VII. *infra*), the proponents of that regulation are likely to have used a necessary expense analysis in drafting the regulation. In such a circumstance, you are probably safe relying upon the regulation to make the intended purchase. If after reviewing a regulation, you feel there is a disconnect between what the regulation permits and what should be permitted under a necessary expense analysis, you should consult your next higher legal counsel.

Example: For several years, AR 165-1 has permitted the use of appropriated funds to conduct religious retreats and workshops. These events would include lodging and food and would also be open to service members as well as their families. Prior to enactment of the 2003 DOD Appropriations Act, there had been no express authority given to DOD to carry out these sorts of programs for family members (This authority is now codified in 10 U.S.C. § 1789). Using a necessary expense analysis, it would be hard to come up with justification for using appropriated funds to pay for lodging and food for participants, especially for the non-service member participants. Various installations eventually raised their concerns – that the regulation did not mesh with the fiscal rules – to DA-level. This high-level attention resulted in a solution being worked out (express authorization from Congress in the form of legislation).

3. It is probably a good idea to have a written document that you retain in your files that addresses the underlying facts as well as your analysis that led to your conclusion that the purchase satisfied the necessary expense test. It would also probably be advisable to have a written document from the requester of the intended items/ services that indicates what the underlying facts are.

4. Even assuming you conduct a necessary expense test which leads you to believe you should have the authority to purchase the intended items or services, you still need to determine whether there is a regulatory prohibition or restriction covering that purchase. To do so, *see* Part VII.B. *infra*.

Example: I need to know whether I can buy bottled water for distribution to troops at remote locations in Southwest Asia. I determine there is no statute dealing specifically with this issue. I perform a "necessary expense" analysis and determine that having bottled water for these remotely located troops will definitely contribute materially towards their mission accomplishment (they need water to survive and if the troops are not located near a potable water supply, such as a water buffalo, then bottled water is probably going to be the most effective way to get their water needs replenished). Unfortunately, there are a variety of Army Regulations that place restrictions on the purchase of bottled water, including the approval authority. As a result, looking at just the statutes and doing a necessary expense analysis will not be sufficient.

C. Determine Whether the Agency Has Promulgated any Regulation on Point.

1. Agency Publication Websites. The DOD and many of the civilian agencies have websites containing electronic copies of most of their regulations. Most agency publication websites allow you to perform a search of the text of the regulations. Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether "T-shirts" may be purchased, you may have to look under "Clothing," "Uniforms," etc. If you know the underlying statutory authority, you can also use it as your keyword (i.e. plug in "10 U.S.C. § 2246" or "10 U.S.C. 2246" or "10 USC 2246" as your search term).

a. DOD Regulations (http://www.dtic.mil/whs/directives/).

b. Army Regulations (http://www.apd.army.mil/). Unfortunately, the Army website only permits a search of the titles (not the text) of the regulations. To search the text of Army regulations, you must use the JAGCNET website.

c. Air Force Regulations (http://www.e-publishing.af.mil).

d. Navy Regulations (http://doni.daps.dla.mil/).

e. Marine Corps Regulations (http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx).

f. Joint Publications (http://www.dtic.mil/doctrine/).

2. Use JAGCNET (https://www.jagcnet2.army.mil/JAGCNetIntranet/Applications/ejaws/ejaws.nsf/vwAppConfig/frmHome?opendocument) to Search for Publications. Those individuals with AKO access may conduct a search of the text of all publications contained within the JAGCNET library of publications (most DOD-level and DA-level regulations plus TJAGSA deskbooks).

3. Specialized Websites. In addition to the above websites that compile all agency regulations into one location, there are various other websites that contain regulations specific to the fiscal arena. These include:

a. DOD Financial Management Regulation (http://comptroller.defense.gov/FMR.aspx). The DOD Financial Management Regulation, DOD 7000.14-R establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the Department of Defense. This 15 volume set of regulations contains a very user-friendly, key word-searchable function.

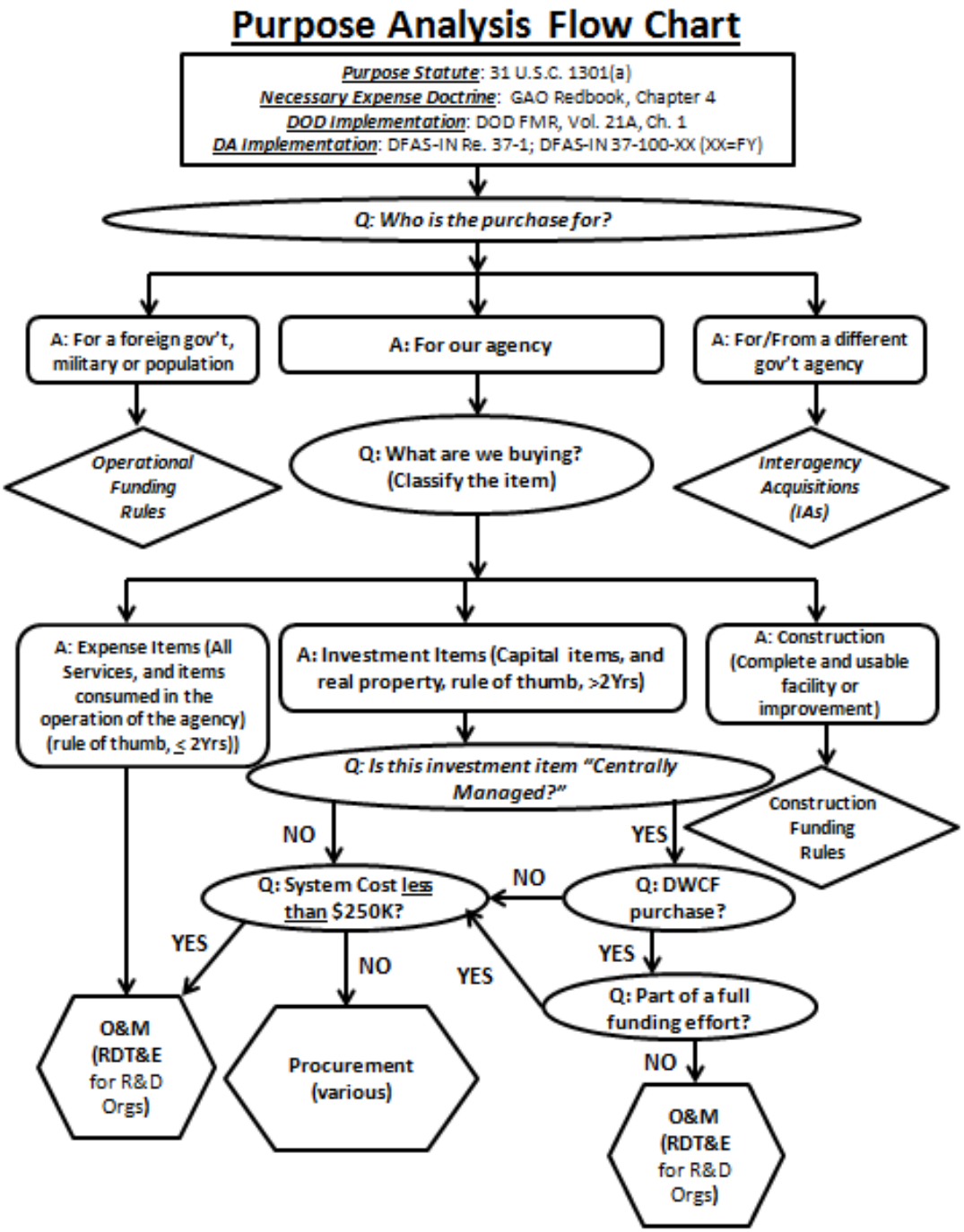
b. Defense Finance and Accounting Service (DFAS) Regulations https://dfas4dod.dfas.mil/library/. DFAS handles the finance and accounting services for DOD. It is organized into geographic regions which are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army).

D. Emergency & Extraordinary (E&E) Expenses.

1. As a matter of last resort, if you cannot find a statute or legislation that permits your intended purchase ***and*** you do not believe the item / service is necessary, you could request to use E&E funds to make the purchase.

2. The service regulations already contain guidance on the items/ services for which the service secretaries have issued "blanket approvals." Your purchase probably will not fit into this category, but each of the regulations permit an exception or waiver provided there is adequate justification.

APPENDIX B: PURPOSE ANALYSIS FLOWCHART



Chapter 3:

Availability of Appropriations as to Time

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CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO TIME

I. INTRODUCTION. Following this instruction, the student will understand:

A. The various time limits on availability of appropriated funds;

B. The *Bona Fide* Needs Rule and some common exceptions to that rule;

C. The rules concerning availability of funds for funding replacement contracts; and

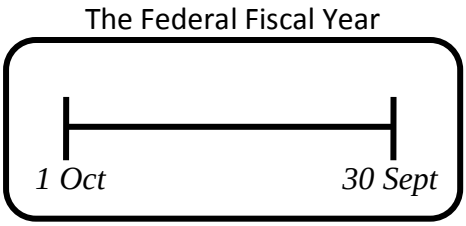
D. The general rules concerning use of expired appropriations.

II. KEY DEFINITIONS.

A. **Appropriation or Appropriations Act**. An appropriations act is the most common form of budget authority. It is a statutory authorization to incur obligations and make payments out of the U.S. Treasury for specified purposes. An appropriations act fulfills the requirement of Article I, Section 9, of the U.S. Constitution, which provides that "no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Government Accountability Office (GAO), A Glossary of Terms Used in the Budget Process, GAO-05-734SP, 13 (Fifth Edition, September 2005) [hereinafter GAO Glossary]. An appropriations act may include many separate provisions of budget authority. Each provision within an act may also be referred to as a "fund" or "pot of money."

B. **Authorizing Legislation**. Authorizing Legislation (called "authorization acts") provides the legal basis for actual appropriations that are passed later. It establishes and continues the operation of federal programs or agencies either indefinitely or for a specific period, or sanctions a particular type of obligation or expenditure within a program. Authorizing legislation does not provide budget authority, which stems only from the appropriations act itself. GAO Glossary, at 15.

C. **Fiscal Year.** The Federal Government's fiscal year runs from 1 October through 30 September. This fiscal year governs the use of appropriated funds and is referenced throughout this chapter.



1. The fiscal year has changed throughout history. Prior to 1842, all accounting was based on a calendar year. From 1842 to 1976, the fiscal year ran from 1 July to the following 30 June. In 1974, Congress mandated the fiscal year run from 1 October to 30 September beginning in 1977. 31 U.S.C. § 1102.

2. A fiscal year is indispensable to the orderly administration of the budget given the "vast and complicated nature of the Treasury." Bachelor v. United States, 8 Ct. Cl. 235, 238 (1872); Sweet v. United States, 34 Ct. Cl. 377, 386 (1899) (stating that it is a necessity that "the Government have a fixed time in the form of a fiscal year; whether it be with the commencement of the calendar year or at some other fixed period is not material, but that there should be a limit to accounts and expenses into distinct sections of time is an absolute necessity.")

D. **Period of Availability**. The period of time for which appropriations are available for obligation. If funds are not obligated during their period of availability, then the funds expire and are generally unavailable for new obligations. GAO Glossary, at 23.

1. Default Rule: Most funds are available for obligation only for a specific period of time, presumed to be only during the fiscal year in which they are appropriated. 31 U.S.C. § 1502; DoD FMR Vol. 14, Ch. 2, para. 020103.E; DFAS-IN Reg. 37-1, para. 080302.

2. The annual DOD Appropriations Act typically contains the following provision: "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly so provided herein." See Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, § 8003, 128 Stat. 5 (2015).

3. Periods of Availability for Various Appropriations. Below are examples of the standard periods of availability for some of the more common appropriations.

Appropriation	Period of Availability
Operations and Maintenance (O&M)	1 Year
Personnel	1 Year
Research, Development, Test, and Evaluation (RDT&E)	2 Years
Overseas Humanitarian, Disaster, and Civic Aid (10 U.S.C. § 401)	2 Years
Procurement	3 Years
Military Construction	5 Years
Shipbuilding and Conversion, Navy	5 Years (with some exceptions)
"Available until expended" or "X-year" funds	No expiration date

a. The appropriations act language supersedes other general statutory provisions. National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 (1991) (holding that general statutory language making funds available until expended is subordinate to appropriations act language stating that funds are available until a date certain).

b. Multiple year appropriations expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. Office of Management and Budget Circular A-11, Instructions on Budget Execution, § 20.4(c) (2012). See Section VII, infra.

c. Service regulations may limit the use of funds. *See e.g.* U.S. Dep't of Army, Reg. 70-6, Management of the Research, Development, Test and Evaluation, Army Appropriation, 16 Jun. 1986 (AR 70-6) (restricting Research, Development, Test and Evaluation (RDT&E) funds to one-year unless exception granted). *Note*: AR 70-6 expired on 27 December 2011 and is referenced here only for its value as an example of what types of regulations services may place on the use of funds.

E. **Commitment**.

1. Definition. An administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. GAO Glossary, at 32. Commitments are usually based upon firm procurement requests, unaccepted customer orders, directives,

and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying officer. DOD FMR, Vol. 3, Ch. 15, para. 150202.

2. Purpose. A commitment document is an order form used to ensure that funds are available prior to incurring an obligation. Commitment accounting helps to ensure that the subsequent entry of an obligation will not exceed available funds. DOD FMR, Vol. 3, Ch.15, para 150202. Commitments in the Army may be accomplished using DA Form 3953 (Purchase Request and Commitment) or similar documents having the effect of a firm order or authorization to enter into an obligation. DFAS-IN 37-1, Ch. 7, para. 070601. The Air Force uses AF Form 9 as a fund cite authorization document.

3. Who: The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment document. DOD FMR, Vol. 3, Ch. 15, para. 150202A.

   a. Army. Serviced activities or fund managers will maintain commitment registers, and are responsible for processing, recording, and performing the oversight function for commitment accounting. Fund control responsibilities may be delegated, in writing, to the Director of Resource Management (DRM)/ Comptroller or other appropriate official(s) IAW regulation. Designated officials will perform commitment accounting as required. DFAS-IN 37-1, Ch. 3, para. 030209, and Ch. 7, para. 0703.

   b. Air Force. Financial Service Office(r) will certify fund availability before obligations are authorized or incurred against funding documents. DFAS-DE, Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force, p. 1-7.

4. What: Activities may commit funds only to acquire goods, supplies, and services that meet the bona-fide needs of the period for which Congress appropriated funds, or to replace stock used during that period. In general, agencies record as a commitment the cost estimate set forth in the commitment document. DFAS-IN 37-1, para. 070501; DOD FMR, Vol.3, Ch.8, para. 080201.

F. **Obligation**.

1. Definition: A definite act that creates a legal liability on the part of the government for the payment of goods and services ordered or received, or a legal

duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. Payment may be made immediately or in the future. An agency incurs an obligation, for example, when it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another. GAO Glossary, at 70.

2. General Rules.

a. An obligation must be definite and certain. GAO Redbook, Vol. II, pg. 7-3. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it. Always obtain documentary evidence of the transaction before recording an obligation. 31 U.S.C. § 1501; DOD FMR, Vol. 3, Ch.8, para. 080302; DFAS-IN 37-1, chapter 8.

b. Obligate funds only for the purposes for which they were appropriated. 31 U.S.C. § 1301(a).

c. Obligate funds only to satisfy the *bona fide* needs of the current fiscal year. 31 U.S.C. § 1502(a); DOD FMR, Vol. 3, Ch. 8, para. 080303A.

d. Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. DOD FMR, Vol. 3, Ch. 8, para. 080303B.

e. Generally, obligate current funds when the government incurs an obligation (incurs a liability). DOD FMR, Vol. 3, Ch. 8, para. 080302. Some exceptions, discussed in the obligations outline and in the "Time" outline, include: Protests (see section VIII A of this outline); Replacement contracts for contracts that have been terminated for default (see section VI of this outline) and "in-scope" contract changes (see section VI B of this outline).

f. An improper recording of funds does not create a contractual right, Integral Systems v. Dept. of Commerce, GSBCA 16321-COM, 05-1 BCA ¶ 32,946 (Board rejected a constructive option argument based on the recording of an option exercise which failed to occur).

g. Do not obligate funds in excess of (or in advance of) an appropriation, or in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. §§ 1341, 1517; DOD FMR, Vol. 3, Ch. 8, para. 080301.

(1) Government agencies may not obligate funds prior to signature of the appropriations act **and** receipt of the funds from the Office of Management and Budget through higher headquarters. DoD FMR, Vol. 3, Ch. 8, para. 080301. But see Cessna Aircraft, Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997) aff'g Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912 (holding that an option exercised after Presidential signature of appropriations act but before OMB apportionment did not violate the Anti-Deficiency Act.) See Chapter 4, Antideficiency Act, for more detailed information regarding the apportionment process.

(2) Agencies must avoid situations that require "coercive deficiency" appropriations. A coercive deficiency is an instance in which an agency legally or morally commits the United States to make good on a promise without an appropriation to do so. This act then "coerces" Congress into appropriating funds to cover the commitment. Project Stormfury - Australia - Indemnification of Damages, B-198206, 59 Comp. Gen. 369 (1980).

G. **Subject to the Availability of Funds**. If the agency needs to enter into a contract before the proper funds become available, usually to ensure timely delivery of goods or services, they must execute contracts "subject to the availability of funds" (SAF). If a SAF clause is used, the Government shall not accept supplies or services until the contracting officer has given the contractor written notice that funds are available. FAR 32.703-2.

1. FAR 52.232-18, Availability of Funds, may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) (1) necessary for normal operations and (2) for which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements. FAR 32.703-2 (a).

2. FAR 52.232-19, Availability of Funds for the Next Fiscal Year, is used for one-year indefinite-quantity or requirements contracts for services that are funded by annual appropriations that extend beyond the fiscal year in which they begin, provided any specified minimum quantities are certain to be ordered in the initial fiscal year. FAR 32.703-2 (b).

III. THE *BONA FIDE* NEEDS RULE.

A. **The *Bona Fide* Need**. Government agencies may not purchase goods or services they do not require. However, they may use appropriated funds to fill actual requirements as specified by the purpose of an appropriation, or for purposes necessary and incident to that appropriation. *See* Fiscal Law Deskbook, Ch. 2 (Purpose). Because appropriations are generally only available for limited periods of time, it becomes important to understand when an agency actually requires a good or service. 31 U.S.C. § 1552. Until that requirement (need) accrues, no authorization exists to obligate appropriated funds. Once the need accrues, an agency may only obligate appropriated funds that are current at that time.[1] 31 U.S.C. § 1502(a).

1. **The *bona fide* need is the point in time recognized as the moment when a government agency becomes authorized to obligate funds to acquire a particular good or service based on a currently existing requirement**. Once present, the *bona fide* need may persist unfilled for an extended length of time, or may end based on changing priorities and requirements. Nevertheless, **agencies may only obligate funds to fill a requirement once the *bona fide* need exists, and may only use funds current while the *bona fide* need exists**.

2. The *bona fide* need must be determined by each agency before it obligates funds. This process should involve resource managers, judge advocates or other legal counsel, and requiring activities (units, offices, etc.). If agencies do not take the time to ensure a proper *bona fide* need exists, they run the risk of improperly obligating funds. This could lead to a *per se* violation of the Antideficiency Act (ADA) which cannot be corrected, and may carry criminal, civil, or administrative penalties. *See* Fiscal Law Deskbook, Ch. 4 (Antideficiency Act).

3. The term "*bona fide* needs" has meaning only in the context of a fiscal law analysis. A *bona fide* needs analysis is separate and distinct from an analysis of contract specifications and whether they are a legitimate expression of the government's minimum requirements.

B. **The *Bona Fide* Needs Rule**. Essentially, the *bona fide* needs rule is a timing rule that requires **both the timing of the obligation and the *bona fide* need to be within the fund's period of availability**. DoD FMR, Vol. 3, Ch. 8, para. 080303.A; DFAS-IN Reg. 37-1, para. 070501.

[1] Agencies may have a *bona fide* need for a good or service, but not act on that need due to budget constraints or priorities. Not acting on a *bona fide* need does not obviate or undermine that need. The need may be filled at any time as long as the *bona fide* need continues to exist by obligating currently available funds.

1. **Current year money for current year needs**. The basic principle is that "payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year…." GAO Redbook, Appropriations Law, Volume I, page 5-14. "An agency's compliance with the *bona fide* needs rule is measured at the time the agency incurs an obligation, and whether there is a *bona fide* need at the point of obligation depends on the purpose of the transaction and the nature of the obligation entered into." National Labor Relations Board – Funding of Subscription Contracts, B-309530, 17 Sept 2007, pg5.

2. The *Bona Fide* Needs Rule applies only to appropriations with limited periods of availability for obligation.

3. Appropriated funds may only be used for a requirement that represents the *bona fide* need of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995); To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953); DoD FMR Vol. 14, Ch. 2, para. 020103.E; DFAS-IN 37-1, para. 080302.

4. **History**: "The *bona fide* need rule initially appeared in 1789. From what can be gleaned from the sparse legislative history, the intent of Congress was to instill a sense of fiscal responsibility in the newly formed United States departments and agencies. The Congress wanted the balance of appropriations not needed for a particular year's operations to be returned to the Treasury so that it could be re-appropriated the following year in accordance with the Congress's current priorities. Of even more importance to the Congress today, a limited period of availability means that after that period has expired an agency has to return to the Congress to justify continuing the program or discuss how much is needed to carry on the program at the same or a different level." Hon. Beverly Byron, B-235678, Comp. Gen. (Jul 30, 1990).

5. **Determining the *Bona Fide* Need. Generally speaking, an agency has a need to acquire goods and services when it requires the use or benefit of those goods or services**. However, based on legislation and GAO case law, the *bona fide* need does not always arise at this time. The *bona fide* need may be earlier or later than the date the agency requires the use of goods or the benefit of services. Each main type of acquisition – supplies, services, and construction – has specific rules to help agencies determine the *bona fide* need. These are discussed at length in the discussion of the *Bona Fide* Needs Rule below.

6. Practical Considerations.

a. Generally, the time limitations apply to the obligation of funds, not the disbursement, or payment, of them. Secretary of Commerce, B-136383, 37 Comp. Gen. 861, 863 (1958). See DoD FMR, Vol. 3, Ch. 8, para. 080301.

b. Absent express statutory authority in the appropriations act, agencies may not obligate funds after their period of availability expires. National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 (1991). In this case, the authorizing legislation stated that money provided for the National Endowment of the Arts would remain available until expended. However, the appropriations act stated that the funds would expire on a date certain. The GAO held that the **appropriations act trumps the authorization act** if the two conflict.

c. Any indefinite delivery/indefinite quantity (ID/IQ) contract must include a guaranteed minimum order of goods or services under that contract. The government is required to order at least that minimum quantity from the contractor (or contractors). Because the government must pay for at least the guaranteed minimum, that amount must reflect a valid *bona fide* need at the time the contract is executed. B-321640, U.S. Small Business Administration—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum (2011).

C. ***Bona Fide* Needs Methodology**. Generally speaking, an agency has a need to acquire goods and services when it requires the use or benefit of those goods or services. However, based on legislation and GAO case law, the *bona fide* need does not always arise at this time. The *bona fide* need may be earlier or later than the date the agency requires the use of goods or the benefit of services. Each main type of acquisition – supplies, services, and construction – has specific rules to help agencies determine the *bona fide* need. In each case however, determining the *bona fide* need for an acquisition requires the exercise of judgment. Because a *bona fide* needs analysis requires close examination of the facts, the following methodology may assist in a legal sufficiency review. See Appendix A.

1. Classify what is being acquired (i.e. Are we acquiring a supply, service, or construction?). Application of the *Bona Fide* Needs Rule differs depending on the subject of the acquisition.

2. Analyze the *Bona Fide* Need (i.e. When does the *Bona Fide* Need accrue for this acquisition?). If application of the general rule results in a finding that the *Bona Fide* Need exists in the current Fiscal Year, and current fiscal year funds are being used, the *Bona Fide* Needs Rule is satisfied.

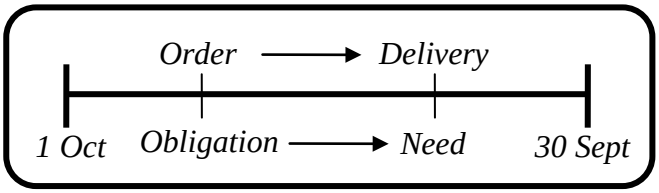
3. Consider any Exceptions. Congress and the GAO have, for different types of acquisitions, provided various exceptions that may allow the agency to treat the acquisition as a *bona fide* need of the current year.

D. **Supplies**.

1. Generally, the *bona fide* need for a supply is determined by when the government actually requires (will be able to use or consume a requirement) the supplies being acquired. Accordingly, agencies generally must **obligate funds from the fiscal year in which the supplies will be used**. Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Admin., B-155876, 44 Comp. Gen. 399 (1965); Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen. 155 (1957).

2. In most cases, the need to use supplies, and the obligation of funds for the acquisition to meet the need, take place during the same FY. In such cases, the *bona fide* needs rule is satisfied as in the example below:

Normal Single FY Supply Contracts



3. Supply needs of a future fiscal year are the *bona fide* need of the subsequent fiscal year, unless an exception applies. As demonstrated in the graphic above, this requirement does not usually create problems for agencies using annual funds. However, towards the end of the fiscal year, requiring activities must pay particular attention to adhering to the *Bona Fide* Needs Rule. Orders of supplies often cannot be delivered until the next FY, cannot be produced in time, or perhaps won't be used entirely during current FY. Two GAO recognized exceptions to the *Bona Fide* Needs Rule, **specific to supplies**, are the lead-time exception (for both delivery and production) and the stock-level exception. DOD FMR, Vol. 3, Ch.8, para. 080303.

4. *Lead-Time Exceptions to the Bona Fide Needs Rule*. There are two variants that comprise the lead-time exception.

a. Delivery Lead-Time: Current Year Requirement – Future Year Use. This aspect of the exception permits the agency to consider delivery lead-time in determining the *bona fide* need for a supply. Under the *Bona Fide* Needs rule, supplies delivered in the next fiscal year are a *Bona Fide* Need of the next fiscal year because they are not used until the next fiscal year. The delivery lead-time exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency currently requires the supply and (2) the delay is due to delivery lead-time. If an agency cannot obtain supplies in the same FY in which they are required and contracted for, delivery in the next FY does not violate the *Bona Fide* Needs Rule as long as the purchase meets the following:

(1) Current Requirement. If the agency could get the item in the current fiscal year, the agency would use the item in the current fiscal year. Practitioners should contrast "requirement" from "need." In this situation the agency has a current year requirement (i.e. if I had it now I would use it now) for a future year *Bona Fide* need (i.e. future year use of the supply).

(2) Delivery Lead-Time Delay. The agency cannot obtain supply in the current FY due to delivery lead-time.

(a) The time between contracting and delivery must not be excessive.

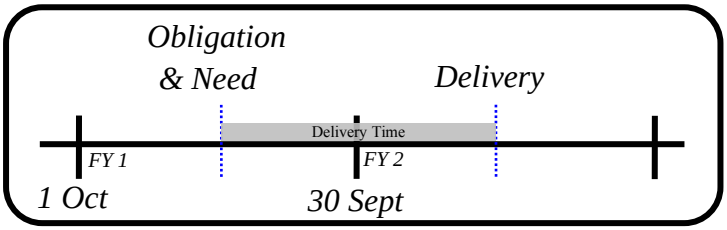
(b) The government may not set a delivery date beyond the normal delivery lead-time and beyond the end of the fiscal year. The supplier must require the delivery lead-time.

(c) If the government directs the contractor to withhold delivery until after the next fiscal year, the DoD FMR states there is not a *bona fide* need for the item until next fiscal year, so next year's fiscal funds must be used. DoD FMR Vol. 3, ¶ 080303B.

(d) There is no requirement that the government pay increased delivery charges to ensure delivery before the end of the FY.

(3) Example: If the normal lead-time for delivery of an item is 45 days, an obligation of FY 2015 funds is appropriate for a delivery on or before a required delivery date of 14 November 2015. (Remember 1 October 2015 is the beginning of FY 15). This represents the *Bona Fide* Need of FY 2015. However, if the government directs the contractor to withhold delivery until after 14 November 2015, there is not a *Bona Fide* Need for the item in FY 2015 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2016.

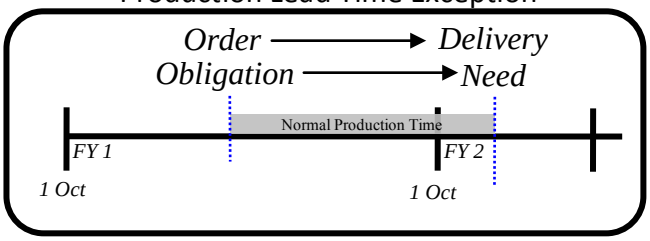
Delivery Lead Time Exception



b. Production Lead-Time: Future Year Requirement – Future Year Use. This aspect of the exception permits the agency to consider the normal production lead-time in determining the *bona fide* needs for an acquisition. Under the *Bona Fide* Needs rule, supplies produced in the next fiscal year are a *Bona Fide* Need of the next fiscal year because they are not used until the next fiscal year. The production lead-time exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency requires the supply in the next fiscal year and (2) in order to use the supply when required, the agency must fund production now. An agency may use current FY funds to start production of a supply required for and used in the next FY. Agencies may contract in the current FY for production of a supply delivery in the next FY if the supply contracted for cannot otherwise be obtained on the open market at the time needed for use, so long as the intervening period is necessary for the production. Chairman, Atomic Energy Commission, B-130815, 37 Comp. Gen. 155, 159 (1957).

(1) The procurement must not be for standard, commercial items readily available from other sources. Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 (1959). If the item is a standard, commercial item readily available from other sources, the DoD FMR prohibits use of the delivery and production lead time exception to the *bona fide* needs rule to procure the item. DoD FMR Vol. 3, Ch. 8, ¶ 080303B.

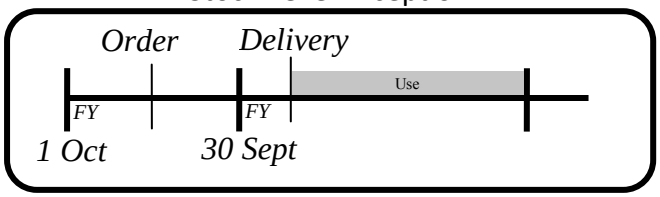
Production Lead Time Exception



(2) **NOTE**: The above descriptions of the Lead-Time exceptions come from the GAO Principles of Federal Appropriations Law ("Redbook"). These discussions, in turn, are based on a limited number of dated GAO opinions. The Production Lead-Time variant appears well settled in allowing the obligation in FY1 for a supply not required until FY2 if the above criteria are met. The Delivery Lead-Time variant is not as well settled in allowing this "back-dating" of the *Bona Fide* Need into FY1; because the case-law is sparse, sound legal analysis, considering the Fiscal Law Philosophy, will be necessary if faced with a Delivery Lead-Time issue.

c. Stock-Level Exception. The stock level exception permits agencies to purchase sufficient readily available common-use standard type supplies to maintain adequate and normal (reasonable) stock levels. The government may use current year funds to replace stock consumed in the current fiscal year, even though the government will not use the replacement stock until the following fiscal year. The purpose of this exception is to prevent interruption of on-going operations between the fiscal years.

Stock-Level Exception



(1) **Example:** The Department of Commerce produced a large number of "small business aids" that it distributed free to the public. During the fourth quarter of FY01, field offices were asked to inventory their stock of "aids" on hand to determine which aids were rapidly being exhausted so that stock could be replenished. It was determined that 263 titles should be retained and reprinted to replenish stock used during that fiscal year. The order for printing was placed with the government printing office (GPO) before the end of FY01, annual FY01 funds were obligated,

but many of the aids were not distributed and used until FY02. Is the *bona fide* needs rule violated?

(2) **Answer**: No. GAO stated that the facts clearly established the aids were a replacement of materials used in FY01, so FY01 funds could be obligated even though the aids were not used until FY02. GAO did note that the order for the aids must be firm and complete. If the Department of Commerce had edited the order or provided the manuscripts after FY01 ended, then FY02 funds would have to be used. Replacement stock does NOT include materials that must be especially created for a particular purpose and which require a lengthy period for creation. Mr. Abraham Starr, Dept. of Commerce Letter, B-95380, Jun 1, 1950, 29 Comp. Gen. 489. See also, Printing & Binding Requisition Seeking to Obligate Expiring Current Appropriations, A-44006, Sept. 3, 1941, 21 Comp. Gen. 1159, and Mr. Betty Leatherman, Dept. of Commerce, B-156161, May 11, 1965, 44 Comp. Gen 695.

d. STOCKPILING. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

(1) EXCESS OF NORMAL USAGE. Agencies may only fund the replenishment of stock items (common-use standard type supplies) up to their "normal usage."

(a) **Example**: The Veterans Administration stocked a quantity of chemicals that went bad before they were used. The label stated the chemicals were good for two years. In reviewing a government claim, GAO questioned whether VA complied with the *bona fide* needs rule when it stocked chemicals that would not be used within one fiscal year of their purchase. See Mr. H. V. Higley, B-134277, Dec. 18, 1957.

(b) **Example**: Under the stock level exception, the Forest Service budgeted for 1000 slide rules but bought 5,800 at the end of FY84 by obligating FY84 money. They only used 1500 of them during FY85. GAO stated the Forest Service improperly obligating FY84 funds because they did not have a reasonable expectation that 5,800 replaced stock used during the fiscal year. Mr. Hartgraves, Forest Service, B-235086, Apr. 24, 1991.

(2) CREATION OF STOCK. Given the goal of the stock-level exception is to prevent interruption of on-going operations between the fiscal years, agencies may not "create stock" under this exception. However, Agencies may not create a new stock of supplies - one not needed in FY1. An agency may not obligate funds when it is apparent from the outset that there will be no requirement until FY2.

(a) **Example:** The Army created the new Common Access Cards (CACs, special plastic cards with an embedded chip) to be implemented on 1 Nov 2002. At that time, the Army maintained no stock level of blank cards. Can the Army use the stock level exception to justify obligating FY 2001 O&M to purchase enough stock for to cover making cards from 1 Nov 2002 thru 2 Feb 2003?

(b) **Answer**: No. The general rule states that a supply is not a need until it is used. Here the cards will not be imprinted until 1 Nov 02. Viewed narrowly, this is a FY2002 need that should be funded with FY2002 funds. The stock level exception cannot be used to justify spending FY2001 O&M to create "stock" that will sit in a supply room.

(c) **Nuance**: However, if the Army must receive the cards before the end of FY01 in order to prepare the cards and forward them to the field units (i.e. use the supply), the cards are a *Bona Fide* need of FY2001 and may be funded with FY2001 O&M. Additionally, if the cards are a BFN of FY 2002, the production lead time exception may allow the Army to order the cards in FY2001 if the contractor needs the intervening time for production of the cards.

E. **Services**.

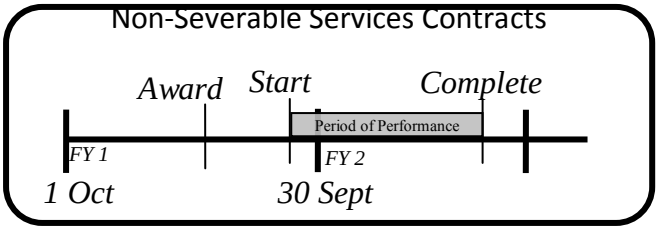
1. General Rule: The *Bona Fide* Need for services does not arise until the services are rendered. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). Thus, in general, services must be funded with funds current as of the date the service is performed.

2. 2 Categories: The *bona fide* needs rule is applied differently depending on the nature of the service. There are two categories of service contracts: (1) Non-severable service contracts; and (2) Severable service contracts.

3. Non-severable Services:

a. A service is non-severable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years. Whether the subdivision is feasible or not is a matter of judgment that includes as a minimum a determination of whether the government has received value from the service rendered. Funding for Air Force Cost Plus Fixed Fee level of Effort Contract, B-277165, Comp. Gen. (Jan. 10, 2000).

b. The government must fund non-severable services contracts with dollars available for obligation at the time the contract is executed. Contract performance may cross fiscal years. DFAS-IN 37-1, tbl. 8-1; Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (fish and wildlife research projects); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986) (study on psychological problems of Vietnam veterans); Comptroller General to W.B. Herms, Department of Agriculture, B-37929, 23 Comp. Gen. 370 (1943) (cultivation and protection of rubber-bearing plants).



(1) **Example**: The Fish & Wildlife Service issues a research work order for a 4 year research study on the effects of harvesting frogs. The study is to produce a publishable report. The work order is non-severable because it contemplates a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year. The work order should be funded entirely out of the appropriation current at the time of award. Incremental funding or SAF clauses are inappropriate. Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994).

(2) **Example**: The Financial Crimes Enforcement Network (FINCEN) wanted to improve web-based retrieval of financial intelligence by law enforcement. So, in June 2004, FINCEN awarded a contract to design, develop and deploy a web-based access system where law enforcement could securely log-onto the database from their computer and query the database for information. The system was to be complete by Sept. 2005 at an estimated cost of $8.9 million. Instead of obligating the entire $8.9 million at contract award, FINCEN incrementally funded the contract across multiple fiscal years. **Result:** GAO found this to be a non-severable service contract because FINCEN contracted for a result (the retrieval system) and the work could not be separated out by fiscal year. As a result, FINCEN should have obligated the entire $8.9 estimated cost ceiling with funds current at the time of contract award. Financial Crimes Enforcement Network – Obligations under a Cost Reimbursement, Nonseverable Services Contract, Comp. Gen. B-317139, 2009 CPD ¶158, 2009 WL 1621304, Jun. 1, 2009.

4. Severable Services:

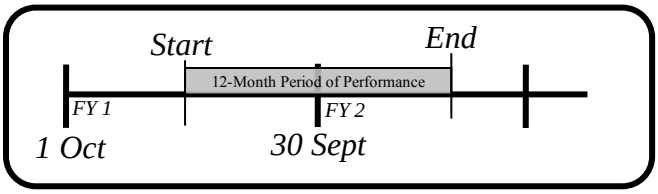
a. A service is severable if it can be separated into components that independently meet a need of the government. The services are continuing and recurring in nature.

b. Severable services thus follow the general service contract *Bona Fide* Needs Rule, and are the *bona fide* need of the fiscal year in which performed. Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). Funding of severable service contracts generally may not cross fiscal years, and agencies must fund severable service contracts with dollars available for obligation on the date the contractor performs the services. DFAS-IN 37-1, para. 080603, tbl. 9-1.

c. Absent an exception, the default rule for severable services is to fund them with Current Year funds from date of award to 30 Sept and Next Year funds from 1 Oct until the end of contract.

d. **10 U.S.C. § 2410a Statutory Exception**. DOD agencies (and the Coast Guard) may obligate funds current at the time of contract award to finance a severable service contract with a period of performance that does not exceed one year. 10 U.S.C. § 2410a. Similar authority exists for non-DOD agencies. 41 U.S.C. § 253*l*.

12-Month Severable Services Contracts



(1) This authority allows an agency to fund severable service contracts that cross fiscal years with funds current at the time of award. Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD ¶ 247 (Kelly AFB lawfully used FY 94 funds for an option period from 1 OCT 93 through 31 AUG 94, and a subsequent option for the period from 1 SEP 94 through 31 DEC 94).

(2) This statutory exception is meant to give flexibility to annual funds so that all contracts do not have to end on 30 September. The exception only applies to annual year funds. It does not prohibit agencies with access to multiple year funds from entering into severable service contracts that exceed one year. However, it cannot be used to extend the period of availability of an expiring multiple year appropriation. Severable Services Contracts, Comp. Gen. B-317636, 2009 CPD ¶ 89, 2009 WL 1140240, Apr. 21, 2009.

e. **Note on Research & Development Contracts**: GAO has opined that a service contract structured as a cost reimbursement level of effort term contract (CPFF term contract) is presumptively by its nature a severable service contract, unless the actual nature of the work warrants a different conclusion (ex: clearly calls for an end product). This is because a CPFF *term contract* typically requires performance of a certain number of hours within a specified period of time rather than requiring completion of a series of work objectives. A CPFF *completion contract*, however, may very well be non-severable. See Funding for Air Force Cost Plus Fixed Fee level of Effort Contract, B-277165, Comp. Gen. (Jan. 10, 2000) (launch vehicle integration analysis and support services for deployed infrared technology satellites was a severable service); See The Hon. Bev. Bryon, 65 Comp. Gen. 154, B-214597, (1985) (finding that research and development level of effort contracts may be either severable or non-severable depending on the nature of the work and the government's ability to define the needed work in advance).

(1) **Example**: A lifecycle management contract may be a severable services contract that must be funded with appropriations current at the time the contract is entered into. Chem. Safety & Hazard Investig. Bd – Interagency agreement with GSA, B-318425, 2009 WL 5184705 (Dec 8, 2009). In this case, the Chemical Safety Board (CSB) proposed to enter an interagency agreement (IA) with the general services administration (GSA) for both the provision of ID cards and the lifecycle management of the cards to include card request, registration, maintenance, renewal and termination for five years. GAO opined that the lifecycle management portion consisted of repetitive recurring tasks such that the IA was for a severable service.

(2) **Example:** Near the end of FY10, the National Labor Relations Board (NLRB) entered into 37 indefinite quantity/indefinite delivery (ID/IQ) contracts for court reporting services to be executed primarily during FY11. GAO found that the services were properly identified as severable services and could be funded entirely up-front at the time the contracts were awarded. National Labor Relations Board – Recording Obligations for Training and Court Reporting, B-321296 (2011). GAO also concluded that NLRB's obligation of an estimated amount based on an estimate of the services it would need in the coming FY was proper.

F. **Training**.

1. Contracts for single training courses are considered similar to non-severable service contracts. In general, the training represents a single undertaking where the government receives the benefit of the training only when the employee has completed the training if full.

2. Training contracts may be obligated in full with fiscal year money current at the time performance begins even though the course extends into the next fiscal year. Matter of: EEOC - Payment for Training of Management Interns, B-257977, 1995 U.S. Comp. Gen. LEXIS 739, 745.

a. Training courses that begin on or after 1 October may constitute a *bona fide* need of the prior year if:

(1) The agency has an immediate need for the training in the prior year,

(2) Scheduling is beyond the agency's control, and

(3) The time between award of the contract and performance is not excessive.

(4) References: Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991) ("Leadership for a Democratic Society" 4-week course); Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-233243, Aug. 3, 1989. See DFAS-IN 37-1. tbl. 8-1, Jan. 2008 (limiting the time for performance of training from civilian institutions to the first 90 days of the next FY).

b. Some multiple course training may be considered a severable service. For example, an advanced degree from an accredited university may include many separate courses. In that situation, the government employee receives the benefit of the training after each single course is completed. Matter of: EEOC - Payment for Training of Management Interns, B-257977, 1995 U.S. Comp. Gen. LEXIS 739, 746; Comptroller General to Secretary of the Interior, B-122928, 34 Comp. Gen. 432 (March 8, 1955).

c. **Example**: In FY10, National Labor Relations Board (NLRB) coordinated for executive training for some senior officials. However, the training was not scheduled to begin until January 2011, well into FY11. NLRB obligated FY10 funds for the training, but the Office of Personnel Management (OPM), which manages the Federal Executive Institute that would provide the training, did not require the NLRB to send funds until 15 October 2010, two weeks after FY10 ended. GAO found that OPM's requirement did not mandate the use of FY11 funds, and since the training was not scheduled until January 2011, it was not a *bona fide* need of FY10. National Labor Relations Board – Recording Obligations for Training and Court Reporting, B-321296 (2011).

G. **Construction**.

1. Contracts for construction are considered as similar to non-severable service contracts. **Construction contracts may constitute a *bona fide* need of the fiscal year in which the contract is awarded even though performance is not completed until the following fiscal year**. However, the requirement to enter into the contract must exist during the funds' period of availability. The contracting agency must intend for the contractor to begin work without delay.

2. A determination of what constitutes a *bona fide* need of a particular year depends upon the facts and circumstances of a particular year (e.g. weather). Associate General Counsel Kepplinger, B-235086, Apr. 24, 1991. In analyzing *bona fide* needs for construction contracts, the agency should consider the following factors:

   a. Normal weather conditions. A project that cannot reasonably be expected to commence on-site performance before the onset of winter weather is not the *bona fide* need of the prior fiscal year.

   b. The required delivery date.

   c. The date the government intends to make facilities, sites, or tools available to the contractor for construction work.

   d. The degree of actual control the government has over when the contractor may begin work.

      (1) For example, suppose a barracks will not be available for renovation until 27 December 2012 because a brigade is deploying on 20 December and cannot be disrupted between 1 October and 20 December. If the normal lead-time for starting a renovation project of this type is 15 days, then the renovation is a *bona fide* need of FY 2013 and the contract should be awarded in FY 2013 using FY2013 funds. Accordingly, use of FY 2012 funds under these facts violates the *Bona Fide* Needs Rule.

3. The DoD FMR allows **agencies to obligate current year appropriations for maintenance and repair projects even though contractor performance may not *begin* until the next fiscal year**. The contract shall satisfy a *bona fide* need of the current year. DoD FMR, Vol. 3, Ch. 8, para. 080303.D.

   a. Work must begin before January 1 of the following calendar year.

   b. To determine the commencement of work, the contracting officer should visually inspect the site or obtain documentary evidence that costs have been incurred or material ordered to allow performance of the contract.

H. **Leases**. Identically to the severable services exception, 10 U.S.C. 2410a provides statutory authority to lease real or personal property, including the maintenance of such property (when contracted as part of the lease agreement) for up to 12 months with funds current at the time the contract begins.

1. **Example**: The Securities and Exchange Commission (SEC) entered into a 10-year lease contract for the Constitution Center building in Washington, D.C., which it planned to use as its headquarters. The entire lease was estimated to cost between $371.7 million and $454.4 million (based on the amount of space ultimately leased). This cost was between one third and one half of the SEC's entire annual appropriation for Salaries and Expenses (which included leases) of $1.1 billion. Thus, the SEC intended to incrementally fund the lease over multiple years. GAO found that because this was a 10-year firm term lease, it was non-severable and should have been funded entirely at the time the lease was entered into. Securities and Exchange Commission – Recording of Obligation for Multiple-Year Contract, B-322160 (2011).

IV. MULTIPLE YEAR APPROPRIATIONS

A. Introduction.

1. There is a clear distinction between multiple year appropriations and multi-year contracts. Proper analysis requires consideration of fiscal law issues independently from the type of contract use.

2. Multiple year appropriations are those appropriations that expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. Office of Management and Budget Circular A-11, Instructions on Budget Execution, § 20.4(c) (2012). See also DOD FMR, Vol. 3, Ch. 13, para. 130202.A.1.b.

3. The multiple year appropriations usually provided to DOD include:

(1) Overseas, Humanitarian, Disaster, and Civic Aid: 2 years.

(2) Research, Development, Test, and Evaluation (RDT&E): 2 years.

(3) Procurement: 3 years.

(4) Military Construction: 5 years.

(5) Shipbuilding and Conversion, Navy: 5 years, except that certain obligations may be incurred for longer periods.

4. Agencies must have all of the funds necessary for an entire given procurement to ensure stable production runs and lower costs. This policy is referred to as "full funding." DOD FMR, Vol. 2A, para. 010202.

5. The *Bona Fide* Needs Rule and most of its exceptions apply to multiple year appropriations. Honorable Byron, B-235678, 30 Jul 1990; Defense Technical Information Center-Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989); Chairman, Committee on Appropriations, House of Representatives, B-132900, 55 Comp. Gen. 768 (1976).

   a. A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 2015 RDT&E Army Appropriation (Pub. L. 113-76), which is available for obligation until 30 September 2016, may be obligated for the needs of FY 2015 and 2016; it is not available for the needs of FY 2017.

   b. The statutory severable services exception, 10 U.S.C. 2410a, does NOT apply to severable services contracts funded with multiple-year appropriations. Severable Services Contracts, Comp. Gen. B-317636, 2009 CPD ¶ 89, 2009 WL 1140240, Apr. 21, 2009.

6. Administrative controls, including regulations, may impose independent restrictions on the use of multi-year funds. See, e.g., DOD FMR, Vol. 2A, Budget Formulation and Presentation.

V. *BONA FIDE* NEEDS RULE APPLIED TO REVOLVING FUNDS.

1. As a general rule, revolving funds are “no-year” funds that do not depend on annual appropriations. 10 U.S.C. § 2210(b). The GAO has ruled that the *bona fide* needs rule does not apply to “no-year” funds. Small Business Administration, 43 Comp. Gen. 657, 661 (1964); Education and the Workforce, B-279886 (1998).

2. Parking Funds through Interagency Acquisitions. The GAO has ruled that the *Bona Fide* Needs Rule does apply to funds placed by an agency into a revolving fund and an agency may not "bank" funds to meet future needs. Implementation of the Library of Congress FEDLINK Revolving Fund, Comp. Gen. B-288142, Sep. 6, 2001; Continued Availability of Expired Appropriation for Additional Project Phases, Comp. Gen. B-286929, Apr. 25, 2001.

a. Elements of the General Services Administration (GSA), e.g., The Federal Systems Integration and Management Center (FEDSIM) and the Federal Computer Acquisition Center (FEDCAC), provide services under separate authority (a designation by the Office of Management and Budget) as an executive agent for government wide acquisitions, and the Information Technology Fund (40 U.S.C. § 757).

b. Parking funds in the GSA Information Technology Fund was a possible violation of the Antideficiency Act when the United States Army Claims Service (USARCS) provided the GSA fund with $11.6 million of FY 1997 through FY 2000 Operation and Maintenance Funds for procurement of support services and information technology. See Office of the inspector General of the Department of Defense, Army Claims Service Military Interdepartmental Purchase Requests, Report NO. D-2002-109 (June 19, 2002) (hereinafter DOD REPORT NO. 02-109).

(1) Of the $11.6 million, $3.8 million were obligated without defining USARCS' needs and without establishing a *bona fide* need for tasks relating to the personnel claims software development project, the torts and affirmative claims software development project, and the acquisitions of hardware and software. $2.8 million of these funds were "banked" in the GSA IT Fund to meet "future" requirements.

(2) The report also found that $8.5 million of the funds were obligated within the last three days of the applicable FY. Although USARCS could technically obligate funds at the end of a fiscal year, the obligation should be based on a valid need in the fiscal year of the appropriation in order to comply with the *bona fide* need rule.[2]

[2] The report also found that USARCS had violated the "purpose" *bona fide* need rules, in addition to "time" *bona fide* need rules. Specifically, USARCS incorrectly obligated $3.3 million of O & M funds for the development of personnel claims software and the torts and affirmative claims software instead of research, development, test and evaluation, and/or procurement funds. See DOD REPORT NO. 02-109, pp. 16-18. Last, the report found that USARCS may have exercised better control over administrative costs by partnering with larger Army contracting offices. *Id*. at pp. 10-11.

c. **Case Study**: Parking Agency Funds – GSA's AutoChoice Program.

(1) **Facts**: GSA is the single government wide provider of vehicles in the federal government. In 2009, GSA had a Summer AutoChoice Program to provide agencies with an efficient method for buying new cars. In the summer, the car manufacturers were switching to the next year's model cars so GSA could not order them. Instead, GSA allowed agencies to go on-line during the 4th quarter of the FY and place orders for next year's car models based on an estimate of what was likely to be available. A percentage was added to the price to approximate next year's price increases. At the time of the order, agencies obligated FY1 funds. GSA did not do anything with the order at that time. After 1 October, new model information was available. Agencies then went online again, re-selected all the model information, got a finalized price quote and re-submitted their order. GSA took the finalized order and processed it in FY2 with the obligated FY1 funds. Once the manufacturer received the order, the vehicles would arrive about three months later (in FY2).

(2) **Q: Did the agencies violate the *bona fide* need rule?**

(3) **Answer:** Yes. From a fiscal standpoint, the vehicles are classified as a "supply" so they are a *bona fide* need when they can be used. Here, the vehicles arrived in FY2 so the agencies *bona fide* need did not arise until the next fiscal year. GSA cited to a statute for intra-agency acquisitions, 31 USC 1501(a)(3). This statute provides that an agency "incurs an obligation when it places an order required by law to be made from another agency." GSA believed that this statute allowed the agency to place the order in the summer and obligate FY1 funds, even though the order wasn't going anywhere until FY2. GAO disagreed. Although the agency was required to order from GSA, the 4th quarter FY1 "order" was "inchoate" or incomplete. GAO stated that agencies may not incur obligations against current appropriations based on inchoate or incomplete orders. In this case, the agencies had to resubmit all the order information in October when actual information was available. Only in October was the agencies order firm enough to justify obligation of funds. Natural Resources Conservation Service – Obligating Orders with GSA's AutoChoice Summer Program, Comp. Gen. B-317249, 2009 WL 2004210, July 1, 2009.

(4) **Note:** Why wouldn't the production lead-time exception apply to this scenario? First, GSA did not raise this exception as a defense to GAO. Second, even if it had raised it, the exception would still only apply to a firm order that funds could be obligated to. So, until the firm order was submitted in October, use of the production lead-time exception could not be considered. In theory, if GSA had transmitted a firm and complete order to the car manufacturer during the 4th quarter with FY1 funds obligated to the order, a production lead time exception would apply because it took the car manufacturer three months to produce and deliver the vehicles. Thus, it would allow delivery of the vehicles in FY2. (Of course, this is assuming that the needed vehicles are custom enough that they could not be procured elsewhere right off the lot.)

VI. *BONA FIDE* NEEDS RULE APPLIED TO INTERAGENCY ACQUISITIONS.

A. See the Chapter on Interagency Acquisitions for a more complete fiscal analysis.

B. The Economy Act (31 U.S.C. § 1535) provides general authority for one agency (requesting agency) to transfer funds to another agency (servicing agency) to enter into a contract under certain conditions. The DOD FMR provides that the *bona fide* need determination is made by the requesting activity and not by the servicing activity. A servicing activity should, however, refuse to accept an Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. DOD FMR, Vol. 11A, Ch. 3, para. 030403.

C. If the servicing agency does not award the contract before the end of the fiscal year, the funds expire as provided by § 1535(d) and the funds must be de-obligated and returned to the requesting agency. Neither the servicing agency nor the requesting agency can use these funds for new obligations. Memorandum, Under Secretary of Defense Dov S. Zakheim, to Chairman of the Joint Chiefs of Staff, et. al, subject: Fiscal Principles and Interagency Agreements (24 Sep. 2003). See Interagency Agreement with the Department of Energy for Online Research and Education Information Service, Comp. Gen. B-301561 (Jun. 14, 2004).

D. When an authority other than the Economy Act is used for an interagency agreement, the de-obligation provisions of 31 U.S.C. § 1535 may not apply. If funds were properly obligated, they remain obligated and can continue to be used by the other agency. See Transfer of Fiscal Year 2003 Funds from the Library of Congress to the Office of the Architect of the Capitol, Comp. Gen. B- 302760 (May 17, 2004). Generally, funds are properly obligated if you have a legitimate separate authority, a written agreement with the other agency, and a *Bona Fide* Need of the current fiscal year. (GAO provides an excellent explanation of Economy Act and non- Economy Act transactions in National Park Service Soil Surveys, Comp. Gen B-282601 (September 27, 1999)).

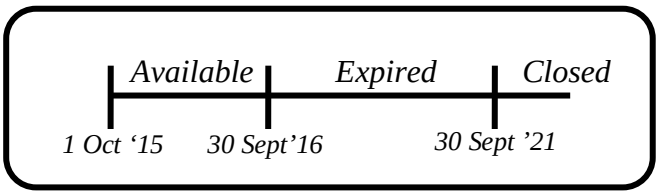
VII. USE OF EXPIRED/CLOSED APPROPRIATIONS.

A. Definitions.

1. **Current Appropriation**. An appropriation that is still available for new obligations under the terms of the applicable appropriations act. 31 U.S.C. § 1502.

2. **Expired Appropriation**. An appropriation whose period of availability has ended and is no longer available for new obligations. It retains its fiscal identity and is available to adjust and liquidate previously incurred obligations for five years. 31 U.S.C. § 1553(a).

Appropriation Life-Cycle (1 Year Money.)



3. **Closed Appropriation**. An appropriation that is no longer available for any purpose. An appropriation becomes "closed" five years after the end of its period of availability as defined by the applicable appropriations act. 31 U.S.C. § 1552(a).

B. Expired Appropriations.

a. Some adjustments are possible after the end of the period of availability, but before an account closes. 31 U.S.C. § 1553(a).

b. Appropriations retain their complete accounting classification identifiers throughout the entire five-year "expired" period. See DOD FMR, Vol. 3, Ch. 13, para. 130208.B.

c. Appropriations remain available for recording, adjusting, and liquidating prior obligations properly chargeable to the account. 31 U.S.C. § 1553(a). See also DOD FMR, Vol. 3, Ch. 10, para. 100201.A.

d. If the appropriation has expired and if an obligation of funds from that appropriation is required to provide funds for a program, project, or activity to cover a contract change:

(1) For the Department of Defense, the Under Secretary of Defense (Comptroller) may approve applicable obligations in excess of $4 million. 31 U.S.C. § 1553 (c)(1). See also DOD FMR, Vol. 3, Ch. 10, para. 100204.

(2) For all changes exceeding $25 million, the Under Secretary of Defense (Comptroller) must take the following actions: notify Congress of an intent to obligate funds and wait 30 days before obligating the funds. 31 U.S.C. § 1553(c)(2); See also DOD FMR, Vol. 3, Ch. 10, para. 100205.

e. For purposes of the notice requirements discussed in the preceding paragraph, a "contract change" is defined as a change to a contract that requires the contractor to perform additional work. The definition specifically excludes adjustments necessary to pay claims or increases in contract price due to the operation of an escalation clause in the contract. 31 U.S.C. § 1553(c)(3). See also DOD FMR, Vol. 3, Ch. 10, para. 100202.

f. The heads of the defense agencies are required to submit annual reports on the impact of these revisions to the procedures for accounting for expired funds and for closing accounts.

C. Closed Appropriations.

1. On 30 September of the fifth year after the period of availability of a fixed appropriation ends:

a. The account is closed;

b. All remaining balances in the account, obligated and unobligated, are canceled; and

c. No funds from the closed account are available thereafter for obligation or expenditure for any purpose. 31 U.S.C. § 1552. See also DOD FMR, Vol. 3, Ch. 10, para. 100201.B. and DOD FMR, Vol. 3, Ch. 15, para. 150308

2. Agencies will deposit collections authorized or required to be credited to an account, but received after an account is closed, in the Treasury as miscellaneous receipts. 31 U.S.C. § 1552(b); Appropriation Accounting - Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130. See also DOD FMR, Vol. 3, Ch. 10, para. 100209.B.

a. After an account is closed, agencies may charge obligations (and adjustments to obligations) formerly chargeable to the closed account and not otherwise chargeable to another current agency appropriation to any current agency account available for the same general purpose. 31 U.S.C. § 1553(b). See also DOD FMR, Vol. 3, Ch. 10, para. 100201.E.

b. Charges may not exceed the lesser of:

(1) The unexpended balance of the canceled appropriation (the unexpended balance is the sum of the unobligated balance plus the unpaid obligations of an appropriation at the time of cancellation, adjusted for obligations and payments which are incurred or made subsequent to cancellation, and which would otherwise have been properly charged to the appropriation except for the cancellation of the appropriation); or

(2) The unobligated expired balance of the original appropriation available for the same purpose; or

(3) One percent (1%) of the current appropriation available for the same purpose. 31 U.S.C. § 1553(b)(2); DOD FMR, Vol. 3, Ch. 10, para. 100201.F.

c. Under an equity theory, if a suit is filed prior to funds' expiration, a federal court can enjoin the expiration of funds to allow for the payment of a judgment. National Ass'n of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977).

VIII. USE OF EXPIRED FUNDS: FUNDING REPLACEMENT CONTRACTS / CONTRACT MODIFICATIONS.

A. **General**. There are four important exceptions to the general prohibition on obligating funds after the period of availability:

1. Contract Modifications;

2. Bid Protests

3. Terminations for Default; and

4. Terminations for Convenience (only in limited circumstances).

B. **Contract Modifications Affecting Price**. Contract performance often extends over several fiscal years, and modifications to the contract occur for a variety of reasons. If a contract modification results in an increase in contract price, and the modification occurs after the original funds' period of availability has expired, then proper funding of the modification is subject to the *bona fide* needs rule. See also DOD FMR, Vol. 3, Ch. 8, para. 080304.B. Certain adjustments for contract modification can be made to expired funds, if the rules below are met. Once the expired funds close, however, they are no longer available for adjustment.

1. General Rule:

a. When a contract modification does not represent a new requirement or liability, but instead only modifies the amount of the government's pre-existing liability, then such a price adjustment is a *bona fide* need of the same year in which funds were obligated for the original contract.

(1) To determine if an adjustment is modifying a pre-existing liability, one must ask if "the government's liability arises and is enforceable under a provision in the original contract." **If yes, then the adjustment is attributable to an antecedent liability and original funds are available for obligation for the modification**. GAO Redbook, Appropriations Law – Volume I, Page 5-35.

(2) Provisions in the contract that may result in such "antecedent liability" include most clauses granting equitable adjustments to the contract price. Thus if modifications are within the scope of the changes clause, within the scope of a government property clause or within the scope of a negotiated overhead rates clause, then the change is essentially "within the contract's statement of work" and it is considered a *bona fide* need of the same year in which funds were obligated for the original contract. GAO Redbook, Appropriations Law, Vol. I, page 5-34; Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, B-219829, 65 Comp. Gen. 741 (1986); Obligations and Charges Under Small Business Administration Service Contracts, B-198574, 60 Comp. Gen. 219 (1981).

(3) The determination of whether a contract change is "in-scope" is highly fact specific and depends on the application of multiple factors. For a more complete discussion, please refer to the Contract Changes Outline in the Contract Attorneys Deskbook.

(a) As a shortened discussion, GAO, courts and boards look to the materiality of the change to see to what extent the product or service, as changed, differs from the requirements of the original contract. They may examine (1) changes to the function/type of work, (2) changes in quantity; (3) the number and cost of changes; and (4) changes to the time of performance. These factors and their application are discussed at length in the Contract Changes outline.

(b) As a shortened discussion, a contract change is generally within the scope of a contract's changes clause if either test is met below:

(i) Offerors (prior to award) should have reasonably anticipated this type of contract change based upon what was in the solicitation. In other words, the field of competition for this contract, as modified, is not significantly different from that obtained for the original contract. Krykowski Const. Co., Inc. v. U.S., 94 Fed.3d 1537 (Fed. Cir. 1996); H.G. Properties A. LP v. U.S., 68 fed. Appx. 192 (Fed. Cir. 2003).

OR

(ii) The contract, as modified, is for essentially the same work as the parties originally bargained for. The contract, as modified could "be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." See Freund v. United States, 260 U.S. 60 (1922); Shank-Artukovich v. U.S., 13 Cl. Ct. 346 (1986); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358; Gassman Corp., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.

(4) Limitations. For an expired, fixed appropriations account, obligations for contract changes to a program, project, or activity, may not exceed:

(a) $4 million in one FY without the approval of the head of the agency. 31 U.S.C. § 1553 (c)(1). Within DoD, the action is submitted to the USD(C) for approval. DOD FMR, Vol. 3, Ch. 10, paras. 100204 and 100206.E.

(b) $25 million in one FY without notice to Congress and a 30 days waiting period. 31 U.S.C. § 1553 (c)(1). 31 U.S.C. § 1553 (c)(2). See also DOD FMR, Vol. 3, Ch. 10, para. 100205.

b. Increases to Quantity: The government accountability office and Volume 3, Chapter 8 of the DoD Financial Management Regulation offer quite a bit of guidance on how to determine the funding source for contract modifications that add a quantity of supplies or additional services. The DoD FMR should be consulted on fact specific questions.

(1) In general, increases to the quantity of items to be delivered on a contract are viewed as outside the scope of most changes clauses. Thus, a modification to increase quantity will amount to a new obligation chargeable to funds current at the time the modification is made. See Request Concerning Funding of Contract Modification After Expiration of Appropriations, B-207433 (1983).

(2) Example: The IRS issued a task order with FY1 funds for a specific amount of computer equipment under an ID/IQ contract. There was a cost underrun (it cost less money), so the IRS proposed to modify to the task order in FY2 to use the FY1 money it "saved" to purchase additional computers. GAO opined that a modification of a contract to increase the quantity constitutes a new obligation and is chargeable only to funds current at the time of the modification, even though it was an ID/IQ contract and the IRS argued it "needed" the computers in FY1 but had limited funds available. Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995);

(3) Example: In FY7, The Army had a *bona fide* need for 557 thermal viewers. Due to a limitation of funds, the Army was only able to enter into a fixed price contract for 509 viewers. The Army obligated $8.2 million for the viewers. In FY8, Army modified the contract to purchase an additional 285 viewers, obligating FY8 funds. In FY9, there was a cost underrun (it cost less than 8.2 million to produce 509 viewers). The Army wanted to use the remaining FY7 funds to purchase 48 viewers. GAO opined that the Army could not use surplus FY7 funds in a succeeding fiscal year. Even though the Army had a *bona fide* need for 557 viewers in FY7, the Army chose not to obligate for 557 viewers. Any increased quantities in FY9 are a *bona fide* need of FY9. The funds do not relate back. Magnavox—Use of Contract Underrun Funds, B-207433, 83-2 CPD ¶ 401 (1983).

(4) DoD FMR Guidance on Increases in Quantity. "Changes in the quantity of the major items called for by a contract generally are not authorized under the "Changes" clause. Therefore, a change that increases the number of end items ordered on a contract is a change in the scope of the contract and would have to be funded from funds available at the time the change is made."

(a) "For example, if the original contract provided for delivery of 50 items and a modification was issued to provide for the delivery of 70 items, the additional 20 items would represent a change in the scope of the contract. . . .However, changes in the quantity of subsidiary items under a contract, such as spare parts, generally are considered to be within the scope of a contract unless they are so significant that they alter the basic contractual undertaking. See also DOD FMR, Vol.3, Ch. 8, para. 080304.C.

(5) Severable Services: A modification providing for increased additional deliverable services must be charged to the fiscal year or years in which the services are rendered. Hartgraves, B-235086, 1991 WL 122260 (Comp. Gen)(Apr 24, 1991); Dept. of the Interior, FY Approp. Chargeable for Contract Modifications, B-202222, 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, Aug. 2, 1983; Acumenics Research & Tech., B-224702, 87-2 CPD ¶128 (Aug 5, 1987). Note: In dicta, GAO has suggested that an increased services modification to a contract awarded for 12 months under 2410a would relate back to the funds initially placed on the contract. See GAO Redbook, Volume I, Appropriations Law, page 5-34 (2008).

2. General Rule for Cost –Reimbursement Contracts. Contract modifications that increase the original estimated cost ceiling of a contract are funded with an appropriation current at the time the modification is signed by the contracting officer. The reason is that the agency cannot anticipate the need for or the amount of cost increases at the time of award and ultimately, this type of modification is viewed as discretionary in nature. Therefore, GAO considers it a *bona fide* need at the time of modification. FINCEN – Obligations Under a Cost Reimbursement Nonseverable Services Contract, Comp. Gen. B-317139, 2009 CPD ¶158, 2009 WL 1621304, June 1, 2009.

3. Cost Plus Fixed Fee - Level of Effort Contracts. See also Contract Types and Contract Changes outlines.

   a. A term level of effort contract is by presumption, a severable services contract. This is because it requires the performance of a certain number of hours of work within a specified time period, rather than requiring the completion of a series of work objectives. FAR 16.306(d)(2); EPA Level of Effort Contracts, B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216. GAO has held that in some cases, this presumption can be overcome because it is always the nature of the work being performed, not the contract type, that drives the analysis. Honorable Byron, B-235678, 30 July 1990; Funding for Air Force CPFF Level of Effort Contract, B-277165, 10 Jan. 2000.

   b. A completion contract, in contrast, is generally a non-severable services contract because it requires the contractor to complete and deliver a specified end product. FAR 16.306(d)(1).

c. A severable term level of effort contract cannot be converted by modification into a non-severable completion-type level of effort contract. EPA Level of Effort Contracts, B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216.

C. Bid Protests. Funds available for obligation on a contract at the time a protest is filed shall remain available for obligation for 100 calendar days after the date on which the final ruling is made on the protest. This authority applies to protests filed with the agency, at the Government Accountability Office (GAO), or in the Court of Federal Claims. 31 U.S.C. § 1558; FAR 33.102(c); DFAS-IN 37-1, para. 080606.

D. Terminations for Default (T4D).

1. Replacement Contract: A new contract the agency enters into to satisfy a continuing *bona fide* need for a good or service covered by the original contract that was terminated. Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).

2. If a contract or order is terminated for default, and the *bona fide* need still exists, then the originally obligated funds remain available for obligation for a re-procurement, even if they otherwise would have expired. The agency must award the re-procurement contract on the same basis. The contract must be substantially similar in scope and size as the original contract and awarded without delay. DOD FMR, Vol. 3, paragraph 080303.D; Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, Sept. 28, 1983, 84-1 CPD ¶91; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976). The policy reasons for allowing the use of original funds is to facilitate contract administration.

3. If additional funds are required for the replacement contract, and the funds have otherwise expired, then under certain circumstances, the original year's funds may be used to fund the additional cost (and if listed conditions are not met or funds are unavailable, then current funds may be used). See DoD FMR, Vol. 3, Ch. 10, para. 100206; DFAS-IN 37-1, tbl. 8-7.

4. As a remedy for the government, the agency may retain all re-procurement or completion costs, liquidated damages and performance bond money from the contractor as "refunds" to be applied to the replacement contract's specific appropriation in order to make the appropriation "whole." Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 at *4-7 (Sept. 8, 1986); Department of the Interior—Disposition of Liquidated Damages Collected for Delayed Performance.

E. Terminations for Convenience of the Government (T4C).

1. General Rule: A termination for the convenience of the government generally extinguishes the availability of prior year funds remaining on the contract. In most instances, such funds are not available to fund a replacement contract in a subsequent year. DOD FMR, Vol. 3, Ch. 10, para. 100206.

2. Exceptions. Funds originally obligated may be used in a subsequent fiscal year to fund a replacement contract if the original contract was terminated as a result of:

   a. Court Order;

   b. Determination by a contracting officer that the contract award was improper due to explicit evidence the award was erroneous; or

   c. Determination by other competent authority (e.g. a Board of Contract Appeals) that the contract award was improper. DOD FMR, Vol. 3, para. 100206; Funding of Replacement Contracts, B-232616 (1988).

3. If the original award was improper and the contract is terminated for convenience, either by the contracting officer or by judicial order, then the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:

   a. The original award was made in good faith;

   b. The agency has a continuing *bona fide* need for the goods or services involved;

c. The replacement contract is of the same size and scope as the original contract; and

d. The replacement contract is executed without undue delay after the original contract is terminated for convenience. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158, 162 (Dec. 19, 1988), DOD FMR, Vol. 3, para. 100206; DFAS-IN 37-1, tbl. 8-7.

e. If all of the conditions above cannot be met, then current year funds shall be used to fund the requested action. DoD FMR, Vol. 3, Ch.10 para. 100206.

f. Example: The U.S. Mint contracted for an asbestos abatement contract in FY1. Subsequently, a federal district court ordered the Mint to terminate the award and re-solicit. The Mint T4C'd the contract. If the FY1 funds have expired, may the Mint still obligate those funds on a replacement contract? Yes, provided the original award was made in good faith, the Mint has a continuing *bona fide* need for the services, the replacement contract is of the same size and scope as the original contract and the replacement contract was executed without delay. Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (Dec. 19, 1988).

IX. MULTI-YEAR CONTRACTS AND FULL FUNDING POLICY

A. Full Funding Policy.

1. It is the policy of the Department of Defense to fully fund procurements of military useable end items in the fiscal year in which the item is procured. DOD FMR, Vol. 2A, Ch. 1, para. 010202.A. The full funding policy is intended to prevent the use of incremental funding, under which the cost of a weapon system is divided into two or more annual portions or increments. Thus, full funding provides disciplined approach for program managers to execute their programs within cost and available funding.

2. The total estimated cost of a complete, military useable end item or construction project must be fully funded in the year it is procured. DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.

3. There are two basic policies concerning full funding:

   a. The policy rationale is to provide funds in the budget for the total estimated cost of a complete, military usable end item to document the dimensions and cost of a program. DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.1.

   b. Exceptions to this policy are advance procurement for long lead-time items and advance economic order quantity (EOQ) procurement. DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.2.

4. The DOD full funding policy is not statutory. Violations of the full funding policy do not necessarily violate the Anti-Deficiency Act. Newport News Shipbld'g and Drydock Co., B-184830, Feb. 27, 1976, 76-1 CPD ¶ 136 (holding option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).

B. Incremental Funding of Major Defense Systems. The efficient production of major defense systems has necessitated two general exceptions to the full funding policy. DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.2; DFARS 217.172.

1. Advance Procurement (Long Lead-time Items). Advance procurement for long lead-time items allows acquisition of components, material, parts, and effort in an earlier fiscal year than the year the government acquires the related end item.

   a. To be eligible for advance procurement, long lead-time items must have a significantly longer lead-time than other items. The cost of the advanced procurement items must be relatively small when compared to the remaining costs of the end item.

   b. An annual budget request must include at least the estimated termination liability for long lead-time item procurements. The advanced procurement is for one fiscal year's program increment. DOD FMR, Vol. 2A, Ch. 1, para. 010202.C.3; DFARS 217.172.

2. Economic Order Quantity (EOQ) Procurement. Advance EOQ procurement for multi-year procurement allows the agency to acquire components, materials, and parts for up to five fiscal-year program increments to obtain the economic advantage of multi-year procurements. The advance procurement may obligate the termination costs, or, if cheaper, the entire cost. The government may also include EOQ costs in an unfunded cancellation clause. DOD FMR, Vol. 2A, Ch. 1, para. 010202.C.4; DFARS 217.172.

C. Incremental Funding of RDT&E Programs.

1. The government executes the RDT&E Program through the incremental funding of contracts and other obligations. DOD FMR, Vol. 2A, Ch. 1, para. 010213.

2. Program managers using RDT&E usually prefer to incrementally distribute funding among various programs, giving more to those programs showing progress and withholding from other programs.

3. The incremental funding policy budgets an amount for each fiscal year sufficient to cover the obligations expected during that fiscal year. Each contract awarded limits the government's obligation to the costs estimated to be incurred during the fiscal year. The government obligates funds for succeeding years during later years. Through the incremental funding policy, the government maintains very close control over R&D programs by limiting their funding.

4. Contract Provisions.

a. An incrementally funded cost-reimbursement contract contains FAR 52.232-22, Limitation of Funds. This provision limits the government's obligation to pay for performance under the contract to the funds allotted to the contract. The contract also contains a schedule for providing funding. Typically, the contractor promises to manage its costs and to perform the contract until the government provides the next increment.

b. Incrementally funded fixed-price contracts contain a similar clause, Limitation of Government's Obligation. See DFARS Part 232.704-70 and DFARS 252.232-7007.

c. The government allots funds to the contract by an administrative modification identifying the funds.

d. To prevent funding gaps associated with late appropriations, the contracting officer may use current research and development funds to fund contract performance for 90 days into the next fiscal year.

5. Incremental funding transforms two-year RDT&E appropriations into one-year funds. However, the government may obligate RDT&E funds during their second year of availability. Frequently, agencies receive permission from the appropriation manager to obligate funds during the second year where problems prevent obligating an annual increment during the first year. Defense Technical Information Center--Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989).

D. Multi-year Contracts. 10 U.S.C. 2306b; 10 U.S.C. 2306c.

1. Multi-year contracts is a generic term describing the process under which the government may contract for the purchase of supplies or services for more than one year, but not more than five program years. Such contracts may provide that performance during the subsequent years of the contract is contingent upon the appropriation of funds, and generally provide for a cancellation of payments to be made to the contractor if such appropriations are not made. DOD FMR, Vol. 2A, Ch.1 , para. 010203.A.

2. Title 10, U.S.C. § 2306b provides that the head of a contracting agency may enter into a multi-year contract for the acquisition of "property" (i.e., major end items). This authority is subject to a significant number of statutory limitations and approval criteria. 10 U.S.C. § 2306b; DFARS 217.172; DOD FMR, Vol. 2A, Ch.1 , para. 010203.B.

3. Similar authority at 10 U.S.C. § 2306c provides that the head of a contracting agency may enter into a multi-year contract for the acquisition of services, to include environmental remediation services. This statute is also subject to a significant number of limitations and approval criteria. 10 U.S.C. § 2306c; DFARS 217.171.

4. The DFARS restricts the use of multi-year contracts for supplies to only those for complete and usable end items. DFARS 217.172 (e)(5). In addition, the DFARS restricts the use of advanced procurement to only those long-lead items necessary in order to meet a planned delivery schedule for complete major end items. DFARS 217.172 (e)(6).

E. Incremental Funding of Fixed-Price Contracts. DFARS 232.703-1 and 252.232-7007.

1. Department of Defense policy is to fully fund fixed price contracts, as opposed to incremental funding. Incremental funding is the partial funding of a contract or an exercised option with the anticipation that additional funds will be provided at a later time.

2. Exception #1: DoD permits incremental funding of service contracts if:

   a. The contract (excluding any options) or any exercised option does not exceed one year in length, and

   b. Is incrementally funded using funds available (unexpired) as of the date the funds are obligated.

3. Exception #2: DoD permits incremental funding on contracts funded with research and development appropriations as long as the funds are multiple year funds.

4. Exception #3: Congress has otherwise authorized incremental funding.

X. MISCELLANEOUS

A. Options.

1. Contracts with options are one means of ensuring continuity of a contractual relationship for services from fiscal year to fiscal year. The contract continues to exist, but performance must be subject to the availability of funds. Contel Page Servs., Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540.

2. There are restrictions on the use and exercise of options. FAR Subpart 17.2.

a. The government must have synopsized the contract with the option(s) in the Government-wide Point of Entry (GPE) and must have priced and evaluated the option at the time of contract award. FAR 5.003, FAR 17.206. If the government did not evaluate the option at the time of the award, or if the option is unpriced, then the government must justify the exercise of the option IAW FAR Part 6 (the contracting activity must obtain approval for other than full and open competition through the justification and approval (J&A) process).

b. The government cannot exercise the option automatically. The government must determine that the option is the most advantageous means of filling a requirement.

c. The government must have funds available.

d. The contract must contain the Availability of Funds clause. FAR 32.703-2. Cf. Blackhawk Heating, Inc. v. United States, 622 F.2d 539 (Ct. Cl. 1980).

e. The government must obligate funds for each option period when proper funds become available. After it exercises the option, the government may fund the option period incrementally; for example, during continuing resolution (CR) periods, the government may provide funding for the period of the CR. United Food Servs., Inc., ASBCA No. 43711, 93-1 BCA ¶ 25,462 (holding that if the original contract contains the Availability of Funds clause and the government exercises the option properly, funding the option period in multiple increments does not void the option).

f. The government must obligate funds consistent with all normal limitations on the obligation of appropriated funds, e.g., *Bona Fide* Needs Rule, period of availability, type of funds.

B. Requirements or Indefinite Quantity Contracts.

1. Requirements contracts and indefinite quantity contracts also allow the contractual relationship to cross fiscal years. FAR Subpart 16.5.

2. Use of the Availability of Funds clause is mandatory. FAR 32.705-1.

3. The government obligates funds for each delivery order using funds available for obligation at the time the government issues the order.

XI. CONCLUSION – SHORT OUTLINE

A. Most appropriations, or funds, have a period of availability during which an agency may obligate funds for needs that arise, or continue to exist, during that period. Only *bona fide* needs of that FY may be met by obligating funds current at that time.

1. **Supplies** are a *bona fide* need of the fiscal year in which the supplies will be **used**. However, FY1 funds may be used for supplies that won't arrive until FY2 if the delivery or production lead-time exceptions apply. Also, stock items may be ordered and used into the next FY if the stock level exception applies.

2. **Services** are the *bona fide* need of the year they are **performed**. Services are either severable (repeatable) or non-severable (singular).

   a. Non-severable services are funded with money current at the time of **contract award**.

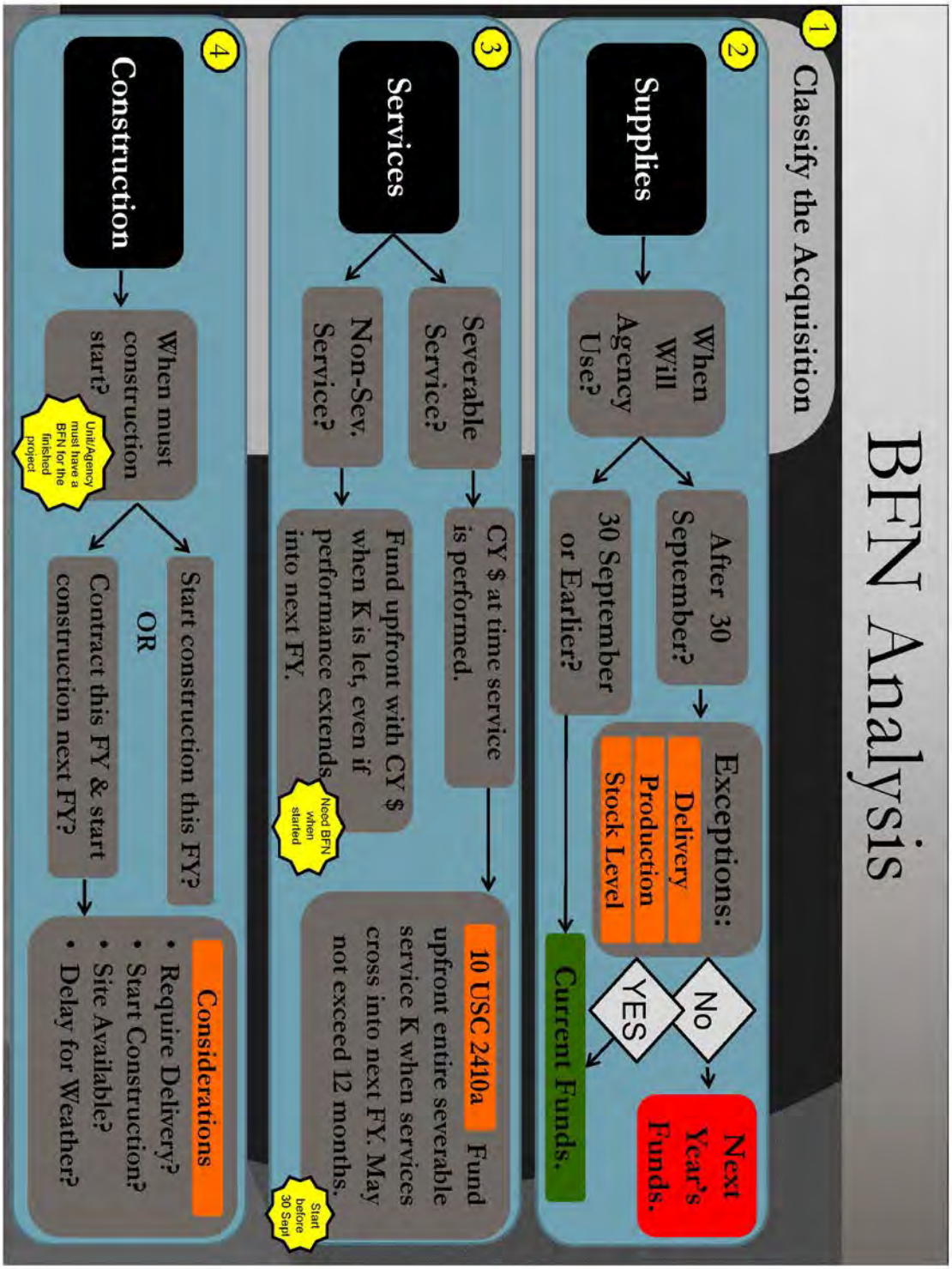
   b. Severable services are funded in the FY during which they are **performed**, unless 10 U.S.C. 2410a applies.

3. **Construction** is a *bona fide* need of the year in which the construction must be **contracted** for in order to have the building completed when required. However, considerations like site availability and weather could push the *bona fide* need into the next FY.

4. **Training** is a *bona fide* need at the time the training is **received**. Individual courses are non-severable services; multiple repeated courses are severable from each other. Some training courses can be funded with FY1 funds even though they don't start until FY2 under some circumstances.

5. Upon expiration of an appropriation, the remaining funds are not available for new obligations. However, they may be reached to adjust old obligations. Contract modifications that are within the scope of the original contract relate back to the original contract date and may be funded with expired funds.

APPENDIX A –
BONA FIDE NEEDS ANALYSIS



Chapter 4:

The Antideficiency Act

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CHAPTER 4

THE ANTIDEFICIENCY ACT

I. INTRODUCTION

II. REFERENCES

A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).

B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).

C. 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).

D. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).

E. OMB Circular A-11, Preparation, Submission, and Execution of the Budget (2014) [hereinafter OMB Cir. A-11], available at http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc.

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III. BACKGROUND

A. History

1. The original Anti-Deficiency Act (ADA) was enacted in 1870 (16 Stat. 251) for the purpose of preventing the federal government from making expenditures in excess of the amounts that Congress appropriated. *See* Red Book, 6-34 to 6-35.

2. The ADA was amended in 1905 (33 Stat. 1257) and in 1906 (34 Stat. 48) for the purpose of preventing expenditures in excess of apportionments (divisions within an appropriation). These amendments required that certain appropriations be apportioned over a fiscal year to obviate the need for a deficiency appropriation. Originally, the authority to make, waive, or modify apportionments was the head of the agency. Today, that authority rests with the Office of Management and Budget (OMB). *See* Red Book, 6-35. *See* Executive Order 6166 (June 10, 1933) (transferring apportionment to OMB).

3. The ADA was amended again in 1951 (64 Stat. 765), in 1956 (70 Stat. 783), and in 1957 (71 Stat. 44) for the purpose of strengthening the apportionment procedures and the agency control procedures. *See* Red Book, 6-35 to 6-36.

B. Summary of ADA Prohibitions

1. In its current form, the ADA states that an "officer or employee of the U.S. government" **may not**:

   a. "Make or authorize an expenditure or obligation *exceeding an amount available* in an appropriation" unless authorized by law (emphasis added). *See* 31 U.S.C. § 1341(a)(1)(A);

   b. Involve the government "in a contract or obligation for the payment of money *before* an appropriation is made unless authorized by law" (emphasis added). *See* 31 U.S.C. § 1341(a)(1)(B);

   c. "[M]ake or authorize an expenditure or obligation *exceeding* -- (1) an apportionment; or (2) the amount permitted by regulations prescribed under section 1514(a) of this title" [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a); or

   d. "[A]ccept voluntary services [for the United States] or employ personal services. . .except for emergencies involving the safety of human life or the protection of property," or unless authorized by law. *See* 31 U.S.C. § 1342.

2. The ADA imposes prohibitions (or fiscal controls) at three levels: (1) at the **appropriations** level, (2) at the **apportionment** level, and (3) at the **formal subdivision** level. The fiscal controls at the appropriations level are derived from 31 U.S.C. § 1341(a)(1)(A) and (B). The fiscal controls at the apportionment level and at the formal subdivision level are derived from 31 U.S.C. § 1517(a). Thus, if an officer or employee of the United States violates the prohibitions (or fiscal controls) at any of these three levels, he/she thereby violates the ADA.

3. The Comptroller General summarized the intent and effect of the ADA in an often-quoted 1962 decision.

> These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditure or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriations under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, *within the limits and purposes of appropriations* annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, *in advance of appropriations made* for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made (emphasis added).

To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

4. To whom does the ADA apply?

   a. The ADA applies to "any officer or employee of the United States Government" and thus, it applies to all branches of the federal government—executive, legislative, and judicial. Nevertheless, whether a federal judge is an "officer or employee" of the U.S. Government remains an open question, in some cases. *See* Red Book, 6-39.

b. By the plain wording of the statute, 31 U.S.C. § 1341 specifically applies to any officer or employee who makes or authorizes an expenditure or obligation. Additionally, DOD applies the ADA by regulation to "commanding officers, budget officers, or fiscal officers. . .because of their overall responsibility or position." *See* DOD FMR, Vol 14, Ch 5, para. 050302.

IV. THE ANTIDEFICIENCY ACT'S FISCAL CONTROLS

A. APPROPRIATIONS – THE FIRST LEVEL. 31 U.S.C. § 1341

1. The ADA imposes <u>two</u> fiscal controls at the **appropriations** level. These controls prohibit obligating and expending appropriations "*in excess of*" the amount available in an appropriation or "*in advance of*" an appropriation being made. 31 U.S.C. § 1341(A)(1)(A) and (B). The provisions located in 31 U.S.C. § 1341(A)(1)(A) and (B) are often considered the key provisions of the ADA; in fact, the original ADA contained only these provisions. *See* Red Book, 6-38.

2. The **"In Excess Of"** Prohibition

a. An officer or employee may not make or authorize an obligation or expenditure that **exceeds** an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A).

b. DOD Examples

(1) The Navy over-obligated its Military Personnel, Navy appropriation from 1969-1972 by nearly $110 million. This is an example of how the Navy violated the ADA by obligating an appropriation *in excess* of the amount available in that appropriation, and has been called the "granddaddy of all violations." *See* Red Book, 6-43.

(2) The Navy lost its "place of honor" for committing the "granddaddy of all violations" when the Army over-obligated four procurement appropriations from 1971 to 1975 by more than $160 million involving approximately 900 contractors and 1,200 contracts. Once the Army realized it had over-obligated these appropriations, it ceased

payments to the contractors and requested GAO's *recommendations*. In a December 1975 letter, the Army requested the GAO's advice regarding some potential courses of action. In response, initially, the GAO opined that "obviously these contracts violate the 'Antideficiency Act.'" Additionally, the GAO stated that the Army had a duty to mitigate the Antideficiency Act violations. The GAO endorsed one of the Army's proposals whereby the Army would terminate "contracts for which no critical requirement exists." This option, however, would only mitigate the violation; it would not make funds available to the unpaid contractors. The GAO further commented that the Army could request Congress to appropriate additional funds (i.e. a deficiency appropriation) for the purpose of satisfying these outstanding obligations. The GAO specifically *disapproved* an Army proposal to use current year funds to cover the obligations.[1] To the Chairman, Committee on Appropriations, House of Representatives, B-132900, Feb. 19, 1976. *See also* Red Book, 6-43.

(3) Not to be outdone, in fiscal 2002 the Air Force embarked upon an obligation of over $300 million against its Missile Procurement appropriation, for replacement of Minuteman guidance systems. Unfortunately, the funds weren't

[1] The GAO rejected the Army's proposal to use current year funds (i.e. 1976 annual appropriations) to satisfy these outstanding prior years' obligations by stating:

> The proposal to apply current funds (either directly or through reprogramming) to payments on continuing contracts is apparently designed to achieve full performance of such contracts and also provide some immediate relief to contractors by cash payments. *In our opinion, this action would be precluded by* 31 U.S.C. § 712a (1970) [now located at 31 U.S.C. § 1502, the "Bona Fide Needs Statute"]. . . Under these circumstances, 31 U.S.C. § 712a would preclude the use of *current* appropriations to fund these *prior* year contracts since such transactions would constitute neither "the payment of expenses properly incurred" nor "the fulfillment of contracts properly made" in fiscal year 1976 (emphasis added).

Chairman, Committee on Appropriations, B-132900, Feb. 19, 1976.

Thus, the GAO reasoned that obligating and expending current year 1976 funds to pay for contracts the Army awarded in previous years would violate the Bona Fide Needs Rule. This rule prohibits the government from obligating and expending current year funds for prior year needs. *Id.*

available at the time of obligation, resulting in an ADA violation.[2]

c. Other Examples

(1) USEC Portsmouth Gaseous Diffusion Plant "Cold Standby" Plan, B-286661, Jan. 19, 2001; Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992) (stating that where the agency expended "training and employment services" funds for an unauthorized purpose, the agency violated the Antideficiency Act's "in excess of" prong because no funds were available for that unauthorized purpose).[3]

(2) As far as amounts go, it could be some time before the Department of Housing and Urban Development is unseated from their position of prominence with an ADA violation in excess of $1.5 billion in FY 2004.[4]

d. What is the "amount available" under 31 U.S.C. § 1341(a)(1)(A)?

(1) "Amount available" means the unobligated balance of a particular appropriation.[5]

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[2] *See* US Government Accountability Office, Antideficiency Act Report Information, FY 2006, available at http://www.gao.gov/ada/adarptinfofy06.pdf. In this case, funds were obligated in excess of amounts apportioned under a continuing resolution for missile procurement. *Id.*

[3] The GAO was somewhat less decisive in their language, stating that the violation "could be viewed as either in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose." Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992).

[4] *See* US Government Accountability Office, Antideficiency Act Report Information, FY 09, available at http://www.gao.gov/ada/adarptinfofy09.pdf. In this case, Congress had set a FY 2004 commitment level of $3.8B for various loan guarantee commitments, and by December 2003, HUD had made commitments exceeding the cap by $1,529,229,523. *Id.*

[5] *See* Red Book, 6-84.

(2) Thus, if the DOD Appropriations Act provides $31B in the Army O&M appropriation, then the "amount available" for obligation is $31B.[6] As obligations are made against this appropriation, the amount available for new obligations declines.

(3) Earmarks[7] may also limit the "amount available" in a particular appropriation. Thus, if an earmark establishes a maximum amount that may be obligated, once that amount has been obligated, no further obligations may occur. Any obligation in excess of the earmark would violate 31 U.S.C. § 1341(a)(1)(A) (the *in excess* of prong). For example, if the DOD Appropriations Act provides that as part of the Army's O&M appropriation, the Army receives "not to exceed $12,478,000 . . .for emergencies and extraordinary expenses," then $12,478,000 is an earmark. If the Army obligates in excess of $12,478,000 for emergencies and extraordinary expenses, then the Army has violated 31 U.S.C. § 1341(a)(1)(A) by obligating *in excess* of the amount available. *See* Red Book, 6-41.

e. The GAO has opined that this statute prohibits obligations in excess of appropriated or authorized amounts <u>and</u> obligations that violate specific statutory restrictions on obligations or spending.

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[6] For example, the FY 2012 DOD Appropriations Act, Div. A, Title II (Operation and Maintenance, Army) states in relevant part:

> For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and not to exceed **$12,478,000** can be used for *emergencies and extraordinary expenses*, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes, **$31,072,902,000**. (emphasis added)

[7] An "earmark" is a portion of a lump-sum appropriation (i.e. an O&M appropriation which is made to fund at least two programs, projects, or items) where Congress designates a certain amount of appropriation as "either a maximum or a minimum or both." *See* Red Book, 6-26, 6-41. Note that under a "not to exceed" earmark, "the agency is not required to spend the entire amount on the object specified." *Id.* If within the Army's O&M appropriation, $12.5M is earmarked for emergencies and extraordinary expenses and the Army does not obligate the full $12.5M, then the unobligated balance "may—within the time limits for obligation—be applied to other unrestricted objects of the [lump sum] appropriation [in this case, the Army O&M appropriation]." *Id.*

(1) Regarding statutory restrictions, if Congress states that no funds appropriated shall be available for a particular purpose, and an agency expends funds for the prohibited purpose, then the agency violates the Antideficiency Act. Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282 (1985); Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440 (1981) (stating that where an appropriation limits the payment of overtime to an individual employee to $20,000 in one year, if an agency exceeds this $20,000 limit, it has violated both the Antideficiency Act's "in excess of" prong and its "in advance of" prong).8

(2) Examples of recurring statutory restrictions in the annual DOD Appropriations Act:

(a) "None of the funds appropriated or otherwise made available pursuant to . . . this Act shall be obligated or expended to finance directly any assistance or reparations for the governments of Cuba, North Korea, Iran, or Syria . . ."[9]

(b) "None of the funds made available by this Act may be used to support any training program involving a unit of the security forces or police of a foreign country if the Secretary of Defense has received credible information from the Department of State that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken."[10]

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[8] See 10 USC § 2222 (as amended by FY 2012 National Defense Authorization Act Section 901) which states that a violation of the antideficiency act will result if funds available to the DOD are obligated for covered defense business system programs that will have a total cost in excess of $1,000,000 over the period of the current future-years defense program submitted to Congress unless certain exceptions are met.

[9] FY 2012 DOD Appropriations Act, Div. A, Title VII, Sec. 7006.

[10] *Id.* at Sec. 8058.

f. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations. Matter of Adjustment of Expired and Closed Accounts, B-253623, 73 Comp. Gen. 338 (1994); The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992).

3. The **"In Advance Of"** Prohibition. An officer or employee may not involve the government in a contract or obligation for the payment of money **before** an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987) (20-year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

a. So, for example, if on 15 September 2012 (FY 2012), an Army contracting officer awarded a contract obligating FY 2013 Army O&M funds for an FY 2013 need, that contracting officer would have violated the ADA by obligating funds "before an appropriation is made." 31 U.S.C. § 1341(a)(1)(B). Such a violation is also referred to as obligating funds *in advance* of their availability.

b. What does "before an appropriation is made" mean? An "appropriation is made" when *all the following have occurred*: (1) Congress has passed the appropriation act, (2) the President has signed the appropriation act, and (3) the date is 1 October (or later) of the fiscal year in which the appropriation becomes available.[11]

(1) So, if Congress passes the FY 2013 DOD Appropriations Act on 29 September 2012, then as of 30 September 2012 the funds contained in this appropriation are still not available because it is not yet 1 October 2012 (and the President has not yet signed the act). If an Air Force contracting officer awarded a contract on 30 September 2012 obligating FY 2013 Air Force O&M funds for a FY 2013 need, then the contracting officer would have violated the ADA by obligating funds "before the appropriation was made." This is a violation of the *in advance* of prohibition.

[11] *See* Red Book, Vol I, 5-9. *See generally* Red Book 6-146.

(2) Likewise, if Congress passes the FY 2013 DOD Appropriations Act on 1 October 2012 (FY 2013) but the President has not yet signed the act, then the appropriations subject to this act are still not yet available. Under these circumstances, if an Army contracting officer awarded a contract on 1 October 2012 obligating FY 2013 Army O&M funds, then the contracting officer would have violated the ADA by obligating funds "before the appropriation was made."

c. Funding gaps. A funding gap "refers to the period of time between the expiration of an appropriation and the enactment of a new one." *See* Red Book 6-146. Obligating funds during a funding gap violates the ADA by obligating funds *in advance* of their availability, unless an exception applies. *See* Red Book 6-146. *See also* Chapter on Continuing Resolution Authority of Fiscal Law Deskbook for discussion of exceptions during a funding gap.

4. Exceptions to 31 U.S.C. § 1341(a)(1)(A) and (B). Government officials may obligate or expend *in excess of* an amount available in an appropriation or involve the Government in a contract *in advance of* an appropriation being made <u>if authorized by law</u>.

a. The statute must specifically authorize entering into a contract i*n excess of* or *in advance of* an appropriation. <u>The Army Corps of Eng'rs' Continuing Contracts</u>, B-187278, 56 Comp. Gen. 437 (1977); <u>To the Secretary of the Air Force</u>, B-144641, 42 Comp. Gen. 272 (1962).

b. The existence of a law creates an exception to the statutory prohibition regarding entering into a contract i*n excess of* or *in advance of* an appropriation.

(1) The Feed and Forage Act (aka The Adequacy of Appropriations Act) (41 U.S.C. § 6301) (*in excess* of exception).

(a) This statute permits the DOD and the Coast Guard to contract *in excess of* an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies but cannot exceed the needs for the current fiscal year (FY).[12] In DOD, this authority is limited by regulation to "emergency circumstances. . .[where] action cannot be delayed long enough to obtain sufficient funds." See DOD FMR, vol. 3, ch. 12, para. 1201 and 1202. Report use of this authority to the next higher level of command. See DOD FMR, vol. 3, ch. 12, para. 120207 (July 2010); DFAS-IN 37-1, ch. 8, para. 0818 (requiring local commanders to forward reports through command channels).

(b) The authority conferred by the Feed and Forage Act is "contract" authority, and does not authorize disbursements. See, DOD FMR, vol. 3, chap. 1201; AF Procedures for Administrative Control of Appropriations, § 4, para. E. So, if the Air Force exercised its "contract authority" under 41 U.S.C. § 11 to incur obligations for F-16 fighter fuel exceeding its available O&M appropriation, then the Air Force could only obligate its O&M funds by awarding a contract; the Air Force could not disburse those funds unless and until Congress granted additional funds.

[12] The full text of 41 U.S.C. § 11 states:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

Id.

(2) Multi-year Contract Authority (*in advance* of exception). See, e.g., 10 U.S.C. §§ 2306b, 2306c, 2829; 41 U.S.C. § 254c. See also FAR 17.104; DFARS 217.170; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).

(a) Multi-year contract authority permits an agency to award contracts for terms in excess of one year obligating one-year funds.

(b) DOD is authorized under 10 U.S.C. §§ 2306b and 2306c to award contracts for goods and services for terms not exceeding five years so long as certain administrative determinations are met. 10 U.S.C. § 2306c was enacted specifically in response to a request from the Air Force following the GAO's "Wake Island" decision.[13] 10 U.S.C.§§ 2306b and 2306c pertain to contracts for installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. These statutes permit DOD to obligate the entire amount of a five-year contract to an annual fiscal year appropriation current at the time the contract is awarded (i.e. an O&M appropriation) even though some of the goods or services procured do not constitute the needs of that fiscal year. *See* Red Book, 6-49 and Red Book Vol I, Chap 5, 5-45.

5. Contracts Conditioned Upon the Availability of Funds. See FAR 32.703-2; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).

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[13] To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962). In this case, the Air Force awarded a three-year contract for aircraft maintenance services for aircraft landing at Wake Island (a remote island in the Pacific Ocean) obligating one-year funds. The GAO concluded that this contract violated the ADA's *in advance* of prohibition because it obligated the Air Force to pay the contractor in future fiscal years using only one-year funds. Following this GAO decision, the Air Force requested that Congress enact a statute which would have authorized such a contract. Congress responded by enacting 10 U.S.C. § 2306c. *See* Red Book, 6-49 and Red Book Vol I, Chap 5, 5-45.

a. Agencies may award certain types of contracts (i.e. contracts for "operations and maintenance and continuing services") prior to an appropriation becoming available if the solicitation and contract include the "subject to the availability of funds" clause, FAR 52.232-18, Availability of Funds. See FAR 32-703-2(a). See also To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485 (award without clause violated the ADA's "in advance" of prong).

b. The government may not accept supplies or services under these contracts (containing the "subject to the availability of funds" clause) until the contracting officer has given written notice to the contractor that funds are available. See, FAR 32.703-2(c).

c. The "subject to the availability of funds" clause will not be read into a contract pursuant to the "Christian Doctrine." See To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485. So, if a contracting officer awards a contract near the end of one fiscal year citing funds of the next fiscal year and neglects to insert the "subject to the availability of funds" clause into the contract, then the award of the contract violates the ADA's prohibition against obligating funds *in advance* of their availability.

d. When a contracting officer awards a contract—containing a "subject to the availability of funds" clause—citing funds of the next fiscal year, this is not a true exception to the ADA's *in advance* of prohibition. This is because when a contracting officer awards a contract subject to the availability of funds, no funds of the next fiscal year are obligated unless and until those funds become available.

6. Variable Quantity Contracts. Requirements or indefinite quantity contracts for services funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year. The contract also must incorporate FAR 52.232-19, Availability of Funds for the Next Fiscal Year. See FAR 32.703-2(b).

B. APPORTIONMENT – THE SECOND LEVEL. 31 U.S.C. §§ 1512 – 1515, 1517(a)(1)

1. Requirement. 31 U.S.C. § 1512 requires apportionment of appropriations. 31 U.S.C. § 1513(b) requires the President to apportion Executive Branch appropriations. The President has delegated the authority to apportion executive branch appropriations to the Office of Management and Budget (OMB).[14]

2. Definition. An "apportionment" is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or programs. The OMB apportions funds to federal agencies based upon the agency's request on SF 132 (Apportionment and Reapportionment Schedule). With regard to DOD, the OMB generally apportions funds on a quarterly (four times per year) basis. OMB Cir. A-11, § 20.3; DOD FMR, vol 3, chap 2, para 020102; DOD FMR, vol 3, chap 13, para 130204.

3. The apportionment is OMB's plan on how to spend the resources provided by law. OMB Cir. A-11, § 120.1; Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. OMB Cir. A-11, § 120.2. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. See 31 U.S.C. § 1512.

   a. Exceptions. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:

      (1) Military and civilian pay increases;

      (2) Laws enacted after budget submission which require additional expenditures; or

      (3) Emergencies involving life or property.

[14] Appropriations for the legislative and judicial branches are apportioned by officials having administrative control over those appropriations. 31 U.S.C. § 1513(a).

b. An agency violates the apportionment statute if it must curtail its activity drastically to enable it to complete the fiscal year without exhausting its appropriation. To John D. Dingell, B-218800, 64 Comp. Gen. 728 (1985); To the Postmaster Gen., B-131361, 36 Comp. Gen. 699 (1957).

4. The ADA Prohibition

a. An officer or employee of the United States may not make or authorize an obligation or expenditure that **exceeds** an amount available in an **apportionment**. 31 U.S.C. § 1517 (a)(1).[15, 16]

b. It can be argued that the statute *does not* prohibit obligating in advance of an apportionment. See Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997). However, service regulations prohibit the practice. *See* FMR Vol III, Chap 13, para 130203A (stating that "except in certain circumstances, as specified in OMB Circular No. A-11, appropriations…by the OMB are required before funds may be obligated."). *See also* AF Procedures for Administrative Control of Appropriations, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are actually apportioned). Moreover, GAO's Red Book clearly asserts that such an act would be an ADA violation. See Red Book, 6-141 for further discussion.

c. So, if an Army contracting officer awarded a contract obligating a given year's O&M funds, exceeding the apportionment for those O&M funds, the contracting officer would have violated the ADA by exceeding the apportionment. 31 U.S.C. § 1517 (a)(1). Since an apportionment is a division of an appropriation (i.e. a division of the Army O&M appropriation), it is possible to exceed an apportionment without exceeding the appropriation.

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[15] The relevant ADA provision states in pertinent part: "An officer or an employee. . . may not make or authorize an expenditure or obligation *exceeding* an (1) apportionment or (2) the amount permitted by regulations prescribed under section 1514(a) of this title" [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a).

[16] Since the Antideficiency Act requires an apportionment before an agency can obligate the appropriation, 31 U.S.C. § 1512(a), an obligation *in advance of* an apportionment violates the Act. See B-255529, Jan. 10, 1994. In other words, if zero has been apportioned, zero is available for obligation or expenditure.

C. ADMINISTRATIVE SUBDIVISIONS – THE THIRD LEVEL. 31 U.S.C. § 1514

1. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:

   a. OMB Cir. A-11, § 150.7. This circular applies to all Executive agencies and requires OMB approval of fund control systems.

   b. DOD Directive 7000.14-R; DOD FMR, vol. 14, ch. 1.

   c. DFAS-IN 37-1, ch. 4 (Army); Air Force Procedures for Administrative Control of Appropriations § 5; DON FMPM, ch. 3. (Navy)

2. Administrative Subdivision of Funds. OMB Cir. A-11, § 150.7; DOD FMR, vol. 1.

   a. **"Formal" Administrative Subdivisions** (i.e. Allocations and Allotments). DFAS-IN 37-1, ch. 3, paras. 0312, 0314; Air Force Procedures for Administrative Control of Appropriations, § 5, para. B. These are formal administrative subdivisions prescribed generally by 31 U.S.C. § 1514. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).

   b. **"Informal" Administrative Subdivisions** (i.e. Allowance/Target/Advisory Guide). DFAS-IN 37-1, ch. 3, para. 031402; Air Force Procedures for Administrative Control of Appropriations, § 6, para. B. These distributions do not create formal administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution.

3. The ADA Prohibition

a. An officer or employee may not make or authorize an obligation or expenditure that **exceeds** the amount available in a **formal administrative subdivision** established by regulations. See 31 U.S.C. §1517(a)(2).[17]

b. So, if a Navy contracting officer awarded a contract obligating FY 2013 O&M Navy funds which exceeds a formal subdivision (of FY 2013 Navy O&M funds), then the contracting officer would have violated the ADA's prohibition against exceeding a formal administrative subdivision. Since a formal administrative subdivision is a division of an apportionment (i.e. a division of the Navy O&M apportionment), it is possible to exceed a formal administrative subdivision without exceeding an apportionment or exceeding an appropriation.

[17] The relevant ADA provision states in pertinent part: "An officer or an employee. . . may not make or authorize an expenditure or obligation *exceeding* an (1) apportionment or (2) the amount permitted by regulations prescribed under section 1514(a) of this title" [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a).

V. P-T-A VIOLATIONS AND THE ANTIDEFICIENCY ACT (AKA ACTIONS THAT CAN RESULT IN ADA VIOLATIONS)

A. Purpose

1. A violation of the Purpose Statute (31 U.S.C. § 1301(a)) may also lead to a violation of the Antideficiency Act (31 U.S.C. § 1341 or § 1517), but all Purpose Statute violations are not ADA violations. To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (stating that even if the wrong appropriation was charged, the ADA is not violated unless the proper funds were not available at the time of the obligation and at the time of correction and continuously between those two times).[18] See also AF Procedures for Administrative Control of Appropriations, § 10, para. F.4. (providing that a reportable ADA violation may be avoidable if proper funds were available at the time of the original, valid obligation). Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); Funding for Army Repair Projects, B-272191, 97-2 CPD ¶ 141. The November 2010 update to the DOD FMR changed the three-part ADA corrections test to a two part ADA corrections test. Specifically, the DOD FMR provides that even if the wrong appropriation was charged, the ADA is not violated unless the proper funds were not available at the time of the obligation and at the time of correction. DOD FMR, vol. 14, ch. 2, para. 020202.B.

2. Common "Purpose Statute" Violations - Operation and Maintenance (O&M) Funds.

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[18] The GAO has stated:

> Not every violation of 31 U.S.C. § 1301(a) [the Purpose Statute] also constitutes a violation of the Antideficiency Act. . .Even though an expenditure may have been charged to an improper source [i.e. the wrong appropriation], the Antideficiency Act's prohibitions against incurring obligations *in excess* or *in advance of* available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C. § 1301(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriation fund source, although available at the time, was subsequently obligated, making re-adjustment of accounts impossible (emphasis added).

To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422.

a. There is a limitation of $1,000,000 on the use of O&M funds for construction. This is a "per project" limit. See 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable); DOD FMR, vol. 14, ch. 2, para. 020404.4A.1 (stating an ADA violation may occur if this limitation is exceeded); cf. AF Procedures for Administrative Control of Appropriations, § 6, para. C.6(a) ("Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation").

b. DOD activities may use O&M funds for purchase of investment items costing not more than $250,000. See Department of Defense Appropriations Act, 2011, Pub. L. No. 112-10, § 8031. Use of O&M in excess of this threshold is a "Purpose" violation and may trigger an Antideficiency Act violation. See DOD FMR, vol. 14, ch. 2, para. 020404.4A.2.

3. The GAO's concept of "correcting" a Purpose Statute violation (thereby avoiding an ADA violation) is not new. *See* 16 Comp. 750 (1910); 4 Comp. Dec. 314 (1897); DOD FMR, vol. 14, ch. 2, para. 020202.B.

4. "Correcting" a Purpose Statute violation. Despite violating the Purpose Statute, officials **can** avoid an ADA violation if *both* of the following conditions are met:

a. **Proper funds** (the proper appropriation, the proper year, the proper amount) **were available**[19] **at the time of the erroneous obligation**; and

b. **Proper funds were available** (the proper appropriation, the proper year, the proper amount) **at the time of correction for the agency to correct the erroneous obligation**.

5. Funding Correction

[19] A fair interpretation of recent GAO cases would be that "available" as it is applied in the "ADA Correction Test" means an existing balance in an appropriation in either "current" or "expired" status. Interagency Agreements—Obligation of Funds Under an IDIQ Contract, B-308969 (May 31, 2007).

a. Whenever an agency obligates and/or expends improper funds (i.e. the wrong appropriation or the wrong fiscal year), the agency must de-obligate the improper funds and obligate the proper funds. This is called a "funding correction" and must be accomplished whether or not the original obligation results in an ADA violation *See* DOD FMR, vol. 14 ch. 5, para. 050403.

b. For example, if the Air Force obligated Air Force, O&M funds for a construction project with a funded cost of $1.5 million, then the Air Force has committed a Purpose Statute violation by obligating O&M funds when it should have obligated Unspecified Minor Military Construction Funds. This Purpose Statute violation will result in an ADA violation unless the Air Force can pass both prongs of the ADA correction test. Whether there is an ADA violation or not, the Air Force must accomplish the "funding correction" by de-obligating the improper funds (Air Force, O&M) and obligating the proper funds (Unspecified Minor Military Construction Funds). *See* DOD FMR, vol. 14 ch. 5, para. 050403.

B. Time ("Bona Fide Needs Rule")

1. A violation of the Bona Fide Needs Rule (31 U.S.C. § 1502(a)) also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. See DFAS-IN 37-1, ch. 8, para. 0803; AF Procedures for Administrative Control of Appropriations, § 10, para. G.

2. To determine whether a Bona Fide Needs Rule violation results in an ADA violation, **follow the same analytical process described above** for determining whether a "Purpose Statute" violation is correctable.

3. Common Bona Fide Needs Rule Violations

a. Formal Contract Changes. Contract changes that are "within the scope" of the original contract must be funded with the appropriation *initially obligated by the contract*; this is true even if the contract change occurs in a fiscal year subsequent to the fiscal year the contract was awarded. Contract changes that are "outside the scope" of the original contract must be funded with the *appropriation that is current at the time the change is made*. See, The Honorable Andy Ireland, B-245856.7. 71 Comp. Gen. 502 (1992). Obligating funds of the wrong fiscal year results in a violation of the Bona Fide Needs Rule, however, this violation may be corrected by applying the ADA 2-part Correction Test.

b. Agencies may not expend *current* fiscal year funds for *future* fiscal year needs. To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962) (stating that a contract for services and supplies with a 3-year base period violated the Bona Fide Needs Rule and the Anti-Deficiency Act because the contract obligated the government in advance of appropriations for the second and third years of contract performance). Such a Bona Fide Needs Rule violation will result in a *per se* ADA violation because this violation cannot pass the ADA 2-part test (if the "proper funds" are future year funds, it is impossible to pass the first prong of the ADA 2-part test—that "proper funds were available at the time of the erroneous obligation"). Note that this analysis differs if you in-appropriately obligated *future* year funds for a *current* year need – in that case you *may* be able to correct with ADA's 2-part test.

C. Amount

1. As previously discussed, making or authorizing obligations or expenditures in excess of funds available in an appropriation, apportionment, or formal administrative subdivision violates the Antideficiency Act. 31 U.S.C. §§ 1341 and 1517.

2. Nevertheless, obligations or expenditures exceeding an informal subdivision of funds do not violate the ADA unless to do so would cause a formal subdivision, an appropriation, or an appropriation to be exceeded.

3. To determine whether an Amount violation results in an actual ADA violation, follow the same analytical process described above used in determining whether a "Purpose Statute" violation is correctable.

4. Common Amount Problems

a. Exceeding the amount available in an informal subdivision, formal subdivision, apportionment, or appropriation. Remember that the ADA only applies at the following levels: formal subdivision, apportionment, and appropriation. Exceeding the amount available in an informal subdivision does not violate the ADA, however, this could lead to an ADA violation if it causes a formal subdivision, apportionment, or appropriation to be exceeded. For example, if a contracting officer at Altus AFB over-obligated its O&M, Air Force allowance (an informal subdivision), that over-obligation would not violate the ADA unless the over-obligation caused an over-obligation of a formal subdivision (in Altus' case, most likely their MAJCOM, AETC), or of an appropriation or apportionment.

b. Over Obligations of Expired and Closed Appropriations. Over obligations arising under expired and closed appropriations may not be paid from current appropriations. If an agency incurs such over obligations, it must report the over obligation to the President and to Congress, and Congress may enact a deficiency appropriation or authorize the agency to pay the over obligations out of current appropriations; absent Congressional authority, a deficiency will continue to exist in the account. Thus, an over obligation of a prior year appropriation is a reportable violation of the Anti-Deficiency Act; this violates the "in excess of" prong of 31 USC § 1341(a)(1)(A). Additionally, charging an over obligation of a prior year appropriation to a current year appropriation violates the Bona Fide Needs Rule. See, The Honorable Andy Ireland, B-245856.7. 71 Comp. Gen. 502 (1992).

D. Additional Antideficiency Act Related Issues

1. Indemnification Provisions. Generally, the GAO and courts have ruled that "open-ended" indemnification provisions in contracts violate 31 U.S.C. § 1341. See e.g., Union Pacific Railroad Corp. v. United States, 52 Fed. Cl. 730 (2002); United States Park Police Indemnification Agreement, B-242146, 1991 US Comp. Gen. LEXIS 1070, Aug. 16, 1991 (stating that absent specific statutory authority, indemnification provisions which subject the government to indefinite or potentially unlimited liability violate the ADA); Project Stormfury, B-198206, 59 Comp. Gen. 369 (1980). To Howard Metzenbaum, B-174839.2, 63 Comp. Gen. 145 (1984); Assumption by Gov't of Contractor Liability to Third Persons, B-201072, 62 Comp. Gen. 361 (1983); Reimbursement of the State of New York Under Support Contract, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 2; cf. E.I. DuPont De Nemours v. United States, 365 F.3d 1367 (2004) (holding that the Contract Settlement Act of 1944 exempted certain contracts with indemnification provisions from operation of the Antideficiency Act). There are statutory exceptions to this general rule:

a. Public Law 85-804 (codified at 50 U.S.C. §§ 1431- 1435 and implemented by E.O. 10,789 and FAR Subpart 50.4) allows the Secretary of Defense and Service Secretaries to approve the use of contract provisions which provide that the U.S. will indemnify a contractor against risks that are "unusually hazardous" or "nuclear" in nature.

b. 10 U.S.C. § 2354 authorizes indemnity provisions for unusually hazardous risks associated with research or development contracts.

c. 42 U.S.C. § 2210(j) permits the Nuclear Regulatory Commission and Department of Energy to initiate indemnification agreements that would otherwise violate the Antideficiency Act.

d. Thus, the above examples are statutory exceptions to "open ended indemnification" provisions that would—absent statutory authority—violate the ADA's prohibition against obligating "in advance of" or "in excess" of the amount available in an appropriation.

2. Judgments. A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. While the "Judgment Fund" (a permanent appropriation allowing the prompt payment judgments) may be available to pay the judgment, the Contract Disputes Act requires agencies to reimburse the Judgment Fund. See, 31 U.S.C. § 1304(a); 28 U.S.C § 2677; 28 U.S.C § 2414. Reimbursement of the Judgment Fund must be paid from appropriations current at the time of the judgment against the agency. If the judgment exceeds the amount available in the appropriate current year appropriation, this deficiency is not an Antideficiency Act violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984) (stating that where current funds are insufficient to reimburse the Judgment Fund there is no ADA violation); Availability of Funds for Payment of Intervenor Attorney Fees, B-208637, 62 Comp. Gen. 692 (1983).

3. Augmentation. An Antideficiency Act violation may arise if an agency retains (aka "augments") and spends funds received from outside sources, absent statutory authority. Unauthorized Use of Interest Earned on Appropriated Funds, B-283834, 2000 US Comp. Gen. LEXIS 163, Feb. 24, 2000 (unpub.) (stating that an agency's spending the $1.575 million in interest it earned after depositing its 1998 appropriation in an interest bearing account was an unauthorized augmentation of funds resulting in an ADA violation). Thus, if an agency improperly receives and retains funds, i.e. interest, from a source other than Congress, then the agency has improperly augmented its appropriation. This augmentation leads to an ADA violation where the agency then expends these additional funds—thereby making obligations or expenditures "in excess" of the amount available in its appropriation.

4. Unauthorized Commitments. Because an unauthorized commitment does not result in a legal obligation, there is no Antideficiency Act violation. Nevertheless, subsequent ratification of the unauthorized commitment could trigger an Antideficiency Act violation. Air Force Procedures for Administrative Control of Appropriations, § 10, para. E; see also FAR 1.602-3(a).

VI. THE ANTIDEFICIENCY ACT'S LIMITATION ON VOLUNTARY SERVICES. 31 U.S.C. § 1342

A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.) (stating that when the agency directed contractors to continue performance despite its insufficient appropriated funds, the agency violated the ADA's prohibition against acceptance of voluntary services). **Thus, absent specific statutory authority, the acceptance of voluntary services is a *per se* ADA violation**.

1. Definition. "Voluntary services" are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June, 2007; Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982.

2. **The ADA Prohibition**. An officer or an employee may not accept 'voluntary services' unless authorized by law. 31 U.S.C. § 1342. The statute states in pertinent part: "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." Id.

   a. When voluntary services may be accepted:

      (1) When authorized by law; or

      (2) For emergencies involving the safety of human life or the protection of property.

b. Examples:

(1) In 2005, the DOD Comptroller concluded that the Oregon Army National Guard accepted "voluntary services" in violation of 31 U.S.C. § 1342 when it accepted free services (without authority to do so) from four civilians who helped to conduct training. A general officer was named responsible for this violation. *See* the GAO's ADA Database at gao.gov/legal products/ADA Reports/2005.

(2) In 2007, the GAO concluded that the President's appointment of Mr. Sam Fox as ambassador to Belgium while Congress was in recess where Mr. Fox could not be compensated (per 5 U.S.C. § 5503) until confirmed did **not** constitute "voluntary services" prohibited by 31 U.S.C. § 1342. *See* Sam Fox, 6.

3. Acceptance of voluntary services does not create a legal obligation of the government. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, 1990 US Comp. Gen. LEXIS 735, July 30, 1990; Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). Cf. T. Head & Co. v. Dep't of Educ., GSBCA No. 10828-ED, 9**3-1** BCA ¶ 25,241.

4. The voluntary services prohibition dates back to 1884.[20]

5. Examples of some types of voluntary services authorized by law:

a. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).

b. 5 U.S.C. § 3111 (student intern programs).

[20] Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June, 2007. In 1884, Congress first prohibited the acceptance of voluntary services in an appropriations law. Congress enacted this provision after receiving claims for "extra services performed here and elsewhere by [employees] of the Government who had been engaged after hours." *Id.* In 1905, Congress passed a permanent statute in order to "cure [the] abuse" where agencies would "coerce their employees to 'volunteer' their services in order to stay within their annual appropriation." *Id.* Later, these employees would seek payment and then Congress would feel a moral obligation to pass a deficiency appropriation. *Id.*

c. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

d. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).

e. 10 U.S.C. § 10212 (SECDEF or Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).

f. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).

B. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs. -- Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

C. Gratuitous Services Distinguished

1. It is not a violation of the Antideficiency Act to accept unpaid services from a person where an advance written agreement is executed that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. See Dep't of the Treasury – Acceptance of Voluntary Services, B-324214, Jan. 27, 2014, 2014 WL 293545; See Sam Fox, 4; Army's Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982; To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).

2. However, an employee may *not* waive compensation (via a gratuitous services agreement) if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev. -- Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program -- State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, 1987 US Comp. Gen. LEXIS 1815, Jan. 2, 1987 (augmentation would occur) with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur). Cf. Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

VII. VOLUNTARY CREDITOR RULE

A. Definition. A voluntary creditor is one who uses personal funds to pay what is perceived to be a government obligation.

B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. Bank of Bethesda, B-215145, 64 Comp. Gen. 467 (1985).

C. Claims Recovery. U.S. International Trade Commission – Cultural Awareness, B-278805, 1999 US Comp. Gen. LEXIS 211, July 21, 1999 (noting that agencies, not the GAO, now must render decisions on such claims); Lieutenant Colonel Tommy B. Tompkins, B-236330, 1989 US Comp. Gen. LEXIS 1305, Aug. 14, 1989; Claim of Bradley G. Baxter, B-232686, 1988 US Comp. Gen. LEXIS 1511, Dec. 7, 1988; Irving M. Miller, B-210986, 1984 US Comp. Gen. LEXIS 1127, May 21, 1984; Grover L. Miller, B-206236, 62 Comp. Gen. 419 (1983); Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine). Cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, 1991 US Comp. Gen. LEXIS, July 22, 1991. See DFAS-IN 37-1, ch. 9, para. 092037. Claims are recoverable if:

1. The underlying expenditure is authorized;

2. The claimant shows a public necessity;

3. The agency could have ratified the transaction if the voluntary creditor had not made the payment.

VIII. PASSENGER CARRIER USE. 31 U.S.C. § 1344

A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for "official purposes." Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't Vehicles for Transp. Between Home and Work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not ADA violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force, 37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

B. Exceptions.

1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.

   a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).

   b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork, or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).

2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.

3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See Home-to-Airport Transp., B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); Home-to-Work Transp. for Ambassador Donald Rumsfeld, B-210555.5, 1983 US Comp. Gen. LEXIS 115, Dec. 8, 1983.

C. Penalties

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).

2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a $10,000 fine).

IX. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS

A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518

1. Officers or employees who authorize or make prohibited obligations or expenditures are subject to administrative discipline, including suspension without pay and removal from office.

2. Military Members "may be subject to appropriate administrative discipline or may be subject to action under the UCMJ." DOD FMR, vol. 14, ch. 9, para. 0901. Civilian employees may be disciplined by "written admonishment or reprimand, reduction in grade, suspension from duty without pay, or removal from office." DOD FMR, vol. 14, ch. 9, para. 0901.

3. **Good faith or mistake of fact does not relieve an individual from responsibility for a violation under this section**. Factors such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline. See DOD FMR, vol. 14, ch. 9, para. 0902.

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A **knowing and willful violation** of the Antideficiency Act is a Class E felony. Punishment may include a $5,000 fine, confinement for up to two years, or both. See also DOD FMR, vol. 14, ch. 9, para. 0903.

X. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, § 145.2; DOD FMR, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3, 4; DON FMPM, pt. E. See also U.S. DEP'T OF ARMY, ANTIDEFICIENCY ACT (ADA) INVESTIGATION MANUAL (October 2010) available at http://asafm.army.mil/Documents/OfficeDocuments/FinancialOps/Guidances/ada//ada-im.pdf.

A. Reporting Suspected Violations.

1. The DOD Financial Management Regulation contains the primary (DOD) guidance regarding the investigation and reporting of ADA violations. According to the FMR, an individual learning of or detecting a suspected ADA violation must report within two weeks the possible violation to his/her chain of command. Upon receiving the report, the military service comptroller "shall evaluate the potential violation for validity and completeness and if it determines a potential violation has occurred, assign a case number for tracking purposes." DOD FMR, vol. 14, ch. 3, para. 0301.[21]

2. It should be noted by Army practitioners that DFAS-IN 37-1 (applying solely to the Army) requires that individuals detecting a possible violation "inform the Director for Resource Management (DRM)" who will then *immediately* notify the commander responsible.[22]

3. Information that must be reported:

a. Accounting classification of funds involved;

[21] In November 2010, Chapter 3, Volume 14 of the FMR was updated and in that update, the FMR deleted the requirement to report preliminary cases to the Office of the Under Secretary (Comptroller) Deputy Chief Financial Officer and clarified when a case number is assigned. DOD FMR, vol. 14, ch. 3, Summary of Changes.

[22] *See* DEFENSE FINANCE AND ACCOUNTING SERVICE, INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION para. 040204 (January 2015). Rather than report within two weeks to the chain of command (under the FMR), 37-1 requires reporting to the DRM followed by immediate notification to the affected commander, who then has 15 days to send a flash report through the MACOM to the Assistant Secretary of the Army for Financial Management & Comptroller. *Id.* For the remainder of the outline, the text refers to FMR requirements (which apply to all services).

b. Name and location of the activity where the alleged violation occurred;

c. Name and location of the activity issuing the fund authorization;

d. Amount of fund authorization or limitation that allegedly was exceeded;

e. Amount and nature of the alleged violation;

f. Date the alleged violation occurred and date discovery;.

g. Means of discovery;

h. Description of the fact and circumstances of the case;

i. Anticipated dates of completions of the investigation and submission of the report; and

j. The names of work phone numbers of member of the preliminary investigation team.

B. Investigations

1. The first step in the investigation process is a **preliminary review** to gather basic facts and ultimately factually establish whether an Antideficiency Act violation "may have occurred." DOD FMR, vol. 14, ch. 3, para. 0302. The focus of this review is on the potential violation and not on corrective actions. In the Army, the investigating officer is normally appointed by either the installation commander of by the applicable Army Command (ACOM) commander. *See* DFAS-IN-37-1, ch. 4, para. 040204. In the Air Force, the investigating officer is normally appointed by the Major Command's Comptroller—although the Air Force Comptroller could assume these duties. See AFI 65-608, Chap 3, para 3.4.

   a. Completion of the preliminary review is usually required within **14 weeks** from the date of the initial discovery. DOD FMR, vol. 14, ch. 3, para. 030202. For Army activities, the preliminary review must be completed within 90 days after discovery of the suspected ADA violation. DFAS-IN 37-1, ch. 4, para. 040204. For the Air Force, the review must be completed and reported to SAF/FMFP no later than 90 days from the review start date. AFI 65-608, para. 3.3.

   b. The preliminary review should focus on the potential violation not on corrective actions. *See*, DOD FMR, Chap 3, para 030202.

   c. The results of the preliminary review must be forwarded to the applicable DOD Component Comptroller, and coordinated with the applicable DOD Component office of legal counsel. *See*, DOD FMR, Chap 3, para 030204.

2. Upon considering the preliminary review, if the DOD Component Comptroller involved determines that there is a potential violation, then a **formal investigation** must be initiated within two weeks from the approval of the preliminary review report. DOD FMR, vol. 14, ch. 3, para. 030205. On the other hand, if the DOD Component involves determines that no violation occurred, then the preliminary review completes the investigation process. FMR, vol. 14, ch. 3, para 030204.

a. The purpose of the formal investigation is to determine the relevant facts and circumstances of the suspected violation – if a violation has occurred, what caused the violation, what are appropriate corrective actions and lessons learned, and who was responsible. DOD FMR, vol. 14, ch. 5, para. 0501.

b. Typically, the Army Command/Air Force MAJCOM commander approves and appoints an adequately trained and qualified individual(s) to serve as formal investigator(s). DOD FMR, vol. 14, ch. 4, para. 040201; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, para. 4.3. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within **12 months and two weeks** from the date the preliminary report ended (or 12 months from the date the formal investigation began if there is no related preliminary review). DOD FMR, vol. 14, ch. 7, para. 070102.

c. The investigating officer (IO) must address the following questions:

(1) Did the violation occur because an individual carelessly disregarded instructions?

(2) Did the violation occur because an individual was inadequately trained or lacked knowledge to properly perform his or her job? If so, then was the individual or a supervisor at fault?

(3) Did the violation occur because of an error or mistake in judgment by an individual or a supervisor?

(4) Did the violation occur because of lack of adequate procedures and controls? If so, then who was at fault?

(5) Did the violation occur because of other reasons? If so, then who was at fault? DOD FMR, vol. 14, ch. 5, para. 050302(E).

d. If the IO believes criminal issues may be involved, the investigation should be stopped immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DOD FMR, vol. 14, ch. 5, para. 050302(F).

C. Establishing Responsibility

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., overobligation, overexpenditure, etc.

2. A responsible individual(s) is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. "However, the investigation shall attempt to discover the specific act -- or failure to take an action -- that caused the violation and who was responsible for that act or failure to take an action." DOD FMR, vol. 14, ch. 5, para. 050302.

3. The investigation report *must* assign responsibility for the violation to "one or more individuals" so that "appropriate administrative or disciplinary action" may be imposed. DOD FMR, vol. 14, ch. 5, para. 050302. Generally, the responsible party (or parties) will be the highest ranking official in the decision making process who had actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. See To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.

D. Reporting the Report of Violation (to OSD Comptroller)

1. At the conclusion of the formal ADA investigation, the IO shall prepare a Report of Violation that documents the results of the investigation pursuant to DOD FMR, Vol 14, ch. 7.

2. OUSD(C) DCFO will consider the report and if it agrees, then it will prepare notification letters to the President, Congress, the GAO. OMB Cir. No. A-11, Exhibit 145A; DOD FMR, vol. 14, Ch. 7, para. 070501. As of 8 December 2004, the report must also be transmitted to the Comptroller General. See Transmission of Antideficiency Act Reports to the Comptroller General of the United States, B-304335, Mar. 8, 2005 (citing 31 U.S.C. §§ 1351, 1517(b), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (2004)).

3. Contents of the final ADA report (to OSD). DOD FMR, vol. 14, Ch. 7, figure 7-1.

   a. Administrative information;

   b. Type of the violation;

   c. Identification of the responsible individual(s);

   d. Cause and circumstances of the violation;

   e. Date and description of how violation was discovered;

   f. Disciplinary action taken;

   g. Corrective action taken;

   h. Evidence of willful intent to violate; actions taken to correct the violation; and

   i. Statement of the responsible individual(s), if any.

   j. Statement as to whether the system of administrative control is adequate.

4. The GAO now maintains an online database of all reported ADA violations which are transmitted to it by the federal agencies. *See* www.gao.gov/legal/antideficiency.html. This database includes the letters from the agency head reporting the ADA violation to the President, Congress and the GAO. The letters generally describe the violation, the appropriation involved, and the amount. Normally, the name(s) of the responsible party also appears on the letters.

XI. CONTRACTOR RECOVERY WHEN THE ADA IS VIOLATED

A. Recovery Under the Contract

1. A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. Hooe v. United States, 218 U.S. 322 (1910) (contract funded with specific appropriation). Cf. American Tel. and Tel. Co. v. United States, 177 F.3d 1368 (Fed. Cir. 1999).

2. Where contractors have not been responsible for exceeding a statutory funding limitation, the courts have declined to penalize them. See, e.g., Ross Constr. v. United States, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (1965).

3. The exercise of an option may be inoperative if the government violates a funding limitation. The contractor may be entitled to an equitable adjustment for performing under the "invalid" option. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327.

B. Quasi-Contractual Recovery. Even if a contract is unenforceable or void, a contractor may be entitled to compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; Prestex Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963); Claim of Manchester Airport Auth. for Reimbursement of Oil Spill Clean-up Expenses, B-221604, Mar. 16, 1987, 87-1 CPD ¶ 287; Department of Labor--Request for Advance Decision, B-211213, 62 Comp. Gen. 337 (1983).

C. Referral of Claims to Congress. The GAO may refer non-payable claims to Congress. 31 U.S.C. § 3702(d); Campanella Constr. Co., B-194135, Nov. 19, 1979, 79-2 CPD ¶ 361.

XII. CONCLUSION

Chapter 5:

Obligating Appropriated Funds

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CHAPTER 5

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CHAPTER 5

OBLIGATING APPROPRIATED FUNDS

I. INTRODUCTION. Following this block of instruction, students will understand:

A. The importance of accounting for commitments and obligations;

B. Amounts to commit and obligate for various types of contract actions.

C. Obligation rules for bid protests, contract changes, contract terminations, litigation, and miscellaneous other circumstances.

II. REFERENCES.

A. 31 U.S.C. § 1501, Documentary evidence requirement for Government obligations.

B. Office of Management and Budget Circular A-11, Section 20.5, (2014) [hereinafter OMB Cir. A-11].

C. Government Accountability Office, Principles of Federal Appropriations Law, Vol. II, ch. 7, Obligation of Appropriations (3d ed. 2006).

D. Department of Defense, DOD Financial Management Regulation, Vol. 3, Budget Execution – Availability and Use of Budgetary Resources, ch.8, Standards for Recording and Reviewing Commitments and Obligations [hereinafter DOD FMR].

E. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, ch. 7 (Commitments) (Apr. 2014) & ch. 8 (Obligation Management) (May 2014) [hereinafter DFAS-IN 37-1].

F. Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Procedures For Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter DFAS-DE, Procedures for Administrative Control]; Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Accounting For Commitments (Oct. 2003) [hereinafter DFAS-DE, Commitments]; and Defense Finance and Accounting Service Instruction 7000.4-I, Accounting for Obligations (Aug. 2013) [hereinafter DFAS 7000.4-I, Obligations].

III. ACCOUNTING FOR COMMITMENTS.

A. Definitions.

1. Certifying Officer. An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. (S)he is responsible for the correctness of the facts and computations, and the legality of payment. DFAS-IN 37-1, Glossary.

2. Funds Certifying Officials. An individual responsible for the proper assignment of funding on a commitment or obligation document before the obligation is incurred. DFAS-IN 37-1, Glossary.

3. Fund Managers. Individuals who manage financial resources to include major activity, sub-activity directors, and their representatives who are delegated fund certification responsibility. DFAS-IN 37-1, Glossary.

4. Certification of Fund Availability. A certification by a funds-certifying official that funds are available in the proper subdivision of funds to cover the obligation to be incurred. This certification authorizes the obligating official to make the desired obligation. DOD FMR, vol. 11A, ch. 18, 180207.

5. Commitment. An administrative reservation of funds based upon firm procurement requests, orders, directives, and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying official. DOD FMR, vol. 3, ch. 15, para. 150202.A.

6. Initiation. An administrative reservation of funds based on procurement directives, requests, or equivalent instruments that authorize preliminary negotiations, but require that funds be certified by the official responsible for the administrative control of funds before incurrence of the obligation. Initiations help keep pre-commitment actions, such as approved procurement programs and procurement directives, within the available subdivision of funds. Synonyms may be used for this term. DOD FMR, vol. 1, Definitions.

B. Rules Governing Commitments.

1. When used. DOD and OMB have agreed to use commitment accounting procedures for military construction; research, development, test, and evaluation; and procurement appropriations. Commitments need not be recorded for small purchases if, in the aggregate, they are insignificant in the management of funds. Commitment accounting is not required for other accounts, but may be used if cost effective. Commitment accounting is not required for the operation and maintenance appropriation accounts, revolving fund accounts, or military personnel appropriation accounts, but may be used if cost effective. DOD FMR, vol. 3, ch. 15, para. 150202C.

   a. Army. The Army requires the use of commitment registers for all unexpired funds by the accountable financial officers as well as certification of fund availability for unexpired and expired appropriations. DFAS-IN 37-1, ch.2, para. 020302.K; ch. 3, para. 031701.

   b. Air Force. Commitment accounting is prescribed for all Air Force appropriations, apportioned stock fund divisions, management funds, contract authorizations, administrative and direct cite foreign military sales (FMS) trust fund, and special fund appropriations. *See* Interim Guidance on Accounting for Commitments (October 2003), p. 3-1.

2. Who. The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment document.[1] DOD FMR, vol. 3, ch. 15, para. 150202A.

[1] A commitment document is an order form used to ensure that funds are available prior to incurring an obligation. Commitments in the Army may be accomplished using DA Form 3953 (Purchase Request and Commitment, PR&C) or similar documents having the effect of a firm order or authorization to enter into an obligation. DFAS-IN 37-1, ch. 8, para. 081305. *See* Appendix C for an example of the PR&C.

a. Army. Serviced activities or fund managers will maintain commitment registers, and are responsible for processing, recording, and performing the oversight function for commitment accounting. Fund control responsibilities may be delegated, in writing, to the Director of Resource Management (DRM)/ Comptroller or other appropriate official(s) IAW regulation. Designated officials will perform commitment accounting as required. DFAS-IN 37-1, ch. 3, para. 030209C.

b. Air Force. Financial Service Office(r) will certify fund availability before obligations are authorized or incurred against funding documents. DFAS-DE Interim Guidance, Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sept. 1999), p. 1-7.

3. Why. Commitment accounting helps ensure that the subsequent entry of an obligation will not exceed available funds. DOD FMR, vol. 3, ch. 15, para. 150202A. Issuing a commitment authorizing obligations in excess of an appropriation or formal subdivision of funds could result in an Antideficiency Act violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517.

4. What. Activities may commit funds only to acquire goods, supplies, and services that meet the bona-fide needs of the period for which Congress appropriated funds, or to replace stock used during that period. DOD FMR, vol. 3, ch. 8, para. 080201; DFAS-IN 37-1, ch. 8, para. 080608;

5. Agencies cancel outstanding commitments when the committed funds expire for obligation. DOD FMR, vol. 3, ch. 15, para. 150202F.

C. Determining the Amounts of Commitments. Agencies commit funds according to the following rules:

1. General. Record as a commitment the cost estimate set forth in the commitment document. DOD FMR, vol. 3, ch. 8, para. 080201.

2. Contingent liabilities. As a budgetary term, a contingent liability represents a variable that cannot be recorded as a valid obligation. DOD FMR, vol. 1, Definitions. A contingent liability ripens into a recordable obligation for purposes of 31 U.S.C. § 1501 only if and when the contingency materializes. *See, e.g.*, National Mediation Board—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act, B-305484, Jun. 2, 2006. Commit an amount that is **conservatively estimated to be sufficient** to cover the additional obligations that probably will materialize, based upon judgment and experience. Allowances may be made for the possibilities of downward price revisions and quantity underruns. The contingent liability shall be supported by sufficient detail to facilitate audit. DOD FMR, vol. 3, ch. 8, para. 080202A. Examples of contract actions requiring a contingent liability commitment include:

   a. Fixed-price contracts with price escalation, price redetermination, or incentive clauses, such as economic price adjustments (EPAs).

   b. Contracts authorizing variations in quantities to be delivered.

   c. Contracts where allowable interest may become payable on a contractor claim supported by a written appeal pursuant to the "Disputes" clause of the contract.

   d. Cost-reimbursable and time-and-material contracts.

      (1) Commitment amounts relating to cost-plus-fixed-fee, cost-sharing, cost-plus-incentive-fee, time-and-material, and labor-hour contracts should include the fixed-fee in the cost-plus-fixed-fee and the target fee in the cost-plus-incentive-fee. *See* Interim Guidance on Accounting for Commitments (October 2003), p. 4-4.

      (2) Cost-plus-award-fee contracts. Commit the estimated cost, the base fee, and an estimated amount based on judgment and experience for the award fee. *See* Interim Guidance on Accounting for Commitments (October 2003), p. 4-4.

3. Letter contracts and letters of intent. Commit **funds to cover the difference** between the maximum legal liability of the government under the interim agreement and the maximum estimated cost of the definitized contract. An exception is a letter providing that award of the definitive contract is dependent upon a congressional appropriation, in which case no funds are available for commitment. DOD FMR, vol. 3, ch. 8, para. 080202B.

4. Open-end contracts and option agreements. Commit funds only when the amount estimated is **reasonably firm**. DOD FMR, vol. 3, ch.8, para. 080202C.

5. Contract Amendments or Engineering Changes. Commit an amount based on a stated **cost limitation**. DOD FMR, vol. 3, ch. 8, para. 080202D.

6. Intra-Governmental Requisitions and Orders (such as a DD Form 448, "Military Interdepartmental Purchase Request"). Commit the **amount of the order** until validly obligated under the guidelines of the DOD FMR. DOD FMR, vol. 3, ch. 8, paras. 080202E and 0807.

7. Imprest Funds.[2] Record as a commitment **before funds are advanced** to the imprest fund cashier. DFAS-DE, Accounting For Commitments, p. 4-2; see also Appropriations Accounting for Imprest Fund Advances Issued to Cashiers, B-240238, 70 Comp. Gen. 481 (May 8, 1991).

8. Commit no funds for--

   a. Potential termination charges on multi-year contracts that provide for cancellation charges if the government must cancel the contract for reasons other than contractor liability. DOD FMR, vol. 3, ch. 8, para. 080202F.

   b. Blanket Purchase Agreements. DFAS-DE, Accounting For Commitments, p. 4-2.

[2] An imprest fund is a "cash fund of a fixed amount established by an advance of funds with or without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts." FAR 13.001. DOD FMR, vol. 5, Glossary. For DOD activities, imprest funds may be used **only** for classified operations or contingency, humanitarian or peacekeeping operations overseas. DOD 7000.14-R, vol. 5, ch. 2, para. 020402 and DFAR 213.305-3(d).

D. Advanced Acquisition Planning for the Next FY Funding. In some instances, qualified statements are used to provide authority to contracting officers to proceed with advance contracting actions before actual receipt of funds. DFAS-DE, Accounting For Commitments, p. 3-4.

1. Air Force. Instead of a certification of fund availability, the following statement must be placed upon the request for purchase and signed by budget office personnel at the time approval is obtained: "This requirement is included or provided for in the installation or major command financial plan for FY___. The accounting classification shall be ___." See DFAS-DE 7010.5-R, para. C3.6.2.5.

2. Army. The comptroller or designee shall sign the following statement on the purchase request: "This requirement is included or provided for in the financial plan for FY___. The accounting classification will be ___. This statement is not a commitment of funds." See AFARS 5132.702(a)(ii)(A).

IV. OBLIGATION OF FUNDS.

A. Definitions.

1. Obligation. An act which creates a **legal liability** on the part of the Government for the payment of appropriated funds for goods and services ordered or received. GAO Redbook, Vol. II, page 7-3 to 7-4.

2. Examples: Amounts of orders placed, contracts awarded, services received, and similar transactions that will require payments during the same or a future period. The legal requirement for recording obligations is found in 31 U.S.C. § 1501. OMB Cir. No. A-11, para. 20.5, page 22. All obligations require a standard document number (SDN). DFAS-IN 37-1, para. 080102. SDN formats are in DFAS Manual 37-100-** (** indicates fiscal year).

3. The obligation takes place when the definite commitment is made, even though the actual payment may not take place until the following fiscal year. GAO Redbook, Vol. II, page 7-4.

4. Current Appropriation. An appropriation whose availability for new obligations has not expired under the terms of the applicable appropriations act. See, generally, GAO Redbook Vol. 1, pages 2-13 to 2-15.

5. Expired Appropriation. An appropriation whose availability for new obligations has expired, but which retains its fiscal identity and is available for recording, adjusting, and liquidating obligations properly chargeable to that appropriation. 31 U.S.C. § 1553(a).

6. Closed Appropriation. An appropriation that is no longer available for any purpose. An appropriation becomes "closed" five years after the end of its period of availability as defined by the applicable appropriations act. 31 U.S.C. § 1552(a).

B. General Rules.

1. An obligation must be definite and certain. GAO Redbook, Vol. II, page 7-3.

2. Obligate funds only for the purposes for which they were appropriated. 31 U.S.C. § 1301(a).

3. Obligate funds only to satisfy the bona fide needs of the current fiscal year. 31 U.S.C. § 1502(a); DOD FMR, vol. 3, ch. 8, para. 080303A.

4. Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. DOD FMR, vol. 3, ch. 8, para. 080303B.

5. Generally, obligate current funds when the government incurs an obligation (incurs a liability). DOD FMR, vol. 3, ch. 8, para. 080302. *See* Department of Defense—Obligation of Bonuses under Military Service Agreements, B-325526, Jul. 16, 2014 (holding that for recruiting and retention bonus agreements that are paid in installments over a number of years, DoD incurs an obligation for the entire bonus amount when it enters into the bonus agreement and should charge the entire amount to an appropriation current at the time of agreement). Some exceptions, discussed in this outline and in the "Time" outline, include: Protests (see section VIII.A of this outline); Replacement contracts for contracts that have been terminated for default (see section VI of this outline); and "in-scope" contract changes (see section VI.B of this outline).

6. An improper recording of funds does not create a contractual right. Integral Systems v. Dept. of Commerce, GSBCA 16321-COM, 05-1 BCA ¶ 32,946 (Board rejected a constructive option argument based on the recording of an option exercise which failed to occur).

7. Do not obligate funds in excess of (or in advance of) an appropriation, or in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. §§ 1341, 1517; DOD FMR, vol. 3, ch. 8, para. 080301

8. Subject to the Availability of Funds. Execute contracts "subject to the availability of funds" (SAF) if administrative lead-time requires contract award prior to the receipt of funds to ensure timely delivery of the goods or services. If a SAF clause is used, the Government shall not accept supplies or services until the contracting officer has given the contractor written notice that funds are available. FAR 32.703-2.

   a. FAR 52.232-18, Availability of Funds, may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) (1) necessary for normal operations and (2) for which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements. FAR 32.703-2(a).

   b. FAR 52.232-19, Availability of Funds for the Next Fiscal Year, is used for one-year indefinite-quantity or requirements contracts for services that are funded by annual appropriations that extend beyond the fiscal year in which they begin, provided any specified minimum quantities are certain to be ordered in the initial fiscal year. FAR 32.703-2(b).

V. AMOUNTS TO OBLIGATE.

A. General.

1. Recording obligations.

   a. Obtain documentary evidence of the transaction before recording an obligation. 31 U.S.C. § 1501; DOD FMR, vol. 3, ch.8, para. 080302; DFAS-DE 7000-4, para. 3; DFAS-IN 37-1, chapter 8.

b. Contracts, purchase orders, rental agreements, travel orders, bills of lading, civilian payrolls, and interdepartmental requisitions are common contractual documents supporting obligations.
DFAS-IN 37-1, chapter 8.

2. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it.

3. Obligation must be recorded no later than ten calendar days following the day that an obligation is incurred. Obligations of $100,000 or more must be recorded in the same month, but every effort should be made to record an obligation in the same month. DoD FMR, vol. 3, ch. 8, para. 080301A

B. Contract Types.

1. Firm-Fixed Price Contracts (FFP). FAR 16.202.

a. Description. FFP contracts are not subject to price changes during performance, regardless of contractor cost experience. All risk of increased costs of performance fall on the contractor.

b. Amount to Obligate. Record **total amount** stated in the contract. DOD FMR, vol. 3, ch. 8, para. 080501.

2. Fixed-Price contracts with escalation, price redeterminations, incentive provisions, and award fees. In each case below, obligate the **target or billing price** stated in the contract, even though the ceiling price may be higher. DOD FMR, vol. 3, ch.8, para. 080502.

a. Fixed-Price Contract with Economic Price Adjustment (FP w/EPA). FAR 16.203.

(1) The Economic Price Adjustment (EPA) clause, FAR 52.216-2, provides for government assumption of a portion of the cost risk of certain unforeseeable price fluctuations, such as material or wage increases. If the clause is inserted into a contract, the government will absorb some cost increases.

(2) Amount to Obligate. At the time of contract award, obligate the **amount of the base contract**. No additional obligation of funds is required, as the contract price will be adjusted later if the contingencies occur.

b. Fixed-Price Contracts with Price Redetermination (FPR). FAR 16.205 and 16.206. There are two types, based on the structure of the contract. For both, obligate the **target or billing price** (the base contract price):

(1) Prospective. Price is fixed for initial quantities, but is adjusted periodically for future quantities based upon the contractor's cost experience. This type is useful on initial production contracts.

(2) Retroactive. Price for work already performed is subject to redetermination based upon the contractor's actual cost experience. This type of contract is useful on small R&D contracts and other contracts where unresolved disagreements over cost accounting issues may affect price significantly.

c. Fixed-Price-Incentive Contract (FPI). FAR 16.403.

(1) An FPI contract provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of the total final negotiated cost to the total target cost. The final price is subject to a price ceiling, negotiated at the outset.

(2) The contractor bears all costs above the fixed ceiling price.

(3) Amount to Obligate. Obligate the **fixed price** stated in the contract, or the target or billing price in the case of a contract with an incentive clause. Subsequently, adjust to a "best-cost estimate" whenever it is determined that the actual cost of the contract will differ from the original target. DOD FMR, vol. 3, ch.8, para. 080502.

d. Fixed-Price-Award-Fee Contracts. FAR 16.404.

(1) Contractor receives a negotiated fixed price (which includes normal profit), with an opportunity to receive additional award fee based upon the quality of its performance.

(2) Award-fee provisions may be used when the Government wishes to motivate a contractor and other price incentives cannot be used because contractor performance cannot be measured objectively.

(3) Amount to Obligate. Obligate the **fixed price** stated in the contract, but **not** the award fee. Obligate award when determined that award will be paid. Obligation for award is against the same appropriation and FY used for contract. DoD FMR, vol. 3, ch. 8, para. 080511D; DFAS-IN 37-1, Table 8-1.

BASIS FOR RECORDING OBLIGATIONS			
Contract Type	**Appropriation Year**	**Basis for Recording Obligation**	**Obligation Amount (note 1)**
1. Government Charge Card (non-CARE)	Current	Historical	Estimated monthly purchases.
2. Cost Reimbursable	Current	Contract Award	Full Amount
3. Cost-Plus-Fixed-Fee	Current	Contract Award	Full amount of contract, including the fixed fee.
4. Cost-Plus-Incentive-Fee	Current	Contract Award	Full amount of contract, including the incentive fee.
5. Cost-Plus-Award-Fee	Current	Contract Award	Full amount of contract, **not** including the award amount. Obligate award when determined that award will be paid. Obligation for award is against same appropriation and FY used for contract.
6. Cost Reimbursable with Delivery Orders	Current	Contract Award and delivery orders	Minimum liability of the U.S. Government when contract awarded. Obligate additional funds over minimum for each order when placed.
7. Firm Fixed Price	Current	Contract Award	Full Amount
8. Firm Fixed Price with Escalation Clause	Current	Contract Award	Target Amount
9. Indefinite	Current	Contract	When contract is awarded obligate

Delivery, Indefinite Quantity		Award and delivery orders	minimum liability of U.S. Government. Obligate additional funds over minimum for each order when placed.
10. Indefinite Delivery, Definite Quantity	Current	Contract Award	Full amount for quantity required in current year. (see note 2)
11 Job Order Contracts	Current	Contract Award	Minimum liability of U.S. Government and delivery orders in excess of the minimum liability.
12. Letter Contract	Current	Upon Issuance	The amount of maximum legal liability. (see note 3)
13. Letter Contract	Current	When Definitized (see note 4)	Adjust the recorded obligation to equal the contract amount.
14. Non-severable contract. (see note 5)	Current	Contract Award	Full amount unless restricted by other obligation rules.
15. Purchase Order $100,000 and less.	Current	Upon Issuance	Full Amount
16. Purchase Order over $100,000.	Current	Upon written acceptance or constructive acceptance based on delivery	Full Amount

(4) Funding Limitations: FAR 16.4 requires the government to evaluate contractor performance in deciding how much award fee to pay the contractor. FAR 16.401(e) includes a matrix to assist contracting officers in deciding how much fee to pay.

Rating	Definition of Rating	Award Fee
Unsatisfactory	Contractor had failed to meet the basic (minimum essential) requirements of the contract.	0%

Satisfactory	Contractor has met the basic (minimum essential) requirements of the contract.	No Greater than 50%
Good	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 50% of the award fee criteria established in the award fee plan.	51% - 75%
Excellent	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 75% of the award fee criteria established in the award fee plan.	76% - 90%
Outstanding	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 90% of the award fee criteria established in the award fee plan.	91% - 100%

3. Cost-Reimbursement Contracts. FAR Subpart 16.3.

a. Description. These contract types provide for payment of allowable incurred costs to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed–except at its own risk—without the approval of the contracting officer. FAR 16.301-1.

b. Cost ceilings. Ceilings are imposed through the Limitation of Cost clause, FAR 52.232-20 (fully funded), or the Limitation of Funds clause, FAR 52.232-22 (incrementally funded). The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. RMI, Inc. v. United States, 800 F.2d 246 (Fed. Cir. 1986).

c. Fees. In Government contracting, fee is a term of art for the profit the Government agrees to pay on some cost-reimbursement contracts.

d. Types of Cost-Reimbursement Contracts.

(1) Cost-Plus-Fixed-Fee (CPFF) Contract. FAR 16.306.

(a) The contract price is the contractor's allowable costs, plus a fixed fee, which is negotiated and set prior to award.

(b) Obligate the **full amount** of the contract (i.e. total estimated costs), including the fixed fee. DFAS-IN 37-1, Table 8-1.

(2) Cost-Plus-Incentive-Fee Contract (CPIF). FAR 16.304, FAR 16.405-1.

(a) This type specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee payable to the contractor is determined in accordance with the formula.

(b) Obligate the **total estimated payment**, including the target fee. DOD FMR, vol. 3, ch. 8, para. 080503.

(3) Cost-Plus-Award-Fee (CPAF) Contract. FAR 16.305 and 16.405-2.

(a) The contractor receives its costs; a base fee[3] that is fixed at award; and, possibly, an additional award fee based upon the quality of the contractor's performance.

(b) The award fee is determined unilaterally by the contracting officer or Award Fee Determining Official.

(c) Obligate the **total estimated payment**, including the base fee. Do not include the award amount. Obligate award fee when determined that award will be paid. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

(d) Funding Limitations: The fee limitations of FAR 16.4 also apply to CPAF contracts.

[3] For DOD contracts, base fees are limited to 3% of the estimated cost at time of award. DFARS 216.405-2(c)(ii)(2)(b).

(4) Cost Contract. FAR 16.302.

(a) The contractor receives its allowable costs but no fee.

(b) Obligate total estimated payment of the contract. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

(5) Time-and-Materials (T&M), FAR 16.601, and Labor-Hour (L-H) Contracts, FAR 16.602.

(a) T&M contracts and LH contracts are used when it is impossible at the outset to estimate accurately the extent or duration of the work. The work being acquired is defined as a specified number of hours effort by an individual of a certain skill level.

(b) The contract is priced at a specified firm-fixed-price per labor hour for each skill level. In a T&M contract, materials are priced at cost plus material overhead.

(c) Amount to obligate. Obligate the **minimum liability** exclusive of permitted variations. Obligate additional funds for each delivery order when the order is placed. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, tbl. 8-1.

4. Indefinite Delivery Contracts.

a. Variable Quantity Contracts.

(1) Indefinite-Quantity/Indefinite-Delivery Contracts (also called Minimum Quantity). FAR 16.504.

(a) An ID/IQ contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor shall furnish any additional quantities, not to exceed the stated maximum. FAR 16.504(a).

(b) The government must buy the minimum quantity, but may purchase up to the maximum quantity. The government issues task orders (for services) or delivery orders (for supplies) as needs arise.

(c) Amount to obligate. Obligate the amount of the stated minimum quantity at the time of contract award. Once the stated minimum is ordered, obligate funds for each additional order at the time the order is issued. DOD FMR, vol. 3, ch. 8, para. 080504; DFAS-IN 37-1, tbl. 8-1.

(d) Any indefinite delivery/indefinite quantity (ID/IQ) contract must include a guaranteed minimum order of goods or services under that contract. The government is required to order at least that minimum quantity from the contractor (or contractors). Because the government must pay for at least the guaranteed minimum, that amount must reflect a valid *bona fide* need at the time the contract is executed. B-321640, U.S. Small Business Administration—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum (2011).

(e) Statutory Limitation on Awarding Sole-Source ID/IQ's: Section 843 of the 2008 NDAA limited DoD's ability to award large, sole-source task orders on ID/IQ contracts. Section 843, which is implemented through FAR 16.5(c)(1)(ii)(D), modified Title 10 by prohibiting the award of any ID/IQ estimated to exceed $100 million (including options), unless the head of the agency determines, in writing, that:

(i) the task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) the contract provides only for firm, fixed price task orders or delivery orders for— products for which unit prices are established in the contract, or services for which prices are established in the contract for the specific tasks to be performed;

(iii) only one source is qualified and capable of performing the work at a reasonable price to the government; or

(iv) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source.

(v) Finally, the head of the agency must notify Congress within 30 days after any written determination authorizing the award of an ID/IQ estimated to exceed $100 million.

(2) Indefinite delivery-definite quantity contracts. FAR 16.502.

(a) The quantity and price are fixed. The government issues task (for services) or delivery orders (for supplies) to specify the delivery date and location.

(b) Amount to obligate. Obligate the **full amount of the definite quantity** (for the quantity required in the current year) at the time of contract award. DFAS-IN 37-1, tbl. 8-1; DoD FMR. Vol. 3, ch. 8, para. 080504. Note that the agency must have a valid *bona fide* need for the full quantity at the time of contract award.

(3) Requirements Contracts. FAR 16.503.

(a) The government fills all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor.

(b) Amount to obligate. Obligate no funds at contract award. Record each order, when issued, as a separate obligation. DFAS-IN 37-1, tbl. 8-1; DOD FMR, vol. 3, ch. 8, para. 080504.

5. Letter Contracts or Letters of Intent.

a. Defined. Letter contracts are used to expedite performance in exigent or emergency circumstances.

b. Definitization. The parties must reduce the contract terms to writing within 180 days after issuance. FAR 16.603-2c; DFARS 217.7404-3. Until the contract terms are definitized, the government may not pay the contractor more than 50% of the NTE price. 10 U.S.C. § 2326; FAR 16.603-2(d).

c. Amount to obligate. Obligate current funds in the amount of the maximum liability authorized. When the contract is definitized, adjust the obligation to equal the final amount. In adjusting the balance, use funds currently available for obligation. DOD FMR, vol. 3, ch. 8, para. 080507; DFAS-IN 37-1, tbl. 8-1; Obligating Letter Contracts, B-197274, Sept. 23, 1983, 84-1 CPD ¶ 90.

6. Purchase Orders.

a. A purchase order creates an obligation if the purchase order represents acceptance of a binding written offer of a vendor to sell specific goods or furnish specific services at a specific price, or the purchase order was prepared and issued in accordance with small purchase or other simplified acquisition procedures. DOD FMR, vol. 3, ch. 8, para. 080510A.

b. A purchase order requiring acceptance by the vendor before a firm agreement is reached must be recorded as an obligation in the amount specified in the order at the time of acceptance. If written acceptance is not received, delivery under the purchase order is evidence of acceptance to the extent that delivery is accomplished during the period of availability of the appropriation or funding cited on the purchase order. If delivery is accepted subsequent to the period of availability, a new or current funding citation must be provided on an amended purchase order. DOD FMR, vol. 3, ch. 8, para. 080510B.

7. Service Contracts.

a. Severable Services. Absent a statutory exception, severable services are the *bona fide* need of the fiscal year in which performed. Thus, agencies must fund service contracts with dollars available for obligation on the date the contractor performs the services. Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216; Matter of Funding of Air Force Cost Plus Fixed Fee Level of Effort Contract, B-277165 (2000).

b. Statutory exception to severable service bona fide needs rule: DOD agencies may obligate funds current at the time of award to fully finance any severable service contract with a period of performance that does not exceed one year. See 10 U.S.C. § 2410a (this authority also covers the Coast Guard). Similar authority exists for non-DOD agencies. See 41 U.S.C. § 253*l*. However, the agency must obligate the funds for the contract before the funds expire. National Labor Relations Board – Improper Obligation of Severable Service Contract, Comp. Gen. B-308026, Sept. 14, 2006 (due to "ministerial" error, NLRB failed to obligate FY 05 funds for an option year for service contract that ran from 1 Oct 05 – 30 Sep 06). "Fund holders may obligate funds current when a severable service contract is signed for the amount of the contract provided the contract does not exceed 12 months. Fund holders may also split the obligation between fiscal years that the contract covers provided the contract does not exceed 12 months. Severable service contracts that exceed 12 months will be funded by appropriations of the fiscal years in which the services are rendered." DFAS-IN Reg. 37-1, para. 080603(A); DOD FMR, vol. 3, ch. 8, para. 080303.C.

c. Nonseverable services. If the services produce a single or unified outcome, product, or report, the services are nonseverable. If so, the government must fund the entire effort with dollars available for obligation at the time the contract is awarded, and the contract performance may cross fiscal years. DFAS-IN 37-1, tbl. 8-1; Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Fiscal Year Appropriation to Charge for Contracts and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986).

8. Options.

a. Defined. An option is an offer that is irrevocable for a fixed period. An option gives the government the unilateral right, for a specified time, to order additional supplies or services, or to extend the term of the contract, at a specified price. FAR 2.101.

b. Amount to Obligate. Obligate funds for each option period after funds become available. Obligations must be consistent with all normal limitations on the obligation of appropriated funds, e.g., bona fide needs rule, period of availability, and type of funds. DoD FMR, vol. 3, ch. 8, para. 080303.A.

c. For severable service contracts, option years are treated as new contracts. Therefore, when the severable service contract has renewal options, obligate funds for the basic period and any penalty charges for failure to exercise options. DFAS-IN 37-1, ch. 8, para. 080603.B.

9. Rental Agreements and Leases of Real or Personal Property. Generally, obligate for one month at a time throughout the term of the rental agreement. Determine the amount of the obligation by analyzing the government's rights to terminate the rental agreement or lease. DOD FMR, vol. 3, ch. 8, para. 080603.

(1) If the government may terminate a rental agreement without notice and without obligation for any termination costs, obligate the monthly amount of the rent on a monthly basis. DOD FMR, vol. 3, ch. 8, para. 080602.

(2) If the government may terminate a rental agreement without cost upon giving a specified number of days notice, obligate the monthly amount of the rent. Additionally, obligate for the number of days notice the government is required to give. DOD FMR, vol. 3, ch. 8, para. 080603.

(3) If the rental agreement provides for a specified payment in the event of termination, obligate the monthly rental amount plus the amount of the termination payment. DOD FMR, vol. 3, ch. 8, para. 080604.

(4) If a domestic or foreign rental agreement has no termination provision and is financed with an annual appropriation, obligate the full amount of the rental agreement (up to 12 months), even if the rental agreement extends into the next fiscal year. DOD FMR, vol. 3, ch. 8, para. 080605.

(5) The government may enter into leases of structures and real property other than military family housing in foreign countries for periods up to 5 years and the rent for each yearly period is paid from funds appropriated for that year (ten years for family housing outside Korea and 15 years in Korea) and rent may be paid on an annual basis for from funds appropriated from that year. 10 U.S.C. § 2675. DOD FMR, vol. 3, ch. 8, para. 080605.

10. Reimbursable Orders Placed With DOD Components or Other U.S. Government Agencies.

a. Reimbursable orders. The requiring agency records an obligation when the procuring agency accepts the order in writing. DOD FMR, vol. 3, ch. 8, para. 080701; DFAS-IN 37-1, tbl. 8-2.

b. Direct citation method. Record the obligation when the requiring agency is notified, in writing, that the acquiring agency's contract, project order, purchase order, etc., has been executed, or when the requiring agency receives copies of the obligating documents (contract, delivery order, etc.) from the procuring agency. DOD FMR, vol. 3, ch. 8, para. 080702. For the Army, DFAS-IN 37-1, tbl. 8-2, provides that the requiring agency may record the obligation only upon receipt of the obligating documents from the acquiring agency. DFAS guidance regarding reimbursable orders and direct fund cite orders: When a direct fund cite is used, the performing activity will provide a copy of the contract or other obligating document to the ordering activity. This will provide the documentation required to record the obligation. If not using direct fund cite, the ordering activity will obligate upon receipt of the accepted DD Form 448-2. DFAS-IN 37-1, para. 081207(A).7.d.Section 8070 of the 2005 Appropriations Act stated that O&M funds used for the following contracts may be obligated at the time the reimbursable order is accepted by the performing activity: supervision and administration costs for facilities maintenance and repair, minor construction, or design projects, or any planning studies, environmental assessments or similar activities related to installation support functions. 108 P.L. 287 (Aug. 5, 2004). This provision applies in future years, and has not been rescinded as of the 2015 NDAA or DODAA.. See also Sec. 9003 of the 2015 Department of Defense Appropriations Act, 113 P.L. 235 (Dec. 16, 2014) (providing that "[s]upervision and administration costs and costs for design during construction associated with a construction project funded with appropriations available for operation and maintenance or the 'Afghanistan Security Forces Fund' provided in this Act and executed in direct support of overseas contingency operations in Afghanistan, may be obligated at the time a construction contract is awarded: Provided, That for the purpose of this section, supervision and administration costs and costs for design during construction include all in-house Government costs.").

c. Orders placed with DOD components under the Project Order Statute (41 U.S.C. § 23), or with other U.S. governmental agencies under the Economy Act or non-Economy Act (31 U.S.C. § 1535). DOD FMR, vol. 3, ch. 8, para. 080703.

(1) Project orders. When the performing activity accepts the order in writing, obligate funds in the amount stated in the order. DOD FMR, vol. 3, ch. 8, para. 080703.A; DFAS-IN 37-1, tbl. 8-2.

(2) Economy Act orders. Requesting agencies must obligate funds when the performing activity accepts the order in writing. Deobligate funds on Economy Act orders issued against annual or multiple year appropriations to the extent the unit or agency filling the order has not incurred obligation before the period of availability of the funds by providing goods or services, or making an authorized contract to provide the requested goods or services. DOD FMR, vol. 3, ch. 8, para. 080703B; DFAS-IN 37-1, tbl. 8-2.

(3) Non-Economy Act Orders. Obligate funds only when supported by documentary evidence of an order required by law to be placed with an agency or upon a binding agreement (funding vehicle) between an agency and another person (including an agency); the agreement is in writing; is for a purpose authorized by law; serves a bona fide need arising, or existing, in the fiscal year or years for which the appropriation is available for new obligations; executed before the end of the period of availability for new obligation of the appropriation or fund used; and provides for specific goods to be delivered, real property to be bought or leased, or specific services to be supplied. Funds provided to a performing agency for ordered goods where the funds period of availability thereafter has expired shall be deobligated and returned by the performing agency unless the request for goods was made during the period of availability of the funds and the time(s) could not be delivered within the funds period of availability because of delivery, production, manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the parties. DOD FMR, vol. 11A, ch. 18, para. 180301.

d. Orders required by law to be placed with another U.S. governmental agency, such as the Federal Prison Industries (18 U.S.C. § 4124), or the Government Printing Office (44 U.S.C. § 111). Record as an obligation by the requiring agency in the amount stated in the order when the order is issued. DOD FMR, vol. 3, ch. 8, para. 080703; DFAS-IN 37-1, tbl. 8-2.

e. It is improper to "bank" an agency's annual funds with a GSA account to cover future year needs. Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001. In accordance with (IAW) 40 U.S.C. 1412(e), Department of Defense (DoD) activities may obtain information technology resources from GSA programs without relying on the Economy Act. The obligation is recorded at the time the activity enters into a binding written interagency agreement with GSA. New needs may not be added to an existing order and funded with expired funds unless deemed to be a within scope change to the original order. DFAS-IN 37-1, para. 080607.

11. Stock Fund Orders. These are orders for stock (i.e. standard) items procured through an integrated material management (IMM) activity, such as vehicle repair parts or ammunition. Record as an obligation when the order is placed. If the item does not have a stock number, record at the time the stock fund accepts the order. DOD FMR, vol. 3, ch. 8, para. 080802.

a. Adjust obligations for undelivered stock fund orders when a change notice affecting price, quantity, or an acceptable substitution is received. DOD FMR, vol. 3, ch. 8, para. 080802A.

b. Cancel a stock fund obligation when notice is received of: (a) unacceptable substitution; (b) transfer of a stock-funded item to funding by a centrally managed procurement appropriation within a DOD component; or (c) advice that the stock fund is unable to perform under the terms of the order. DOD FMR, vol. 3, ch. 8, para. 080802A.

VI. ADJUSTING OBLIGATIONS.

A. Adjusting Obligation Records. For five years after the time an appropriation expires for incurring new obligations, both the obligated and unobligated balances of that appropriation shall be available for recording, adjusting, and liquidating obligations properly chargeable to that account. 31 U.S.C. § 1553(a); DOD FMR, vol. 3, ch. 10, para. 100201A.

B. Contract Changes. A contract change is one that requires the contractor to perform additional work. Identity of the appropriate fund for obligation purposes is dependent on whether the change is "in-scope" or "out-of-scope." The contracting officer is primarily responsible for determining whether a change is within the scope of a contract. DOD FMR, vol. 3, ch. 8, para. 080304, Specific Guidelines for Determining Scope of Work Changes.

1. In-scope change. Charge the appropriation initially used to fund the contract.

   a. Relation-Back Theory. The "relation-back theory" is based upon the rationale "that the Government's obligation under the subsequent price adjustment is to fulfill a bona fide need of the original fiscal year and therefore may be considered as within the obligation which was created by the original contract award." See Environmental Protection Agency - Request for Clarification, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 611, 82-2 CPD ¶ 491; See also The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992).

   b. Increase of ceiling price under cost-reimbursement contract. For an increase in ceiling price not required in the original contract (i.e., discretionary increase), obligate funds from fiscal year cited in the original contract if available, then current funds. DFAS-IN 37-1, table 8-7, note 1. See also Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986) (finding proper the use of current funds to fund increase to CPFF contract).

2. Change outside the scope of the contract. Treat as a new obligation and use funds current when the contracting officer approves the change. Environmental Protection Agency-Request for Clarification, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 82-2 CPD ¶ 491.

3. It is not permissible to obligate for potential contract modifications or close-out costs in order to protect those funds for other obligations. Office of the Special Inspector General for Iraq Reconstruction, INTERIM AUDIT REPORT ON IMPROPER OBLIGATIONS USING THE IRAQ RELIEF AND RECONSTRUCTION FUND (IRRF 2), SIGIR-06-037 (Sept. 22, 2006).

C. Limitations on use of Expired or Current Funds to adjust obligations. 31 U.S.C. § 1553(c); DOD FMR, vol. 3, chs. 8 and 10; DFAS-IN 37-1, para. 0815.

1. Expired Accounts. If a contract change requires the contractor to perform new work (i.e. an in-scope modification that adds tasks or performance objectives), the change is subject to the following provisions:

a. Contract change in Excess of $4 Million. Approval by the Under Secretary of Defense (Comptroller) is required when the amount of an obligation would cause the total amount of charges in any fiscal year for a single program, project, or activity to exceed $4 million and the account being used to fund the obligations is no longer available for new obligation. DOD FMR, vol. 3, ch. 10, para. 100204.

b. Contract change of $25 Million or More. In addition to the requirements for changes in excess of $4 Million, the Under Secretary of Defense (Comptroller) must submit a notice of intention to make the obligation, along with the legal basis and policy reasons for obligation, to the Armed Services and Appropriations Committees of the Senate and the House for those changes of $25 Million or more. DOD FMR, vol. 3, ch. 10, para. 100205.

(1) After 30 days have elapsed following submission of the notice, the proposed obligation may be recorded unless any congressional committee notifies the USD(C) of its disapproval.

(2) DOD components are required to submit to the OUSD(C)(P/B) documentation that explains the circumstances, contingencies, or management practices that caused the need for the adjustment, to include letters to the appropriate congressional committees for the signature of the USD(C).

2. Current Funds otherwise chargeable to Cancelled Account. DOD FMR, vol. 3, ch. 10, para. 100201F. When a currently available appropriation is used to pay an obligation, which otherwise would have been properly chargeable both as to purpose and amount to a canceled appropriation, the total of all such payments by that current appropriation may not exceed the lesser of:

a. The unexpended balance of the canceled appropriation; or

b. The unexpired unobligated balance of the currently available appropriation; or

c. One percent of the total original amount appropriated to the current appropriation being charged.

(1) For annual accounts, the 1 percent limitation is of the annual appropriation for the applicable account—not total budgetary resources (e.g. reimbursable authority).

(2) For multi-year accounts, the 1 percent limitation applies to the total amount of the appropriation.

(3) For contract changes, charges made to currently available appropriations will have no impact on the 1 percent limitation rule. The 1 percent amount will not be decreased by the charges made to current appropriations for contract changes.

VII. RULES OF OBLIGATION FOR TERMINATED CONTRACTS.

A. Termination for Convenience.

1. When a contract is terminated for the convenience of the government, the contractor is entitled to a settlement that typically includes payment for costs incurred, a reasonable profit (unless the contractor is in a loss status at time of termination), and reasonable costs of settlement of the terminated work. See e.g., FAR 52.249-1, Termination for the Convenience of the Government (Fixed-Price).

2. The contracting officer is responsible for deobligating all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD FMR, vol. 3, ch. 8, para. 080512.

3. If a contract is terminated for default of for the convenience of the government pursuant to a court order or determination by a contracting officer that the award was improper due to explicit evidence the award was erroneous and when the determination is documented with appropriate finding of fact or law or by other competent authority (board of contract appeals, Government Accountability Office, or contracting officer) that the contract award was improper, the appropriation originally cited may be used in a subsequent fiscal year to fund a replacement contract if the following criteria are met:

   a. the original contract is made in good faith;

b. the agency has a continuing bona fide need for the goods or services involved;

c. the replacement contract is of the same size and scope as the original contract; and

d. the replacement contract is executed without undue delay after the original contract is terminated for convenience. See Navy, Replacement Contract, B-238548, Feb. 5, 1991, 70 Comp. Gen. 230, 91-1 CPD ¶ 117 (holding that funds are available after contracting officer's determination that original award was improper); DFAS-IN 37-1, table 8-7, note 8. If a reprocurement will result in an obligation that exceeds $4 million then the action first must be submitted to USD(C) for approval. DOD FMR, vol. 3, ch. 10, para. 100206.

B. Termination for Default. After a contract is terminated for default, the government may still have a bona fide need for the supply or service. In such a case, the originally obligated funds remain available for obligation for a reprocurement contract, notwithstanding the expiration of the normal period of availability, if:

1. The replacement contract is awarded without undue delay after the original contract is terminated for default;

2. its purpose is to fulfill a bona fide need that has continued from the original contract; and

3. the replacement contract is awarded on the same basis and is similar substantially in scope and size as the original contract. See Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 81-2 CPD ¶ 33; DFAS-IN 37-1, table 8-7, para. 8.

VIII. MISCELLANEOUS RULES OF OBLIGATION.

A. Bid Protests or other challenge. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080606.

1. Funds available at the time of protest or other action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action. A protest or other action consists of a protest filed with the Government Accountability Office, or an action commenced under administrative procedures or for a judicial remedy if:

    a. The action involves a challenge to—

        (1) a solicitation for a contract;

        (2) a proposed award for a contract;

        (3) an award of a contract; or

        (4) the eligibility of an offeror or potential offeror for a contract or of the contractor awarded the contract; and

    b. Commencement of the action delays or prevents an executive agency from making an award of a contract or proceeding with a procurement. 31 U.S.C. § 1558.

2. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558.

    a. A request for reconsideration of a GAO protest must be made within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b).

    b. The appeal of a protest decision of a district court or the Court of Federal Claims must be filed with the Court of Appeals for the Federal Circuit within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).

B. Ratification of Unauthorized Commitments. Charge against the funds that would have been charged had the obligation been valid from its inception. FAR 1.602-3; DFAS-IN 37-1, tbl. 8-6, para. 11; Fish & Wildlife Serv.-Fiscal Year Chargeable on Ratification of Contract, B-208730, Jan. 6, 1983, 83-1 CPD ¶ 75 (ratification relates back to the time of the initial agreement, which is when the services were needed and the work was performed); *see also* National Science Foundation—Potential Antideficiency Act Violation by the National Science Board Office, B-317413, Apr. 24, 2009.

C. Liquidated Damages. Recover the amount of liquidated damages deducted and withheld from the contractor. If the contractor objects to the assessment of liquidated damages, treat the amount as a contingent liability. Reestablish an obligation only when a formal contractor claim is "approved," i.e., sustained by government admission or by a judgment. DFAS-IN 37-1, tbl. 8-7, para. 10 and note 3.

D. Litigation.

1. General. As a general rule, the amount of liability expected to result from pending litigation shall be recorded as an obligation in cases where the government definitely is liable for the payment of money from available appropriations, and the pending litigation is for determining the amount of the government's liability. In other cases, an obligation shall not be recorded until the litigation has been concluded or the government's liability finally is determined. DOD FMR, vol. 3, ch. 8, para. 081205.

2. Settlement of a claim. Obligate funds using the same obligation rules that would be used for normal contracts. DOD FMR, vol. 3, ch. 8, para. 080304E; DFAS-IN 37-1, tbl. 8-6, para. 14.

3. Judgments or monetary awards. Initially, the government may pay judgments from a permanent appropriation called the Permanent Judgment Appropriation (Judgment Fund). 31 U.S.C. § 1304. The Contract Disputes Act (CDA) requires agencies to reimburse the Judgment Fund for CDA judgments. 41 U.S.C. § 612(c). Agencies make reimbursements from funds available for obligation when the judgment is entered. Expired funds that were current at the time of the judgment may also be used. If more than one appropriation is involved in the monetary judgment, then the reimbursement is prorated against those appropriations. Any proration between or among appropriations must be based on the nature of the claim and the basis of that monetary judgment in the particular case. DOD FMR, vol. 3, ch. 8, para. 080304F1; DFAS-IN 37-1, tbl. 8-6, para. 15; Bureau of Land Mgt. - Reimbursement of CDA Payments, B-211229, 63 Comp. Gen. 308 (1984).

4. Attorney fees and other expenses. These costs are not payable by the Judgment Fund. Record obligations against current funds at the time the awards are made by the deciding official or by the court. DFAS-IN 37-1, tbl. 8-6.

IX. CONCLUSION

A. Commitment accounting allows the government to ensure sufficient funds exist to fund all pending obligations should they all be executed simultaneously. Commitments must be recorded in various amounts for different types of contracts, generally tracking with the amount of liability (or a reasonable estimate of future liability) the government will incur at the time of obligation.

B. Obligations are accounting transactions based on actual legal liabilities such as contract award, acceptance of orders placed (if that order constitutes acceptance of a contractor's offer to sell), and other transactions. Obligations carry legal liabilities and may lead to Antideficiency Act violations unless they are correctable. Agencies must obligate various amounts based on the known or estimated amount of financial liability the government has in a given contract action.

C. Most funds are only available for obligation for a certain period of time, after which they expire. Expired funds may be used in some circumstances to adjust old obligations, but are subject to some approval requirements if the adjustment is based on requiring the contractor to perform more work and the amount exceeds $4 million.

D. Expired appropriations may remain available for obligation based on the termination of a contract under some conditions.

APPENDIX A
31 U.S.C. 1501 (2012)

§ 1501. Documentary evidence requirement for Government obligations

(a) An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of—

(1) a binding agreement between an agency and another person (including an agency) that is—

(A) in writing, in a way and form, and for a purpose authorized by law; and

(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided;

(2) a loan agreement showing the amount and terms of repayment;

(3) an order required by law to be placed with an agency;

(4) an order issued under a law authorizing purchases without advertising—

(A) when necessary because of a public exigency;

(B) for perishable subsistence supplies; or

(C) within specific monetary limits;

(5) a grant or subsidy payable—

(A) from appropriations made for payment of, or contributions to, amounts required to be paid in specific amounts fixed by law or under formulas prescribed by law;

(B) under an agreement authorized by law; or

(C) under plans approved consistent with and authorized by law;

(6) a liability that may result from pending litigation;

(7) employment or services of persons or expenses of travel under law;

(8) services provided by public utilities; or

(9) other legal liability of the Government against an available appropriation or fund.

(b) A statement of obligations provided to Congress or a committee of Congress by an agency shall include only those amounts that are obligations consistent with subsection (a) of this section.

APPENDIX B

OBLIGATIONS AND COMMITMENTS – COMPARISON CHART

Commitment / Certification	Obligation
Internal to Agency	Promise to External Agency
Subjective: Conservative Estimate	Objective: Amount Promised
Conservative Estimate of Contingent Liability	No Obligation while Liability Contingent
Certify Before Award	Occurs upon Award; Record After Obligation
Specific Act of Certifying Officer	Occurs when Promise is Made

APPENDIX C

PURCHASE REQUEST AND COMMITMENT (PR&C)

PURCHASE REQUEST AND COMMITMENT
For use of this form, see AR 37-1; the proponent agency is OASA(FM)

1. PURCHASE INSTRUMENT NO. | 2. REQUISITION NO. | 3. DATE | PAGE OF PAGES

4. TO: | 5. THRU: | 6. FROM:

It is requested that the supplies and services enumerated below or on attached list be

7. PURCHASED FOR | 8. DELIVERED TO | 9. NOT LATER THAN (Date)

The supplies and services listed below cannot be secured through normal supply channels or other Army supply sources in the immediate vicinity, and their procurement will not violate existing regulations pertaining to local purchases for stock, therefore, local procurement is necessary for the following reason: *(Check appropriate box and complete item.)*

☐ 12. LOCAL PURCHASES AUTHORIZED AS THE NORMAL MEANS OF SUPPLY FOR THE FOREGOING BY

☐ 13. REQUISITIONING DISCLOSES NONAVAILABILITY OF ITEMS AND LOCAL PURCHASE IS AUTHORIZED BY

10. NAME OF PERSON TO CALL FOR ADDITIONAL INFORMATION | 11. TELEPHONE NUMBER

FUND CERTIFICATION

The supplies and services listed on this request are properly chargeable to the following allotments, the available balances of which are sufficient to cover the cost thereof, and funds have been committed.

19. ACCOUNTING CLASSIFICATION AND AMOUNT

20. TYPED NAME AND TITLE OF CERTIFYING OFFICER | 21. SIGNATURE | 22. DATE

23. DISCOUNT TERMS

24. PURCHASE ORDER NUMBER

EMERGENCY SITUATION PRECLUDES USE OF REQUISITION CHANNELS FOR SECURING ITEM

14. ITEM	15. DESCRIPTION OF SUPPLY OR SERVICES	16. QUANTITY	17. UNIT	18. ESTIMATED UNIT PRICE *a*	18. ESTIMATED TOTAL COST *b*

25. THE FOREGOING ITEMS ARE REQUIRED NOT LATER THAN AS INDICATED ABOVE FOR THE FOLLOWING PURPOSE

26. DELIVERY REQUIREMENTS

ARE MORE THAN 7 DAYS REQUIRED TO INSPECT AND ACCEPT THE REQUESTED GOODS OR SERVICES YES ☐ NO ☐

IF YES, NUMBER OF DAYS REQUIRED

27. TYPED NAME AND GRADE OF INITIATING OFFICER | 28. SIGNATURE | 29. DATE

30. TELEPHONE NUMBER

31. TYPED NAME AND GRADE OF SUPPLY OFFICER | 32. SIGNATURE | 33. DATE

34. TYPED NAME AND GRADE OF APPROVING OFFICER OR DESIGNEE | 35. SIGNATURE | 36. DATE

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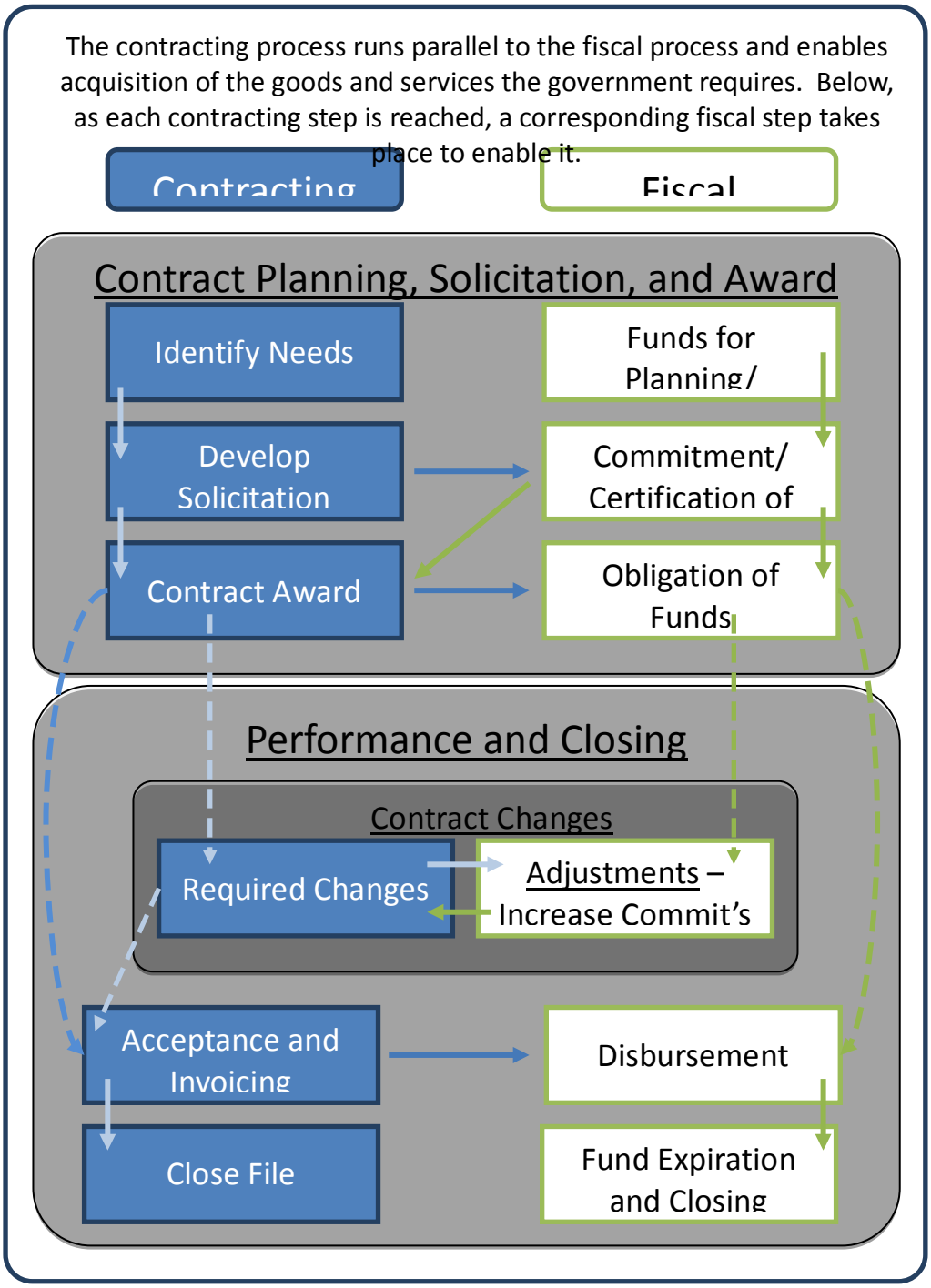
APPENDIX D

CONTRACT – FISCAL PARALLEL EVENTS CHART



APPENDIX E:

DPAP MEMO, SUBJECT: PROPER USE OF AWARD FEE CONTRACTS AND AWARD FEE PROVISIONS, DTD 24 APRIL 2007

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

APR 24 2007

ACQUISITION, TECHNOLOGY AND LOGISTICS

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
(ATTN: ACQUISITION EXECUTIVES)
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Proper Use of Award Fee Contracts and Award Fee Provisions

Over the past several years there has been an increased use of cost-plus-award-fee contracts and award fee provisions, particularly for development efforts and low rate initial production (LRIP) efforts. The purpose of this memorandum is to state the Department's policy with regard to the proper use of award fee contracts and award fee provisions.

FAR 16.104 requires that we take into account a number of factors when selecting the proper contract type. Among them are: price competition, price analysis, cost analysis, type and complexity of requirement, urgency of requirement, period of performance or length of production run, the Contractor's technical capability and financial responsibility, the adequacy of the contractor's accounting system, concurrent contracts, and the extent and nature of proposed subcontracting and acquisition history.

In particular, with regard to the use of award fee contracts, FAR 16.405-2 (b)(1)(i) states that: "The cost-plus-award-fee contract is suitable for use when – (i) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, technical performance or schedule."

The fact is that most, if not all, of our development and LRIP contracts contain numerous objective criteria. For a variety of reasons, expediency being among the most prevalent, over the past several years we have chosen not to construct contracts that appropriately contain the means to measure objective and subjective criteria.

It is the policy of the Department that objective criteria will be utilized, whenever possible, to measure contract performance. In those instances where objective criteria exist, and the Contracting Officer and Program Manager wish to also evaluate and incentivize subjective elements of performance, the most appropriate contract type would be a multiple incentive type contract containing both incentive and award fee criteria (*e.g.*, cost-plus-incentive/award fee, fixed-price-incentive/award fee) or a fixed price/award fee contract.

If it is determined that objective criteria do not exist and that it is appropriate to use a cost-plus-award fee (CPAF) contract, then the Head of the Contracting Activity (HCA) must sign a determination and finding (D&F) that "the work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, technical performance or schedule." The HCA may delegate this approval authority, within the contracting chain, no lower than one level below the HCA.

The following shall apply to all award fee provisions:

Award fee may be earned in accordance with the following:

Rating	Award Fee Pool Earned
Unsatisfactory	0%
Satisfactory	No Greater Than 50%
Good	50%-75%
Excellent	75%-90%
Outstanding	90%-100%

Definitions of Ratings

Unsatisfactory	Contractor has failed to meet the basic (minimum essential) requirements of the contract.
Satisfactory	Contractor has met the basic (minimum essential) requirements of the contract.
Good	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 50% of the award fee criteria established in the award fee plan.
Excellent	Contractor has met the basic (minimum essential) requirements of the contract, and has met at least 75% of the award fee criteria established in the award fee plan.

Outstanding	Contractor has met the basic (minimum essential) contract requirements and has met at least 90% of the award fee criteria established in the award fee plan.

Contracting Officers are required, together with the Program Manager, to determine the basic contract requirements that will be specified in the contract. In consultation with the Program Manager and the Fee Determining Official, the Contracting Officer shall derive the award fee criteria to be included in the Award Fee Plan among the trade space of various technical/programmatic, cost and schedule contract objectives.

The policies included in this memo are effective for all solicitations issued commencing on 1 August 2007, and will be incorporated into the DFARS or DFARS Procedures, Guidance and Information, as appropriate.

For ACAT I programs, copies of all D&Fs shall be provided to the Director, Defense Procurement and Acquisition Policy, within 30 days of the end of the quarter, beginning with the quarter ending September 30, 2007. Senior Procurement Executives of the Military Departments and Other Defense Agencies shall be responsible for establishing the level of reporting for non-ACAT I contracts within their organizations.

Please direct any questions regarding this memorandum to Mr. Bill Sain, Senior Procurement Analyst, Defense Procurement and Acquisition Policy (Office of Cost, Pricing, and Finance) at 703-602-0293 or bill.sain@osd.mil.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Chapter 6:

Interagency Acquisitions

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CHAPTER 6

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CHAPTER 6

INTERAGENCY ACQUISITIONS[1]

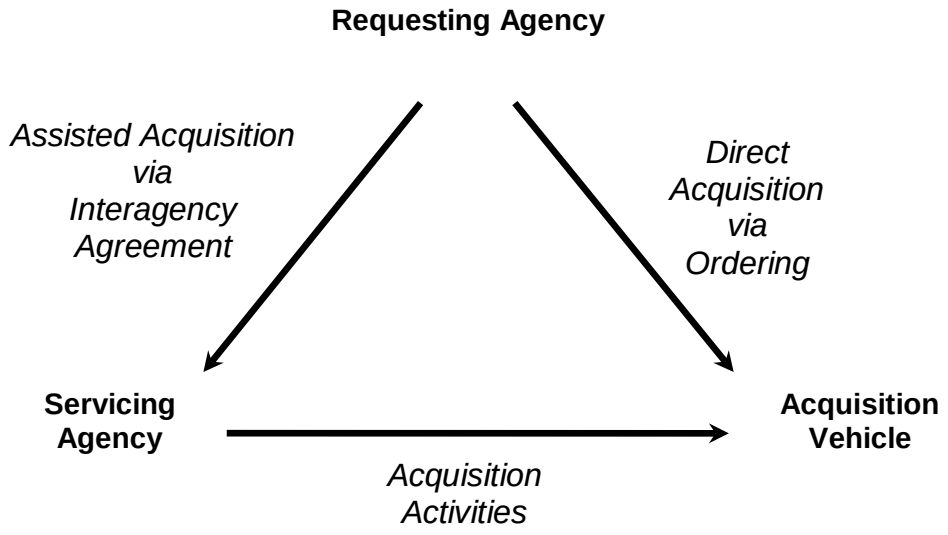
I. INTRODUCTION.

A. Interagency Acquisition: the procedure by which an agency needing supplies or services (the *requesting agency*) obtains them through another federal government agency (the *servicing agency*).

1. Types of Interagency Acquisitions.

a. Direct Acquisitions: the requesting agency places an order directly against a servicing agency's contract.

b. Assisted Acquisitions: the servicing agency and requesting agency enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on behalf of the requesting agency, such as awarding a contract or issuing a task or delivery order, to satisfy the requirements of the requesting agency.



[1] References to the Federal Acquisition Regulation (FAR) in this chapter are current as of 9 March 2015. Numerous changes were made to FAR 17.5 per FAC 2005-55, effective 2 Feb 2012. FAC 2005-62, effective 20 Nov 2012 made additional changes to FAR 17.5 and also added a new section, FAR 17.7 which provides guidance regarding acquisitions made by non-DoD agencies on behalf of DoD agencies. These changes may not appear in commercially printed copies of the FAR with effective dates of Jan 2012 or earlier. *See* the current on-line version of the FAR *available at* http://farsite.hill.af.mil/. Additionally, a DPAP memo of 2 Jan 2013 called for a DoD-wide review of Interagency Acquisition policy. Practitioners should review the most current policy updates *available at* http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

2. Determination of Best Procurement Approach. For all direct acquisitions and assisted acquisitions subject to the Federal Acquisition Regulation (FAR)[2], a determination must be made that an interagency acquisition is the best procurement approach.

a. Assisted Acquisitions. Prior to requesting that another agency conduct an acquisition on its behalf, the requesting agency shall make a determination that the use of an interagency acquisition represents the best procurement approach. This requires the requesting agency's contracting office to concur that using the acquisition services of another agency— (i) Satisfies the requesting agency's schedule, performance, and delivery requirements; (ii) Is cost effective (taking into account the reasonableness of the servicing agency's fees); and (iii) Will result in the use of funds in accordance with appropriation limitations and compliance with the requesting agency's laws and policies. FAR 17.502-1(a)(1).

b. Direct acquisitions. Prior to placing an order directly against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach. This requires the requesting agency's contracting office to consider numerous factors such as: (i) The suitability of the contract vehicle; (ii) The value of using the contract vehicle, including administrative cost savings from using an existing contract, prices, the number of vendors, and reasonable vehicle access fees; and (iii) the expertise of the requesting agency to place orders and administer them against the selected contract vehicle throughout the acquisition lifecycle. FAR 17.502-1(a)(2).

c. Interagency Agreements.

i) Assisted Acquisition. Prior to the issuance of a solicitation under an *assisted acquisition*, the servicing and requesting agencies shall sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties. The agreement should cover roles and responsibilities for acquisition planning, contract execution, and contract administration. It should also include any

[2] FAR 17.5 does not apply to interagency reimbursable work (other than acquisition assistance); interagency activities where contracting is incidental to the purpose of the transaction; or orders of $500,000 or less issued against Federal Supply Schedules (FAR 17.500(c)).

unique terms and conditions[3] of the requesting agency that must be incorporated into the order or contract awarded by the assisting agency. If there are no unique terms or conditions, the agreement should so state. A copy of the interagency agreement, prepared in accordance with current OFPP guidance,[4] must be included in the files of both the servicing and requesting agencies. FAR 17.502-1(b).

ii) Direct Acquisitions. Since the requesting agency administers its own order under a *direct acquisition*, and interagency agreement is not required. FAR 17.502-1(b)(2).

B. Contract Vehicles: Interagency acquisitions are often made using indefinite delivery/indefinite quantity (ID/IQ) contracts under FAR Subpart 16.5 that permit the issuance of task or delivery orders during the term of the contract. Contract vehicles used most frequently to support interagency acquisitions are the General Services Administration (GSA) Schedules (also referred to as Multiple Award Schedules and Federal Supply Schedules), government-wide acquisition contracts (a GWAC is a multi-agency task or delivery order contract, typically for information technology, established by one agency for governmentwide use under authority other then the Economy Act), and multi-agency contracts (a MAC is a task or delivery order contract established by one agency for use by other Government agencies consistent with the Economy Act). In addition to the best procurement determinations discussed above, in order to establish new multi-agency or governmentwide acquisition contracts, a business-case analysis must be prepared and approved in accordance with current Office of Federal Procurement Policy (OFPP) guidance. *See* FAR 17.502-1(c)[5] for additional guidance.

C. Fiscal Policy: unless authorized by Congress, interagency transactions are generally prohibited.

1. Under 31 U.S.C. § 1301 (the "purpose statute") a federal agency must use its appropriated funds for the purposes for which the appropriations were made. Therefore, unless authorized by Congress, funds appropriated for

[3] FAR Subpart 17.7 outlines many of the unique terms and conditions that apply when a nondefense agency procures supplies and services on behalf of a defense agency.

[4] For current Interagency Agreement drafting guidance and templates *see* http://www.whitehouse.gov/omb/assets/procurement/iac_revised.pdf.

[5] *See also*, OMB memo, "Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions," dtd 29 Sep 2011, *available at* *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/development-review-and-approval-of-business-cases-for-certain-interagency-and-agency-specific-acquisitions-memo.pdf*

the needs of one federal agency may not be used to fund goods and services for the use of another federal agency.

a. From the standpoint of the requesting agency, receiving goods or services funded by another agency's appropriations without reimbursing the servicing agency would constitute an improper augmentation of the requesting agency's funds.

b. Funds sent by the requesting agency to the servicing agency as reimbursement for goods or services provided could not be retained and spent by the servicing agency, but instead would have to be turned over to the Treasury under 31 U.S.C. § 3302(b) (the Miscellaneous Receipts Statute).

2. Congress has provided several statutory authorities for interagency acquisitions, allowing agencies to avoid these fiscal law limitations.

a. The Economy Act: 31 U.S.C. §§1535-1536. This is the general authority for interagency acquisitions, but is used only when more specific authority does not apply (see below).

b. The Project Order Statute: 41 U.S.C. § 23.

c. Other Non-Economy Act Authorities: Government Employees Training Act (GETA), Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWAC), and other required sources.

d. These other, more specific "non-Economy Act" authorities, must be used instead of the Economy Act where applicable. (FAR 17.502-2(b)).

II. THE ECONOMY ACT (31 U.S.C. §§ 1535-1536).

A. Purpose: Provides authority for federal agencies to order goods and services from other federal agencies, or with a major organizational unit within the same agency, if: [6]

1. Funds are available;

2. The head of the ordering agency or unit decides the order is in the best interests of the government;

[6] 31 U.S.C. §1535(a); DoD FMR, vol. 11A, ch. 3, para. 030102 and 030103. The Economy Act was passed in 1932 as an effort to obtain economies of scale and eliminate overlapping activities within the federal government.

3. The agency or unit filling the order can provide or get by contract the goods or services; **and**

4. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.[7]

B. Authorized Uses.

1. Inter-service Support: orders placed between DoD activities, including those: (1) between military departments; or (2) between military departments and other defense agencies.[8] Also referred to as "intra-agency support."

2. Intra-governmental Support: orders placed with non-DoD federal agencies.[9] Also referred to as "Interagency."

3. The Economy Act applies only in the absence of a more specific acquisition authority. FAR 17.502-2(b).[10]

C. Determinations and Findings (D&F) Requirements (FAR Subpart 17.502-2(c)).

1. Basic Determinations. All Economy Act orders must be supported with a written D&F by the requesting agency stating that:

a. The use of an interagency acquisition is in the best interest of the government (FAR 17.502-2(c)(1)(i));

b. The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source (FAR 17.502-2(c)(1)(ii)); *see also*, DoD FMR, vol. 11A, ch. 3, para. 030302); **and**

c. A statement that at least one of the three following circumstances apply:

1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of

[7] *See Dictaphone Corp.*, B-244691.2, 92-2 Comp. Gen. Proc. Dec. ¶ 380 (Nov. 25, 1992). *See also*, DoD FMR, vol. 11a, ch. 3, para. 030104.A (March 2012).

[8] *See* FAR 2.101 (defining executive agencies as including military departments); *Obligation of Funds under Military Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980); DoD FMR, vol. 11A, ch. 3, para. 030103.

[9] *See also* FAR 17.7, Acquisitions by Nondefense Agencies on Behalf of the Department of Defense.

[10] *See also, An Interagency Agreement—Admin. Office of the U.S. Courts*, B-186535, 55 Comp. Gen. 1497 (1976).

the servicing agency for the same or similar supplies or services;

2) The servicing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or

3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. FAR 17.502-2(c)(1)(iii). See also, DoD FMR, vol. 11A, ch. 3, para. 030302.B.[11]

d. NOTE: In Economy Act transactions between DoD activities, DoDI 4000.19 and DoD FMR vol. 11A, ch. 3, para. 030303 indicate that if the transaction is documented on a DD Form 1144 support agreement signed by the head of the requiring and supplying activities (O6 or GS-15), then no further written determinations are required.[12] If there is no support agreement, the D&F is required.

2. D&F Approval Authority. (FAR 17.502-2(c)(2)).

a. The D&F must be approved by a contracting officer of the requesting agency with the authority to contract for the supplies or services ordered (or by another official designated by the agency head).

b. If the servicing agency is not covered by the FAR, then the D&F must be approved by the requesting agency's Senior Procurement Executive.

c. DoD-specific approval authority rules.

1) Interagency Support. The D&F for an order with a non-DoD servicing agency (i.e. "Interagency Support") shall be approved by the head of the major organizational unit ordering the support. This authority may be delegated, but at a level no lower than a Senior Executive Service

[11] Prior to the effective date of FAC 2005-55, FAR 17.503(b) required one of these three statements *only* if the Economy Act transaction required the servicing activity to take some contracting action. The current version of the FAR (FAR 17.502-2(c)) does not make the same distinction. The current version of DoD FMR, vol. 11A, ch. 3, para. 030302.B (March 2012) parallels the prior version of the FAR, specifying that one of these statements would need to be included in a D&F *if* the transaction requires a contract action by a non-DoD servicing agency. Despite this inconsistency, the best practice is to include these statements in all D&Fs regardless of whether the Economy Act transaction requires a contract action.

[12] *But see*, note 13 *infra*.

(SES)/flag/general officer. DoD FMR, vol. 11A, ch. 3, para. 030304. If the servicing agency is not covered by the FAR, then the D&F must be approved by the requesting agency's Senior Procurement Executive.

2) Intra-Agency Support. If the support requested is between DoD activities (i.e. Intra-Agency or Inter-Service support), then the agreement may be approved provided the head of the major organizational unit ordering the support determines that it is in the best interest of the U.S. Government, and the head of the servicing activity determines that capability exists to provide support without jeopardizing assigned missions. These determinations are accomplished by signing a Support Agreement (DD1144). No further written determinations[13] are generally required for agreements between DoD Activities. DoD FMR, vol. 11A, ch. 3, para. 030303.

D. Additional Determinations by DoD Policy.[14] (*See* section V.B., *infra* discussing requirements for Non-Economy Act orders).

1. Use of a non-DoD contract to procure goods or services in excess of the simplified acquisition threshold (currently $150,000) requires determinations in addition to the D&F. See FAR 17.7.[15]

a. A DoD acquisition official may place an order, make a purchase, or otherwise acquire supplies or services for DoD in excess of the simplified acquisition threshold through a non-DoD agency **only** if the head of the non-DoD agency has certified that the non-DoD agency will comply with defense procurement requirements for the

[13] While the DoD FMR and DoDI 4000.19 indicate that "no further written determinations are required," neither reference take priority over the FAR, which still requires a D&F pursuant to FAR 17.502-2(c). The FAR makes no exception to the D&F requirement for inter-service or intra-DoD transactions made pursuant to the Economy Act. Further, DFARS 217.503(a) requires "a copy of the executed D&F required by FAR 17.502-2" be furnished to the servicing agency, which suggests at least, that a complete file for an Economy Act transaction includes a D&F executed per the guidance in FAR 17.502-2. Since the FAR has broader reach then DoD-level regulations (*see* FAR 1.3), its requirements may trump the more streamlined approach outlined in the DoDI and DoD FMR. A separate Interagency Support Agreement (*see* discussion at V.D *infra*) may not be required if the DD1144 covers the roles, responsibilities, and unique terms and conditions outlined in FAR 17.502-1(b)(1), or if the transaction is a direct acquisition (FAR 17.502-1(b)(2)).

[14] All Economy Act orders must comply with FAR Subpart 17.502-2; DFARS Subparts 217.5 and 217.78, and DoDI 4000.19.

[15] *See also* Appendix A, which provides a collection of memoranda applicable to use of non-DoD contracts under both Economy Act and non-Economy Act authorities. These and other applicable memoranda related to interagency acquisitions can be found on the Defense Procurement and Acquisition Policy (DPAP) webpage under "Interagency Acquisition" *available at* http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

fiscal year to include applicable DoD financial management regulations. FAR 17.703(a) and DFARS 217.7802 (a). Non-DoD agency certifications and additional information are available at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

b. With some slight differences between the military departments (*see* DFARS 217.7802(b) and your individual service policy in the Appendix), current policies generally require additional statements including:

1) The order is in the best interest of the military department considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

2) The supplies or services to be provided are within the scope of the non-DoD contract;

3) The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and

4) The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable procurement statutes, regulations, and directives.

c. The officials with authority to make these determinations are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).

E. Fiscal Matters.

1. Economy Act orders are funded either on a reimbursable basis or by a direct fund citation basis. The ordering agency must pay the actual costs of the goods or services provided (31 U.S.C. § 1535(b); DoD FMR, vol. 11A, ch. 3, para. 0305 and 0306).[16]

[16] *See Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network*, B-238024, 70 Comp. Gen. 592 (1991) (concluding that payment in excess of actual costs not only violated the Economy Act, but also the Purpose Statute. Accordingly, the actual cost limitation is **applicable to both Economy Act and non-Economy Act** transactions).

a. Actual costs include:

1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased. (DoD FMR, vol. 11A, ch. 3, para. 030601 and vol. 11A, ch. 1, para. 010203);[17] and

2) Indirect costs, to the extent they are funded out of currently available appropriations, bear a significant relationship to providing the goods or services, and benefit the ordering agency. (DoD FMR, vol. 11A, ch. 3, para. 030601).[18]

3) DoD activities not funded by working capital funds normally do not charge indirect costs to other DoD activities. (DoD FMR, vol. 11A, ch. 3, para. 030601).[19]

b. When providing goods or services via a contract, the servicing agency may not require payment of a fee or charge which exceeds the actual cost of entering into and administering the contract. (FAR 17.502-2(d)(4); DoD FMR, vol. 11A, ch. 3, para. 030601).

c. Payments by the requesting agency are credited to the appropriation or fund that the servicing agency used to fill the order (31 U.S.C. § 1536; 10 U.S.C.§ 2205).

d. Economy Act orders may **NOT** be used to circumvent the fiscal principles of purpose, time, and amount for appropriations. It is the responsibility of the requesting agency to certify that the funds used are proper for the purpose of the order and for a bona fide need in the fiscal year for which the appropriation is available.[20]

2. Obligation and Deobligation of Funds.

a. Obligation.

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[17] *See Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978). *See GSA Recovery of SLUC Costs for Storage of IRS Records*, B-211953, Dec. 7, 1984 (unpub.) (storage costs); *David P. Holmes*, B-250377, Jan. 28, 1993 (unpub.) (inventory, transportation, and labor costs).

[18] *See Washington Nat'l Airport, supra* (depreciation and interest); *Obligation of Funds Under Mil. Interdep'tal Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980) (supervisory and administrative expenses).

[19] DoD Instruction 4000.19, *Interservice and Intragovernmental Support*, para. 4.6 (Aug. 9, 1995). A DoD Working Capital Fund is a revolving, reimbursable operations fund established by 10 U.S.C. § 2208 to sell support goods and services to DoD and other users with the intent to be zero-profit. *See* DoD FMR vol. 11B, chp 1-2.

[20] DoD FMR vol. 11A, ch. 3, para. 030105. *See also,* FAR 17.501(b).

1) Reimbursable Order: the requesting agency obligates funds current when the performing activity accepts the reimbursable order. (31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030404.A).

2) Direct Citation Order: the servicing agency will provide a copy of the contract or other obligating document to the requesting agency. This will provide the documentation required to record the obligation. DFAS-IN Reg. 37-1, para. 081207.A.7.e.

b. Deobligation.

1) At the end of the period of availability of the requesting agency's appropriation, funds must be deobligated to the extent that the servicing agency has not itself incurred obligations by: (1) providing the goods or services; or (2) by entering into an authorized contract with another entity to provide the requested goods or services. 31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030404.B.[21]

2) This deobligation requirement is intended to prevent attempts to use the Economy Act to "park" funds with another agency in order to extend the life of an appropriation.

F. Ordering Procedures.[22]

1. An Economy Act order may be placed on any form that is acceptable to both the requesting and servicing agencies. (FAR 17.503(b)).

a. DoD ordering activities typically use DD Form 448, Military Interdepartmental Purchase Request (MIPR), to place Economy Act orders. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR.

b. If the MIPR is not used, the terms of the supporting interagency agreement should specify the method of acceptance. (DoD FMR, vol. 11A, ch. 3, para. 030501).

[21] *See* GAO Redbook, vol. III, ch. 12 (3rd Ed.), pp. 12-43 to 12-50.

[22] *See* FAR 17.503; DoD FMR, vol. 11A, ch. 3. In addition, individual agencies will have their own policies for ordering.

2. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself. (DoD FMR, vol. 11A, ch. 3, para. 030401). Minimum order requirements under FAR 17.503(b) and DoD FMR, vol. 11A, ch. 3, para. 030501 include:

   a. Specific description of the supplies or services required;

   b. Delivery requirements,

   c. Fund citation (either direct or reimbursable);

   d. Payment provision; and

   e. Acquisition authority as may be appropriate.

3. The requesting agency shall furnish a copy of the required D&F to the servicing agency with the request for order. FAR 17.502-2(c)(3). When the requesting agency is within DoD, a copy of the executed D&F shall also be furnished to the servicing agency as an attachment to the order. When a DoD contracting office is acting as the servicing agency, a copy of the executed D&F shall be obtained from the requesting agency and placed in the contract file for the Economy Act order. DFARS 217.503(d).

4. The work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing agency. (DoD FMR, vol. 11A, ch. 3, para. 030405). The requesting agency should therefore ensure in advance of placing an order that such capability exists.

5. Although the servicing activity may require advance payment for all or part of the estimated cost of the supplies or services,[23] DoD policy generally prohibits the practice of advance payment unless the DoD components are specifically authorized by law, legislative action, or Presidential authorization.[24]

G. Other Economy Act Applications.

1. Recurring Interagency Support.

   a. From a fiscal standpoint, the Economy Act may form the basis for interagency agreements that involve recurring interagency support.

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[23] 31 U.S.C. § 1535(d); FAR 17.502-2(d); DoD FMR, vol. 11A, ch. 3, para. 030502.

[24] Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007 (Appendix B).

b. In DoD, recurring interagency support that requires reimbursement should be documented on a DD Form 1144, Support Agreement, or similar format that contains all the information required on the form. (DoDI 4000.19, Enc.3.2.(a)(1)).

c. Support is reimbursable to the extent that it increases the support supplier's direct costs. Costs associated with common use infrastructure are non-reimbursable, unless provided solely for the use of one or more tenants. Suppliers of inter-service and intra-governmental support are permitted to waive low cost reimbursements[25] when the costs of billing and collecting the reimbursement would exceed the minor increase in the support suppliers costs (DoDI 4000.19, Enc.3.4(c)).

2. Interagency Details of Personnel.

a. General Rule: Details of employees from one agency to another must be done under the authority of the Economy Act on a reimbursable basis.[26]

b. Exception: Details of employees may be made on a nonreimbursable basis when: (1) specifically authorized by law; (2) the detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission; or (3) the detail is for a brief period and entails minimal cost.[27] For this exception to apply, the statute must not only authorize the transfer, but also the nonreimbursement. *Matter of: Nonreimbursable Transfer of Administrative Law Judges*, B-221585, 65 Comp. Gen. 635 (June 9, 1986).

H. Limitations.

1. Funding Limitations. As discussed above, an agency shall not use an interagency acquisition to circumvent conditions and limitations imposed on the use of funds. FAR 17.501(b).

2. Disputes. No formal method for dispute resolution exists for Economy Act transactions. The requesting and servicing agencies "should agree" to

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[25] *But see* DoD FMR, vol. 11A, ch. 3, para. 030503.A. (explaining that DoD working capital funds, the Corps of Engineers Civil Works revolving fund, and other DoD revolving funds, may not waive reimbursement of any amount).

[26] The detail must be on a reimbursable basis in order to avoid a violation of the Purpose Statute and an improper augmentation of the appropriations of the agency making use of the detailed employees.

[27] *See Department of Health & Human Servs. Detail of Office of Community Servs. Employees*, B-211373, 64 Comp. Gen. 370 (1985).

procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third party forum. FAR 17.503(c). The dispute resolution mechanism should be contained in the written interagency agreement. Within DoD, disputes shall be elevated for resolution through each DoD activity's chain of command. (DoDI 4000.19, Enc.3.2(b)(1)).

3. Compliance with CICA. The requesting agency may not procure from a servicing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5); 41 U.S.C. § 253(f)(5); *Valenzuela Eng'g, Inc.*, B-277979, 98-1 Comp. Gen. Proc. Dec. ¶ 51 (Jan. 26, 1998).

III. THE PROJECT ORDER STATUTE (41 U.S.C. § 6307).[28]

A. Purpose: provides DoD with authority to order goods and nonseverable services from DoD-owned and operated activities, separate and distinct from the Economy Act.

1. Allows DoD to place orders or contracts pertaining to "approved projects" with Government-owned establishments. These orders are considered to be obligations "in the same manner as provided for similar orders or contracts placed with…private contractors." (41 U.S.C. § 6307).

a. The term "approved projects" in the statute simply refers to projects approved by officials having legal authority to do so. (DoD FMR, vol. 11A, ch. 2, para. 020103).

b. A "project order" is a specific, definite, and certain order issued under the Project Order Statute. (DoD FMR, vol 11A, ch.2, para 020301).

2. Within DoD, regulatory guidance on project orders is found at DoD FMR, vol. 11A, ch. 2, and DFAS-IN Regulation 37-1, ch. 12, para. 1208.[29]

B. Applicability.

1. DoD-Owned Establishment. Although the language of the statute refers broadly to "Government-owned establishments," it applies only to transactions between military departments and government-owned, government-operated (GOGO) establishments within DoD. (DoD FMR, vol. 11A, ch. 2, para. 020303).

[28] Numerous sections of Title 41 were renumbered by Pub. L. 111-350, Jan. 4, 2011. The Project Order Statute was previously identified as 41 U.S.C. § 23.

[29] The Coast Guard has similar project order authority, at 14 U.S.C. § 151.

2. GOGO establishments include:

a. Equipment overhaul or maintenance shops, manufacturing or processing plants or shops, research and development laboratories, computer software design activities, testing facilities, proving grounds, and engineering and construction activities. (DoD FMR, vol. 11A, ch. 2, para. 020303).

b. GAO decisions have also "found arsenals, factories, and shipyards owned by the military to be GOGOs." *Matter of John J. Kominski*, B-246773, 72 Comp. Gen. 172 (1993).

3. Government-Operated.

a. The DoD-owned establishment must substantially do the work in-house.

b. While the DoD-owned establishment may contract for incidental goods or services pursuant to a project order, it must itself incur costs of not less than 51% of the total costs attributable to performing the work. (DoD FMR, vol. 11A, ch. 2, para. 020515).

4. Nonseverable Work Only.

a. Under DoD FMR, vol. 11A, ch. 2, para. 020509, activities may use project orders only for nonseverable or "entire" efforts that call for a single or unified outcome or product, such as:

1) Manufacture, production, assembly, rebuild, reconditioning, overhaul, alteration, or modification of:

a) Ships, aircraft, and vehicles of all kinds;

b) Guided missiles and other weapon systems;

c) Ammunition;

d) Clothing;

e) Machinery and equipment for use in such operations; and

f) Other military and operating supplies and equipment (including components and spare parts);

2) Construction or conversion of buildings and other structures, utility and communication systems, and other public works;

3) Development of software programs and automated systems when the purpose of the order is to acquire a specific end-product;

4) Production of engineering and construction related products and services.

b. Activities may **not** use project orders for:

1) Severable services, such as custodial, security, fire protection, or refuse collection;

2) Routine maintenance in general, such as grounds maintenance, heat and air conditioning maintenance, or other real property maintenance;

3) Services such as education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, utilities, or communications; or

4) Efforts where the stated or primary purpose of the order is to acquire a level of effort (e.g., 100 hours, or one year) rather than a specific, definite, and certain end-product.

C. Fiscal Matters.

1. Obligation of Funds.

a. A project order is a valid and recordable obligation of the requesting agency when the order is issued and accepted. (DoD FMR, vol. 11A, ch. 2, para. 020301.A). [30]

b. The project order must serve a valid *bona fide need* that exists in the fiscal year in which the project order is issued. (DoD FMR, vol. 11A, ch. 2, para. 020508).

2. Deobligation of Funds.

a. Unlike orders under the Economy Act, there is no general requirement to deobligate the funds if the servicing agency has not performed before the expiration of the funds' period of availability. (41 U.S.C. § 6307).

b. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the

[30] Providing the obligation otherwise meets the criteria for recordation of an obligation contained in 31 U.S.C. § 1501(a) (the "Recording Statute").

work will be completed within the normal production period for the specific work ordered. (DoD FMR, vol. 11A, ch. 2, para. 020510.A).

c. If that evidence existed at the time of acceptance and is documented in the file, then there are no consequences if the servicing agency subsequently fails to begin work within the 90 days unless that delay extends beyond 1 January of the following calendar year.

1) If work on a project order does not begin, or is not expected to begin, by January 1 of the following calendar year, then the project order must be returned for cancellation and the funds deobligated.

2) If it is documented that the delay is unavoidable and could not have been foreseen at the time of project order acceptance, and that documentation is retained for audit review, then the project order can be retained and executed. (DoD FMR, vol. 11A, ch. 2, para. 020510.B).

D. Ordering Procedures.

1. Project orders are analogous to contracts placed with commercial vendors and, similar to such contracts, must be specific, definite, and certain both as to the work and the terms of the order itself. (DoD FMR, vol. 11A, ch. 2, para. 020506).

2. Project orders shall be issued on a reimbursable basis only (no direct cite orders). (DoD FMR, vol. 11A, ch. 2, para. 020519). The project order may be on a fixed-price or costs-incurred (cost-reimbursement) basis. (DoD FMR, vol. 11A, ch. 2, para. 020701).

3. The MIPR is normally used for issuance and acceptance of project orders.

a. The DoD FMR states that although "the use of a specific project order form is not prescribed," activities shall use the "Universal Order Format" described in DoD FMR, vol.11A, ch. 1, whenever practicable. DoD FMR, vol. 11A, ch. 2, para. 020302.

b. The Army, however, requires that project orders be issued on a MIPR (DD Form 448). DFAS-IN Reg. 37-1, para. 120803.A.

4. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.

5. Because project orders are not made under the authority of the Economy Act, there is no requirement for determinations and findings (D&F).[31]

IV. OTHER NON-ECONOMY ACT AUTHORITIES.

A. Purpose: specific statutory authority for interagency acquisitions for DoD to obtain goods and services from a non-DoD agency outside of the Economy Act. When any of these more-specific non-Economy Act authorities apply, they must be used instead of the Economy Act.

B. Fiscal Matters.

1. Obligation of Funds. The requesting agency records an obligation upon meeting all the following criteria:[32]

a. A binding agreement, in writing, between the agencies;

b. For a purpose authorized by law;

c. Serve a bona fide need of the fiscal year or years in which the funds are available for new obligations;[33]

d. Executed before the end of the period of availability of the appropriation used; and

e. Provides for specific goods to be delivered or specific services to be supplied.

2. Deobligation of Funds.

a. General Rule: the order is generally treated like a contract with a private vendor in that requesting agency does not have to deobligate its funds if the servicing agency has not performed or incurred obligations at the end of the funds' period of availability.[34]

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[31] *See* FAR 17.500(c), which excludes interagency reimbursable work performed by federal employees from the requirements of FAR 17.5.

[32] DoD FMR vol. 11A, ch. 18, para. 180301.

[33] While *bona fide need* is generally a determination of the requesting agency and not that of the servicing agency, a servicing agency can refuse to accept a non-Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. (DoD FMR, vol. 11A, ch. 18, para. 180208).

[34] *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157

b. DoD Policy: In response to several GAO and DoD Inspector General audits indicating contracting and fiscal abuses with DoD agencies' use of interagency acquisitions, the DoD has issued policy that severely restricts the flexibility that these non-Economy Act authorities provide and now applies a deobligation requirement similar to that of the Economy Act. (DoD FMR, vol. 11A, ch. 18, para. 180302).[35]

1) General: Expired funds must be returned by the servicing agency and deobligated by the requesting agency to the extent that the servicing agency has not:

i) Provided the goods or services (or incurred actual expenses in providing the goods or services); or

ii) Entered into a contract with another entity to provide the goods or services before the funds expired, subject to the bona fides need rule.

2) Non-Severable Services: the contract must be funded entirely with funds available for new obligations at the time the contract was awarded, even though performance may extend across fiscal years. (DoD FMR, vol. 11A, ch. 18, para. 180302.C).

3) Severable Services: one-year funds may be used to fund up to twelve months of continuous severable services beginning in the fiscal year of award and crossing fiscal years under the authority of 10 U.S.C. § 2410a. (DoD FMR, vol. 11A, ch. 18, para. 180302.B).[36]

4) Goods: if the contract is for goods that were not delivered within the funds period of availability, the funds must be deobligated and current funds used, unless the goods could not be delivered because of delivery, production or manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the

[35] Office of the Under Secretary of Defense (Comptroller) memorandum, Subject: Non-Economy Act Orders, dated October 16, 2006. (Appendix C).

[36] **NOTE:** The 12 months does not start upon obligation of the funds by the servicing agency, but upon obligation of the funds by the requesting agency. *See* DoD FMR, vol. 11A, ch. 18, para. 180203.F (requiring a statement on the funding document that states: "all funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but *no later than one year after the acceptance of the order, or upon completion of the order, which ever is earlier*.")(emphasis added). Therefore, a DoD requesting activity can still "lose" funds if the servicing agency does not award a contract promptly after acceptance of the order.

contracting parties at the time of contracting. DoD FMR, vol. 11A, ch. 18, para. 180302.A.

3. Advance Payment. [37]

a. DoD agencies are prohibited from making advance payments to non-DoD agencies unless specifically authorized by law. (DoD FMR, vol. 11A, ch. 18, para. 180209).

b. For those few exceptions where DoD is specifically authorized to advance funds, the specific appropriation or law authorizing the advance must be cited on the obligating and/or interagency agreement documents and orders, and any unused amounts of the advance must be collected from the servicing agency immediately and returned to the fund from which originally made. (DoD FMR, vol. 11A, ch. 18, para. 180209).

C. DoD Policy for non-DoD orders.[38] (*See* section V.B., *infra*).

1. If the non-Economy Act order is over the Simplified Acquisition Threshold (SAT; currently $150K), comply with your Military Department's policy requirements for use of non-DoD contracts over the SAT, in addition to the requirements below.[39] (*See supra* part II.D., discussing determinations for Economy Act orders).

2. Non-Economy Act orders may be placed with a non-DoD agency for goods or services if:[40]

a. Proper funds are available;

b. The non-Economy Act order does not conflict with another agency's designated responsibilities (*e.g.*, real properly lease agreements with GSA);

c. The requesting agency determines the order is in the best interest of the Department; and

d. The servicing agency is able and authorized to provide the ordered goods or services.

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[37] Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007 (Appendix B).

[38] *See generally,* DoD FMR, vol. 11A, ch. 18. *See also* FAR 17.7.

[39] *See* Appendix A.

[40] DoD FMR, vol. 11A, ch. 18, para. 180202

3. Best Interest Determination.

a. Each requirement must be evaluated to ensure that non-Economy Act orders are in the best interest of DoD. Factors to consider include: satisfying customer requirements; schedule, performance, and delivery requirements; cost effectiveness, taking into account the discounts and fees; and contract administration, to include oversight. (DoD FMR, vol. 11A, ch. 18, para. 180204; *see also* FAR 17.502-1(a) requiring a determination of best procurement approach and consideration of similar factors).

b. If the order is in excess of the SAT, then the best interest determination must be documented in accordance with individual Military Department policy.

D. Content of Orders. (DoD FMR, vol. 11A, ch. 18, para. 180203).

1. A firm, clear, specific, and complete description of the goods or services ordered;

2. Specific performance or delivery requirements;

3. A proper fund citation;

4. Payment terms and conditions;

5. The specific non-Economy Act statutory authority used;

6. *For severable services*: "These funds are available for severable service requirements crossing fiscal years for a period not to exceed one year, where the period of any resultant contract for services commences this fiscal year. All funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but no later than one year after the acceptance of the order or upon completion of the order, which ever is earlier."

7. *For goods and non-severable services*: "I certify that the goods or non-severable services to be acquired under this agreement are a necessary expense of the appropriation charged, and represent a bona fide need of the fiscal year in which these funds are obligated."

8. The requesting agency's DoD Activity Address Code (DODAAC).

9. Contracting Officer Review. If the non-Economy Act order is in excess of $500,000, it must be reviewed by a DoD warranted contracting officer prior to sending the order to the funds certifier or issuing the MIPR. (DoD FMR, vol. 11A, ch. 18, para. 180206).

E. Commonly used non-Economy Act transaction authorities.

1. Government Employees Training Act (GETA). (5 U.S.C. § 4104).

a. Purpose: permits agencies to provide training to employees of other federal agencies on a reimbursable basis.

1) Servicing agency is authorized to collect and to retain a fee to offset the costs associated with training the employees of other agencies.

2) Reimbursement is NOT authorized for training of other agency employees if funds are already provided for interagency training in its appropriation.[41]

b. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.

c. Limitation: Non-government personnel.

1) This authority applies only to transactions between federal government agencies; therefore, it does not authorize the provision of training to non-government personnel.

2) The Comptroller General has not objected to federal agencies providing training to non-government personnel on a space-available basis incidental to the necessary and authorized training of government personnel, but the non-government personnel must reimburse the government for the costs of that training, and the agency providing the training must deposit the fees collected in the Treasury as miscellaneous receipts.[42]

2. Federal Supply Schedules (FSS). (41 U.S.C. § 251 *et seq* -- The Federal Property and Administrative Services Act of 1949; 40 U.S.C. § 501; FAR Subpart 8.4).

a. Purpose: authorizes the General Services Administration (GSA) to enter into contracts for government-wide use outside of the restrictions of the Economy Act.

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[41] OFFICE OF PERSONNEL MANAGEMENT, TRAINING POLICY HANDBOOK: AUTHORITIES AND GUIDELINES 26, May 11, 2007.

[42] *Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses*, B-271894, 1997 U.S. Comp. Gen. LEXIS 252; *To the Secretary of Commerce*, B-151540, 42 Comp. Gen. 673 (1963).

1) The FSS program (also known as the GSA Schedules Program or the Multiple Award Schedule Program) provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.

2) The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards thousands of government-wide ID/IQ contracts for over 11 million commercial items and services.

3) Agencies place orders or establish blanket purchasing agreements against these Schedule contracts.

b. The procedures of FAR 17.5 do not apply to orders of $500,000 or less issued against Federal Supply Schedules. FAR 17.500(c)(2).

c. Ordering Guidelines: FAR Subpart 8.4 provides detailed guidance on the use of FSS, including ordering procedures for services requiring or not requiring a statement of work, establishing blanket purchase agreements under an FSS contract, and the limited "competition" requirements for FSS orders (*see also* DFARS 208.405-70, for competition requirements for DoD orders exceeding $150,000).

d. DoD Policy: contracting officers must: (1) consider labor rates as well as labor hours and labor mixes when establishing a fair and reasonable price for an order; (2) evaluate proposed prices for both services and products when awarding combination orders; (3) seek discounts and explain why if they were not obtained; and (4) solicit as many contractors as practicable.[43]

3. Committee for Purchase From People Who Are Blind or Severely Disabled. (41 U.S.C. §§ 46-48c – The Javits-Wagner-O'Day Act (JWOD Act); 41 C.F.R. Part 51; FAR Subpart 8.7).

a. Purpose: provides authority to orchestrate agencies' purchase of goods and services provided by nonprofit agencies employing people who are blind or severely disabled.

b. Program Oversight: the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) oversees the AbilityOne program (formerly known as the JWOD Program).

[43] Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Use of Federal Supply Schedules and Market Research, dated January 28, 2005 (Appendix D).

c. Ordering Requirements:

1) The JWOD Act requires agencies to purchase supplies or services on the Procurement List (this list may be accessed at http://www.abilityone.gov) maintained by the Committee,[44] at prices established by the Committee, from AbilityOne nonprofit agencies if they are available within the period required.

2) These supplies or services may be purchased from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee.

4. Federal Prison Industries, Inc. (FPI or UNICOR). (18 U.S.C. §§ 4121-4128; FAR Subpart 8.6).

a. Originally required federal departments and agencies to purchase products of FPI that met requirements and were available at market price or less, unless FPI granted a waiver for purchase of the supplies from another source. (10 U.S.C. § 2410n).[45]

b. Current Requirements:

1) The law has changed in recent years, minimizing the "mandatory source" nature of FPI.[46]

2) When acquiring an item for which FPI has a significant market share[47] DoD must use competitive procedures or fair opportunity procedures under the FAR to procure the product. DFARS 208.602-70.

3) If FPI does not have a significant market share, comply with procedures under FAR 8.602.

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[44] The decision to place an item or service on the procurement list is subject to review. *See* Systems Application Technologies v. United States, (No. 12-526C, Fed. Cl. 2012) (concluding that the Committee's decision to place Army live-fire range operation and maintenance services on the Procurement List was arbitrary and capricious).

[45] FPI products are listed in the FPI Schedule, at http://www.unicor.gov. FPI also offers services, though agencies have never been required to procure services from FPI.

[46] National Defense Authorization Act for FY2002, Pub. L. No. 107-107; Bob Stump National Defense Authorization Act for FY2003, Pub. L. No. 107-314; Consolidated Appropriations Act of 2004, Pub. L. No. 108-199.

[47] Significant market share is defined as "FPI share of the Department of Defense market is greater than five percent." See Appendix E, Office of the Under Secretary of Defense (AT&L) Policy Memorandum, Subject: Competition Requirements for Purchases from Federal Prison Industries, dated 28 March 2008.

i) Before purchasing products from FPI, agencies must conduct market research to determine whether the FPI item is comparable to supplies available from the private sector in terms of price, quality, and time of delivery. This is a unilateral determination of the contracting officer that is not subject to review by FPI. (FAR 8.602).

ii) If the FPI item is determined not to be comparable, then agencies should acquire the items using normal contracting (i.e., competitive) procedures, and no waiver from FPI is required.

iii) If the FPI item is comparable, then the agency must obtain a waiver to purchase the item from other sources, except when:

a) Public exigency requires immediate delivery or performance;

b) Used or excess supplies are available;

c) The supplies are acquired and used outside the United States;

d) Acquiring supplies totaling $3,000 or less; or

e) Acquiring services.

5. The Clinger-Cohen Act of 1996. (40 U.S.C. § 11302).

a. Purpose: required the Director, Office of Management and Budget (OMB) to improve the way the federal government acquires and manages information technology by designating one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.

1) Government-wide Acquisition Contracts (GWACs) are multiple award task order or delivery order contracts used by other agencies to procure information technology products and services outside of the Economy Act. (FAR 2.101; see also discussion and references at section I.B *supra* regarding business-case analysis for new or renewed GWACs).

2) To use GWACs, agencies may either obtain a delegation of authority from the GWAC Center or work through a

procurement support operation such as GSA's Office of Assisted Acquisition Services.

b. Presently, five agencies serve as executive agents to award and administer GWACs pursuant to OMB designation: GSA, Department of Commerce, NASA, the National Institutes of Health, and the Environmental Protection Agency. These agencies operate approximately 13 GWACs. A list of current GWACs is provided below.

Government-wide Acquisition Contracts (GWACs)[48]

Managing Agency	Vehicle	Available Information Technology Products and Services	Agency website address for more information
1. Commerce	Commerce Information Technology Solutions (COMMITS) NexGen	Wide range of services from small businesses	http://oam.ocs.doc.gov/commits/index.html
2. EPA	Recycling Electronics and Asset Disposition (READ) Services	Services associated with recycling of electronic equipment and disposal of excess or obsolete electronic equipment in an environmentally responsible manner	http://www.epa.gov/oam/read/
3. GSA	Applications and Support for Widely-diverse End User Requirements (ANSWER)	Full-service support	www.gsa.gov/gwacs
4. GSA	HUBZone	Services from historically underutilized business zone (HUBZone) contractors	www.gsa.gov/gwacs
5. GSA	Information Technology Omnibus Procurement (ITOP II)	Information systems engineering and security support; systems operations and management	www.gsa.gov/gwacs
6. GSA	Millennia	Services to support large systems integration and software development projects	www.gsa.gov/gwacs
7. GSA	Millennia Lite	Planning, studies, and assessment; high end services; mission support; legacy systems migration; new enterprise systems development	www.gsa.gov/gwacs
8. GSA	STARS	Services from disadvantaged small businesses	www.gsa.gov/gwacs
9. GSA	Veterans Technology Services	Information systems engineering and systems operations and maintenance from service-disabled veteran-owned small businesses.	www.gsa.gov/gwacs
10. HHS- NIH	Chief Information Officer Solutions & Partners 2 Innovations (CIO-SP2i)	Hardware; software development; systems integration; technical support services	http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/
11. HHS- NIH	Electronic Commodities Store	Commercial-off-the-shelf products; software; maintenance; peripherals	http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/

[48] http://www.whitehouse.gov/omb/procurement/interagency_acq/gwac_list.pdf

	(ECS III)		
12. HHS- NIH	Image World2 *New Dimensions* (IW2nd)	Imaging and document management services	http://olao.od.nih.gov/Acquisitions/ MultipleVehicleContracts/GWACs/
13. NASA	Scientific Engineering Workstation Procurement (SEWP)	High-end scientific and engineering products	http://www.sewp.nasa.gov/

6. Franchise Funds. (The Government Management Reform Act of 1994, Pub. L. No. 103-356, Title IV, § 403, 103 Stat. 3413 (Oct. 13, 1994)).

a. Purpose: authorized the Director of OMB to establish six franchise fund pilot programs to provide common administrative support services on a competitive and fee basis.

1) OMB designated pilots at Department of Interior, Department of Treasury, Department of Commerce, Environmental Protection Agency, Veterans Affairs, and Department of Health and Human Services.

2) Of these, the DoD most frequently uses GovWorks,[49] run by the Department of the Interior, and FedSource, run by the Department of the Treasury.

b. Operating Details:

1) Franchise funds are revolving, self-supporting businesslike enterprises that provide a variety of common administrative services, such as payroll processing, information technology support, employee assistance programs, and contracting services.

2) To cover their costs, the franchise funds charge fees for services. Unlike other revolving funds, the laws authorizing each franchise fund allow them to charge for a reasonable operating reserve and to retain up to 4 percent of total annual income for acquisition of capital equipment and financial management improvements.

c. Although these pilots were to expire at the end of fiscal year 1999, they have been extended several times.

[49] A previous DoD-wide prohibition on purchases in excess of $100,000 through GovWorks imposed on June 14, 2007, has since been rescinded. *See* Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, subject: Revision to DoD Prohibition to Order, Purchase, or Otherwise Procure Property or Services through the Acquisition Services directorate of the Department of Interior's National Business Center locations, Herndon, Virginia (formerly known as GovWorks and now known as AQD-Herndon) and Sierra Vista, Arizona (formerly known as Southwest Branch and now known as ACQ-Sierra Vista), dated March 28, 2008. However, this memo imposed a new restriction on acquisition of furniture.

1) The termination provision at section 403(f) was amended to be limited to the DHS Working Capital Fund. (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Title VII, § 730, 121 Stat. 1844 (Dec. 26, 2007)).

2) Because the termination provision no longer applies to the other franchise fund pilot programs, the others are now apparently permanent.

d. NOTE: while the deobligation requirements of the Economy Act do not apply, various audits have identified contracting and fiscal abuses with DoD's use of franchise funds.[50] Accordingly, the deobligation policies described in section IV.B *supra*, would apply here as well.

V. DOD POLICY ON USE OF NON-DOD CONTRACTS.[51]

A. General Policy: "use of non-DoD contracts and the services of assisting agencies to meet DoD requirements, when it is done properly, is in the best interest of the Department, and necessary to meet our needs."[52]

B. Requirements For Use of Non-DoD Contracts Over the Simplified Acquisition Threshold (currently $150,000).[53]

1. The policies of the Military Departments require certain written determinations or certifications prior to using a non-DoD contract for goods or services over $150,000 (under the Economy Act or under any non-Economy Act authority, to include orders against GSA's FSS).

2. The officials with authority to make these determinations/certifications are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).

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[50] *See, e.g.*, GOVERNMENT ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: FRANCHISE FUNDS PROVIDE CONVENIENCE, BUT VALUE TO DOD IS NOT DEMONSTRATED, GAO-05-456 (July 2005); *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157.

[51] Common policy applicable for Economy Act and non-Economy Act transactions.

[52] Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, Subject: Interagency Acquisition, dated January 18, 2008 (Appendix F).

[53] *See* policies of each of the Military Departments (Appendix A), which implement Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (Oct. 28, 2004) and the requirements of Office of the Secretary of Defense (OSD) memorandum, Subject: Proper Use of Non-DoD Contracts, dated October 29, 2004.

3. This requirement is separate and distinct from the D&F required for Economy Act transactions, but may be combined with the D&F for approval by an official with authority to make all determinations and issue all approvals.

4. With some slight differences between the Military Departments (see your individual service policy, contained in the Appendices to this chapter), these policies generally require statements[54] including:

   a. The order is in the best interest of the Military Department considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

   b. The supplies or services to be provided are within the scope of the non-DoD contract;

   c. The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and

   d. The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable statutes, regulations, and directives.

5. Of the Military Departments, the Army's policy is the most stringent, requiring enhanced coordination prior to making the orders.

   a. For all non-DoD orders over the Simplified Acquisition Threshold, the required written certification must be prepared with the assistance (and written coordination) of the Army contracting officer and the fund certifying official.

   b. For direct acquisitions of services, the requiring activity must also obtain written concurrence from the non-DoD contracting officer at the servicing agency that the services are within the scope of the contract (unless the Army contracting office has access to the non-DoD contract document), and the Army contracting officer must obtain written coordination from supporting legal counsel.

   c. For assisted acquisitions of both supplies and services:

[54] These considerations are also outlined in DFARS 217.78, Contracts or Delivery Orders Issued by a Non-DoD Agency.

1) The requiring activity must first consult with the Army contracting office, which will advise regarding the various DoD contractual options available to obtain the goods or services, and which will provide any unique terms, conditions and requirements that must be incorporated into the resultant non-DoD order to comply with DoD rules.

2) The fund authorizing official must annotate the MIPR with the following statement: "This requirement has been processed in accordance with Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (Public Law 108-375) and the Army Policy memorandum on Proper Use of Non-Department of Defense contracts, dated July 12, 2005. The order is properly funded (correct appropriation and year), and it is in compliance with Army procedures for placement of orders on the Army's behalf by a non-DoD organization."

3) The head of the requiring activity shall obtain written coordination from supporting legal counsel prior to sending the order to the servicing agency.

4) The requiring activity must also provide a copy of the certification to the non-DoD contracting officer.

C. Certifications. Under DFARS 217.7802(a) and FAR 17.7, the requesting agency may not procure from a non-DoD servicing agency that fails to comply with DoD procurement laws and regulations unless the Under Secretary of Defense determines in writing that "it is necessary in the interest of the Department of Defense to continue to procure property and services through the non-defense agency during such fiscal year." (Pub. L. No. 110-181 (2008 National Defense Authorization Act, § 801)).[55] Certifications from non-DoD agencies indicating that they will comply with defense procurement and financial management regulations are maintained at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

D. Interagency Agreements. Prior to the issuance of a solicitation arising from an assisted acquisition,[56] the servicing agency and the requesting agency shall both

[55] *See* Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Delegation of Authority under Section 801 of the National Defense Authorization Act for Fiscal Year 2008, dated July 19, 2008. *See also* Office of the Under Secretary of Defense (AT&L) memorandum, Subject: National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110-181, Section 801, *Internal Controls for Procurements on Behalf of the Department of Defense by Certain Non-Defense Agencies, Requests for "Waiver,"* dated September 18, 2009. (Appendix G). Waiver procedures are also addressed in FAR 17.703(e) and (f).

[56] Since the requesting agency administers an order in a direct acquisition themselves, there is generally no need for a written interagency agreement outlining roles and responsibilities as there is in an assisted acquisition. *See* FAR 17.502-1(b)(2).

sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties. FAR 17.502-1(b). An interagency agreement should cover roles and responsibilities related to acquisition planning, contract execution, and contract administration. It should also cover procedures for resolution of disputes that may arise.[57] DoD agencies are specifically required to use an Interagency Agreement for all assisted interagency acquisitions regardless of dollar value. Additionally, DoD agencies must include specific enumerated elements or utilize a model agreement per Office of Federal Procurement Policy Memo (OFPP).[58] Service specific[59] directives should also be consulted for additional guidance on preparation, content, and approval of interagency agreements.

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[57] FAR 17.503(c).

[58] *See* Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Meeting Department of Defense Requirements Through Interagency Acquisition, dated October 31, 2008. This memo does not eliminate requirements under FAR 17.5 or DFARS 217.78, which take precedence in any conflict with OFPP guidance. (Appendix H).

[59] In preparing interagency agreements to support assisted acquisitions, agencies should review the Office of Federal Procurement Policy guidance, Interagency Acquisitions, available at *http://www.whitehouse.gov/omb/procurement_index_interagency_acq/.*

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APPENDIX A

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON DC 20301-1100

COMPTROLLER

SEP 25 2003

MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF
ASSISTANT SECRETARY OF THE ARMY (FINANCIAL MANAGEMENT AND COMPTROLLER)
ASSISTANT SECREATARY OF THE NAVY (FINANCIAL MANAGEMENT AND COMPTROLLER)
ASSISTANT SECRETARY OF THE AIR FORCE (FINANCIAL MANAGEMENT AND COMPTROLLER)
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Fiscal Principals and Interagency Agreements

Recent media attention has focused on the impropriety of using interagency agreements to "bank" funds that would otherwise expire at the end of the fiscal year. For Economy Act agreements, this is expressly forbidden. The Economy Act requires servicing agencies to return unobligated funds to requesting agencies before the funds would expire.

However, some Federal agencies have separate legal authority to provide services—including contracting services—without the need to return unobligated funds at year's end. The Department of Interior's GovWorks and the General Services Administration's Federal Technology Service (FTS) are just two examples. These programs provide legitimate and useful services, but they are not intended solely to extend an appropriation's period of availability.

Every order under an interagency agreement must be based upon a legitimate, specific and adequately documented requirement representing a *bona fide* need of the year in which the order is made. As always, adequate funds of the appropriate type (procurement, O&M, *etc.*) must be available. If these basic conditions are met, these servicing agencies may retain and promptly obligate the funds in the *following* fiscal year. On the other hand, an interagency agreement may not be used in the last days of the fiscal year solely to prevent funds from expiring or to keep them available for a requirement arising in the following fiscal year.

As we close out each fiscal year, contracting officials and accountable officers must resist the misguided desire to bank government funds through improper use of interagency agreements. Misuse of interagency agreements may result in disciplinary action, adverse media attention, and additional congressional limitations and oversight Department-wide.

Dov S. Zakheim

cc: ODGC(F)

OFFICE OF THE SECRETARY OF DEFENSE

1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

OCT 29 2004

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Proper Use of Non-DoD Contracts

Each year billions of Department of Defense (DoD) dollars are spent using non-DoD contracts to procure supplies and services. In many cases this represents an effective way to accomplish acquisitions in support of DoD's mission. For this reason, the use of non-DoD contracts is encouraged when it is the best method of procurement to meet DoD requirements. However, recent DoD and General Services Administration Inspector General reports identified several issues associated with the Department's use of non-DoD contracts for the acquisition of certain supplies and services. Non-DoD contracts may not be used to circumvent conditions and limitations imposed on the use of funds, nor are they a substitute for poor acquisition planning.

Military Departments and Defense Agencies must establish procedures for reviewing and approving the use of non-DoD contract vehicles when procuring supplies and services on or after January 1, 2005, for amounts greater than the simplified acquisition threshold. This requirement applies to both direct *(i.e.* orders placed by DoD) and assisted acquisitions (*i.e.* contracts awarded or orders placed by non-DoD entities, including franchise funds, on behalf of DoD), using DoD funds. These procedures must include:

- evaluating whether using a non-DoD contract for such actions is in the best interest of the DoD. Factors to be considered include:
  - satisfying customer requirements;
  - schedule;
  - cost effectiveness (taking into account discounts and fees); and
  - contract administration (including oversight);
- determining that the tasks to be accomplished or supplies to be provided are within the scope of the contract to be used;
- reviewing funding to ensure it is used in accordance with appropriation limitations;
- providing unique terms, conditions and requirements to the assisting agency for incorporation into the order or contract as appropriate to comply with all applicable DoD-unique statutes, regulations, directives and other requirements, (*e.g.* the requirement that all clothing procured with DoD funding be of domestic origin); and
- collecting data on the use of assisted acquisitions for analysis.

FEDERAL RECYCLING PROGRAM PRINTED ON RECYCLED PAPER

This new policy satisfies the requirements of Section 2330(b)(1)(C)(ii) of Title 10, United States Code as amended by Section 801 of the National Defense Authorization Act for Fiscal Year 2002. Section 801 requires advance approval to buy services via use of a "contract entered into or a task order issued, by an official of the United States outside of the DoD." Although Section 801 applies only to the procurement of services, we are applying this requirement to supplies in order to achieve consistency and discipline in the DoD acquisition process. The Defense Acquisition Regulation Council will issue coverage for the Defense Federal Acquisition Regulation Supplement that is consistent with the requirements of this memorandum.

The use of multiple award contracts must be consistent with the requirements of Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Competition Requirements for Purchase of Services Pursuant to Multiple Award Contracts); Federal Acquisition Regulation (FAR) Part 8.002 (Priorities for Use of Government Supply Sources); FAR Part 17.5 (Interagency Acquisitions under the Economy Act); FAR Part 7(Acquisition Planning); and DoD Instruction 4000.19 (Interservice and Intragovernmental Support).

While the Program Manager or requirements official has primary responsibility to ensure compliance with this policy, success will not be achieved without a team approach and specific support from the financial management and contracting communities. For example, the financial management community shall: (1) ensure the program manager or other appropriate individual has certified that the procedures established by the Military Department or Defense Agency have been followed and (2) ensure that funds are available and appropriate for the procurement action.

Please ensure widest dissemination of this memorandum and the procedures you establish. It is imperative that when non-DoD contracts are utilized to meet DoD requirements, they are utilized properly. The point of contact on this matter is Mr. Michael Canales. He can be reached at (703) 695-8571 or via email at michael.canales@osd.mil.

Robert J. Henke
Principal Deputy Under Secretary
of Defense (Comptroller)

Michael W. Wynne
Acting Under Secretary of Defense
(Acquisition, Technology, and Logistics)

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
ACQUISITION LOGISTICS AND TECHNOLOGY
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

JUL 12 2005

SAAL-PP

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Proper Use of Non-Department of Defense (Non-DoD) Contracts

This memorandum establishes Army policy for reviewing and approving the use of non-DoD contract vehicles when procuring supplies or services on or after January 1, 2005, for amounts greater than the simplified acquisition threshold (SAT) (the generally applicable SAT currently is $100,000). These procedures implement Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) and the associated requirements of the Office of the Secretary of Defense (OSD) policy memorandum, subject: Proper Use of Non-DoD Contracts, dated October 29, 2004 (Enclosure One).

Ensuring the proper use of non-DoD contract vehicles requires an emphasis on market research, acquisition planning and early involvement in the procurement process by requiring activity, contracting, and financial management personnel. Although the requirements community has the primary responsibility to ensure compliance with this policy, all must work closely together to develop an acquisition strategy (that complies with the procedures contained in this memorandum) and to ensure that use of a non-DoD contract is in the best interest of the Army.

This memorandum applies to both direct acquisitions (i.e., orders placed by an Army contracting or ordering officer against a non-DoD contract) and assisted acquisitions (i.e., contracts awarded or orders placed by non-DoD organizations using Army funds) for supplies and services. Except as expressly noted herein, this memorandum applies to all non-DoD contract vehicles, to include orders placed by Army personnel against the General Services Administration's Federal Supply Schedules.

Defense Federal Acquisition Regulation Supplement (DFARS), Army Federal Acquisition Regulation Supplement (AFARS), and DoD Financial Management Regulation changes will be forthcoming as a result of this policy. In the interim, addressees shall use the procedures set forth in Enclosure Two, which have an effective date of January 1, 2005.

The Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology) points of contact are Ms. Barbara Binney at (703) 604-7113, and Mr. Ed Cornett at (703) 604-7142, office symbol SAAL-PP. The Office of the Assistant Secretary of the Army (Financial Management and Comptroller) point of contact is Mr. Joseph Hemphill at (703) 692-7487, office symbol BUC-E.

This memorandum also rescinds the Deputy Assistant Secretary of the Army (Policy and Procurement) memorandums, subject: Military Interdepartmental Purchase Requests (MIPRs), dated March 4, 2002 and March 8, 2002.

Valerie L. Baldwin
Assistant Secretary of the Army
(Financial Management and Comptroller)

Claude M. Bolton, Jr.
Assistant Secretary of the Army
(Acquisition, Logistics and Technology)

Enclosures:
1. OSD Memorandum, Proper Use of Non-DoD Contracts, October 29, 2004
2. Army Policy for Proper Use of Non-DoD Contracts

DISTRIBUTION:
ADMINISTRATIVE ASSISTANT TO THE SECRETARY OF THE ARMY
ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS
ASSISTANT SECRETARY OF THE ARMY FOR INSTALLATIONS AND ENVIRONMENT
ASSISTANT SECRETARY OF THE ARMY FOR MANPOWER AND RESERVE AFFAIRS
DEPUTY UNDER SECRETARY OF THE ARMY (OPERATIONS RESEARCH)
DEPUTY CHIEF OF STAFF FOR PERSONNEL, UNITED STATES ARMY
DEPUTY CHIEF OF STAFF FOR INTELLIGENCE, UNITED STATES ARMY
DEPUTY CHIEF OF STAFF FOR OPERATIONS & PLANS, UNITED STATES ARMY
DEPUTY CHIEF OF STAFF FOR LOGISTICS, UNITED STATES ARMY
CHIEF INFORMATION OFFICER, OFFICE OF THE SECRETARY OF THE ARMY
DEPUTY CHIEF OF STAFF FOR PROGRAMS
CHIEF OF ENGINEERS, UNITED STATES ARMY CORPS OF ENGINEERS
THE SURGEON GENERAL, OFFICE OF THE SURGEON GENERAL, UNITED STATES ARMY
THE JUDGE ADVOCATE GENERAL, UNITED STATES ARMY
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT, UNITED STATES ARMY
THE INSPECTOR GENERAL

Army Policy
Proper Use of Non-Department of Defense (Non-DoD) Contracts

1. Definitions: For purposes of this policy –

a. Assisted acquisition means a contract awarded or a task or delivery order placed on the behalf of DoD by a non-DoD agency.

b. Designated contracting office means the Army/DoD contracting office that is responsible for providing primary contracting support to a particular requiring activity.

- In a situation where a requiring activity does not have a designated contracting office, the requiring activity shall contact the Office of Procurement Policy and Support under the Deputy Assistant Secretary of the Army (Policy and Procurement) (e-mail PSStaff@hqda.army.mil or PSStaff@saalt.army.mil) for assignment of an Army contracting office to perform the functions set forth in this policy.

c. Direct acquisition means a task or delivery order placed by a DoD official under contract awarded by a non-DoD agency. The term includes an order placed against the General Services Administration Federal Supply Schedules (GSA FSS).

d. Fund authorizing official means the individual who executes the funds authorization portion of a Military Interdepartmental Purchase Request (MIPR) (DD Form 448, blocks 14-17) or other equivalent form used to provide funding to a non-DoD organization in support of an order for supplies or services, certifying that funds for the procurement are properly chargeable to the allotment(s) provided and that the available balances are sufficient to cover the estimated price of the order.

e. Fund certifying official means the individual who executes the fund certification portion of the commitment document (e.g., Purchase Request and Commitment, DA Form 3953 (blocks19-22) or other equivalent form) certifying that the supplies or services being requested are properly chargeable to the allotment(s) provided, that available balances are sufficient to cover the cost thereof, and that funds have been committed.

f. Requiring activity means the Army organization that has a requirement for goods or services and requests the initiation of, and provides funding for, an assisted or direct acquisition to fulfill that requirement.

g. Assisted acquisition report means the annual report (per fiscal year) that shall be submitted by the requiring activity to report the use of assisted acquisitions.

2. Applicability:

a. Except as noted herein, this policy shall apply to the use of non-DoD contract vehicles for all procurements of supplies or services above the simplified acquisition threshold (SAT). The generally applicable SAT currently is $100,000 (41 U.S.C. 403(11)). For procurements in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States, the SAT currently is $250,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and $1,000,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States (41 U.S.C. 428a). See also, 41 U.S.C. 259(d)(1) and Federal Acquisition Regulation (FAR) Subpart 2.101. Future changes to the foregoing statutory thresholds shall be incorporated automatically into this policy.

b. This policy shall not apply to procurements of the following services:

(1) Printing, binding or blank-book work to which 44 U.S.C. 502 applies;

(2) Services available under programs pursuant to 2 U.S.C. 182c (section 103 of the Library of Congress Fiscal Operations Improvement Act of 2000 (Public Law 106-481)).

3. Procedures:

a. Direct acquisition of supplies and services –

(1) Prior to the placement of a direct acquisition order, the head of the requiring activity (O6/GS-15 level or higher) must execute a written certification that:

- The order is in the best interest of the Army considering the factors of availability of a suitable DoD contract vehicle, ability to satisfy customer requirements, delivery schedule, cost effectiveness and price (including any discounts and fees), contract administration (including ability to provide contract oversight), socio-economic opportunities, the comparative costs of using a DoD, as opposed to non-DoD, contractual instrument – to include administrative fees charged by the non-DoD activity, and any other applicable considerations;

- The supplies or services to be provided are within the scope of the non-DoD contract;

- The proposed funding is appropriate for the procurement and is being used in a manner consistent with any appropriation limitations;

- All unique terms, conditions and requirements will be incorporated into the order or contract, as appropriate, to comply with all applicable

DoD-unique statutes, regulations, directives and other requirements(e.g., compliance with 10 U.S.C. 2533a – Requirement to buy certain articles from American sources; exceptions ("Berry Amendment")); and

- The review and approval procedures set forth in paragraph 4, Management Review and Approval Requirements, of this policy memorandum have been completed.

(2) The requiring activity shall prepare this certification with the assistance of the contracting officer in the designated contracting office and the fund certifying official, and shall obtain these individuals' written coordination upon the certification.

(3) Additional requirements for direct acquisitions of services: Unless the contracting office has access to the servicing organization's contract (including the statement of work), the requiring activity shall obtain written concurrence from the non-DoD contracting officer at the servicing organization that the services to be provided are within the scope of the servicing organization's contract. The contracting officer in the designated contracting office also shall obtain written coordination from supporting legal counsel prior to placement of the order; legal review of orders for supplies shall be in accordance with contracting activity procedures.

(4) The contracting officer in the designated contracting office shall maintain a copy of the above certification and all accompanying reviews and coordination records in the contract file established for the direct acquisition.

(5) Army personnel are reminded that specific guidance regarding the use of MIPRs is available in the Federal Acquisition Regulation (FAR) subpart 17.5 and the Defense Federal Acquisition Regulation Supplement subpart 217.5 – "Interagency Acquisitions Under the Economy Act, " DoD Instruction 4000.19 – "Interservice and Intragovernmental Support," and DoD 7000.14R – DoD Financial Management Regulations (FMR), Volume 11A, Chapter 3 – "Economy Act Orders". These regulations should be consulted prior to placement of an order with a non-Army contracting office within the DoD.

b. Assisted acquisition of supplies and services –

(1) Prior to the transmittal of an assisted acquisition request to a non-DoD organization, the requiring activity shall consult with its designated contracting office (if there is no designated contracting office, see paragraph 1.b.), which will advise regarding the various DoD contractual options available to obtain the supplies and services, and which will provide any unique terms, conditions and requirements that must be incorporated into the resultant non-DoD order or contract to comply with all applicable DoD-unique statutes, regulations, directives and other requirements.

(2) Also prior to the transmittal of an assisted acquisition request to a non-DoD organization, the head of the requiring activity (O6/GS-15 level or higher) must execute a written certification that:

- The use of a non-DoD contract vehicle is in the best interest of the Army considering the factors of availability of a suitable DoD contract vehicle, ability to satisfy customer requirements, delivery schedule, cost effectiveness and price (including any discounts and fees), contract administration (including ability to provide contract oversight), socio-economic opportunities, the comparative costs of using a DoD, as opposed to non-DoD, contractual instrument – to include administrative fees charged by the non-DoD activity, and any other applicable considerations;

- The supplies or services to be provided are within the scope of the non-DoD contract;

- The proposed funding is appropriate for the procurement and is being used in a manner consistent with any appropriation limitations;

- All unique terms, conditions and requirements will be incorporated into the order or contract, as appropriate, to comply with all applicable DoD-unique statutes, regulations, directives and other requirements (e.g., compliance with 10 U.S.C. 2533a – Requirement to buy certain articles from American sources; exceptions ("Berry Amendment")); and

- The review and approval procedures set forth in paragraph 4, Management Review and Approval Requirements, of this policy memorandum have been completed.

(3) The requiring activity shall prepare this certification with the assistance of the contracting officer in the designated contracting office and the fund authorizing official, and shall obtain these individuals' written coordination upon the certification. The requiring activity shall also obtain written concurrence from the non-DoD contracting officer at the servicing organization that the supplies or services to be provided are within the scope of the non-DoD contract. The fund authorizing official shall annotate the MIPR or other equivalent form used to transmit funding to the servicing organization with the following statement: "This requirement has been processed in accordance with Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) and the Army Policy memorandum on Proper Use of Non-Department of Defense contracts, dated July 12, 2005. The order is properly funded (correct appropriation and year), and it is in compliance with Army procedures for placement of orders on the Army's behalf by a non-DoD organization. Reference https://webportal.saalt.army.mil/saal-zp/armypolicyuseofnon-dodcontracts.pdf. The head of the requiring activity also shall

obtain written coordination from supporting legal counsel prior to transmittal of the order to the servicing agency.

(4) The requiring activity and fund authorizing official shall maintain a copy of the above certification and all accompanying reviews and coordination records in a file established for the non-DoD transaction. The requiring activity shall provide a copy of this certification to the non-DoD contracting officer at the servicing organization.

(5) The requiring activity shall request the servicing organization contracting officer to provide it with a copy of the Federal Procurement Data System report submitted in connection with the procurement action.

(6) For assisted acquisitions that are subject to the Economy Act, 31 U.S.C. 1535, the requiring activity also shall comply with the requirements of FAR Subpart 17.5 (including the determination and findings requirements at FAR 17.503) and Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 217.5. DoD Instruction 4000.19, Interservice and Intragovernmental Support, and the DoD Financial Management Regulation, DoD 7000.14-R, Vol. 11A, also apply to these transactions.

4. Management Review and Approval Requirements:

a. The review and approval procedures for acquisition of services set forth at DFARS Subpart 237.170-3(b), Army Federal Acquisition Regulation Supplement (AFARS) 5137.170-3(b) and AFARS 5137.5-3 apply to direct and assisted acquisitions. In accordance with these provisions, requiring activities shall obtain advance approval of direct and assisted acquisitions of services as follows:

(1) For a total planned dollar value of $500M or more, or identified by the Assistant Secretary of the Army (Acquisition, Logistics and Technology (ASA(ALT)) as special interest, obtain Deputy Assistant Secretary of the Army (Policy & Procurement) (DASA (P&P)) approval.

(2) For a total planned dollar value greater than $100M and less than $500M, obtain approval of the cognizant Program Executive Officer (PEO), Direct Reporting Program Manager (DRPM), or Head of Contracting Activity (HCA) (at HCA's discretion, delegable to a level no lower than the Principal Assistant Responsible for Contracting (PARC)) unless the acquisition is already covered in an acquisition strategy approved by the cognizant official; obtain PEO/DRPM/HCA approval of all acquisitions designated as special interest.

(3) For a total planned dollar value less than $100M, follow Major Command (MACOM) and the Army Contracting Agency (ACA) procedures.

(4) For a total planned dollar value less than $100M where the requiring activity does not fall under a MACOM or the ACA, follow procedures established by the

head of the requiring activity; such procedures should be commensurate with the acquisition's risk and operational impact.

b. Requiring activities shall obtain advance approval of direct and assisted acquisitions of supplies as follows:

(1) For a total planned dollar value of $500M or more, obtain the approval of the DASA(P&P).

(2) For a total planned dollar value greater than $100M and less than $500M, obtain the approval of the PEO, DRPM or requiring activity head who is a General Officer (GO) or a member of the Senior Executive Service (SES).

(3) For a total planned dollar value less than $100M, follow procedures established by the head of the requiring activity; such procedures should be commensurate with the acquisition's risk and operational impact.

5. Data Collection and Reporting Requirements for Assisted Acquisitions:

a. MACOM Commanders and PEOs/DRPMs shall ensure that requiring activities within their organizations collect data on their use of assisted acquisitions for purposes of analysis. No later than November 1st of each year, MACOM Commanders and PEOs/DRPMs shall submit the enclosed Army Assisted Acquisition Summary Report. A central report per Department of Defense Activity Address Code (DODAAC) from the MACOM Commanders and PEOs/DRPMS is required. To facilitate the collection of this data, the enclosed Assisted Acquisition Individual Report will be completed by the requiring activity for each funding document, which will be part of the documentation described in paragraph 3.b. above. The Army Assisted Acquisition Summary Report is available in a downloadable Excel spreadsheet format found at the ASA(ALT) website at:

https://webportal.saalt.army.mil/saal-zp/armyreportforassistedacquisition.xls

Download this report to enter the data and then electronically submit this report to PSStaff@hqda.army.mil or PSStaff@saalt.army.mil to the Office of Procurement Policy and Support (SAAL-PP). Negative reports are required in the event that no reportable assisted acquisitions were conducted. Requiring activities that do not fall under a MACOM or PEO/DRPM shall consolidate and submit the summary report directly to SAAL-PP.

b. To the maximum extent possible, the Federal Procurement Data System-Next Generation (FPDS-NG), the acquisition data system to be used by all federal agencies, will be relied upon to provide contract award data for analysis on non-DoD assisted acquisitions. The FPDS-NG is currently scheduled for implementation in fiscal year 2006. A change is being requested to add assisted acquisition to this report. However,

until that revision is made to the regulations, the requiring activity will maintain a centrally managed report and consolidate with the PEO/DRPM, the MACOM, or other requiring activity. Once the FPDS-NG system is automated to capture assisted acquisition reports, then the PM or the requiring activity will ask the non-DoD contracting office for a copy of the FPDS report for their assisted acquisition(s) and maintain a copy in the applicable file.

DEPARTMENT OF THE AIR FORCE
WASHINGTON DC

OFFICE OF THE ASSISTANT SECRETARY

6 DEC 2004

MEMORANDUM FOR ALMAJCOM-FOA-DRU/CV/LG/FM/PK

SUBJECT: Proper Use of Non-DoD Contracts

This memo establishes Air Force policy for reviewing and approving the use of non-DoD contract vehicles when procuring supplies and services on or after January 1, 2005, for amounts greater than the simplified acquisition threshold ($100K). These procedures are being implemented to comply with Section 854 of the FY05 National Defense Authorization Act and an OSD memo on Proper Use of Non-DoD Contracts, dated 29 OCT 04.

Ensuring the proper use of non-DoD contracts requires an emphasis on market research, acquisition planning and early involvement by contracting and financial management personnel in the acquisition process. Acquisition program managers and requirements personnel, financial management personnel and contracting officers must work closely together to ensure the selected acquisition strategy complies with the requirements and procedures contained in this policy memo and to ensure use of a non-DoD contract is in the best interest of the Air Force.

This memo addresses both direct acquisitions (i.e. orders placed by Air Force Contracting Officers against non-DoD contracts) and assisted acquisitions (i.e. contracts awarded or orders placed by non-DoD organizations using Air Force funds) for supplies and services.

DFARS, AFFARS and financial management regulation changes as a result of this policy will be forthcoming. In the interim, see the attachment for Air Force procedures that are effective as of January 1, 2005.

Please direct any questions to Lt Col Rich Unis, SAF/AQCP, DSN 425-7030 or (703) 588-7030, Richard.Unis@pentagon.af.mil or Ms. Judith Oliva, SAF/FMBMM, DSN 425-8250 or (703) 697-8250, Judith.Oliva2@pentagon.af.mil.

MARVIN R. SAMBUR
Assistant Secretary of the Air Force
(Acquisition)

MICHAEL MONTELONGO
Assistant Secretary of the Air Force
(Financial Management and Comptroller)

Attachment:
Air Force Policy for Proper Use of Non-DoD Contracts

Air Force Policy
Proper Use of Non-DoD Contracts

1) Applicability and Definitions:

This policy applies to the use of non-DoD contract vehicles for all acquisitions of supplies or services above the Simplified Acquisition Threshold (SAT), other than procurements of the following services:

(1) Printing, binding or blank-book work to which 44 U.S.C. 502 applies; and

(2) Services available under programs pursuant to 2 U.S.C. 182c (section 103 of the Library of Congress Fiscal Operations Improvement Act of 2000 (Public Law 106-481)).

Direct Acquisition - a task or delivery order placed by an Air Force official against a contract vehicle established outside the DoD.

Assisted Acquisition - a contract awarded or task or delivery order placed on behalf of DoD by an official of the United States outside DoD.

2) Direct Acquisition of Supplies - For all direct acquisition orders of supplies placed against non-DoD contracts (including GSA Federal Supply Schedule (FSS) Orders), and for each Blanket Purchase Agreement issued against a GSA FSS, the Program Manager, Project Manager (for Medical Treatment Facilities (MTFs), the Medical Logistics Flight Commander), requirement initiator (as appropriate) or the Contracting Officer must document the contract file to reflect:

a) Order is in the best interest of the Air Force. Consider such factors as satisfying customer requirements, cost effectiveness and price, delivery schedule, non-availability of a suitable contract within DoD, contract administration, small business opportunities and any other factors as applicable.

b) Supplies to be provided are within the scope of the basic contract.

c) Funding is available and appropriate for the acquisition. The financial management organization shall validate that the funds are appropriate for the acquisition.

d) Any terms, conditions and/or requirements unique to DoD or the Air Force are incorporated into the order to comply with applicable statutes, regulations and directives (e.g. the requirement that the items listed in DFARS 225.7002-1 and procured with DoD funds be of domestic origin, unique identification requirements, etc.)

e) Certify that procedures contained in this policy memo have been followed.

3) Assisted Acquisition of Supplies - The requiring organization (for the Air Force medical service at local level the Medical Logistics Flight Commander, and at Airstaff level, the Chief,

Procurement Services at the Air Force Medical Logistics Office) shall coordinate with their servicing Air Force contracting and financial management office on all supplies requirements proposed for award by non-DoD organizations using Air Force funds. The contracting organization shall advise the requiring organization as to the various contractual options available to obtain the supplies and any DoD terms and conditions that must be incorporated into the resultant order or contract. The requiring organization shall document the following:

a) Use of a non-DoD contract is in the best interest of the Air Force considering the factors of satisfying customer requirements, cost effectiveness and price, delivery schedule, non-availability of a suitable contract within DoD, contract administration, small business opportunities and any other factors as applicable.

b) The supplies to be provided are within the scope of the contract to be used. Coordinate with the non-DoD Contracting Officer to verify the requirement is within the scope of the assisting agency's selected contract.

c) Funding appropriation is legal and proper for the acquisition and used in accordance with any appropriation limitations. The financial management organization shall validate that the funds are appropriate for the acquisition.

d) Any terms, conditions and/or requirements unique to DoD or the Air Force that must be incorporated into the resultant order or contract to comply with applicable statutes, regulations and directives (e.g. the requirement that the items listed in DFARS 225.7002-1 and procured with DoD funds be of domestic origin, unique identification requirements, etc.)

e) Certify that procedures contained in this policy memo have been followed.

For interagency acquisitions subject to the Economy Act (31 U.S.C. 1535), comply with the D&F requirements at FAR 17.503. A sample D&F template for Economy Act transactions is contained at AFFARS Informational Guidance 5317.5. Note - Assisted acquisitions by GSA are generally authorized by other statutes, e.g. Federal Property and Administrative Services Act, Clinger-Cohen Act, etc, and are not subject to the Economy Act, so no Economy Act D&F is needed. Similarly, health care supplies and equipment purchased under sharing agreements between the Air Force and the Veterans Administration pursuant to 38 U.S.C. 8111 are not subject to the Economy Act and no Economy Act D&F is needed (although other procurement laws and regulations still apply).

4) Direct Acquisition of Services - The Contracting Officer must ensure compliance with AFFARS 5337.170-3, Approval Requirements, for all orders of services placed against non-DoD contracts. The Program Manager, Project Manager (for Medical Treatment Facilities (MTFs), the Medical Logistics Flight Commander), requirement initiator (as appropriate) or the Contracting Officer must document the contract file to reflect:

a) Order is in the best interest of the Air Force. Consider such factors as satisfying customer requirements, cost effectiveness and price, delivery schedule, non-availability of a suitable contract within DoD, contract administration, small business opportunities and any other factors as applicable.

b) The services to be provided are within the scope of the basic contract.

c) Funding is available and appropriate for the acquisition. The financial management organization shall validate that the funds are appropriate for the acquisition.

d) Any terms, conditions and/or requirements unique to DoD or the Air Force are incorporated into the order to comply with applicable statutes, regulations and directives (e.g. the requirement that the items listed in DFARS 225.7002-1 and procured with DoD funds be of domestic origin, unique identification requirements, etc.)

e) Certify that procedures contained in this policy memo have been followed.

5) Assisted Acquisition of Services - Ensure compliance with AFFARS 5337.170-3, Approval Requirements, for all services requirements that are proposed for award by non-DoD organizations using Air Force funds. The requiring organization shall document the following:

a) Use of a non-DoD contract is in the best interest of the Air Force considering the factors of satisfying customer requirements, cost effectiveness and price, delivery schedule, non-availability of a contract within DoD, contract administration, and any other factors as applicable.

b) The services to be provided are within the scope of the contract to be used. Coordinate with the non-DoD Contracting Officer to verify the requirement is within the scope of the assisting agency's selected contract.

c) Funding appropriation is proper for the acquisition and used in accordance with any appropriation limitations. The financial management organization shall validate that the funds are appropriate for the acquisition.

d) Any terms, conditions and/or requirements unique to DoD or the Air Force that must be incorporated into the resultant order or contract to comply with applicable statutes, regulations and directives (e.g. the requirement that the items listed in DFARS 225.7002-1 and procured with DoD funds be of domestic origin, unique identification requirements, etc.)

e) Certify that procedures contained in this policy memo have been followed.

For interagency acquisitions subject to the Economy Act (31 U.S.C. 1535), comply with the D&F requirements at FAR 17.503. A sample Economy Act D&F template is contained at AFFARS Informational Guidance 5317.5. Note - Assisted acquisitions by GSA are generally authorized by other statutes, e.g. Federal Property and Administrative Services Act, Clinger-Cohen Act, etc, and are not subject to the Economy Act, so no Economy Act D&F is needed. Similarly, health care supplies and equipment purchased under sharing agreements between the Air Force and the Veterans Administration pursuant to 38 U.S.C. 8111 are not subject to the Economy Act and no Economy Act D&F is needed (although other procurement laws and regulations still apply).

For assisted acquisitions of supplies and services, the Federal Procurement Data System - Next Generation (FPDS-NG), the acquisition data system to be used by all non-DoD agencies, will be relied upon to provide data for analysis on assisted acquisitions. FPDS-NG is currently scheduled for implementation in early calendar year 2005.

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
1000 NAVY PENTAGON
WASHINGTON DC 20350-1000

DEC 2 0 2004

MEMORANDUM FOR DISTRIBUTION

Subj: PROPER USE OF NON-DOD CONTRACTS

Ref: (a) Federal Acquisition Regulation (FAR) 2.101

Encl: (1) National Defense Authorization Act for FY 2005, Section 854
(2) OSD memorandum of October 29,2004
(3) DoN Guidelines for Proper Use of Non-DoD Contracts of December 14,2004

Recent Department of Defense (DoD) and other non-DoD Inspector General audits noted that DoD encountered a variety of problems using contracts awarded by non-DoD agencies. Congress and the Office of the Secretary of Defense (OSD) reacted to these findings by requiring specific approvals for use of non-DoD contracts (enclosures (1) and (2) respectively).

Addressees are required to establish procedures for reviewing and approving the use of non-DoD contract vehicles for supplies or services in excess of the simplified acquisition threshold (reference (a)) on or after January 1,2005. Procedures must be consistent with financial management and acquisition regulations and conform to the guidelines of enclosure (3). Ensuring the proper use of non-DoD contracts requires collaboration of the DoN program management, financial management, legal and contracting communities. Program and other requiring managers must seek early involvement of appropriate financial management and contracting personnel to ensure that the resultant acquisition strategy is in the best interests of DoD in terms of meeting requirements, schedule, cost effectiveness, oversight and administration, and availability of a contract vehicle within DoD.

Within ten days from the date of this memorandum, please provide contact information for the individual(s) within your Command responsible for developing these procedures. Submit the contact information, and address questions/comments to Bob Johnson at ROBERT.F.JOHNSON@NAVY.MIL or 703-693-2936.

John J. Young
Assistant Secretary of the Navy
Research, Development and Acquisition

Richard Greco, Jr.
Assistant Secretary of the Navy
Financial Management and Comptroller

Distribution:
Page 2

Subj: PROPER USE OF NON-DOD CONTRACTS

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SNDL:	A1	(Immediate Office of the Secretary) (AA/USN, ASN(M&RA), ASN(RD&A), ASN(I&E), ASN(FM&C) only
	A2A	(Dept of the Navy Staff Offices) (CNR, OPA, JAG, FMO, DONCIO only)
	A3	(CNO) (NOOT, N09B, N091, N093, N095, N096, N1, N2, N3/5, N4, N6/N7, N70, N8, N80, N81, N89 only)
	A5	(CHNAVPERS)
	A6	(CMC)
	21A1	(COMLANTFLT)
	21A2	(COMPACFLT)
	23C3	(COMNAVRESFOR)
	41A	(COMSC)
	FE1	(COMNAVSECGRU)
	FG1	(COMNAVNETCOM)
	FH1	(BUMED)
	FKA1A	(COMNAVAIRSYSCOM)
	FKA1B	(COMSPAWARSYSCOM)
	FKA1C	(COMNAVFACENGCOM)
	FKA1F	(COMNAVSUPSYSCOM)
	FKA1G	(COMNAVSEASYSCOM)
	FS1	(DONI)
	FT1	(NETC)
	FT89	(COMNAVSYSMGTACT) (COMTRANSCOM) (CNI)

PEO for Carriers
PEO for Air ASW, Assault & Special Mission Programs
PEO for Strike Weapons and Unmanned Aviation
PEO for Joint Strike Fighter
PEO for Integrated Warfare Systems
PEO for Ships
PEO for Submarines
PEO for Littoral and Mine Warfare
PEO for Tactical Air Programs
PEO for Information Technology
PEO for C41
PEO for Space Systems
DRPM for Strategic Systems Programs
DRPM for Expeditionary Fighting Vehicle
DRPM for NMCI
DRPM for ERP

Copy to: Page 3

DoN Guidelines for Proper Use of Non-DoD Contracts

1. Definitions:

"Assisting Activity" means the department/agency/activity outside of DoD with contracting responsibility for a DoD requirement.

"Assisted Acquisition" means a contract awarded or a task or delivery order placed on behalf of the DoD by an official of the United States outside of the DoD.

"Direct Acquisition" means a task or delivery order placed by DoN against a contract vehicle established outside of the DoD.

"Non-DoD contracts" means contracts awarded by an official outside the DoD. These include Federal Supply Schedules, Blanket Purchase Agreements issued against Federal Supply Schedules, and other contracts/schedules awarded outside DoD.

"Requiring Individual" means the individual in the organization responsible for identifying and fulfilling the requirement.

"Requiring Activity Supporting Contracting Office" means the DoN contracting activity normally providing contracting support to the requiring organization.

2. Applicability:

These guidelines apply to the use of non-DoD contract vehicles for acquisition of supplies and/or services at or above the Simplified Acquisition Threshold identified in Section 2.101 of the Federal Acquisition Regulation.

3. General

Use of non-DoD contract vehicles is encouraged when it is the best method of procurement to meet DoD requirements. Non-DoD contract vehicles shall not be used to 'bank' funds. Nor is use of non-DoD contract vehicles a substitute for poor planning.

The primary responsibility to ensure that proper procedures are followed lies with the requiring organization. Requiring individuals must seek early involvement of their legal, financial management and Requiring Activity Supporting Contracting Office personnel to ensure that the acquisition strategy is in the best interests of DoD in terms of meeting requirements, schedule, cost effectiveness, oversight and administration, and availability of a contract vehicle within

ENCLOSURE (3)

DoD. For direct acquisitions, the DoN contracting officer can make the within scope determination and ensure that required DoD-unique terms and conditions are incorporated into the specific contract action.

Legal, financial management and Requiring Activity Supporting Contracting Office personnel shall advise the requiring individuals of DoD-unique terms and conditions based on the specifics of the proposed acquisition. These are DoD unique terms/conditions that are required by statute/directive/etc. to apply to DoD acquisition, regardless of who places the award. DoN legal, financial management and Requiring Activity Supporting Contracting Office personnel shall work with the requiring individuals to ensure that the assisting activity understands and incorporates such DoD unique terms and conditions.

4. Assisted Acquisitions

4.1 Decision Authority

ASN(RDA) is the decision authority for assisted acquisitions exceeding $500,000,000. DASN(ACQ) is the decision authority for acquisitions exceeding $50,000,000. The Requiring Organization Commander/Commanding Officer is the decision authority for requirements at or below $50,000,000. This authority may be delegated, but for requirements above $5,000,000, decision authority may only be delegated to an official in the Requiring Organization who is a Flag or General Officer; a member of the Senior Executive Service; or, for a requirement arising from a claimant activity without local Flag/General Officer/SES, the commanding officer of that activity.

4.2 Assisted Acquisition of Supplies

Requiring individuals coordinate with legal, financial management and Requiring Activity Supporting Contracting Office personnel early in the acquisition process for identification of DoD-unique terms/conditions and availability of suitable contracts within DoD.

For assisted acquisitions of supplies at or above the Simplified Acquisition Threshold placed against non-DoD contracts, requiring individuals must document for the record the following:

(a) The action is in the best interests of DoD in terms of satisfying customer requirements, cost effectiveness, delivery schedule, availability/non-availability of suitable contracts within DoD, contract administration and any other applicable considerations.
(b) DoD/DoN unique terms and conditions that are provided to the assisting activity and to be included in the contract award.
(c) Funding is available and appropriate for the acquisition.
(d) Supplies to be provided are within the scope of the basic contract; and
(e) Procedures for assisted acquisition of supplies have been followed.

4.3 Assisted Acquisition of Services

Requiring individuals coordinate with legal, financial management and Requiring Activity Supporting Contracting Office personnel early in the requirements development phase for identification of DoD-unique terms/conditions and availability of suitable contracts within DoD.

For assisted acquisition of services at or above the Simplified Acquisition Threshold placed against non-DoD contracts, requiring individuals must document for the record the following:

(a) The action is in the best interests of DoD in terms of satisfying customer requirements, cost effectiveness, delivery schedule, availability/non-availability of suitable contracts within DoD, contract administration and any other applicable considerations.
(b) Approvals required by Navy-Marine Corps Acquisition Regulation Supplement 5237.170-3(b) have been obtained.
(c) DoD/DoN unique terms and conditions were provided to the assisting activity and will be included in the contract award.
(d) Funding is available and appropriate for the acquisition.
(e) Services being ordered are within the scope of the basic contract; and
(f) Procedures for assisted acquisition of services have been followed.

4.4 Economy Act

31 U.S.C. 1535 permits ordering supplies/services from another Federal agency when there is no other specific authority to do so. Interagency acquisitions subject to the Economy Act must comply with the requirements of Federal Acquisition Regulation 17.503 and Navy-Marine Corps Acquisition Regulation Supplement 5217.503. The Economy Act determination and findings may be used to document compliance with the procedures herein, provided that the determination addresses application of DoD-unique terms and conditions.

Assisted acquisitions by non-DoD activities are frequently covered by other statutory authorization and not covered by the Economy Act. Requiring individuals are responsible for ensuring there is adequate documentation to demonstrate that these assisted acquisitions comply with the OSD and DoN policies and procedures set forth herein.

5. Direct Acquisitions

5.1 Decision Authority

The decision authority for direct acquisitions is the business clearance approval official.

5.2 Direct Acquisition of Supplies

For direct acquisition of supplies at or above the Simplified Acquisition Threshold placed against non-DoD contracts, the contracting officer must document for the record the following:

(a) The action is in the best interests of DoD in terms of satisfying customer requirements, cost effectiveness, delivery schedule, availability/non-availability of suitable contracts within DoD, contract administration and any other applicable considerations.
(b) Funding is available and appropriate for the acquisition.
(c) Terms, conditions and/or requirements unique to DoD or DoN are incorporated into the action to comply with applicable statutes, regulations and directives.
(d) Supplies being ordered are within the scope of the basic contracts; and
(e) Procedures for direct acquisition of supplies have been followed.

5.3 Direct Acquisition of Services

For direct acquisition of services at or above the Simplified Acquisition Threshold placed against non-DoD contracts, requiring individuals or the contracting officer must document for the record the following:

(a) Compliance with the approval requirements at Navy-Marine Corps Acquisition Regulation Supplement 5237.170-3.
(b) The action is in the best interests of DoD in terms of Satisfying customer requirements, cost effectiveness, delivery schedule, non-availability of a suitable contracts within DoD, contract administration and any other applicable considerations.
(c) Funding is available and appropriate for the acquisition.
(d) Terms, conditions and/or requirements unique to DoD or DoN are incorporated into the action to comply with applicable statutes, regulations and directives.
(e) Services being ordered are within the scope of the basic contracts; and
(f) Procedures for direct acquisition of services have been followed.

6. Record Data

At a minimum, the Requiring Organization shall establish procedures to record and report the data identified in Attachment (1) [NOTE: to the extent practicable, it is recommended that records be retained in electronic format to facilitate reporting and in anticipation of specific reporting requirements from OSD.]. Data records should be retained for at least two years following completion of the resultant contract/order.

Specific reporting requirements will be provided by separate correspondence.

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APPENDIX B

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER

MAR 1 2007

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
COMMANDER, U.S. SPECIAL OPERATIONS COMMAND
COMMANDER, U.S. TRANSPORTATION COMMAND
ASSISTANT SECRETARIES OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Advance Payments to Non-Department of Defense (DoD) Federal Agencies for Interagency Acquisitions

In accordance with current DoD policy, all DoD Components are directed to stop the practice of advancing funds to non-DoD federal entities unless the DoD Components are specifically authorized by law, legislative action, or Presidential authorization. This includes the practice of permitting advance billings without the receipt of goods or services. All existing advancements retained by a non-DoD federal agency must be returned.

Components requesting goods or services from a non-DoD federal agency must be fully aware of the outside agency's billing practices and take appropriate action to ensure DoD funds are not disbursed in advance of contract performance. In addition, Components must work with their servicing disbursement sites to revise trading partner agreements to restrict other federal agencies' ability to withdraw funds prior to the delivery of goods or services performed.

The Department's legal authority to make advances is contained in Title 31, United States Code, Section 3324 and the Department of Defense Financial Management Regulation ("DoDFMR"), Volume 4, Chapter 5, which states that an advance of public money may be made only if it is authorized by:

a. a specific appropriation or other law; or

b. the President to be made to—

(1) a disbursing official if the President decides the advance is necessary to carry out--

(a) the duties of the official promptly and faithfully; and

(b) an obligation of the Government; or

(2) an individual serving in the armed forces at a distant station if the President decides the advance is necessary to disburse regularly pay and allowances."

The specific appropriation or law authorizing the advance must be cited on the obligating and/or interagency agreement documents for those few exceptions where advances are authorized in a specific appropriation or law authorizing DoD to advance funds.

My point of contact is Ms. Kathryn Gillis, who can be reached at (703) 697-6875 or by e-mail at kathryn.gillis@osd.mil.

Tina W. Jonas

APPENDIX C

OFFICE OF THE UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER

MAR 2 4 2005

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (FINANCIAL MANAGEMENT AND COMPTROLLER)
ASSISTANT SECRETARY OF THE NAVY (FINANCIAL MANAGEMENT AND COMPTROLLER)
ASSISTANT SECRETARY OF THE AIR FORCE (FINANCIAL MANAGEMENT AND COMPTROLLER)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Proper Use of Interagency Agreements for Non-Department of Defense Contracts Under Authorities Other Than the Economy Act

Billions of dollars have been provided by Department of Defense (DoD) Components to the General Services Administration (GSA) Federal Technology Service and other Federal agencies, by agreement, to acquire a wide variety of supplies and services.

Based on recent work by the DoD Office of Inspector General (OIG), it appears that some interagency agreements continue to be used in an attempt to keep funds available for new work after the period of availability for those funds has expired. This was the subject of the DoD Comptroller memorandum dated September 25, 2003, subject: "Fiscal Principles and Interagency Agreements" (Attachment 1). This memo, in conjunction with DoD Comptroller and DoD Acquisition, Technology and Logistics memorandum dated October 29, 2004, subject: "Proper Use of Non-DoD Contracts" (Attachment 2), establishes DoD policy that includes assisted acquisitions.

To ensure interagency agreements (under other than the Economy Act) for non-DoD contracts are used in accordance with existing laws and DoD policy, and to save Government resources, the following actions should be completed by June 1, 2005:

- Completed agreements. All interagency agreements shall be reviewed to determine if they are complete. Completed agreements shall be closed out, and the financial accounts shall be adjusted to ensure the return of any funds held by servicing agencies, irrespective of whether the funds have expired.
- Services. Funds provided to a servicing agency that are now past their period of availability ("expired funds") shall, in the case of services, be deobligated and returned from the servicing agency unless all of the following criteria are met:
  - the order was made during the period of availability of the funds;
  - the order was specific, definite and certain, with specificity similar to that found in contractual orders; and

- in the case of severable services, the performance period does not exceed one year.

- Goods. Funds provided to a servicing agency that are now expired shall, in the case of ordered goods, be deobligated and returned from the servicing agency unless the request for goods was:
  - made during the period of availability of the funds; and
  - for an item that, solely because of delivery, production lead time, or unforeseen delays, could not be delivered within the period of availability of those funds.

- Limitation on Work. Expired funds shall not be available for work outside the original interagency agreement.

- Performance.
  - DoD expired funds may be used by a servicing agency to enter into a non-severable service contract, provided the interagency agreement was properly executed while the funds were available and with the good faith intent that the servicing agency commence work and perform without unnecessary delay.
  - DoD expired funds may ***not*** be used by a servicing agency to enter into a severable services contract. However, DoD expired funds may *continue* to be used for a severable services contract, properly entered into by the servicing agency *before* the funds expire, provided the period of contract performance does not exceed one year.

- Oversight. Interagency agreements in excess of the simplified acquisition threshold shall comply with the DoD policy memorandum, "Proper Use of Non-DoD Contracts," (Attachment 2); the DoD Components' procedures for proper use of non-DoD contracts; the procedures found in the Federal Acquisition Regulation Part 7, "Acquisition Planning" and Part 17.5, "Interagency Acquisitions Under the Economy Act," and DoD Instruction 4000.19, "Interservice and Intragovernmental Support."

The GSA provided a summary of unobligated funds by DoD Component and fiscal year as of December 30, 2004 (Attachment 3). You are to immediately initiate needed actions to review these unobligated balances, coordinate with GSA to return unobligated balances to your respective offices, and coordinate with your servicing accounting office to ensure that appropriate adjustments to the accounting records are recorded before June 1, 2005. You are to certify to my office, no later than June 30, 2005, that you have completed these actions in accordance with the DoDFMR, Volume 3, Chapter 8, Section 0804, "Tri-Annual Review of Commitments and Obligations." In addition, all potential violations of the Antideficiency Act detected during this review shall be processed promptly in accordance with the Department of Defense Financial Management Regulation (DoDFMR), Volume 14.

My point of contact for this matter is Ms. Carol Phillips at 703-693-6503, or e-mail at carol.phillips@osd.mil. My point of contact for tri-annual reviews is Mr. Oscar Covell at 703-697-6149, or e-mail at oscar.covell@osd.mil.

Teresa McKay
Deputy Chief Financial Officer

Attachments:
As stated

cc:
USD (AT&L)

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
TECHNOLOGY
AND LOGISTICS

SEP 2 0 2005

MEMORANDUM FOR: SEE DISTRIBUTION

Subject: Interagency Acquisition: A Shared Responsibility

On July 29, 2005, the United State Government Accountability Office (GAO) issued a report entitled "Interagency Contracting: Franchise Funds Provide Convenience, but Value to DoD is Not Demonstrated (GAO Report GAO-05-546)" which, among other things, emphasized to both the Department of Defense (DoD) and the assisting agencies the importance of understanding shared responsibilities in the interagency acquisition process. The report can be found at http://www.acq.osd.mil/dpap/specificpolicy/index.htm.

Teamwork and communication are critical to the success of interagency acquisitions. Although the Federal Acquisition Regulations state that it is ultimately the contracting officer's responsibility to determine if a procurement package is sufficient for use in a solicitation, order, or contract, it is incumbent upon the DoD customer to provide the assisting agency with sufficient detail concerning the requirement. When using an assisting agency to issue a solicitation, place an order, or issue a contract on our behalf, DoD customers must ensure that their requirements are clearly defined, and include measurable outcomes desired. Similarly, all parties to an interagency acquisition must ensure that the duties and responsibilities of contract administration and oversight are clearly assigned and correctly performed.

The decision to meet DoD mission needs via an interagency acquisition is a business decision. DoD and the assisting agencies have a shared responsibility when an interagency acquisition is determined to be the right approach to meet DoD requirements. This shared responsibility begins with acquisition planning and does not end until contract close-out. The DoD policy on the "Proper Use of Non-DoD Contracts" can be found at http://www.acq.osd.mil/dpap/specificpolicy/index.htm. My point of contact is Mike Canales. He can be reached at 703-695-8571 or via e-mail at michael.canales@osd.mil.

Domenic C. Cipicchio
Acting Director, Defense Procurement
and Acquisition Policy

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

COMPTROLLER

MAR 2 7 2006

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
COMMANDER, U.S. SPECIAL OPERATIONS COMMAND
COMMANDER, U.S. TRANSPORTATION COMMAND
ASSISTANT SECRETARIES OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Proper Use of Interagency Agreements with Non-Department of Defense Entities Under Authorities Other Than the Economy Act

Despite guidance issued jointly by the Under Secretary of Defense (Comptroller) and the Under Secretary of Defense (Acquisition, Technology and Logistics) on October 29, 2004, and additional guidance issued by the Deputy Chief Financial Officer on March 24, 2005, the Department of Defense's (DoD) practices for the use and control of DoD funds under interagency agreements require improvement. DoD purchases made through non-DoD entities continue to violate these polices and existing regulations.

I am directing you to commence the following corrective actions immediately. Failure to complete these actions may result in a revocation of your authority to transfer funds to non-DoD entities executing interagency agreements.

- Review all interagency agreements to determine their status. Close out all completed agreements and coordinate with the outside entity to return all funds remaining on completed agreements no later than June 30, 2006.

- Funds that were provided to a servicing agency for services or goods where the funds are now past their period of availability ("expired funds") shall be deobligated no later than June 30, 2006 unless they meet the criteria identified in the attached memorandum, "Proper Use of Interagency Agreements for Non-Department of Defense Contracts Under Authorities Other Than the Economy Act," dated March 24, 2005. Under no circumstances should any existing order

for severable services using Operations and Maintenance funds extend beyond one year from the date the funds were accepted by the servicing agency.

- Insert the following statement on all future interagency agreement funding documents for severable services: "These funds are available for services for a period not to exceed one year from the date of obligation and acceptance of this order. All unobligated funds shall be returned to the ordering activity no later than one year after the acceptance of the order or upon completion of the order, which ever is earlier."
- Place the following statement on all future interagency agreement funding documents for goods: "I certify that the goods acquired under this agreement are legitimate, specific requirements representing a bona fide need of the fiscal year in which these funds are obligated."
- Include a specific attestation on your triannual review certification that all existing interagency agreements are consistent with DoD policy.
- Provide my office with a report on the amounts reviewed and deobligated no later than July 15, 2006.

My point of contact is Mr. Dave Patterson. He can be reached at (703) 697-6142 or by e-mail at jack.patterson@osd.mil.

Tina W Jonas

Attachment:
As stated

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON DC 20301-1100

COMPTROLLER

OCT 16 2006

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
COMMANDERS OF THE COMBATANT COMMANDS
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
COMMANDER, U.S. SPECIAL OPERATIONS COMMAND
COMMANDER, U.S. TRANSPORTATION COMMAND
ASSISTANT SECRETARIES OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS DOD FIELD ACTIVITIES

SUBJECT: Non-Economy Act Orders

Attached is the Department's revised financial management policy for Non-Economy Act orders. This policy should be implemented immediately throughout your respective organization. It will be included in the next update to the "DoD Financial Management Regulation," scheduled for first quarter of fiscal year 2007.

My point of contact is Ms. Kathryn Gillis. She can be contacted by telephone at (703) 697-6875 or e-mail at Kathryn.gillis@osd.mil.

Robert McNamara
Acting Deputy Chief Financial Officer

Attachments:
As stated

NON-ECONOMY ACT ORDERS

A. Purpose. Prescribe policy and procedures applicable to Department of Defense (DoD) procurement of goods and services from Non-DoD agencies under statutory authorities other than the Economy Act.

B. Overview. Non-Economy Act orders are for intra-governmental support, where a DoD activity needing goods and services (requesting DoD agency/customer) obtains them from a Non-DoD agency (assisting/servicing agency/performer). Specific statutory authority is required to place an order with a Non-DoD agency for goods or services, and to pay the associated cost. If specific statutory authority does not exist, the default will be the Economy Act, 31 U.S.C. 1535 which is discussed in volume 11A, Chapter 3 of the "DoD Financial Management Regulations" ("DoDFMR"). The more commonly used Non-Economy Act authorities include, but are not limited to, the following.

- Acquisition Services Fund. The Acquisition Service Fund was established by the General Service Administration Modernization Act that merged the General Supply Fund and the Information Technology Fund to carry out functions related to the uses of the Acquisition Services Fund including any functions previously carried out by the Federal Supply Service and the Federal Technology Service managed by General Service Administration.

- Franchise Funds. Franchise Funds were first established by P.L. 103-356, Title IV, Sec 403 to provide common administrative support services on a competitive and fee basis. Franchise fund programs originated within the Environmental Protection Agency (EPA), Department of Commerce, Department of Veterans Affairs (VA), Department of Health and Human Services (HHS), Department of Interior, and Department of the Treasury.

C. Initiating a Non Economy Act Order. Non-Economy Act orders in excess of the simplified acquisition threshold shall comply with Federal Acquisition Regulation (FAR) Part 7, "Acquisition Planning," and DoD Components' procedures for the "Proper Use of Non-DoD Contracts."

1. Justification. Non-Economy Act orders may be placed with another agency for goods or services if:

- Proper funds are available;

- The Non-Economy Act order does not conflict with another agency's designated responsibilities (*e.g.*, real property lease agreements with GSA).

- The requesting agency or unit determines the order is in the best interest of the Department; and

- The performing agency is able and authorized to provide the ordered goods or services.

2. Order. Non-Economy Act orders for work and services outside the Department of Defense (DoD) should be executed by issuance of a DD Form 448, "Military Interdepartmental Purchase Request (MIPR)" and accepted using DD Form 448-2, "Acceptance of MIPR." If an alternative execution document is used, it must provide information consistent with the MIPR to include the purchase request number and the Activity Address Code (DODAAC). A Non-Economy Act order shall comply with the documentation standards in Volume 11A, Chapter 1 of the "DoDFMR," and supported with the items identified in Figure 1. Non-Economy Act orders must include:

- A firm, clear, specific, and complete description of the goods or services ordered. The use of generic descriptions is not acceptable;

- Specific performance or delivery requirements;

- A proper fund citation;

- Payment terms and conditions (*e.g.*, direct cite or reimbursement, and provisions of advanced payments); and

- Specific Non-Economy Act statutory authority such as those referenced in paragraph B above.

- DoD Activity Address Code (DODAAC)

3. Best Interest Determination. Each requirement must be evaluated in accordance with DoD Components' procedures to ensure that Non-Economy Act orders are in the best interest of DoD. Factors to consider include:

- Satisfying the requirements;

- Schedule, performance, and delivery requirements;

- Cost effectiveness, taking into account the discounts and fees; and

- Contract administration, to include oversight.

4. Specific, Definite and Certain. For Non-Economy Act orders in excess of the simplified acquisition threshold, the requesting official must provide:

- Evidence of market research and acquisition planning;
- A statement of work that is specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself.
- Unique terms, conditions, and requirements to comply with applicable DoD-unique statues, regulations, directives and other requirements.

5. Contracting Officer Review. All Non-Economy Act orders greater than $500,000 shall be reviewed by a DoD warranted contracting officer prior to sending the order to the funds certifier or issuing the MIPR to the Non-DoD activity. In addition to the review of the contracting officer, the requesting official shall further review the acquisition package to ensure compliance with the FAR part 7, and the DoD Components' procedures.

6. Certification of Funds. Non-Economy Act orders are subject to the same fiscal limitations that are contained within the appropriation from which they are funded. Because the performing entity may not be aware of all the appropriation limitations, the DoD certifying official must certify that the funds cited on the order are available, meet time limitations, and are for the purpose designated by the appropriation.

7. Bona Fide Need. Non-Economy Act orders citing an annual or multiyear appropriation must serve a bona fide need arising, or existing, in the fiscal year (or years) for which the appropriation is available for new obligations.

D. Fiscal Policy.

1. Obligation. The provisions of 31 U.S.C. 1501 govern the recording of the obligation. An amount shall be recorded as an obligation only when supported by documentary evidence of an order required by law to be placed with an agency or upon meeting all the following criteria:

- Binding agreement (funding vehicle) between an agency and another person (including an agency);
- Agreement is in writing;
- For a purpose authorized by law;

- Serves a bona fide need arising, or existing, in the fiscal year or years for which the appropriation is available for obligation;

- Executed before the end of the period of availability for new obligation of the appropriation or fund used; and

- Provides for specific goods to be delivered, real property to be bought or leased, or specific services to be supplied.

2. Deobligation. Funding under Non-Economy Act orders shall be deobligated as outlined below.

a. Goods. Funds provided to a performing agency for ordered goods where the funds period of availability thereafter has expired shall be deobligated and returned by the performing agency unless the request for goods was made during the period of availability of the funds **and** the item(s) could not be delivered within the funds period of availability solely because of delivery, production or manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the contracting parties at the time of contracting. Thus, where materials cannot be obtained in the same fiscal year in which they are needed and contracted for, provisions for delivery in the subsequent fiscal year do not violate the bona fide need rule as long as the time intervening between contracting and delivery is not excessive and the procurement is not for standard commercial off the shelf (COTS) items readily available from other sources. The delivery of goods may not be specified to occur in the year subsequent to funds availability.

b. Severable Services. An agreement for severable services that are continuing and recurring in nature and provide the Department a benefit each time the service is performed (e.g., maintenance and repair services, scientific, engineering, and technical services) is based on statutory authority other than the Economy Act, 10 U.S.C. 2410a permits the performance of severable services to begin in one fiscal year and end in the next provided the period of performance does not exceed one year. Thus, the performance of severable services may begin during funds period of availability and may not exceed one year. Therefore, annual appropriations provided to a performing agency that have expired shall be deobligated unless the performance of the services requested began during the funds period of availability and the period of performance does not exceed one year. The annual appropriation from the earlier fiscal year may be used to fund the entire cost of the one-year period of performance; however, an annual appropriations may not be used to enter into a severable services agreement where the period of performance for services requested is entirely in the following fiscal year. In no instance may the period of performance extend beyond September 30 of the subsequent year for services funded with annual appropriations.

c. Non-Severable Services. Non-severable services contracts must be funded entirely with appropriations available for new obligations at the time the contract is awarded, and the period of performance may extend across fiscal years. Funds provided to a performing agency that become excess shall be deobligated as identified.

d. Excess or Expired Funds. Activities shall reconcile all obligations and remaining funds available for orders. The purpose of this reconciliation is to ensure the proper use of funds and to identify and coordinate the return of expired or excess funds. Excess or expired funds must be returned by the performing agency and deobligated by the requesting agency to the extent that the performing agency or unit filling the order has not (1) provided the goods or services (or incurred actual expenses in providing the goods or services), or (2) entered into a contract with another entity to provide the requested goods or services. Expired funds shall not be available for new obligations.

3. Prohibitions. Non-Economy Act orders may not be used to violate provisions of law, nor may they be used to circumvent conditions and limitations imposed on the use of funds to include extending the period of availability of the cited funds.

E. Non-Economy Act Follow Up Procedures.

1. Non-Economy Act Order Oversight. The requesting official must establish quality surveillance plans for Non-Economy Act orders in excess of the simplified acquisition threshold to facilitate the oversight of the goods provided or services performed by the performing agency. The plan should include:

a. Contract administration oversight in accordance with the surveillance plan;

b. Process for receipt and review of receiving reports and invoices from the performing agency;

c. Reconciliation of receiving reports and invoices; and

d. Requirements for documenting acceptance of the goods received or services performed.

2. Monitor Fund Status. The requesting official must monitor fund status to:

a. Monitor balances with the performing agency;

b. Conduct tri-annual reviews of Non-Economy Act orders in accordance with the Financial Management Regulation, Volume 3,

Chapter 8, Section 0804, "Tri-Annual Review of Commitments and Obligations;"

c. Confirm open balances with the performing agency;

d. Coordinate the return of funds from the Non-DoD performing agency in accordance with paragraph D2 above; and

e. Coordinate with the accounting office to ensure timely deobligation of funds.

3. Payment Procedures. Payment shall be made promptly upon the written request (or billing) of the performing agency. Under specific conditions, payment may be made in advance or upon delivery of the goods or services ordered and shall be for any part of the estimated or actual cost as determined by the performing agency.

a. The requesting official must be cognizant of the performing agency's payment method. Should the performing agency elect to receive advances or conduct advance billing prior to providing goods or services, the requesting official must comply with the requirements related to advances of public money outlined in Volume 4, Chapter 5 of the "DoD Financial Management Regulation" which implements the general prohibition of advance payments in Title 31, U.S.C. Section 3324 and Title 10, U.S.C. Section 2307. When the conditions under which the advance was made are satisfied, the specific appropriation or law authorizing the advance must be cited on the order and any unused amounts of the advance shall be collected from the performing agency immediately and returned to the fund from which originally made.

b. Payments made for services rendered or goods furnished may be credited to the appropriation or fund of the agency performing the reimbursable work.

4. Non Economy Act Order Close Out. All Non-Economy Act orders shall be reviewed by the requesting official to determine if they are complete. Completed orders shall be fiscally closed out. The requesting official shall reconcile funds and coordinate the return of excess or expired funds held by the performing agency. This review will include:

a. Identify and determine if there are outstanding invoices;

b. Identify and determine existence of excess or expired funds;

c. Coordinate the return of funds from the Non-DoD performing agency in accordance with paragraph D2 above; and

d. Coordinate with the accounting office to ensure the deobligation of funds.

NON-ECONOMY ACT
ACQUISITION PACKAGE CHECKLIST

1. Documented evidence of market research and acquisition planning performed.

2. Package includes a specific, definite, and concise statement of work documenting a bona fide need in the fiscal year that the funds are available for new obligations.

3. Package includes specific performance and/or delivery requirements.

4. Package identifies the statutory authority permitting the performing agency to support the DoD Component for the goods/services required.

5. Package includes the purchase request number and the Activity Address Code (DODAAC).

6. Package includes written justification for the Non Economy Act order in accordance with DFARS Part 217.78 and the DoD Components' procedures.

7. Package documents review of fees/surcharges/contract administration/discounts to ensure the cost is reasonable and consistent with task to be accomplished by performing agency.

8. Package includes specific statutory authority authorizing advance payment or billing.

9. Package documents evidence that DoD competition requirements were followed in accordance with DFARS.

10. Order identifies DoD unique terms & conditions to the performing agency.

11. Order identifies unique reporting requirements not otherwise specified to the performing agency.

REQUESTING OFFICIAL RESPONSIBILITIES

1. Market Research

2. Acquisition Planning

3. Independent Government Cost Estimate (IGCE)

4. Statement of Work (SOW) to include evaluation criteria.

5. Ensure receipt and compliance of MIPR acceptance.

6. Assist in Technical Evaluation

7. Quality Assurance Plan
   a. COR, COTR (Receiving Reports/Invoices - Inspection & Acceptance)
   b. CDRL Procedural/Required Reports/Deliverables Report/Contract Performance
   c. Property/Equipment Management
   d. Perform Contract Oversight

8. Funds Management/Record Keeping
   a. Draw Down
   b. Contract Reconciliation
   c. Initiate Deobligation
   e. Oversight of Billing/Reporting

9. Update all POCs as necessary throughout acquisition.

Figure 1

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APPENDIX D

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
TECHNOLOGY
AND LOGISTICS

JAN 28 2005

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (ACQUISITION, LOGISTICS AND TECHNOLOGY)
ASSISTANT SECRETARY OF THE NAVY (RESEARCH, DEVELOPMENT AND ACQUISITION)
ASSISTANT SECRETARY OF THE AIR FORCE (ACQUISITION)
DIRECTORS OF DEFENSE AGENCIES

SUBJECT: Use of Federal Supply Schedules and Market Research

The Department of Defense utilizes the Federal Supply Schedules of the General Services Administration to meet a significant number of our requirements. The "Use of Federal Supply Schedules" is governed by the requirements in FAR 8.404. FAR 8.404 says in part, "by placing an order against a schedule contract using the procedures in FAR 8.405 – "Ordering Procedures for Federal Supply Schedules" the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs." In response to recent recommendations of the Department of Defense Inspector General (DoDIG) and in support of the recently released policy on the "Proper Use of Non-DoD Contracts" (29 October 2004) the following guidance and clarification is provided when utilizing Federal Supply Schedules:

- Although GSA has already determined rates for services offered at hourly rates under schedule contracts to be fair and reasonable (FAR 8.404(d)), Contracting Officers must not only consider labor rates but also labor hours and labor mixes when establishing a fair and reasonable price for an order.

- Contracting Officers are required to consider the proposed prices for both the services and products when awarding orders for a combination of products and services.

- Contracting Officers are reminded to seek discounts for orders exceeding the maximum order threshold. In cases where a discount is not obtained, explain why in the contract file. When discounts are obtained, explain in the contract file how the discount was determined to be fair and reasonable.

- Contracting Officers are encouraged to solicit as many contractors as practicable when using Federal Supply Schedules. On those occasions where this is not possible, explain why in the contract file.

For all procurements above the simplified acquisition threshold, Military Departments and Defense Agencies are reminded that "Market Research" (FAR Part 10) plays a key role in identifying potential sources of supply and helps identify the best acquisition approach to meet our requirements. Contracting Officers should document the contract file on the market research efforts conducted in support of each acquisition.

As part of the recommendations included in audit report title, the DoDIG recommended that the nine contracting activities visited during their audit (attached) should be "monitored". I agree with the DoDIG recommendation that greater management attention be focused on the quality of price reasonableness determinations and request that you ensure that the adequacy of contracting officer price reasonableness determinations be made a part of Procurement Management Reviews (PMRs) or any other relevant internal review. For the activities listed on the attached, please provide me a list of all completed or planned PMRs, or other internal reviews, that have been completed since March 21, 2002, and identify whether or not the quality of price reasonableness determinations were addressed in the review. This information should be provided to Michael Canales of my staff by March 15, 2005. Please ensure that this requirement is addressed in all future PMRs.

Questions or comments may be referred to Mr. Michael Canales, DPAP/Policy, (703) 695-8571 or e-mail: Michael.Canales@osd.mil.

Deidre A. Lee
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

APPENDIX E

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION
TECHNOLOGY
AND LOGISTICS

MAR 2 8 2008

MEMORANDUM FOR COMMANDER, UNITED STATES SPECIAL OPERATIONS COMMAND (ATTN: ACQUISITION EXECUTIVE)
COMMANDER, UNITED STATES TRANSPORTATION COMMAND (ATTN: ACQUISITION EXECUTIVE)
DEPUTY ASSISTANT SECRETARY OF THE ARMY (POLICY AND PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION & LOGISTICS MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
DIRECTORS, DEFENSE AGENCIES
DIRECTORS, DOD FIELD ACTIVITIES

SUBJECT: Competition Requirements for Purchases From Federal Prison Industries

Section 827 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, changes competition requirements for purchases from Federal Prison Industries, Inc. (FPI). This memorandum provides guidance with respect to implementation of section 827.

Section 827 requires DoD to use competitive procedures when procuring products for which FPI has significant market share. FPI will be treated as having significant market share for a product category if the FPI share of the Department of Defense market is greater than five percent. The Federal Supply Codes (FSC) that meet this criterion are as follows:

FSC	FSC Description
3510	Laundry and Dry Cleaning Equipment
5340	Miscellaneous Hardware
5935	Connectors, Electrical
5975	Electrical Hardware and Supplies
5995	Cable, cord, wire assemblies; comm equipment
6145	Wire and cable, Electrical
7110	Office Furniture
7210	Household Furnishings

Products for which FPI has a significant market share (FSCs listed above) must be procured using competitive (or fair opportunity) procedures. In conducting such a competition, contracting officers shall consider a timely offer from FPI in accordance with FAR 8.602(a)(4). The procedures and requirements of this memorandum will apply to solicitations (and resultant contracts/orders) issued after March 28, 2008.

If FPI does not have a significant market share for a particular product, contracting officers should follow the current process outlined in the Federal Acquisition Regulation (FAR) Subpart 8.6. Specifically, FAR 8.602 requires agencies to conduct market research and make a comparability determination. Such determinations are made at the discretion of the contracting officer. Competitive (or fair opportunity) procedures are appropriate if the FPI product is not comparable in terms of price, quality, or time of delivery. In conducting such a competition, contracting officers shall include FPI in the solicitation process and consider a timely offer from FPI. Likewise, if the procurement is made using a multiple award schedule, then FAR 8.602(a)(4)(iii) requires contracting officers to communicate the item description or specifications and evaluation criteria directly to FPI, "so that an offer from FPI can be evaluated on the same basis as the contract or schedule holder." A timely offer from FPI must then be considered.

The Defense Federal Acquisition Regulation Supplement (DFARS) will be revised to reflect the procedures outlined in this memorandum. In the event of a conflict between this memorandum and the subsequent DFARS revision, the content of the DFARS will take precedence. The FSCs listed above will be updated, as necessary, in subsequent policy memoranda.

My staff point of contact for FPI procurement policy is Ms. Susan Pollack, 703-697-8336 or susan.pollack@osd.mil.

Shay D. Assad
Director, Defense Procurement,
Acquisition Policy, and
Strategic Sourcing

APPENDIX F

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

JAN 1 8 2008

MEMORANDUM FOR DEPUTY ASSISTANT SECRETARY OF THE ARMY (POLICY AND PROCUREMENT), ASA (ALT)
DEPUTY ASSISTANT SECRETARY OF THE NAVY (ACQUISITION MANAGEMENT), ASN (RDA)
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE (CONTRACTING), SAF/AQC
EXECUTIVE DIRECTOR, ACQUISITION, TECHNOLOGY AND SUPPLY DIRECTORATE (DLA)
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Interagency Acquisition

References: (a) "Interagency Acquisition: A Shared Responsibility" memo dated September 20, 2005 (U) (copy attached)
(b) "Designation of Contracting Officer's Representatives on Contracts for Services in Support of Department of Defense Requirements" memo dated December 6, 2006 (U) (copy attached)
(c) "Non-Economy Act Orders" memo dated October 16, 2006 (U) (copy attached)
(d) "Past Performance Information" memo dated November 27, 2007 (U) (copy attached)
(e) "Proper Use of Non-DoD Contracts" memo dated October 29, 2004 (U) (copy attached)

The purpose of this memorandum is to update the Department's policy on interagency acquisition and provide clarification of existing policy.

Proper Use of non-DoD Contracts and non-DoD Contracting Organizations

The Department encourages the use of non-DoD contracts and the services of assisting agencies to meet DoD requirements, when it is done properly, is in the best interest of the Department, and necessary to meet our needs. Utilizing a non-DoD contract or a non-DoD contracting organization is ultimately a business decision. As part of that process, DoD customers should be cognizant of the advantages that exist for the Department in utilizing interagency contracting, and they should be knowledgeable of

what contracting options are available to them, while considering the fees charged by the assisting agency and costs incurred by the Department. The fees that we pay should be commensurate with the task and effort provided by the assisting agency. Program managers and requirements officials must ensure that any fees paid to the assisting agencies are reasonable for the tasks they perform.

Roles and Responsibilities:

Reference (a) addressed the importance of teamwork and communication in the interagency acquisition process. This requirement has not changed; however, I want to comment further on the roles and responsibilities of the program managers and requirements officials, assisting agencies and contracting officers. While the following does not encompass all roles and responsibilities, it represents a few I would like to focus on.

Program Managers and Requirements Officials: Program managers and requirements officials must ensure non-DoD contracting officers use competitive procedures to acquire DoD requirements to the maximum extent possible. In the case of a sole source procurement, program managers and/or requirements officials, after performing due diligence and market research, must provide the assisting agency with the written justification for the non-competitive or sole source determination/justification in accordance with FAR 6.3 or FAR 8.405-6 if using GSA's Multiple Award Schedules. When using multiple award contracts, program managers and requirements officials should assist in documenting that exceptions to the fair opportunity process, if appropriate, are necessary and meet the requirement for statutory exception (FAR 16.505). All justifications must be well supported and clearly documented in the contract file.

Program managers and requirements officials must ensure that statements of work/requirements clearly, precisely, and completely specify the item or service to be procured. Well defined and complete acquisition packages must be provided to the assisting agency. While it is the contracting officer's responsibility to ensure that contract management, oversight, and surveillance functions are clearly assigned (including the appointment of properly trained Contracting Officer Representatives (CORs) where appropriate) and correctly performed (see reference (b)), the program manager and requirements officials should be actively involved in the process.

With regard to Non-Economy Act procurements, program managers and requirements officials must ensure that the requirements detailed in Reference (c) are met, including the required review by a DoD contracting officer when the value of the action exceeds $500,000. The "Non-Economy Act Acquisition Package Checklist" and the list of "Requesting Official Responsibilities" in Reference (c) will assist in ensuring that statute, policy, and regulation are complied with under non-Economy Act actions.

Assisting Agencies: It is the assisting agency's responsibility to ensure its acquisition workforce is capable, qualified, and authorized to acquire the requested supplies/and or services on behalf of DoD. Ultimately under an assisted acquisition, the assisting agency decides whether a specific action will be competed. In addition, the assisting agency must ensure that DoD requirements met via an interagency acquisition, are compliant with statute, regulation and policy, even if it is more limiting than the practices under which the assisting agency is authorized to operate.

Assisting agencies also must comply with FPDS-NG reporting requirements and ensure determinations of price reasonableness are documented for every contract or order they execute on our behalf. In addition, when an assisting agency places a contract on the Department's behalf that meets DoD thresholds for capturing past performance information (see Reference (d) Attachment A), then contractor performance should be evaluated, the information provided to the contractor for review and comment, and when finalized, the information should be captured in the automated past performance information database.

Contracting Officer: In accordance with Reference (c), it is Department policy that a warranted DoD contracting officer review each non-Economy Act order greater than $500,000 to ensure it complies with statute, policy, regulation, and local component requirements and procedures.

Past Performance - A Shared Responsibility

Reference (a) emphasized that "teamwork and communication" are critical to the success of interagency acquisition and that all parties to an interagency acquisition must ensure that the duties and responsibilities of contract administration and oversight are clearly assigned and correctly performed. This is especially important in performing assessments of contractor past performance (FAR 42.15). Reference (d) provides the Department's latest policy on past performance information and emphasizes that past performance information should be captured for all contracts that meet DoD thresholds. Interagency acquisitions are not exempt from this requirement.

Clarification

Reference (e) provided process details for Military Departments and Defense Agencies utilizing non-DoD contracts or non-DoD contracting organizations. The procedures included "providing unique terms, conditions and requirements to the assisting agency for incorporation into the order or contract as appropriate to comply with all applicable DoD-unique statutes, regulations, directives, and other requirements, (e.g. the requirement that all clothing procured with DoD funding be of domestic origin)". This should not be interpreted as requiring non-DoD assisting agency contracting officers

to include DFARS or other agency specific clauses in their resulting contracts or orders, although this is acceptable. Alternatively, DoD officials and the civilian assisting agency contracting officer must collaboratively review the DoD requirements to ascertain whether there are non-DoD contract clauses that provide similar and sufficient coverage. If non-DoD contract clauses are insufficient, both parties shall mutually agree to include such coverage as necessary, through revision of the performance work statement, statement of work, statement of objectives, or otherwise. This process should also be followed when civilian agencies request work under DoD contracts.

Policy links, training opportunities, and other relevant information on Interagency Acquisition is available on the Defense Procurement and Acquisition Policy website at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html#acquisition_policy_memos and the GSA website at http://www.gsa.gov/Portal/gsa/ep/home.do?tabId=13.

Additional guidance on Non-Economy Act Orders can be found in Reference (c), which revised financial management policy for Non-Economy Act Orders. The memorandum includes important policy requirements, especially in the areas of justification, certification of funds, bona fide need and deobligation. In addition, it includes policy on severable services, non-severable services and excess or expired funds.

My POC for Interagency Acquisition is Mr. Michael Canales. He can be reached at michael.canales@osd.mil or at 703-695-8571.

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

APPENDIX G

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION, TECHNOLOGY AND LOGISTICS

JUL 19 2009

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Delegation of Authority Under Section 801 of the National Defense Authorization Act for Fiscal Year 2008

Subsection (b)(1) of section 801 of the National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181, "Internal Controls for Procurements on Behalf of the Department of Defense by Certain Non-Defense Agencies," states that "an acquisition official of the Department of Defense may place an order, make a purchase, or otherwise procure property or services for the Department of Defense in excess of the simplified acquisition threshold through a non-defense agency only if in the case of a procurement by any non-defense agency in any fiscal year, the head of the non-defense agency has certified that the agency will comply with defense procurement requirements for the fiscal year".

For the purposes of this section, a non-defense agency is compliant with defense procurement requirements if the procurement policies, procedures, and internal controls of the non-defense agency applicable to the procurement of products and services on behalf of the Department of Defense and the manner in which they are administered, are adequate to ensure the compliance of the non-defense agency with the requirements of laws and regulations (including applicable Department of Defense financial management regulations) that apply to procurements of property and services made directly by the Department of Defense. A procurement shall be treated as being made during a particular fiscal year to the extent that funds are obligated by the Department of Defense for the procurement in that fiscal year.

Subsection (b)(2) of section 801 authorizes the Under Secretary of Defense for Acquisition, Technology, and Logistics to make exceptions to the limitations imposed on a non-defense agency if determined, in writing, that "it is necessary in the interest of the Department of Defense to continue to procure property and services through the non-defense agency during such fiscal year".

I hereby delegate to the Director, Defense Procurement and Acquisition Policy, the authority to make such determinations and the authority to extend the period for which any determination is in effect. This delegation of authority is effective until September 30, 2010, unless rescinded earlier.

Ashton B. Carter

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

SEP 18 2009

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR OF THE DEFENSE AGENCIES
DIRECTOR OF THE DOD FIELD ACTIVITIES

SUBJECT: National Defense Authorization Act for Fiscal Year 2008 (Pub. Law No. 110-181), Section 801, *Internal Controls for Procurements on Behalf of the Department of Defense by Certain Non-Defense Agencies, Requests for "Waiver"*

Section 801(b) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 authorizes an acquisition official of the Department of Defense to place an order, make a purchase, or otherwise procure property or services for DoD in excess of the simplified acquisition threshold through a non-defense agency **only if** the non-defense agency can certify that it "will comply with defense procurement requirements for the fiscal year." Absent certification, Section 801(b) authorizes the Under Secretary of Defense for Acquisition, Technology, and Logistics to waive the limitation of Section 801(b) for any category of procurements provided "it is necessary in the interest of the Department of Defense to procure property and services through the non-defense agency." Otherwise, DoD Components may not procure property or services in excess of the simplified acquisition threshold through the non-certifying, non-defense agency. Recently USD(AT&L) delegated authority (memo attached) to waive the limitation of Section 801(b) to the Director, Defense Procurement and Acquisition Policy.

To ensure minimal impact to current operations and to comply with Section 801(b), the following procedures are established to request the Director, Defense Procurement and Acquisition Policy approval of a Section 801(b) "waiver". DoD Components are requested to establish a single focal point within your organization to

review each request. Requests must be submitted to the Director, Defense Procurement and Acquisition Policy through your focal point with sufficient lead time for review and processing. The following information must be included in your request:

1. A description of the categories of procurements covered by the request. If the request is for an individual procurement a description of the individual procurement is required.

2. An assessment of why the category of the procurement or the individual request is "necessary in the interest of the Department" to obtain through the non-defense agency that has not certified compliance with Section 801(b).

3. Confirmation that all the affected contracts and supporting documents are on file and available for review or audit by the Department of Defense Inspectors General.

4. A statement by the senior acquisition executive, or senior procurement executive of your agency confirming that your agency has completed a thorough review of all applicable contracts and supporting documents and has determined it is "necessary in the interest of the Department of Defense to procure property and services through the non-defense agency." The statement should also identify the fiscal year(s) of the requirement.

My point of contact is Mr. Michael Canales, 703-695-8571, or at Michael.Canales@osd.mil

Shay D. Assad
Director, Defense Procurement
and Acquisition Policy

Attachment:
As stated

cc:
Under Secretary of Defense for Acquisition, Technology, and Logistics

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APPENDIX H

OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION, TECHNOLOGY AND LOGISTICS

OCT 31 2008

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Meeting Department of Defense Requirements Through Interagency Acquisition

Reference: (a) Office of Federal Procurement Policy (OFPP) memo entitled "Improving the Management and Use of Interagency Acquisitions," dated June 6, 2008 (U)

By means of reference (a), the Administrator, Office of Federal Procurement Policy (OFPP), issued guidance intended to improve the effectiveness of agencies' use of interagency acquisitions (http://www.acq.osd.mil/dpap/cpic/cp/iac_revised.pdf). The Department participated in development of the guide and is mandating its use for Interagency Acquisitions in excess of $500,000, subject to the additional guidance set forth below. The use of a standardized Interagency Agreement will alleviate many of the issues raised in audits conducted by various Inspectors General and the Government Accountability Office (GAO).

In accordance with the request of the Administrator, OFPP, effective no later than November 3, 2008, all components must ensure that new interagency agreements for assisted acquisitions in excess of $500,000 contain the elements enumerated in Appendix 2 of reference (a) or follow the model agreement in Appendix 3 of reference (a). Additional information on Interagency Acquisition is available at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

Requirements included in FAR 17.5/DFARS 217.5, Interagency Acquisitions Under the Economy Act; DFARS 217.78, Contracts or Delivery Orders Issued by a Non-DoD Agency; and the DoD Financial Management Regulation (FMR), Volume 11A, Chapters 3 and 18, are still in effect and take precedence over any conflicting provisions in the OFPP guidance. For example, notwithstanding that the guide establishes a presumption that a direct acquisition under a General Services Administration Federal Supply Services contract is in the best interest of the Government, and that a "requesting" agency only has to document why the acquisition vehicle is suitable for the agency's need, DoD activities still must evaluate the cost effectiveness of such actions as required by DFARS 217.7802(a)(3).

Inasmuch as use of the OFPP guidance within DoD is mandated only for requirements valued over $500K, activities also do not have to comply with requirements applicable below that threshold. Therefore, the requirement in the guide that the requiring office must notify the head of the acquisition office of a planned non-Economy Act assisted acquisition valued over $200K does not apply within DoD. However, the requirement to obtain a contracting officer's review for non-Economy Act requirements over $500K does apply, and is consistent with current DoD policy, as set forth in the FMR, Volume 11A, Chapter 18, and the "Interagency Acquisition" policy memorandum of Jan 18, 2008 (http://www.acq.osd.mil/dpap/policy/policyvault/2007-0203-DPAP.pdf).

Regardless of the dollar value, all assisted acquisitions must be supported by an Interagency Agreement (IA). In drafting IAs that are not subject to the OFPP guidance, DoD activities should use the OFPP guidance as a starting point for tailoring an agreement that addresses the specific types of information that is needed for the acquisition. At a minimum, IAs should define clearly the roles and responsibilities of the requiring and assisting activities, address procedures that will be used if problems arise, and provide information that is required to demonstrate a bona fide need and authorize the transfer and obligation of funds.

My POC for interagency acquisition matters is Mr. Michael Canales. He can be reached at 703-695-8571, or via e-mail at michael.canales@osd.mil.

Shay D. Assad
Director, Defense Procurement,
Acquisition Policy, and
Strategic Sourcing

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

June 6, 2008

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Paul A. Denett
Administrator

SUBJECT: Improving the Management and Use of Interagency Acquisitions

Interagency acquisitions offer important benefits to federal agencies, including economies and efficiencies and the ability to leverage resources. The attached guidance is intended to help agencies achieve the greatest value possible from interagency acquisitions.

Effective management and use of interagency acquisitions is a shared responsibility, especially for assisted acquisitions. Lack of clear lines of responsibility between agencies with requirements (requesting agencies) and the agencies which provide acquisition support and award contracts on their behalf (servicing agencies) has contributed to inadequate planning, inconsistent use of competition, weak contract management, and concerns regarding financial controls.

This document provides guidance to help agencies (1) make sound business decisions to support the use of interagency acquisitions and (2) strengthen the management of assisted acquisitions. Particular emphasis is placed on helping requesting agencies and servicing agencies manage their shared fiduciary responsibilities in assisted acquisitions. The guidance includes a checklist of roles for each responsibility in the acquisition lifecycle and a model interagency agreement to reinforce sound contracting and fiscal practices. The guidance reflects comments provided by Chief Acquisition Officers, Senior Procurement Executives, and Chief Financial Officers. The document was also shared with other interested stakeholders, including the Chief Information Officers and the Government Accountability Office (GAO), and reflects comments received from those parties as well.

Beginning on October 1, 2008, and thereafter, agencies shall ensure that decisions to use interagency acquisitions are supported by best interest determinations, as described in the attached guidance. Agencies shall further ensure that new interagency agreements for assisted acquisitions entered on or after November 3, 2008, contain the elements enumerated in Appendix 2 or follow the model agreement in Appendix 3. Agencies shall use the checklist at Appendix 1 to facilitate the clear identification of roles and responsibilities. Agencies shall also consider modifying existing long-term interagency agreements for assisted acquisitions in accordance with this guidance, as appropriate and practicable.

Providing for the sound management and use of interagency acquisitions is a key step for realizing the intended efficiencies of interagency contracts. Improving the governance structure for creating and renewing these vehicles is equally important, especially for multi-agency contracts. We have made important strides to leverage the government's vast buying power under the Federal Strategic Sourcing Initiative (FSSI) and to identify suitable executive agents that can manage government-wide acquisition contracts (GWACs) on behalf of customers across government. We must build on these efforts in order to maximize the contribution of interagency contracts to mission success. I intend to work with members of the Chief Acquisition Officers Council, including its Strategic Sourcing Working Group, to design a business case review process similar to that currently used for the designation of executive agents for GWACs and to define the structure required to support such a process.

Please have your acquisition officials work with program managers, contracting officers technical representatives, finance officers, information technology officers, legal staff and others involved in your agency's interagency acquisitions to ensure the effective implementation of this guidance and compliance with its requirements. Questions may be referred to Mathew Blum at (202) 395-4953 or mblum@omb.eop.gov.

Thank you for your attention to this important subject.

Attachment

cc: Chief Financial Officers
Chief Information Officers
Performance Improvement Officers
Danny Werfel, Acting Controller, Office of Federal Financial Management

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Chapter 7:

Revolving Funds

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CHAPTER 7

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CHAPTER 7

REVOLVING FUNDS

I. INTRODUCTION.

A. References.

1. 10 U.S.C. 2208. Working-capital funds.

2. 10 U.S.C. 2209. Management funds.

3. Department of Defense Financial Management Regulation, DoD Reg. 7000.14-R, vol. 2B, ch.9 [hereinafter DoD FMR]; vol. 3, ch. 19; vol. 11B, ch. 1; and vol. 12, ch. 1.

B. Definition.

1. "A fund established to finance a cycle of operations through amounts received by the fund. Within the Department of Defense, such funds include the Defense Working Capital Fund, as well as other working capital funds." DoD FMR, vol. 2A, ch. 1, para. 010107.B.54.

2. "Accounts authorized by specific provisions of law to finance a continuing cycle of business-type operations, and which are authorized to incur obligations and expenditures that generate receipts." DoD FMR, Glossary.

3. "A revolving fund has two key features: it is a 'single combined account to which receipts are credited and from which expenditures are made'" and its "generated or collected receipts are available for expenditure for the authorized purposes of the fund without the need for further Congressional action and without fiscal year limitation."[1]

[1] Congressional Research Service, *Interagency Contracting: An Overview of Federal Procurement and Appropriations Law*, Jan. 11, 2011, at 13 (*quoting* the GAO Redbook).

4. "Revolving funds fall into three broad categories: public interest revolving funds, trust revolving funds, and intragovernmental revolving funds."[2]

a. Public Enterprise Revolving Fund: a fund that "derives most of its receipts from sources outside the federal government. It usually involves a business-type operation, which generates receipts, that are in turn, used to finance a cycle of operations."[3] "These funds finance most government corporations and are commonly used for credit programs (direct loan, loan guarantee) of agencies such as the Department of Housing and Urban Development and the Small Business Administration."[4]

b. Trust Revolving Fund: a fund that is "permanently established to fund a continuing cycle of business-type operations except that it is used for specific purposes or programs in accordance with a statute that designates the fund as a trust fund."[5] Examples of trust revolving funds include certain statutorily created life insurance funds such as the Employee's Life Insurance Fund and the Veteran's Special Life Insurance Fund.

c. Intragovernmental Revolving Funds: a "revolving fund whose receipts come primarily from other government agencies, programs, or activities. It is designed to carry out a cycle of business-type operations with other federal agencies or separately funded components of the same agency."[6] Examples of these types of funds "include stock funds, industrial funds, supply funds, working capital funds, and franchise funds."[7]

C. Background. DoD FMR, vol. 2B, ch. 9, para. 090102.

1. Revolving funds satisfy the DoD's recurring requirements using a business-like buyer-and-seller approach. The revolving fund structure creates a customer-provider relationship between military operating units and their support organizations. The intent of this structure is to make decision-makers at all levels more aware of the costs of goods and services by making military operating units pay for the support they receive.

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[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at 14.
[6] *Id.*
[7] *Id.*

2. Revolving funds are not profit-oriented entities. The goal of a revolving fund is to break even over the long term. Revolving funds stabilize or fix their selling prices to protect customers from unforeseen fluctuations.

3. In the past, the DoD had two distinct types of revolving funds.

   a. The DoD used stock funds to procure material in bulk from commercial sources, hold it in inventory, and sell it to authorized customers.

   b. The DoD used industrial funds to provide industrial and commercial goods and services (e.g., depot maintenance, transportation, and research and development) to authorized customers.

4. In 1991, Congress established the Defense Business Operations Fund (DBOF) and authorized its indefinite continuation in 1994. National Defense Authorization Act, 1995, Pub. L. No. 103-337, § 311, 108 Stat. 2662, 2708-09 (1994). The DBOF combined the DOD's existing nine stock and industrial funds and five defense business functions into a single revolving fund.

5. In 1996, the DoD Comptroller reorganized the DBOF and created several working capital funds including an Army Working Capital Fund, a Navy Working Capital Fund, an Air Force Working Capital Fund, and a Defense-Wide Working Capital Fund.[8]

6. In 1998, Congress repealed the statutory authority (10 U.S.C. § 2216a) for the DBOF. See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, § 1008(b), 112 Stat. 1921, 2114 (1998).

7. Defense Working Capital Fund (DWCF). A revolving fund using a business-like buyer-and seller approach with a goal of breaking even over the long term. Stabilized rates or prices are generally established each fiscal year. The DWCF was established on December 11, 1996, upon the reorganization of the former Defense Business Operations Fund (DBOF). DoD FMR, Glossary.

[8] In 1997, the DOD Comptroller established a separate working-capital fund for the Defense Commissary Agency. This working-capital fund took effect in FY 1999.

D. General Concepts.

1. Revolving funds are designed to give management personnel the financial authority and flexibility necessary to adjust their operations.

    a. Funding is not tied to a particular fiscal year.

    b. Revolving funds operate under a buyer/seller or provider/customer relationship concept.

    c. Revolving funds derive their name from the cyclical nature of their cash flow.

2. Congress normally provides appropriations to start, increase, or restore a revolving fund.

    a. The working capital resources are referred to as “the corpus” of the fund.

    b. Working capital and assets may also be transferred from existing appropriations and fund accounts.

3. Customer orders provide the budgetary resources necessary to finance the revolving fund’s continued operations.

    a. The fund sells inventory and/or services to authorized customers.

    b. The fund then deposits the proceeds of the sales back into the fund to pay for the resources required to operate the fund.

E. Other Federal Agency Revolving Funds. Most agencies have at least one working capital fund covering common agency services and/or supplies. The following is a partial listing of the various authorities applicable to civilian agencies: 33 U.S.C. § 576 (Corps of Engineers); 15 U.S.C. § 1521 (Commerce); 7 U.S.C. § 2235 (Agriculture); 15 U.S.C. § 278b (National Institute of Standards and Technology); 20 U.S.C. § 3483 (Education); 22 U.S.C. § 2684 (State); 28 U.S.C. § 527 (Justice); 29 U.S.C. §§ 563, 563a (Labor); 31 U.S.C. § 322 (Treasury); 40 U.S.C. § 293(General Services Administration); 42 U.S.C. § 3513 (Health and Human Services); 42 U.S.C. § 3535(f) (Housing and Urban Development); 43 U.S.C. § 1467 (Interior); 43 U.S.C. § 1472 (Bureau of Reclamation); and 49 U.S.C. § 327 (Transportation).

II. STATUTORY BASIS AND REQUIREMENTS.

A. Working-Capital Funds. 10 U.S.C. §§ 2208(a)-(b). The Secretary of Defense may request that the Secretary of the Treasury establish working-capital funds.

1. Purpose. 10 U.S.C. § 2208(a). The DoD uses working-capital funds to:

   a. Finance inventories of supplies;

   b. Provide working capital for industrial-type activities; and

   c. Provide working capital for commercial-type activities that provide common services within or among the DOD's various departments and agencies.

2. Goal. 10 U.S.C. §§ 2208(a), (e). The DoD's goal is to account for and control program costs and work as economically and efficiently as possible.

3. The Charter. DoD FMR, vol. 2B, ch. 9, paras. 090102.B and 090102.C.

   a. The Secretary or Assistant Secretary of the Military Department (or the Director of the Defense Agency) must prepare and sign charter that details the scope of the potential activity group.

b. The Military Department (or Defense Agency) must submit the charter to the Undersecretary of Defense (Comptroller) for approval.

c. The DoD Comptroller will evaluate the potential activity group based on the following criteria:

(1) The products or services the potential activity group will provide to its customers;

(2) The potential activity group's ability to establish a cost accounting system to collect its costs;

(3) The potential customer base;[9] and

(4) Any buyer-seller advantages and disadvantages (e.g., the customers' ability to influence cost by changing demand).

4. Policy. DoD FMR, vol. 2B, ch. 9, para 090103.

a. Operating Expenses. 10 U.S.C. §§ 2208(c)-(d), (g)-(h). Working-capital funds pay for their own operations.

(1) Congress normally appropriates funds to capitalize working-capital funds initially; however, the Secretary of Defense may also provide capitalizing inventories.

(2) Working-capital funds pay the cost of:

(a) Supplies acquired, manufactured, repaired, issued, or used;

(b) Services or work performed; and

[9] The DOD Comptroller's goal is to align resources with requirements.

(c) Applicable administrative expenses.

(3) Customers then reimburse working-capital funds from:

(a) Available appropriations; or

(b) Funds otherwise credited for those costs.[10]

b. Cash Management. DoD FMR, vol. 2B, ch. 9, para. 090103.A. *See* Memorandum, DoD Comptroller, Working Capital Funds Cash Management Responsibility (5 Jan. 1995).

(1) Military Departments (and Defense Agencies) are responsible for the cash management of their working capital funds.

(2) Working capital funds should maintain the minimum cash balance necessary to meet their operational (7-10 days) and disbursement (6 months) requirements.

(3) Working capital funds should strive to eliminate the need to use advance billings to maintain their cash solvency.

c. Contracting in Advance of the Availability of Funds. 10 U.S.C. § 2208(k). Working-capital funds may contract for the procurement of a capital asset in advance of the availability of funds in the working-capital fund if that capital asset is for:

(1) Unspecified minor military construction projects costing more than $250,000[11];

(2) Automatic data processing equipment or software costing more than $250,000;

[10] Requisitioning agencies may not incur costs for goods or services that exceed the amount of their appropriations or other available funds. 10 U.S.C. § 2208(f).

[11] *See* note 14, *infra*.

(3) Other equipment costing more than $250,000; and

(4) Other capital improvements costing more than $250,000.

d. Advance Billing. 10 U.S.C. § 2208(l). The Secretary of a military department may bill a customer before it delivers the goods or services.[12]

(1) The Secretary concerned must notify Congress of the advanced billing within 30 days of the end of the month in which it made the advanced billing.[13]

(2) The notification must include: the reason(s) for the advance billing; an analysis of the effects of the advance billing on military readiness; and an analysis of the effects of the advance billing on the customer.

(3) The total amount of the advance billings rendered or imposed for all working capital funds of the DoD in a given fiscal year may not exceed more than $1 billion per year.

e. Separate Accounting, Reporting, and Auditing. 10 U.S.C. § 2208(n). The Secretary of Defense must account for, report, and audit the funds and activities managed through working-capital funds separately.

f. Charges for Goods and Services Provided through the Fund. 10 U.S.C. § 2208(o).

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[12] "The term 'advance billing,' with respect to a working-capital fund, means a billing of a customer by the fund, or a requirement for a customer to reimburse or otherwise credit the fund, for the cost of goods or services provided (or for other expenses incurred) on behalf of the customer that is rendered or imposed *before* the customer receives the goods or before the services have been performed." 10 U.S.C. 2208(l). *But see, National Technical Information Service – Use of Customer Advance Deposits for Operating Expenses*, B-243710, 71 Comp. Gen. 224, 226 (1992) (NTIS had no authority to use customer advances that were not directly related to a firm order to pay its operating expenses).

[13] The Secretary of Defense may waive the notification requirement during a war, national emergency, or contingency operation. 10 U.S.C. 2208(l)(2).

(1) Charges for the goods and services provided through a working-capital fund must include amounts necessary to recover:

(a) The full costs of the goods and services provided; and

(b) The depreciation of the fund's capital assets.

(2) Charges for the goods and services provided through a working-capital fund may **not** include amounts necessary to recover:

(a) The costs of military construction projects other than minor military construction projects financed under 10 U.S.C. § 2805(c)[14];

(b) The costs incurred to close or realign military installations; or

(c) The costs associated with mission critical functions.

g. Procedures for Accumulation of Funds. 10 U.S.C. § 2208(p). The SecDef and the Secretaries of the military departments must establish billing procedures to ensure that the balance in their working-capital fund does not exceed the amount necessary to operate the fund.

h. Capital Budget. DoD FMR, vol. 2B, ch. 9, para. 090104.

(1) Working capital funds must finance the acquisition of most of their capital assets through the fund.[15]

[14] 10 U.S.C. § 2805(c) authorizes the funding of minor military construction with Operations and Maintenance funds in an amount not exceeding $750,000. The increased threshold for funding life, health, or safety deficiencies up to $1.5 million was removed in section 2802 of the FY 2012 NDAA.

(2) Capital assets include depreciable property, plant, equipment, and software that:

(a) Has a unit cost that is greater than or equal to $250,000 (except for Minor Construction, which has a capitalization threshold of $100,000); and

(b) Has a useful life of 2 years or more.

i. Minor Construction. DoD FMR, Vol. 2B, ch. 9, para. 090104.O.

(1) Working-capital funds must finance minor construction projects costing more than $750,000 through the annual Military Construction Appropriations Act.[16]

(2) Working-capital funds may finance project planning and design costs through the fund.

j. The Full Recovery of Costs and Setting of Prices. DoD FMR, Vol. 2B, ch. 9, paras. 090107 and 090108.

(1) Managers of activity groups must set their prices to recover their full costs over the long run (i.e., they must set their prices to recoup actual/projected losses or return actual/projected gains in the budget year).

(a) Supply management activity groups establish customer rates by applying a surcharge to the commodity costs.

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[15] This requirement does not apply to construction or the capital assets listed in DoD FMR, vol. 2B, ch. 9, para. 090104.E (e.g., major Range and Test Facility Activities items, major weapons systems, equipment and minor construction purchased to meet mobilization requirements). DoD FMR, vol. 2B, ch9, para 090104.

[16] Projects costing more than $250,000 must be approved in writing by the Director for Revolving Funds and identified separately in the component's annual operating budget (AOB) prior to execution. DoD FMR, vol. 2B, ch. 9, para. 090104.O.1.

(b) Non-supply management activity groups establish unit cost rates based on identified output measures or representative outputs (e.g., cost per direct labor hour, cost per product, cost per item received, cost per item shipped, etc.).

(2) Prices normally remain fixed during the budget year.[17] This is known as the stabilized rate policy.[18] This policy protects customers from unforeseen inflationary increases and other cost uncertainties.

k. Revenue Recognition. DoD FMR, vol. 2B, ch. 9, para. 090103.N.

(1) Working-capital funds must recognize revenue and associated costs in the same accounting period. Recognizing gains and losses in the same period enables activity managers to evaluate the performance of their organizations.

(2) Non-supply Defense Working Capital Fund activities must use the "Percentage of Completion Method" of recognizing revenue.

(3) Working-capital funds may not recognize an amount of revenue that exceeds the amount specified in the order.

l. Apportionments and Budgetary Resources.[19] DoD FMR, vol. 3, ch. 19, paras. 1902 and 1903.

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[17] *See* DoD FMR, vol. 2B, ch. 9, para. 090108 and 090109 for exceptions to this policy.

[18] "The stabilized rate is determined by adjusting anticipated workload and projected overhead costs for the budget year for both inter-Fund transactions (i.e., adjustments to reflect changes in the costs of purchases between activities within the Fund) and the impact of prior year gains or losses as reflected by the [Accumulating Operating Result].". DoD FMR, vol. 2B, ch. 9, para. 090108.B.1.

[19] The following budgetary resources are available for apportionment: (1) appropriations; (2) unobligated balances available at the beginning of the FY; (3) reimbursements and other income; (4) recoveries of prior year obligations; (5) restorations; and (6) anticipated contract authority. Other assets (e.g., inventories and capital assets) are not budgetary resources because they do not provide a direct monetary source to liquidate financial transactions. DoD FMR, vol. 3, ch. 19, paras. 190203 and 190205.

(1) The Office of Management and Budget (OMB) apportions appropriations and contract authority[20] to working-capital funds by means of an SF 132.

(2) A working-capital fund may not incur obligations in excess of its apportioned budgetary resources or total approved operating costs.

(3) Working-capital funds may not obligate the difference between the fund's total budgetary resources and the amount of contract authority the OMB has apportioned to it, unless it is apportioned.

(4) Working-capital funds must maintain a positive budgetary balance.

III. DEFENSE WORKING CAPITAL FUNDS.

A. Types of Funds. DoD FMR, vol. 2B, ch. 9.

1. Supply Management Activity Groups.[21]

a. Supply management activity groups provide a means of accounting for and financing the purchase, storage, and sale of common use items and depot level repair assemblies.

b. Each supply management activity group acquires materials and supplies with its appropriations and other cash accounts. These transactions increase the activity group's inventory and decrease its cash.

(1) The materials and supplies are held in inventory until the activity group issues (sells) them to authorized customers.

[20] "Contract authority is the legal ability to enter into contracts and incur obligations ***before*** budgetary authority is available to make outlays to liquidate those obligations." DoD FMR, Vol. 3, Ch. 19, para. 190206.

[21] These types of funds were previously known as Supply Management Business Areas or Stock Funds.

(2) Examples of the types of materials and supplies that supply management activity groups typically acquire are listed in DoD FMR, Vol. 4, Ch. 4, and typically include: subsistence items; military exchange items; fuel, chemicals, and gases; construction materials; medical and dental supplies; military clothing and individual equipment; and certain spare and repair parts.

c. When the supply management activity group issues (sells) supplies to authorized customers, the activity group charges the supplies to the customers' account. These transactions increase the activity group's cash and decrease its inventory.

2. Non-Supply Management Activity Groups.[22]

a. Non-supply management activity groups finance the operating costs of major service units, such as arsenals, depots, and shipyards.

b. Non-supply management activity groups provide services on a reimbursable basis to authorized customers.

(1) Non-supply management activity groups do not maintain inventories of finished products.

(2) Non-supply management activity groups generate work by accepting customer orders.

3. Management Funds. 10 U.S.C. § 2209.

a. Management fund accounts are working fund accounts authorized by law to facilitate accounting for administration of intragovernmental activities other than a continuing cycle of operations. The DoD uses management funds to conduct operations financed by at least two appropriations and whose costs may not be distributed and charged to those appropriations immediately.

[22] These types of funds were previously known as Depot Maintenance Business Areas or Industrial Funds.

b. There is an Army Management Fund, a Navy Management Fund, and an Air Force Management Fund. Such accounts generally do not own a significant amount of assets.

c. A military department may use a management fund to procure goods and services; however, the military department responsible for the procurement must have appropriations available to reimburse the fund immediately. *See* DoD FMR, vol. 12, ch. 1, para. 0105.

IV. OTHER REVOLVING FUND AUTHORITIES

A. The Clinger-Cohen Act of 1996

1. General. Section 5112(e) of the FY 1996 National Defense authorization Act (Pub. L. No. 104-106) (permanently codified at 40 U.S.C. § 14129e) instructed the Director, Office of Management and Budget (OMB), to designate as considered appropriate, one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.

2. Implementation.

a. OMB has designated the General Services Administration (GSA) as the executive agent for certain government-wide acquisitions of information technology (IT).

b. The scope of the designation is limited to programs that are funded on a reimbursable basis through the Information Technology Fund established by 40 U.S.C. § 757 (repealed by Pub. L. 109-313, Oct. 6, 2006, and subsumed into the Acquisition Services Fund under 40 U.S.C. §321). These programs include the Federal Systems Integration and Management Center (FEDSIM) and Federal Computer Acquisition Center (FEDCAC), as well as other existing government-wide IT acquisition programs. The OMB designation, in combination with 40 U.S.C. § 757, provides separate authority for acquisition from these GSA programs.

c. If the Clinger-Cohen Act applies, the Economy Act is inapplicable.

d. Obligation. Orders placed pursuant to the Clinger-Cohen Act shall be treated for obligational purposes as if they were placed with commercial activities. In other words, obligation occurs upon the formation of a binding agreement between the ordering agency and the GSA, and deobligation is not required to take place merely because the ordering agency's appropriation has expired. **NOTE:** While not required by law, DoD policy requires deobligation for non-Economy act orders essentially the same as for Economy Act orders. DoD FMR, vol. 11A, ch. 18, para. 180302. See Chapter 6, *Interagency Acquisitions*, of this Deskbook for further details of DoD policy on use of non-DoD contracts.

e. Funds may not be used for other purposes in addition to or in lieu of what was included in the interagency agreement. *See Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, April 25, 2001 *available at*: http://www.gpo.gov/fdsys/pkg/GAOREPORTS-B-286929/html/GAOREPORTS-B-286929.html.

f. As with Economy Act orders, agencies may not circumvent the competition requirements by placing an order against a contract under one of these programs which falls outside the scope of that contract. *See e.g., Floro & Associates*, B-285451.3; B-285451.4, 2000 CPD ¶172 (GSA's task order for "management services" was materially different from that of the underlying contract, which required "commercially off-the shelf hardware and software resulting in turnkey systems for GSA's client agencies").

g. An interagency agreement is akin to a contract, and the obligational consequences of an interagency agreement entered into under a revolving fund authority are the same as if it were a contract. *See U.S. Army Europe--Obligation of Funds for an Interagency Agreement for Severable Services*, B-323940, Jan. 7, 2015.

B. Franchise Funds.

1. Background. Congress has decided that competition between agencies on services that were common between the various agencies would result in increased efficiency and lower cost. As a result, Section 403 of the Government Management Reform Act of 1994, Pub. L. 103-356, 108 Stat. 3410, 3413 (found at 31 U.S.C. § 501 note) established a pilot "franchise fund" program. These franchise funds are a special version of working capital funds which permit other agencies (not just the franchise fund's sponsor) to place orders.

2. The Pilot Program. The Office of Management and Budget (OMB) selected six agencies to run pilot programs covering capital equipment, automated data processing systems, and financial management/management information systems. The following agencies have authority to establish franchise funds:

   a. Department of Veterans Affairs. See Pub. L. No. 104-201, 110 Stat. 2874, 2880 (1996);

   b. Environmental Protection Agency. See Pub. L. No. 104-204, 110 Stat. 2874, 2912-13 (1996);

   c. Department of Commerce. See Pub. L. No. 104-204, 110 Stat. 2874, 2912-13 (1996);

   d. Department of Interior. See Pub. L. No. 104-208, §113, 110 Stat. 3009, 3009-200 (1996); and

   e. Department of Treasury. See Pub. L. No. 104-208, 110 Stat. 3009, 3009-316, -317 (1996).

   f. Federal Aviation Administration. See Pub. L. No. 104-205, 110 Stat. 2951, 2957-58 (1996);

   g. Health and Human Services. This franchise fund operates under authority of the HHS service and supply fund.

3. OMB defined 12 operating principles for business-like operations in a 1996 guide for franchise fund pilots.

   a. Services

   b. Organization

c. Competition

d. Self-Sustaining/ Full Cost Recovery

e. Performance Measures

f. Benchmarks

g. Adjustments to Business Dynamics

h. Surge Capacity

i. Cessation of Activity

j. Voluntary Exit

k. FTE Accountability

l. Initial Capitalization

4. Franchise fund pilots provide common administrative services such as acquisition management, administrative management, information technology services, financial management services, records management, employee assistance programs, facilities management and clinical occupational health.

5. Franchise funds share a common feature with other revolving funds in that they are intended to break even over the long term. Most franchise fund authorities do however, authorize servicing agencies to charge a fee calculated to return in full all expenses necessary for operation of the fund. Some also allow the funds to retain up to 4% of total annual income to support acquisition of capital equipment, with any excess funds reverting back to the Treasury.

6. Obligation. The obligation rules of the franchise funds work similarly to the other non-Economy Act authorities. Upon entering into a binding interagency agreement, the ordering agency obligates funds and need not deobligate upon expiration of the ordering agency's appropriation. The interagency agreement establishes the boundaries on the amount to be obligated, however. In addition, if the work is accomplished at a lower rate than initially anticipated, the remaining obligated fund may not be used to pay for other work not covered by the initial interagency agreement. **NOTE:** While not required by law, DoD policy requires deobligation essentially the same as for Economy Act orders. DoD FMR, vol. 11A, ch. 18, para. 180302 (note, however, that this paragraph was revised in a 2013 update to the FMR). See Chapter 6, *Interagency Acquisitions*, of this Deskbook for further details of DoD policy on use of non-DoD contracts.

V. GENERAL FISCAL PRINCIPLES RELATED TO REVOLVING FUNDS.

A. The Miscellaneous Receipts Statute. 31 U.S.C. § 3302(b). The statute requires an official or agent of the Government to deposit money received from any source in the Treasury without deduction for any charge or claim.

1. General Rule.

a. Income generated by a revolving fund represents money collected for the use of the United States.

b. A revolving fund may only withdraw or expend this income in consequence of an appropriation made by law.

c. Retention of customer funds by Working Capital Fund. See 10 U.S.C. §§ 2208, 2210; *see also* 31 U.S.C. § 322(d). Congress has expressly created an exception to the Miscellaneous Receipts Statute permitting working capital funds to retain customer funds ("The fund shall be reimbursed . . . from amounts available to the Department or from other sources, for supplies and services at rates that will equal [its] expenses of operation . . . Amounts the Secretary decides are in excess of the needs of the fund shall be deposited . . . in the Treasury as miscellaneous receipts."). Once the customer funds are transferred into the revolving fund, however, the ordering agency must comply with the normal fiscal rules concerning obligation and bona fide needs. Agencies, therefore, may not "bank" or "park" their money in a revolving fund to prolong its life. *See Implementation of the Library of Congress FEDLINK Revolving Fund*, B-288142, Sep. 6, 2001; *Matter of: Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, Apr. 25, 2001.

B. The Purpose Statute. 31 U.S.C. § 1301. The Purpose Statute requires federal agencies to apply appropriations only to the objects for which Congress made the appropriations.

1. Restrictions on the Use of Revolving Funds.

a. Federal agencies may only use revolving funds for expenditures that are reasonably connected to the authorized activities of the fund. *See The Honorable Robert W. Kastenmeier*, B-230304, 1988 WL 227283 (C.G. Mar. 18, 1988) (unpub.) (Federal Prison Industries, Inc., can use its revolving fund to construct industrial facilities and secure camps to house prisoners engaged in public works, but not general penal facilities or places of confinement); *see also GSA – Working Capital Fund*, B-208697, 1983 WL 27433 (C.G. Sep. 28, 1983) (unpub.) (GSA cannot use its working-capital fund for its mail room, library, and travel services because these items were not specifically authorized); *To the Administrator, Veterans Admin.*, B-116651, 40 Comp. Gen. 356, 358 (1960) (a proposal to finance and operate a centralized silver reclamation program was not the type of operation the VA's supply fund authorized).

b. A revolving fund must deposit any money generated by using the fund for an unauthorized purpose in the Treasury as a miscellaneous receipt. *See To the Administrator, Veterans Admin.*, B-116651, 40 Comp. Gen. 356, 358 (1960) (stating that the VA must deposit collections from the sale of reclaimed silver and scrap gold must be deposited in the Treasury).

2. Restrictions on the Use of Customer Appropriations. DoD FMR, vol. 11B, ch. 1, para. 010110.

a. A revolving fund customer may not use its appropriated funds to do indirectly what it may not do directly.

b. Appropriated funds cited on reimbursable orders:

(1) Are only available for purposes permissible under the source appropriation; and

(2) Remain subject to restrictions applicable to the source appropriation.

C. The Bona Fide Needs Rule. 31 U.S.C. § 1502(a). This statute states that an appropriation limited to a definite period is only available for the payment of expenses properly incurred during that period.

1. Restrictions on the Use of Revolving Funds.

a. 10 U.S.C. § 2210 states that: "Obligations may, without regard to fiscal year limitations, be incurred against anticipated reimbursements to stock funds in such amounts and for such period as the Secretary of Defense . . . may determine to be necessary to maintain stock levels consistently with planned operations for the next fiscal year."

(1) Revolving funds are "no year" funds. *See, e.g.,* Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999). However, it is still improper to "bank" an agency's annual funds with a GSA account to cover future year needs. *Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund*, B-288142, Sep. 6, 2001; *Matter of: Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, Apr. 25, 2001.

(2) Revolving funds are not dependent upon annual appropriations.

b. The Bona Fide Needs Rule does not normally apply to the use of revolving funds. *But see* 10 U.S.C. § 2213(a) (limiting the acquisition of any supply item to 2 years of operating stock); U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESS, DEFENSE WORKING CAPITAL FUND: IMPROVEMENTS NEEDED FOR MANAGING THE BACKLOG OF FUNDED WORK (2001).

2. Restrictions on the Use of Customer Appropriations. DoD FMR, vol. 11B, ch. 1, para. 010110.

a. A revolving fund customer may not use its appropriated funds to do indirectly what it may not do directly.

b. The Bona Fide Needs Rule does apply to the use of customer appropriations. In other words, a customer agency must obligate its funds pursuant to its own *bona fide* need within the specified period of availability of the appropriation it is using. A valid, definite, certain, and binding agreement with a servicing agency must be entered to support a valid obligation. *See GovWorks*, B-308994 (Jul 17, 2007).

c. Once a revolving fund has "earned" the receipts and collections from customers, those funds may be used without fiscal year limitation. A fund "earns" customer funds by providing the requested goods or services. This is distinguishable from customer funds that are "advanced" to a revolving fund, which will retain their fiscal year limitation until the goods and services are provided. *See* GAO Redbook, Vol . III, p. 12-114.

VI. VIOLATIONS OF THE ANTIDEFICIENCY ACT.

A. Types of Violations. 10 U.S.C. §§ 1341-1342; DoD FMR, vol. 14, ch. 2. An Antideficiency Act violation occurs when a revolving fund:

1. Obligates funds in excess of an appropriation or apportionment. 31 U.S.C. § 1341(a)(1)(A). *See U.S. Army, Corps of Engineers Civil Works Revolving Fund*, B-242974.8, Dec. 11, 1992, 72 Comp. Gen. 59, 61 (the Antideficiency Act prohibits the Corps of Engineers from overobligating the available budget authority in its Civil Works Revolving Fund); *National Technical Information Service – Use of Customer Advance Deposits for Operating Expenses*, B-243710, 71 Comp. Gen. 224, 227 (1992) (NTIS violated the Antideficiency Act to the extent it used monies that were not available to it to pay its operating expenses and no other funds were available to cover the obligations). *See also*, DoD FMR, Vol. 3, Ch. 19, para. 190207 explaining that a potential ADA violation may occur when obligations exceed "apportioned contract authority and/or budgetary resources."

2. Obligates funds in advance of an appropriation required to support that obligation, absent a specific exception. 31 U.S.C. § 1341(a)(1)(B).

3. Has an appropriation level deficit cash balance with the U.S. Treasury. 31 U.S.C. § 1341(a)(1)(A).

4. Accepts voluntary services. 31 U.S.C. § 1342.

B. Application of the Antideficiency Act to Reimbursable Orders.

1. A reimbursable order is an agreement to provide goods or services to certain activities, tenant activities, or individuals where the support is:

   a. Initially provided using mission funds; and

   b. Reimbursed through a billing procedure.

2. Reimbursable orders will not be administered or accounted for as separate subdivisions of funds like allotments.

a. The ordering activity will perform appropriation-type accounting for the order as if it were a contract.

b. A revolving fund will not necessarily violate 31 U.S.C. § 1517 if it incurs obligations, costs, or expenditures that exceed the amount of a single reimbursable order.

c. However, the revolving fund may not exceed its own total obligation authority, or the total obligation authority of the ordering activity.

3. Reimbursable orders for work or services done on a cost-reimbursable basis will contain a cost ceiling for billing purposes. This limits an ordering activity's liability if a revolving fund incurs costs that exceed the ceiling.

C. Other Possible Antideficiency Act Violations.

1. Construction. DoD FMR, vol. 2B, ch. 9, para. 090104.O. Activities financed by working capital funds may only use $750,000 of these funds to finance construction projects.

2. Specific Statutory Limitations. *See, e.g.,* National Defense Authorization Act, 1995, Pub. L. No. 103-337, § 314, 108 Stat. 2663 (1994) (imposing a limit of 65% of sales on the obligational authority of stock funds during FY 1995 to further the drawdown of defense stocks).[23]

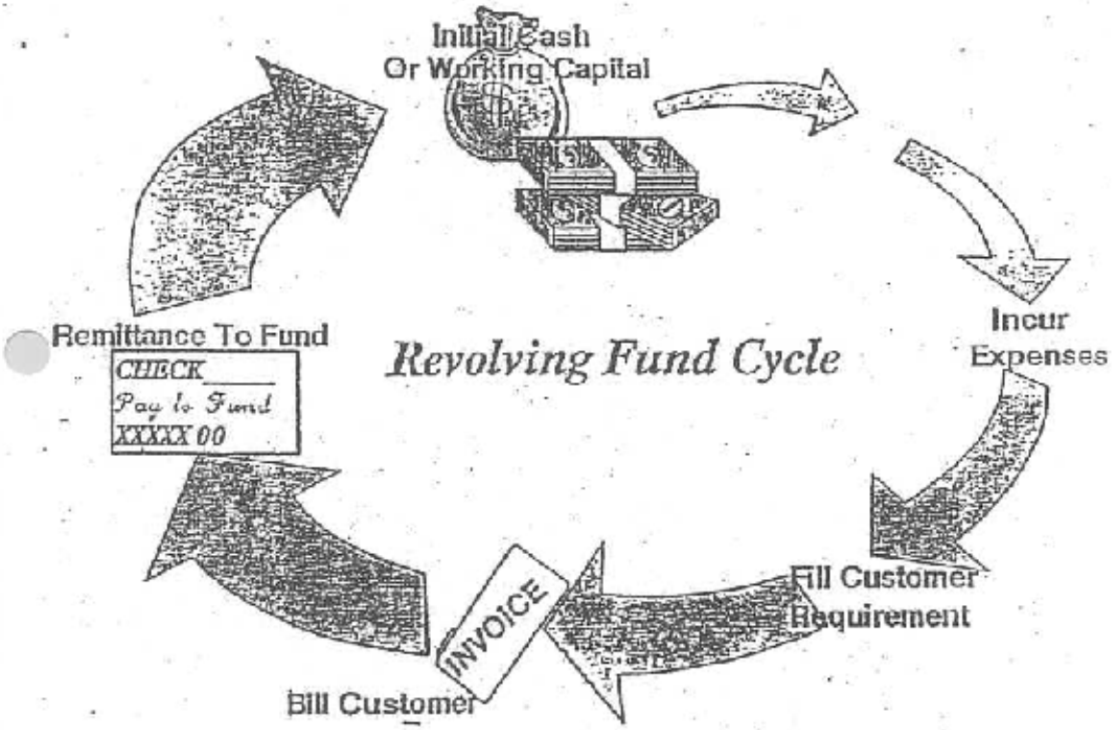
VII. CONCLUSION.

[23] This is merely an illustrative example. This limitation no longer applies. *See, e.g.,* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, 112 Stat. 1920 (1998). Practitioners dealing with working capital funds should review the yearly DoD authorization and appropriation acts to determine whether Congress has imposed any such limitations.

APPENDIX A

APPENDIX A

REVOLVING FUND CYCLE



APPENDIX B

WORKING CAPITAL FUNDS - Statutes

10 USC § 2208 – Working-Capital Funds

(a) To control and account more effectively for the cost of programs and work performed in the Department of Defense, the Secretary of Defense may require the establishment of working-capital funds in the Department of Defense to—

(1) finance inventories of such supplies as he may designate; and

(2) provide working capital for such industrial-type activities, and such commercial-type activities that provide common services within or among departments and agencies of the Department of Defense, as he may designate.

(b) Upon the request of the Secretary of Defense, the Secretary of the Treasury shall establish working-capital funds established under this section on the books of the Department of the Treasury.

(c) Working-capital funds shall be charged, when appropriate, with the cost of—

(1) supplies that are procured or otherwise acquired, manufactured, repaired, issued, or used, including the cost of the procurement and qualification of technology-enhanced maintenance capabilities that improve either reliability, maintainability, sustainability, or supportability and have, at a minimum, been demonstrated to be functional in an actual system application or operational environment; and

(2) services or work performed;

including applicable administrative expenses, and be reimbursed from available appropriations or otherwise credited for those costs, including applicable administrative expenses and costs of using equipment.

(d) The Secretary of Defense may provide capital for working-capital funds by capitalizing inventories. In addition, such amounts may be appropriated for the purpose of providing capital for working-capital funds as have been specifically authorized by law.

(e) Subject to the authority and direction of the Secretary of Defense, the Secretary of each military department shall allocate responsibility for its functions, powers, and duties to accomplish the most economical and efficient organization and operation of the activities, and the most economical and efficient use of the inventories, for which working-capital funds are authorized by this section.

(f) The requisitioning agency may not incur a cost for supplies drawn from inventories, or services or work performed by industrial-type or commercial-type activities for which working-capital funds may be established under this section, that is more than the amount of appropriations or other funds available for those purposes.

(g) The appraised value of supplies returned to working-capital funds by a department, activity, or agency may be charged to that fund. The proceeds thereof shall be credited to current applicable appropriations and are available for expenditure for the same purposes that those appropriations are so available. Credits may not be made to appropriations under this subsection as the result of capitalization of inventories under subsection (d).

(h) The Secretary of Defense shall prescribe regulations governing the operation of activities and use of inventories authorized by this section. The regulations may, if the needs of the Department of Defense require it and it is otherwise authorized by law, authorize supplies to be sold to, or services to be rendered or work performed for, persons outside the Department of Defense. However, supplies available in inventories financed by working capital funds established under this section may be sold to contractors for use in performing contracts with the Department of Defense. Working-capital funds shall be reimbursed for supplies so sold, services so rendered, or work so performed by charges to applicable appropriations or payments received in cash.

(i) For provisions relating to sales outside the Department of Defense of manufactured articles and services by a working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof, see section 4543 of this title.

(j)

(1) The Secretary of a military department may authorize a working capital funded industrial facility of that department to manufacture or remanufacture articles and sell these articles, as well as manufacturing, remanufacturing, and engineering services provided by such facilities, to persons outside the Department of Defense if—

(A) the person purchasing the article or service is fulfilling a Department of Defense contract or a subcontract under a Department of Defense contract, and the solicitation for the contract or subcontract is open to competition between Department of Defense activities and private firms; or

(B) the Secretary would advance the objectives set forth in section 2474 (b)(2) of this title by authorizing the facility to do so.

(2) The Secretary of Defense may waive the conditions in paragraph (1) in the case of a particular sale if the Secretary determines that the waiver is necessary for reasons of national security and notifies Congress regarding the reasons for the waiver.

(k)

(1) Subject to paragraph (2), a contract for the procurement of a capital asset financed by a working-capital fund may be awarded in advance of the availability of funds in the working-capital fund for the procurement.

(2) Paragraph (1) applies to any of the following capital assets that have a development or acquisition cost of not less than $250,000:

(A) An unspecified minor military construction project under section 2805 (c)(1) of this title.

(B) Automatic data processing equipment or software.

(C) Any other equipment.

(D) Any other capital improvement.

(l)

(1) An advance billing of a customer of a working-capital fund may be made if the Secretary of the military department concerned submits to Congress written notification of the advance billing within 30 days after the end of the month in which the advanced billing was made. The notification shall include the following:

(A) The reasons for the advance billing.

(B) An analysis of the effects of the advance billing on military readiness.

(C) An analysis of the effects of the advance billing on the customer.

(2) The Secretary of Defense may waive the notification requirements of paragraph (1)—

(A) during a period of war or national emergency; or

(B) to the extent that the Secretary determines necessary to support a contingency operation.

(3) The total amount of the advance billings rendered or imposed for all working-capital funds of the Department of Defense in a fiscal year may not exceed $1,000,000,000.

(4) In this subsection:

(A) The term "advance billing", with respect to a working-capital fund, means a billing of a customer by the fund, or a requirement for a customer to reimburse or otherwise credit the fund, for the cost of goods or services provided (or for other expenses incurred) on behalf of the customer that is rendered or imposed before the customer receives the goods or before the services have been performed.

(B) The term "customer" means a requisitioning component or agency.

(m) Capital Asset Subaccounts.— Amounts charged for depreciation of capital assets shall be credited to a separate capital asset subaccount established within a working-capital fund.

(n) Separate Accounting, Reporting, and Auditing of Funds and Activities.— The Secretary of Defense, with respect to the working-capital funds of each Defense Agency, and the Secretary of each military department, with respect to the working-capital funds of the military department, shall provide for separate accounting, reporting, and auditing of funds and activities managed through the working-capital funds.

(o) Charges for Goods and Services Provided Through the Fund.—

(1) Charges for goods and services provided for an activity through a working-capital fund shall include the following:

(A) Amounts necessary to recover the full costs of the goods and services provided for that activity.

(B) Amounts for depreciation of capital assets, set in accordance with generally accepted accounting principles.

(2) Charges for goods and services provided through a working-capital fund may not include the following:

(A) Amounts necessary to recover the costs of a military construction project (as defined in section 2801 (b) of this title), other than a minor construction project financed by the fund pursuant to section 2805 (c)(1) of this title.

(B) Amounts necessary to cover costs incurred in connection with the closure or realignment of a military installation.

(C) Amounts necessary to recover the costs of functions designated by the Secretary of Defense as mission critical, such as ammunition handling safety, and amounts for ancillary tasks not directly related to the mission of the function or activity managed through the fund.

(p) Procedures For Accumulation of Funds.— The Secretary of Defense, with respect to each working-capital fund of a Defense Agency, and the Secretary of a military department, with respect to each working-capital fund of the military department, shall establish billing procedures to ensure that the balance in that working-capital fund does not exceed the amount necessary to provide for the working-capital requirements of that fund, as determined by the Secretary.

(q) Annual Reports and Budget.— The Secretary of Defense, with respect to each working-capital fund of a Defense Agency, and the Secretary of each military department, with respect to each working-capital fund of the military department, shall annually submit to Congress, at the same time that the President submits the budget under section 1105 of title 31, the following:

(1) A detailed report that contains a statement of all receipts and disbursements of the fund (including such a statement for each subaccount of the fund) for the fiscal year ending in the year preceding the year in which the budget is submitted.

(2) A detailed proposed budget for the operation of the fund for the fiscal year for which the budget is submitted.

(3) A comparison of the amounts actually expended for the operation of the fund for the fiscal year referred to in paragraph (1) with the amount proposed for the operation of the fund for that fiscal year in the President's budget.

(4) A report on the capital asset subaccount of the fund that contains the following information:

(A) The opening balance of the subaccount as of the beginning of the fiscal year in which the report is submitted.

(B) The estimated amounts to be credited to the subaccount in the fiscal year in which the report is submitted.

(C) The estimated amounts of outlays to be paid out of the subaccount in the fiscal year in which the report is submitted.

(D) The estimated balance of the subaccount at the end of the fiscal year in which the report is submitted.

(E) A statement of how much of the estimated balance at the end of the fiscal year in which the report is submitted will be needed to pay outlays in the immediately following fiscal year that are in excess of the amount to be credited to the subaccount in the immediately following fiscal year.

(r) Notification of Transfers.—

(1) Notwithstanding any authority provided in this section to transfer funds, the transfer of funds from a working-capital fund, including a transfer to another working-capital fund, shall not be made under such authority unless the Secretary of Defense submits, in advance, a notification of the proposed transfer to the congressional defense committees in accordance with customary procedures.

(2) The amount of a transfer covered by a notification under paragraph (1) that is made in a fiscal year does not count toward any limitation on the total amount of transfers that may be made for that fiscal year under authority provided to the Secretary of Defense in a law authorizing appropriations for a fiscal year for military activities of the Department of Defense or a law making appropriations for the Department of Defense.

Chapter 8:

Construction Funding

CHAPTER 8

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CHAPTER 8

CONSTRUCTION FUNDING

I. INTRODUCTION.

A methodical approach to construction projects is imperative. Additionally, proper documentation of the project file and legal analysis will aid in future audits. Finally, the thresholds for military construction are ever changing, as evidenced by the most recent changes discussed herein.

The 2015 National Defense Authorization Act (NDAA), Public Law 113-29, significantly changed the military construction funding landscape. Most important to commands and their legal advisors is the increase in authority to use Operations and Maintenance (O&M) funding for unspecified minor military construction projects costing not more than $1,000,000, a generous increase in spending authority from $750,000. More significant, perhaps, is the increase in the authority for the service secretaries to use Unspecified Minor Military Construction (UMMC) funding, a lump sum appropriation provided by Congress to the service secretaries for minor military construction, to fund military construction projects not exceeding $3,000,000, an increase of $1,000,000 from the previous cap of $2,000,000. Another significant increase in funding authority in this year's NDAA relates to funding military construction that is designed to address a "life, health, or safety" (LHS) issues. Specifically, this authority applies to the UMMC funding at the service secretary level only. Therefore, the Secretary of the Army may, after congressional notification, spend up to $4,000,000 to address a LHS concern without entering into the congressional appropriations cycle. This is an increase of $1,000,000 from the previous cap of $3,000,000.

So what does this mean for commanders and legal advisors? Quite simply, it means that commanders will be able to use their O&M to fund military construction projects up to $1,000,000. It also means that the Army will be able to fund military construction projects not exceeding $3,000,000 without having to wait for the congressional appropriations cycle, thereby increasing the speed and effectiveness of these relatively "minor" projects.

II. REFERENCES.

A. Military Construction Codification Act, Pub. L. No. 97-214, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. §§ 2801-2885).

B. 41 U.S.C. § 6303.

C. Annual Military Construction Authorization and Appropriation Acts and their accompanying Conference Reports.

D. DOD Directive 4270.5, Military Construction (12 February 2005) [hereinafter DOD Dir. 4270.5].

E. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 6, Military Construction/Family Housing Appropriations (July 2013) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 6].

F. DOD Instruction 4165.56, Relocatable Buildings (January 7, 2013) [hereinafter DODI 4165.56] .

G. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 8, Facilities Sustainment and Restoration/Modernization (July 2013) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 8].

H. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 3, Budget Execution – Availability and Use of Budgetary Resources, ch. 17, Accounting Requirements for Military Construction projects (June 2013) [hereinafter DOD Reg. 7000.14-R, vol. 3, ch. 17].

I. DFAS-IN Regulation 37-1, Finance and Accounting Policy Implementation (December 30, 2013) [hereinafter DFAS-IN 37-1].

J. Army Regulation 415-32, Engineer Troop Unit Construction in Connection with Training Activities (April 15, 1998) [hereinafter AR 415-32].

K. Army Regulation 420-1, Army Facilities Management (RAR August 28, 2012) [hereinafter AR 420-1].[1]

L. DA Pamphlet 420-1-2, Army Military Construction and Non-Appropriated Funded Construction Program Development and Execution (April 2, 2009) [hereinafter DA Pam 420-1-2].

M. DA Pamphlet 420-11, Project Definition and Work Classification (March 18, 2010) [hereinafter DA Pam 420-11].

N. DFAS-IN Manual 37-100-11, Appendix A, Expense and Investment Criteria (Definition of a system for RLB analysis).

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[1] AR 420-1 supersedes AR 11-27 (3 Feb 1997), AR 210-50 (3 Oct 2005), AR 415-15 (12 June 2006), AR 420-15 (15 Apr 1997), AR 420-18 (3 Jan 1992), AR 420-49 (19 Sep 2005), AR 420-70 (10 Oct 1997), AR 420-72 (1 May 2000), and AR 420-90 (4 Oct 2006).

O. AFI 32-1021, Planning and Programming of Facility Military Construction (MILCON) Projects (June 14, 2010) [hereinafter AFI 32-1021].

P. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (October 15, 2003) [hereinafter AFI 32-1032].

Q. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch. 9, Military Construction Appropriations (August 16, 2012) [hereinafter AFI 65-601, vol. 1, ch. 9].

R. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch 21, Military Family Housing (MFH) Appropriations (August 16, 2012) [hereinafter AFI 65-601, vol. 1, ch. 21].

S. OPNAVINST 11010.20G, Facilities Projects Manual (October 14, 2005) [hereinafter OPNAVINST 11010.20G].

T. OPNAVINST 11010.33C, Procurement, Lease and Use of Relocatable Buildings (March 7, 2006) [hereinafter OPNAVINST 11010.33C].

III. DEFINITIONS

A. Appropriate Committees of Congress.

10 U.S.C. § 2801(c)(1) defines the "appropriate committees of Congress" as "the congressional defense committees and, with respect to any project to be carried out by, or for the use of, an intelligence component of the Department of Defense, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate."

B. Facility.

10 U.S.C. § 2801(c)(2). The term "facility" means "a building, structure, or other improvement to real property." Service regulations further define the term. For example, AR 420-1, Glossary, defines facility as including "any interest in land, structure, or complex of structures together with any associated road and utility improvements necessary to support the functions of an Army activity or mission."

C. Incrementation - The splitting of a project into separate parts where-

1. It is done solely to reduce costs below an approved threshold or minor construction ceiling, and;

2. Each part *is*[2] in itself complete and usable, and;

3. The total project is not complete until all parts are complete.

4. In order to determine what constitutes a stand-alone project, i.e., a complete and useable facility, a comparison of interdependence as opposed to facility interrelationship should be made.

D. Interdependent Facilities

Those facilities which are mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which runways, taxiways, ramp space and lighting are mutually dependent to accomplish the intent of the construction. AR 415-32, Section II, Terms.

E. Interrelated Facilities

Those facilities which have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities. Their common purpose to support health, welfare, and morale creates an interrelationship. However, neither facility is necessary for the operation of the other. AR 415-32, Section II, Terms.

F. Military Construction.

1. Statutory Definition. 10 U.S.C. § 2801(a). The term "military construction" includes "any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements…."

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[2] *See* AR 415-32. This definition is a better, more accurate definition than the definition in DA PAM 420-11. The definition of incrementation in DA PAM 420-11 is a typographical error and conflicts with the definition above, which is taken from AR 415-32. DA PAM 420-11 improperly included the word "not" in part b. of the definition ("Each part is "not" complete and usable"). The correct incrementation definition is conjunctive, not disjunctive, because each part can be complete and useable in its own right as a standalone project. However, those projects standing alone in the context of a military construction project will not meet the definition of "complete and useable" because the project's original classification requires all parts to be complete in order for the military construction project to be complete and usable.

2. Service Regulation Definitions. See, e.g., AR 420-1, para. 4-17; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20G, para. 4.1.1. a. The term "construction" includes:

(1) The erection, installation, or assembly of a new facility;

(2) The addition, expansion, extension, alteration, functional conversion, or replacement of an existing facility;

(3) The relocation of a facility from one site to another;

(4) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and

(5) Related real property requirements, including land acquisitions, site preparation, excavation, filling, landscaping, and other land improvements.

G. Military Construction Project

10 U.S.C. § 2801(b). The term "military construction project" includes "all military construction work…necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility…."

H. Military Installation

10 U.S.C. § 2801(c)(4). The term "military installation" means "a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control."

I. Project Splitting

Programming a MILCON project in separate increments solely to reduce the projects Program Amount (PA) below an approval threshold or a construction appropriation ceiling amount, which would result in programming an other-than complete and useable facility. Incrementation is contained within the definition of project splitting in AR 420-1. As defined, incrementing an OMA funded construction project solely to reduce the estimated cost below statutory

limitations, contracting threshold, or project approval levels results in project splitting. AR 420-1, Terms.

J. Relocatable Buildings

Personal property used as a structure designed to be readily moved, erected, dissembled, stored, and reused and meets the twenty-percent (20%) rule. Personal property is managed as equipment. Tents that use real property utilities will be considered relocatable. AR 420-1, Terms.

K. 20% Rule

The sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20% of the purchase cost of the relocatable building. If the percentage is greater than 20%, then the facility is real property and follows real property project approval authorities. Foundations include blocking, footings, bearing plates, ring walls, and slabs. Foundations do not include construction cost of real property utilities, roads, sidewalks, parking, force protection, fencing, signage, lighting, and other site preparation (clearing, grubbing, ditching, drainage, filling, compacting, grading, and landscaping). AR 420-1, Terms.

IV. METHODOLOGY FOR REVIEWING CONSTRUCTION ACQUISITIONS.

A. Define the Scope of the Project.

B. Classify the Work.

C. Determine the Funded and Unfunded Costs of the Project.

D. Select the Proper Appropriation.

E. Verify the Identity of the Proper Approval Authority for the Project.

V. DEFINING THE SCOPE OF THE PROJECT (WHAT IS THE PROJECT?).

A. Military Construction Project.

1. Definition. A “military construction project” includes all work necessary to produce a complete and usable facility, or a complete and usable

improvement to an existing facility. 10 U.S.C. § 2801(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.L.2; AR 415-32, Glossary, sec. II; AR 420-1, para. 2-12d and 4-17; AFI 32-1021, para. 3.2.1; OPNAVINST 11010.20G, para. 4.2.1; see also The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (concluding that the Air Force improperly incremented a project involving 12 related trailers into 12 separate projects).

2. Project splitting and incrementation are prohibited.

See AR 415-32, Glossary, sec. II; AR 420-1, para. 2-15; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20G, para. 4.2.1.

3. An agency may not treat "clearly interrelated"[3] construction activities as separate projects. The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991); The Hon. Bill Alexander, House of Representatives, B-213137, Jan. 30, 1986 (unpub). NOTE: The GAO used the term "clearly interrelated" in the Donley case in the same manner that DOD and the military departments use the term "interdependent."

B. Guidance and Restrictions.

1. Legislative History. H.R. Rep. No. 97-612 (1982).

a. The conference report that accompanied the MCCA specifically prohibited:

(1) Splitting a project into increments to avoid:

(a) An approval threshold; or

[3] AR 415-32, Sec. II, Terms, defines "interrelated facilities" differently (i.e., as "facilities which have a common support purpose but are not mutually dependent and are therefore funded as separate projects, for example, billets are constructed to house soldiers with the subsequent construction of recreation facilities"). In contrast, AR 415-32, Glossary, sec. II, defines "interdependent facilities" like the GAO did in the Donley case (i.e., as "facilities which are mutually dependent in supporting the function(s) for which they were constructed and therefore must be costed as a single project, for example, a new airfield on which the runways, taxiways, ramp space and lighting are mutually dependent to accomplish the intent of the construction project"). See also; *Illegal Actions in the Construction of the Airfield at Fort Lee, Virginia: Hearings Before the Subcomm. on Executive and Legislative Reorganization of the House Comm. on Gov't Operations*, 87th Cong. (1962); Hon. Sam Rayburn, Comp. Gen., B-133316 (Jan. 24, 1961); and Hon. Sam Rayburn, Comp. Gen., B-133316 (Mar. 12, 1962).

(b) The UMMC cost ceiling;

(2) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction; and

(3) Engaging in concurrent work to reduce the cost of a construction project below a cost variation notification level.

b. However, the conference report indicated that a military department could carry out an UMMC construction project before or after another military construction project under certain circumstances.[4]

(1) A military department could carry out an UMMC construction project before another military construction project if:

(a) The UMMC construction project satisfied a new mission requirement; and

(b) The UMMC construction project would provide a complete and usable facility that would meet a specific need during a specific period of time.

(2) A military department could carry out an UMMC construction project after another military construction project to satisfy a new mission requirement that arose after the completion of the other project.

2. DOD Guidance and Restrictions. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170102.I and 170102.L.

a. As a general rule, DOD Components may not engage in incremental construction (i.e., the planned acquisition or improvement of a facility through a series of minor construction projects).

b. DOD Components must:

[4] The conference report indicated that a military department should rarely use these exceptions. H.R. REP. NO. 97-612 (1982).

(1) Identify the required end result of a minor construction project and its correlation with the installation master plan; and

(2) Comply with the intent of 10 U.S.C. § 2805 (UMC).

c. Multi-Use Facilities.

(1) DOD Components may divide construction work in a multi-use facility into separate projects if each project is:

(a) Clearly defined; and

(b) Results in a complete and usable facility.

(2) DOD Components must nevertheless treat the following construction work in a multi-use facility as one project:

(a) All construction work for the same or related functional purposes;

(b) All concurrent construction work in contiguous (e.g., touching) areas; and

(c) All construction work in common areas.

3. Army Guidance and Restrictions. AR 420-1, para.2-15; DA Pam 420-11, para. 1-7n.

a. AR 420-1, para. 2-15a, specifically prohibits the following practices:

(1) The acquisition or improvement of a facility through a series of minor military construction projects;

(2) The subdivision, splitting, or incrementing of a project to avoid:

(a) A statutory cost limitation; or

(b) An approval or contracting threshold; and

(3) The development of a minor military construction project solely to avoid the need to report a cost variation on an active military construction project to Congress.

b. In addition, AR 420-1, para. 2-15b, prohibits the Army from using its UMMC funds to begin or complete a "specified" military construction project.

4. Air Force Guidance and Restrictions.

a. AFI 32-1021, para. 4.2.2, specifically prohibits:

(1) Undertaking an UMMC project at the same time as a "specified" military construction project.

(2) Splitting a project into increments to avoid:

(a) An approval threshold; or

(b) The UMMC cost ceiling; and

(3) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction.

b. However, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project before a "specified" military construction project to satisfy a new mission requirement if the UMMC project will provide a complete and usable facility that meets a specific need during a specific period of time.

c. In addition, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project after a "specified" military construction project to satisfy a new mission requirement that arises after the completion of the "specified" project.

d. AFI 32-1032, para. 3.4.2, generally prohibits:

(1) Modifying a newly constructed facility within 12 months of the beneficial occupancy date (BOD) unless an unforeseeable mission or equipment change causes the modification(s); and

(2) Using O&M funds to correct deficiencies in projects funded by MILCON funds.

e. AFI 32-1032, para. 5.3.1, requires the Air Force to include all of the known UMMC work required in a facility during the next 24 months in a single project.

f. AFI 32-1032, para. 5.3.2, only permits multiple minor construction projects in a single building within a 24 month period if:

(1) The Air Force could not have reasonably anticipated the requirement for the additional project when it initiated the previous project;

(2) The requirement for the additional project is for a distinctly different purpose or function; and

(3) Each project results in a complete and usable facility or improvement.

5. Navy Guidance and Restrictions.

a. OPNAVINST 11010.20G, para. 4.2.1, generally requires shore activities to incorporate all work required to meet a requirement in a single facility in a single project.

b. OPNAVINST 11010.20G, para. 4.2.1.f, specifically prohibits:

(1) Acquiring a facility—or an improvement to a facility—through a series of minor construction projects;

(2) Splitting a project solely to:

(a) Avoid an approval requirement; or

(b) Circumvent a statutory funding limitation;

(3) Splitting a project if the resulting sacrifice of economy of scale increases the cost of the construction (e.g., building several small buildings instead of one large building); and

(4) Undertaking concurrent work to avoid the MILCON reprogramming approval procedures (e.g., using O&M funds to augment a construction project).

c. However, OPNAVINST 11010.20G, para. 4.2.1.b, permits a shore activity to undertake an UMMC project before a "specified" military construction project to satisfy an urgent requirement if the UMMC project will provide a complete and usable facility during a specific period of time.

d. In addition, OPNAVINST 11010.20G, para. 4.2.1.b, permits a shore activity to undertake an UMMC project after a "specified" military construction project to satisfy a new mission requirement that develops after the BOD of the "specified" project.

e. OPNAVINST 11010.20G, para. 4.2.3, only permits multiple minor construction projects in a single facility if:[5]

(1) They satisfy unrelated/dissimilar purposes;

(2) They are not dependent on each other;

(3) They are not contiguous; and

(4) Each project will result in a complete and usable improvement to the facility.

VI. CLASSIFYING THE WORK.

A. Project Classification.

Project classification is performed by the garrison staff officer charged with facilities engineering, housing, and environmental support (Engineers). AR 420-1, 2-5 (b) (6). This person sometimes holds the title of facilities engineer and resides in the Directorate of Public Works (DPW).

B. Determine whether the work is defined as construction, repair, maintenance, or something else (like RLB's when they are classified as personal property).

[5] Cf. OPNAVINST 11010.20G, para. 4.2.1.a (imposing similar requirements for construction work involving multiple facilities).

1. Construction

a. Statutory Definition. 10 U.S.C. § 2801(a). Military construction includes any construction, development, conversion, or extension carried out with respect to a military installation.

b. Regulatory Definition. See AR 420-1, para. 4-17 and Glossary, sec. II; AR 415-32, Glossary, sec. II; DA Pam 420-11, para. 1-6c; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20G, para. 4.1.1. Construction includes:

(1) The erection, installation, or assembly of a new facility.

(2) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility.

(a) An addition, expansion, or extension is a change that increases the overall physical dimensions of the facility.

(b) An alteration is a change to the interior or exterior arrangements of a facility that improves its use for its current purpose. But see "New" DOD Definition, para. IX.B.2.b.(2), below.

(c) A conversion is a change to the interior or exterior arrangements of a facility that permits its use for a new purpose.

(d) A replacement is the complete reconstruction of a facility that has been damaged or destroyed beyond economical repair.

(3) The relocation of a facility from one site to another.[6]

(a) A facility may be moved intact, or disassembled and later reassembled.

[6] The Secretary of a military department must notify the appropriate committees of Congress before using UMMC funds to transfer or relocate any activity from one base or installation to another. Military Construction Appropriations Act, 2003, Pub. L. No. 107-249 § 107, 116 Stat. 1578 (2002).

(b) Work includes the connection of new utility lines, but excludes the relocation of roads, pavements, or airstrips.

(c) Relocation of two or more facilities into a single facility is a single project.

(4) Installed equipment made part of the facility. Examples include built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats.

(5) Related site preparation, excavation, filling, landscaping, or other land improvements.[7]

(6) Construction may include relocatable buildings (RLBs) in some circumstances. See, AR 420-1, para. 6-17; Memorandum HQDA, DAIM-ZA, 10 Feb 2008 subject: Interim Policy Change on Relocatable Buildings for Paragraphs 6-13 through 6-17 in AR 420-1, Army Facilities Management (10 February 2008); AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994); and OPNAVINST 11010.33C, Procurement, Lease and Use of Relocatable Buildings (7 Mar 2006), Appendix B, & Appendix E (RLB Funding Flowchart)

(a) Personal property used as a structure designed to be readily moved, erected, dissembled, stored, and reused and meets the twenty-percent (20%) rule. Personal property is managed as equipment. Tents that use real property utilities will be considered relocatable. AR 420-1 Glossary.

(b) 20% Rule- The sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20% of the purchase cost of the relocatable building. If the percentage is greater than 20%, then the facility is real property and follows real property project approval authorities.

[7] This includes the foundation, site work, and utility work associated with the setup of a relocatable building. AR 420-1.

Foundations include blocking, footings, bearing plates, ring walls, and slabs. Foundations do not include construction cost of real property utilities, roads, sidewalks, parking, force protection, fencing, signage, lighting, and other site preparation (clearing, grubbing, ditching, drainage, filling, compacting, grading, and landscaping). AR 420-1 Glossary. Note: DoD removed the 80/20 requirement. See DoDI 4156.56, Relocatable Buildings, Jan. 7, 2013.

(c) Under the interim policy relocatable buildings may be used for no more than 6 years unless approved by ASA (I&E).[8]

(d) If the costs do not exceed 20%, account for the buildings as personal property (use either O&M or Procurement funds, as appropriate).

(e) When properly classified as an unfunded construction cost, relocatable buildings must be funded "with Operation and Maintenance, Army funds or Other Procurement, Army (OPA) depending on the Expense-Investment Threshold contained in law for capital equipment purchase. Whether the relocatables are procured to be stacked or installed individually, all the modules that comprise the relocatable building are a system. This includes the normal amenities or components one finds in buildings, plumbing, electrical systems, and heating ventilation and air condition, etc. It does not include furnishings or other attachments." ASA(I&E) RLB memo, (13 May 2009).

(f) Legal review required prior to approval of relocatable building purchase or lease. AR 420-1, para. 6-14l(2).

(g) Disposition: When classified as real property, the cost to disassemble is classified as demolition. Upon becoming moveable, salvageable relocatable

[8] Requests for extensions beyond the 6 years must be approved by the Assistant Chief of Staff for Installation Management, DAIM-ODF and then forwarded to ASA(I&E).

buildings are classified as equipment and disposed of in accordance with DoD Instruction 5000.64. DoDI 4165.56, para. 3b.

2. Maintenance and Repair.

a. Maintenance and repair projects are not construction for fiscal funding purposes. AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20G, para. 3.1.1, and para 5.1.1. Therefore, maintenance and repair projects are not subject to the $1 Million O&M limitation on construction.[9] See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for "an entire single-purpose facility or one or more functional areas of a multipurpose facility").

b. Definitions.

(1) Maintenance.

(a) AR 420-1, Glossary, sec. II, defines maintenance as the "work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose." It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, para. 1-6a.

(b) AFI 32-1032, para. 4.1.1, defines maintenance as "work required to preserve real property and real property systems or components and prevent premature failure or wearing out of the same." It includes: (a) work required to prevent and arrest component deterioration; and (b) landscaping or planting work that is not capitalized. See AFI 65-601, vol. 1, attch 1.

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[9] But see 10 U.S.C. § 2811. If the estimated cost of a repair project exceeds $7.5 million, the Secretary concerned must approve the project in advance. 10 U.S.C. § 2811(b). The Secretary must then notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2811(d).

(c) OPNAVINST 11010.20G, para. 5.1.1, defines maintenance as "the day-to-day, periodic, or scheduled work required to preserve or return a real property facility to such a condition that it may be used for its designated purpose."

(i) The term "maintenance" includes work undertaken to prevent damage to a facility that would be more costly to repair (e.g., waterproofing and painting interior and exterior walls; seal-coating asphalt pavement; resealing joints in runway concrete pavement; dredging to previously established depths; and cleaning storage tanks).

(ii) Maintenance differs from repair in that maintenance does not involve the replacement of major component parts of a facility. It is the work done to:

(a) Minimize or correct wear; and

(b) Ensure the maximum reliability and useful life of the facility or component.

(2) Repair.

(a) Statutory Definition. 10 U.S.C. § 2811(e). A "repair project" is defined as a project to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

(b) Sustainment definition. DOD FMR Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. Sustainment means the maintenance and repair activities necessary to keep an inventory of facilities in good working order. It includes regularly scheduled adjustments and inspections, preventive maintenance tasks, and emergency response and service calls for minor repairs. It also includes major repairs or

replacement of facility components (usually accomplished by contract) that are expected to occur periodically throughout the life cycle of facilities. This work includes regular roof replacement, refinishing of wall surfaces, repairing and replacement of heating and cooling systems, replacing tile and carpeting, and similar types of work. It does not include environmental compliance costs, facility leases, or other tasks associated with facilities operations (such as custodial services, grounds services, waste disposal, and the provision of central utilities). When repairing a facility, the military department or agency may.

(3) Army Definition. AR 420-1, Glossary, sec. II; Repair is:

(a) Restoration of a real property facility (RPF) to such condition that it may be used effectively for its designated functional purpose.

(b) Correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done concurrently with restoration of failed or failing components.

(c) A utility system or component may be considered "failing" if it is energy inefficient or technologically obsolete.

(i) The term "repair" does not include:

(a) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;

(b) Increasing the quantities of components for functional reasons;

(c) Extending utilities or protective systems to areas not previously served;

(d) Increasing exterior building dimensions; or

(e) Completely replacing a facility.

(4) Air Force Definition. AFI 32-1032, paras. 4.1.2 and 5.1.2. See AFI 65-601, vol. 1, attch 1. The term "repair" means to restore real property, real property systems, and real property components to such a condition that the Air Force may use it effectively for its designated functional purpose. However, AFI 32-1032, para. 4.1.2, specifically states that real property, real property systems, and real property components "need not have failed to permit a repair project." (emphasis added).

(a) The term "repair" includes:

(i) Replacing existing heating, ventilation, and air conditioning equipment with "functionally sized," state-of-the-art equipment;

(ii) Rearranging or restoring the interior of a facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (e.g., accessibility, health, safety, seismic, security, or fire);[10]

(iii) Removing or treating hazardous substances for environmental restoration purposes unless the work supports a construction project;

(iv) Replacing one type of roofing system with a more reliable or economical type of roofing system;

(v) Installing exterior appurtenances (e.g., fire escapes, elevators, ramps, etc.) to meet

[10] Moving load-bearing walls is construction. AFI 32-1032, para. 4.1.2.1.2.

current building standards, code requirements, and/or access laws; and

(vi) Installing force protection measures outside the footprint of the facility.

(b) The term "repair" does not include:

(i) Expanding a facility's foundation beyond its current footprint;

(ii) Elevating or expanding the "functional space" of a facility;

(iii) Increasing the "total volume" of a facility;

(iv) Installing previously uninstalled equipment unless required to comply with accessibility, health, safety, seismic, security, or fire standards and codes;

(v) Relocating a facility;

(vi) Upgrading unpaved surfaces;

(vii) Increasing the dimensions of paved surfaces unless required to comply with Air Force standards or applicable code requirements;

(viii) Changing the permanent route of real property transportation systems;

(ix) Installing walkways, roadway curbs, gutters, underground storm sewers, bicycle paths, jogging paths, etc;

(x) Completely replacing the vertical section of a facility and a substantial portion of its foundation;

(xi) Completely replacing a facility;

(xii) Converting a facility or portion of a facility from one functional purpose to another;[11] or

(xiii) Repairing a facility if the repair work exceeds 70% of the facility's replacement cost.[12]

(5) Navy Definition. OPNAVINST 11010.20G, para. 3.1.1. The term "repair" refers to "the return of a real property facility to such condition that it may be effectively utilized for its designated purposes, by overhaul, reconstruction, or replacement of constituent parts or materials which are damaged or deteriorated to the point where they may not be economically maintained."

(a) The term "repair" includes:[13]

(i) Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety, or environmental);

(ii) Minor additions to components in existing facilities to return the facilities to their customary state of operating efficiency (e.g., installing additional partitions while repairing deteriorated partitions);

(iii) The replacement of facility components, including that equipment which is installed or built-in as an integral part of the facility. Restoration or sustainment has the effect of merely keeping the facility in its customary

[11] Repair work required regardless of a functional conversion may still be repair work. AFI 32-1032, para. 5.1.2.3.2.

[12] This limit does not apply to facilities on a national or state historic register. In addition, the SAF/MII can waive it under appropriate circumstances. AFI 32-1032, para. 5.1.2.3.2.

[13] OPNAVINST 11010.20G, para. 3.1.3, contains several additional examples of repair projects.

state of operating efficiency without adding increased capability for the facility;

(iv) The replacement of energy consuming equipment with more efficient equipment if:

(a) The shore activity can recover the additional cost through cost savings within 10 years;

(b) The replacement does not substantially increase the capacity of the equipment; and

(c) The new equipment provides the same end product (e.g., heating, cooling, lighting, etc.).

(v) Demolition of a facility or a portion of a facility because the extent of deterioration is such that it can no longer be economically maintained, or because the facility is a hazard to the health and safety of personnel is classified as repair. Demolition of an excess facility is always classified as repair. (When demolition is done to clear the footprint for a new facility, the demolition should be included as part of the scope of the construction project and paid for from the same fund source as the construction project fund source.)

(b) The term "repair" does not include additions, expansions, alterations, or modifications required solely to meet new purposes or missions.

3. Concurrent Work. AR 420-1, para. 3-53g; AFI 32-1032, paras. 3.4.3 and 4.1.2.2.5; OPNAVINST 11010.20G, para. 3.1.1.b.

a. A military department or agency can normally do construction, maintenance, and repair projects simultaneously as long as each project is complete and usable.

b. A military department must treat all the work as a single construction project if:

(1) The work is so integrated that the department or agency may not separate the construction work from the maintenance and repair work; or

(2) The work is so integrated that each project is not complete and useable by itself.

VII. DETERMING THE FUNDED/UNFUNDED COSTS OF THE PROJECT.

A. Applicability of Project Limits.

AR 420-1, Glossary, sec. II; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20G, para. 2.1.1.b. Project limits only apply to funded costs.

B. Funded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170203; AR 415-32, para. 2-5a; AR 420-1, Glossary, sec. II; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, attach 1; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20G, para. 2.1.1.b.

1. Funded costs are costs chargeable to the appropriation designated to pay for the project.

2. Funded costs include, but are not necessarily limited to:

a. Materials, supplies, and services applicable to the project;[14]

b. Installed capital equipment;[15]

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[14] AR 420-1, para. 2-17c, specifically includes government-owned materials, supplies, and services as funded costs. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.I.6 (prohibiting DOD components from using materials, supplies, or items of installed equipment on their own minor construction projects on a non-reimbursable basis); AR 415-32, para. 2-5a(1) (including materials, supplies, and services furnished on a non-reimbursable basis by other military departments and defense agencies).

[15] Items of equipment that are "movable in nature and not affixed as an integral part of a facility" or "detachable without damage to the building or equipment" are unfunded costs because they are

c. Transportation costs for materials, supplies, and unit equipment;[16]

d. Civilian labor costs;

e. Overhead and support costs (e.g., leasing and storing equipment);

f. Supervision, inspection, and overhead costs charged when the Corps of Engineers, the Naval Facilities Engineering Command, or the Air Force serves as the design or construction agent;

g. Travel and per diem costs for military and civilian personnel;[17]

h. Operation and maintenance costs for government-owned equipment (e.g., fuel and repair parts); and

i. Demolition and site preparation costs.

C. Unfunded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170301; AR 415-32, para. 2-5b; AR 420-1, Glossary, sec. II; AFI 32-1021, attch 1; AFI 65-601, vol. 1, para. 9.14; OPNAVINST 11010.20G, para. 2.1.1.k.

1. Unfunded costs are costs that:

a. Contribute to the military construction project;

b. Are chargeable to appropriations other than those available to fund the project; and

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funded from O&M, RDT&E, or procurement appropriations. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170304 and 170305.

[16] The cost of transporting unit equipment is a funded cost if the equipment is being transported solely for the construction project; otherwise, it is an unfunded cost (i.e., where the construction project is part of a larger activity, such as an annual training exercise). AR 415-32, para. 2-5a(9) and b(1).

[17] Travel and per diem costs for military personnel are funded costs if these costs are incurred solely for the construction project; otherwise, they are unfunded costs (i.e., where the construction project is part of a larger activity, such as an annual training exercise). AR 415-32, para. 2-5a(10) and b(2).

c. Are not reimbursed by appropriations available to fund the project.

2. Unfunded costs include, but are not necessarily limited to:

a. Military and civilian prisoner labor;

b. Depreciation of government-owned equipment used to build the project;[18]

c. Materials, supplies, and equipment obtained for the project on a non-reimbursable basis as excess distributions from another military department or federal agency.[19]

d. Licenses, permits, and other fees chargeable under:

(1) A State or local statute; or

(2) A status of forces agreement (SOFA);

e. Unfunded civilian fringe benefits;

f. Contract or in-house planning and design costs;[20]

g. Gifts from private parties;[21] and

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[18] Equipment maintenance and operation costs are funded costs.

[19] Generally, DOD Reg 7000.14-R prohibits obtaining equipment or material from another agency on a non-reimbursable basis. In certain cases, DOD regulations permit such acquisition, such as in an excess distribution situation. The costs of capital equipment items obtained in such rare instance on a non-reimbursable basis, including excess distributions from another military department or governmental agency, may be classified as unfunded. However, the value of Army-owned materials, supplies, or items of capital equipment, such as the air conditioner, must always be charged to the construction project as a funded project cost. See DA Pam 420-11, Glossary.

[20] See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 17010302 (stating that planning and design costs are excluded from the cost determination for purposes of determining compliance with 10 U.S.C. § 2805). But see OPNAVINST 11010.20G, para. 2.1.1.k(5) (stating that planning and design costs are funded costs in design-build contracts).

[21] The acceptance of monetary gifts may violate the Miscellaneous Receipts Statute. 31 U.S.C. § 3302(b). "Fisher Houses" at major military and VA medical centers are a prime example of donated construction funding. The houses, donated by Zachary and Elizabeth Fisher, provide comfortable places for families to stay while attending to sick or injured family members. To

h. Donated labor and material.[22]

3. Report unfunded costs to higher headquarters even though they do not apply toward the military construction appropriation limitations.

VIII. SELECTING THE PROPER APPROPRIATION.

A. Sources of Military Construction Funding.

1. Military Construction Appropriations Acts (MILCON Appropriations Act). See, e.g., Consolidated Appropriations Act, 201, Pub. L. No 112-74 (2012).

2. Provides appropriated funds (MILCON) for DOD's specified and unspecified military construction (UMC) programs.

3. MILCON appropriations are generally available for 5 years.

B. Department of Defense Appropriations Act.

See, e.g., Consolidated Appropriations Act, 2012, Pub. L. No. 112-74.,

1. Provides some miscellaneous sources of money for military construction projects, including Operations and Maintenance (O&M) funds and Research, Development, Test, and Evaluation (RDT&E) funds.

2. Appropriations are generally available for 1 year.

C. Sources of Military Construction Authority.

1. Specified Military Construction Projects.

a. Scope of Authorization. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects that are specifically authorized by law. 10 U.S.C. § 2802. Congress typically authorizes these projects in the

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date, the Fishers have completed, or are in the process of completing 32 Fisher Houses. See, http://www.fisherhouse.org/.

[22] The acceptance of donated labor may violate the prohibition against accepting voluntary services. 31 U.S.C. § 1342.

annual Military Construction Authorization Act. The conference report accompanying the Military Construction Authorization Act breaks down project authorizations by project.

(1) Congress typically specifically authorizes only those military construction projects expected to exceed $3 million.[23]

(2) A military department may not carry out a military construction project expected to exceed $3 million without specific Congressional authorization and approval.

b. Proper Appropriation. Congress provides funding for specified military construction projects in the annual Military Construction Appropriations Act. Congress funds each military department's entire military construction program with lump sum appropriations. For example, the Army's principal military construction appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.[24]

c. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by installation and project. An example of this breakdown is provided at Appendix G

2. "Unspecified Minor Military Construction (UMMC) Projects.

a. Scope of Authorization. 10 U.S.C. § 2805(a). See AR 420-1, Appendix D; AFI 32-1021, ch. 4; AFI 32-1032, para. 3.3.3; AFI 65-601, vol. 1, para. 9.12.6; OPNAVINST 11010.20G, para. 4.4.4. The Secretary concerned may use military construction appropriations from the unspecified military construction program to carry out military construction projects not otherwise authorized by law.

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[23] Congress may also specify projects under $3 million. See, e.g., Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); H.R. CONF. REP. NO. 108-773 (2004).

[24] The statutory provisions governing military family housing are at 10 U.S.C. §§ 2821-2837.

b. A UMMC project is defined as a military construction project having an approved cost of $3 million or less.[25]

c. A UMMC project can have an approved cost up to $4 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.

(1) There is no statutory guidance as to what constitutes a project "intended solely to correct a deficiency that threatens life, health, or safety."

(2) AR 420-1 provides that a project submitted for approval under the enhanced threshold must include the following justification:[26]

(a) A description when the requirement was identified and why deferral of the project until the next Military Construction Act poses an unacceptable and imminent risk to personnel;

(b) A description of ongoing actions and temporary work-arounds to mitigate risk and safeguard lives;

(c) An explanation of why the deficiency cannot be corrected by other means; and

(d) An assurance that the project is intended primarily to correct the deficiency that threatens life, health, or safety.

d. Proper Appropriation. Congress usually provides funding for UMMC projects in the Military Construction Appropriations Act or other Consolidated legislation.

e. Congress appropriates "Unspecified Minor Construction" funds as part of the lump-sum military construction appropriation for each service. Of the lump-sum military construction appropriation, the

[25] Section 2803 of the National Defense Authorization Act for Fiscal Year 2008 increased the cap for Unspecified Minor Military Construction from $1.5 million to $2 million, and again in 2015 from $2 million to $3 million.

[26] This justification requirement applies to all UMMC projects having an approved cost over $3M and all OMA-funded military construction projects costing more than $1M.

conference report accompanying the Military Construction Appropriations Act identifies the amount available for unspecified minor construction.[27]

f. The Army refers to its "unspecified" military construction appropriations as "Unspecified Minor Military Construction, Army" (UMMCA). AR 420-1, Appendix D.[28]

g. Requirements for Use. 10 U.S.C. § 2805(b).

(1) Before beginning an UMMC project with an approved cost greater than $1 Million, the Secretary concerned must approve the project.

(2) In addition, the Secretary concerned must:

(a) Notify the appropriate committees of Congress;[29] and

(b) Wait 21 days.[30]

3. UMMC Projects Financed by Operation & Maintenance (O&M) Funds.

a. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See Changes made by 2012 National Defense Authorization Act. The Secretary of a military department may use O&M funds to

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[28] Note that throughout this outline the terms unspecified military construction (UMC) and unspecified minor military construction (UMMC) are used interchangeably. UMC can refer to specific MILCON funding or simply to the concept of all unspecified minor construction paid for with either UMMC or O&M funds.

[29] The Secretary concerned must notify the appropriate committees of Congress of the justification and current cost estimate for the project. 10 U.S.C. § 2805(b)(2). See AFI 32-1021, para. 4.2 (detailing the information MAJCOMS must submit to HQ, USAF/CEC); see also DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests).

[30] The Air Force imposes a 30-day waiting period. AFI 32-1021, para. 4.5. In addition, the statutory waiting period is reduced to 14 days for electronically-submitted notice.

execute UMMC projects not otherwise authorized by law and costing not more than: $1 million.[31]

b. General Prohibition on the Use of O&M Funds. 41 U.S.C. § 12.

(1) Most installations use O&M funds to finance routine operations; however, 41 U.S.C. § 12 prohibits a federal agency from entering into a public contract to build, repair, or improve a public building that binds the government to pay a sum that exceeds the amount Congress specifically appropriated for that purpose.

(2) In The Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422, 433 (1984), the General Accounting Office (GAO) interpreted 41 U.S.C § 12 to:

(a) Require specific Congressional authorization for military construction projects; and

(b) Prohibit the use of other, more general appropriations for military construction projects.

c. Within the Army, approval authority for O&M-funded minor military construction projects has been delegated to Commander, IMCOM, who may redelegate this authority. AR 420-1, para. 2-14a.

d. Special Requirements for Exercise-Related UMMC Projects.

See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 (2010); see also AR 415-32, para. 3-11d. For procedural guidance for executing ERC, see JOINT CHIEFS OF STAFF, INSTR. 4600.02A, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (18 March 2011).

[31] The 2012 National Defense Authorization Act removed language that previously allowed funding a construction project under $1.5 million with O&M if it was solely to correct a deficiency that is life threatening, health-threatening- or safety-threatening. Currently there is no authority that would fund a O&M Minor Military Construction project with a funded cost above $1 million (i.e. the traditional life, health and safety exception would not be applicable to O&M funded construction). However, the life, health, and safety exception remains for UMMC funded (rather than O&M funded) construction over $1 million as noted in 10 U.S.C. 2805 (a) (2).

(1) If a military department expects to spend more than $100,000 for temporary or permanent construction during a proposed exercise involving U.S. personnel, the SECDEF must notify the appropriate committees of Congress of the plans and scope of the exercise.

(2) The SECDEF must provide this notice 30 days before the start of the exercise.

4. **Combat and Contingency Related O&M Funded Construction**.

a. O & M funded contingency construction started with section 2808 of the FY 04 NDAA and has been extended and modified by each NDAA since 2004 (including National Defense Authorization Act, 2012).

(1) Authority derived from the National Defense Authorization Act- the Secretary of Defense may obligate appropriated funds available for operation and maintenance to carry out a construction project inside the area of responsibility of the United States Central Command or the area of responsibility and area of interest of Combined Joint Task Force-Horn of Africa that the Secretary determines meets each of the following conditions:

(a) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation.

(b) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence, unless the military installation is located in Afghanistan, for which projects using this authority may be carried out at installations deemed as supporting a long-term presence.

(c) The United States has no intention of using the construction after the operational requirements have been satisfied.

(d) The level of construction is the minimum necessary to meet the temporary operational requirements.

(2) NOTIFICATION OF OBLIGATION OF FUNDS. Before using appropriated funds available for operation and maintenance to carry out a construction project outside the United States that has an estimated cost in excess of the amounts authorized for unspecified minor military construction projects under section 2805(c) of title 10, United States Code, the Secretary of Defense shall submit to the congressional committees specified in subsection (f) a notice regarding the construction project. The project may be carried out only after the end of:

(a) the 10-day period beginning on the date the notice is received by the committees or, if earlier,

(b) the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of title 10, United States Code. The notice shall include the following:

(i) Certification that the conditions specified in subsection (a) are satisfied with regard to the construction project.

(ii) A description of the purpose for which appropriated funds available for operation and maintenance are being obligated.

(iii) All relevant documentation detailing the construction project.

(iv) An estimate of the total amount obligated for the construction.

(3) Annual Limitation on Use of Authority.—

(a) The total cost of the construction projects carried out under the authority of this section using, in whole or in part, appropriated funds available for operation and maintenance shall not exceed $200,000,000 in a fiscal year.

(b) The Secretary of Defense may authorize the obligation of not more than an additional $10,000,000 of appropriated funds available for operation and maintenance for a fiscal year if the Secretary determines that the additional funds are needed for costs associated with contract closeouts. Funds obligated under this paragraph are not subject to the limitation in the second sentence of paragraph (1).

(4) QUARTERLY REPORT.

(a) Not later than 30 days after the end of each fiscal-year quarter during which appropriated funds available for operation and maintenance are obligated or expended to carry out construction projects outside the United States, the Secretary of Defense shall submit to the congressional committees specified in subsection (f) a report on the worldwide obligation and expenditure during that quarter of such appropriated funds for such construction projects.

(b) The ability to use this section as authority during a fiscal year to obligate appropriated funds available for operation and maintenance to carry out construction projects outside the United States shall commence for that fiscal year only after the date on which the Secretary of Defense submits to the congressional committees specified in subsection (f) all of the quarterly reports that were required under paragraph (1) for the preceding fiscal year.

(5) CONGRESSIONAL COMMITTEES.—The congressional committees referred to in this section are the following:

(a) The Committee on Armed Services and the Subcommittee on Defense and Subcommittee on Military Construction, Veterans Affairs, and Related Agencies on Appropriations in the Senate.

(b) The Committee on Armed Services and the Subcommittee on Defense and Subcommittee on Military Construction, Veterans Affairs, and

Related Agencies of the Committee on Appropriations of the House of Representatives.

(6) EXPIRATION OF AUTHORITY.—The authority to obligate funds under this section expires on the later of—September 30, 2012; or the date of the enactment of an Act authorizing funds for military construction for fiscal year 2013.

(7) DEFINITIONS.—In this section:

(a) The term 'area of responsibility,' with respect to the CJTF-Horn of Africa, is Kenya, Somalia, Ethiopia, Sudan, Eritrea, Djibouti, and Seychelles.

(b) The term 'area of interest', with respect to the Combined Task Force-Horn of Africa, is Yemen, Tanzania, Mauritius, Madagascar, Mozambique, Burundi, Rwanda, Comoros,Chad, the Democratic Republic of Congo, and Uganda.

b. Other Contingency Construction Authority.

(1) 10 U.S.C. § 2804. See DOD Dir. 4270.5; AR 420-1, para. 4-9; AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20G, para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

(a) Scope of Authority. The Secretary of Defense may use this authority—or permit the Secretary of a military department to use this authority—to carry out contingency construction projects not otherwise authorized by law.[32]

(b) Proper Appropriation. Funds are specifically appropriated for construction under 10 U.S.C. § 2804.[33]

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[32] The Secretary of a military department must forward contingency construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3.

[33] In 2003 Congress dramatically increased the amount of funding potentially available to DOD under this authority. See Emergency Wartime Supplemental Appropriations for the Fiscal Year

(c) Requirements for Use.

(i) Before using this authority, the SECDEF must determine that deferral of the project until the next Military Construction Appropriations Act would be inconsistent with:

(a) National security; or

(b) National interest.

(d) In addition, the SECDEF must:

(i) Notify the appropriate committees of Congress;[34] and

(ii) Wait 21 days.[35]

(e) Limitations.

(i) Legislative History. H.R. Rep. No. 97-612 (1982).

2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to $150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that had previously been funded under the authority the DOD Deputy General Counsel (Fiscal) 27 February 2003 memorandum be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 Defense Authorization Acts authorized DOD to spend up to $200 million of O&M per fiscal year on such construction projects, DOD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. See Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to $10 million for fiscal year 2005).

[34] The SECDEF must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2804(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.3 (detailing the requirements for reprogramming requests). But see DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects).

[35] DOD Reg. 7000.14-R, para. 170102.F.1, indicates that the Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

(a) The legislative history of the MCCA indicates that the Secretaries of the military departments should use this authority only for extraordinary projects that develop unexpectedly.

(b) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.

(ii) DOD Limitations.

(a) DOD Dir. 4270.5, para. 4.2, requires the Heads of DOD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.

(b) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.4, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

(iii) Army Limitations. AR 420-1, para. 4-9b(6).

(a) The Army generally reserves this authority for projects that support multi-service requirements.

(b) Commanders should normally process urgent projects that support only one service under 10 U.S.C. § 2803.

(iv) Air Force Limitations. AFI 32-1021, para. 5.2.3.1.

(a) The use of this authority is rare.

(b) The Air Force must consider using its 10 U.S.C. § 2803 authority first.

c. **Train and Equip Related Construction**: Section 1201 of the 2013 NDAA expanded the authority normally contained in the train and equip provisions allowed in section 1206 of the 2006 NDAA by adding authority to conduct "small scale military construction activities."

(1) Limitations

(a) Not more than $750,00 may be obligated for small scale military construction activities; and

(b) Not more than $25,000,000 may be obligated or expended for small-scale military construction activities under all programs authorized under this authority.

5. Emergency Construction Projects. 10 U.S.C. § 2803. See DOD Dir. 4270.5; AR 420-1, para. 4-55; AFI 32-1021, para. 5.2.1; AFI 65-601, vol. 1, para. 9.12.3; OPNAVINST 11010.20G, para. 4.4.2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

a. Scope of Authority. The Secretary of a military department may use this authority to carry out emergency construction projects not otherwise authorized by law.

b. Proper Appropriation. The Secretary concerned must use unobligated military construction funds to finance these projects.[36]

[36] According to the legislative history of the MCCA: "[t]he use of this authority is dependent upon the availability of savings of appropriations from other military construction projects or through funding obtained by deferring or canceling other military construction projects." H.R. REP. NO. 97-612 (1982). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests).

(1) Congress must normally approve a reprogramming request for the project.[37]

(2) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

(3) The Secretary concerned may not obligate more than $50 million per fiscal year for emergency construction (per 2007 Nat'l Defense Authorization Act).

c. Requirements for Use.

(1) Before using this authority, the Secretary concerned must determine that:

(a) The project is vital to:

(i) National security; or

(ii) The protection of health, safety, or the quality of the environment; and

(b) The project is so urgent that deferral until the next Military Construction Appropriations Act would be inconsistent with:

(i) National security; or

(ii) The protection of health, safety, or the quality of the environment.

(2) In addition, the Secretary concerned must:

(a) Notify the appropriate committees of Congress;[38] and

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[37] The Secretary concerned must submit a reprogramming request to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests); see also DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.5 (requiring prior congressional notification and approval for reprogramming action); AR 420-1, para. 4-55c(4) (noting that Congress will probably not approve a reprogramming request unless there is truly a dire need for the project).

(b) Wait 21 days.

d. Limitations.

(1) Legislative History. H.R. Rep. No. 97-612 (1982).

(a) The legislative history of the MCCA indicates that the Secretaries of the military departments should rarely use this authority.[39]

(b) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.; AR 420-1, para. 4-55c.

(2) DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.E.4, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

(3) Army Limitations. The Army should execute emergency construction projects under its UMMC program, if possible. AR 420-1, para. 4-55e.

6. Reserve Component Construction Authorities.

a. Specified Military Construction Projects. 10 U.S.C. § 18233. The Secretary of Defense may carry out military construction projects authorized by law.

(1) Includes authority to acquire, lease, or transfer, and construct, expand, rehabilitate, or convert and equip such

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[38] The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2803(b).

[39] In 1985, the House Appropriations Committee stated that: "This authority was provided to give the Department and Congress flexibility in dire situations. A true emergency project should be confined to facilities without which a critical weapon system or mission could not function." H.R. REP. NO. 99-275, at 23 (1985).

facilities as necessary to meet the missions of the reserve components.

(2) Allows the SECDEF to contribute amounts to any state (including the District of Columbia, Puerto Rico, and the territories and possessions of the United States, (10 U.S.C. § 18232(1)) for the acquisition, conversion, expansion, rehabilitation of facilities for specified purposes. 10 U.S.C. § 18233(a) (2) through (6).

(3) Authorizes the transfer of title to property acquired under the statute to any state, so long as the transfer does not create a state enclave within a federal installation. 10 U.S.C. § 18233(b).

b. Military Construction Funded with Operation & Maintenance accounts. 10 U.S.C. § 18233 and 18233a . AR 140-483, Ch. 7.

7. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DOD Dir. 4270.5; AR 420-1, para. 4-57; AFI 32-1021, para. 5.2.4; AFI 65-601, vol. 1, para. 9.12.5; OPNAVINST 11010.20G, see para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

a. Scope of Authority. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects that are necessary to support the use of the armed forces in the event of:

(1) A declaration of war; or

(2) A Presidential declaration of a national emergency.[40]

b. Proper Appropriation. The SECDEF must use unobligated military construction funds, including funds appropriated for family housing, to finance these projects.

[40] The Secretary of a military department must forward construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.H.

c. Requirements for Use. The SECDEF must notify the appropriate committees of Congress;[41] however, there is **no waiting period** associated with the use of this authority.

d. On November 14, 1990, President George H.W. Bush invoked this authority to support Operation Desert Shield. See Executive Order No. 12734, 55 Fed. Reg. 48,099 (1990), reprinted in 10 U.S.C. § 2808. His son, President George W. Bush invoked this authority on 16 November 2001. See Executive Order No. 13235, 66 Fed. Reg.58,343 (2001).[42]

8. Environmental Response Actions. 10 U.S.C. § 2707. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

a. Scope of Authority. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects for environmental response actions.

b. Proper Appropriation. The SECDEF must use funds specifically appropriated for environmental restoration to finance these projects.[43]

c. Requirements for Use.

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[41] The SECDEF must notify the appropriate committees of Congress of: (1) the decision to use this authority; and (2) the estimated cost of the construction projects. 10 U.S.C. § 2808(b).

[42] National emergency construction authority. Exec. Ord. No. 13235 of Nov. 16, 2001, 66 Fed. Reg. 58343, provides: "By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code, I declared a national emergency that requires the use of the Armed Forces of the United States, by Proclamation 7463 of September 14, 2001 [50 USCS § 1621 note], because of the terrorist attacks on the World Trade Center and the Pentagon, and because of the continuing and immediate threat to the national security of the United States of further terrorist attacks. To provide additional authority to the Department of Defense to respond to that threat, and in accordance with section 301 of the National Emergencies Act (50 U.S.C. 1631), I hereby order that the emergency construction authority at 10 U.S.C. 2808 is invoked and made available in accordance with its terms to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments."

[43] Congress provides annual appropriations for environmental restoration projects. See, e.g., Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004). See DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects). But see DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.G.2 (detailing the requirements for reprogramming requests).

(1) Before using this authority, the SECDEF must determine that the project is necessary to carry out an environmental response action under:

(a) The Defense Environmental Restoration Program, 10 U.S.C. §§ 2701-2708; or

(b) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675.

(2) In addition, the SECDEF must:

(a) Notify the appropriate committees of Congress;[44] and

(b) Wait 21 days.[45]

9. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DOD Dir. 4270.5; AR 420-1, para. 4-56; AFI 32-1021, para. 5.2.2; AFI 65-601, vol. 1, para. 9.12.7; OPNAVINST 11010.20G, para. 4.4.3; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

a. Scope of Authority. The Secretary of a military department may use this authority to repair, restore, or replace a facility that has been damaged or destroyed.[46]

b. Proper Appropriation.

(1) O&M Funds. See H.R. Rep. No. 97-612 (1982); see also AR 420-1, para. 4-56c; AFI 32-1021, para. 5.2.2.2.

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[44] The SECDEF must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2810(b).

[45] DOD Reg. 7000.14-R, vol. 3., ch. 17, para. 170102.G.1, indicates that Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

[46] The intent of this section is to permit military departments and defense agencies to respond to natural disasters, acts of arson, and acts of terrorism promptly to restore mission effectiveness and preclude further deterioration of the damaged facility. H.R. REP. NO. 97-612.

(a) The Secretary concerned may use O&M funds under 10 U.S.C. § 2805(c) if the cost of the project is $1 million or less.[47]

(b) The Secretary concerned may also use O&M funds to repair or restore a facility temporarily to:

(i) Prevent additional significant deterioration;

(ii) Mitigate a serious life or safety hazard; or

(iii) Avoid severe degradation of a critical mission.

(2) Military Construction (MILCON) Funds.[48] See H.R. Rep. No. 97-612 (1982).

(a) The Secretary concerned may use MILCON funds to construct a replacement facility if an economic analysis of life-cycle costs shows that replacement is more cost effective than repair.[49]

(i) Congress must normally approve a reprogramming request for the project. [50]

(ii) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

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[47] The expanded thresholds for Life, Health, and Safety threatening situation should be considered for use in these situations.

[48] MILCON funds are the funds Congress appropriates under the Military Construction Appropriations Act. They include both "specified" funds and UMMC funds.

[49] The Secretary concerned may use current design and material criteria for the replacement facility. In addition, the Secretary concerned may increase the size of the replacement facility to meet current mission and functional requirements. See H.R. REP. NO. 97-612 (1982).

[50] The Secretary concerned must submit reprogramming requests to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2; AR 420-1, para. 4-56d. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.6 (requiring prior congressional notification and approval for reprogramming action).

(b) If the Secretary concerned intends to use UMMC funds to construct a replacement facility, the Secretary concerned must comply with 10 U.S.C. § 2805 and any applicable regulations.

(c) Requirements for Use. If the estimated cost of the project exceeds the UMMC threshold the Secretary concerned must:

(i) Notify the appropriate committees of Congress;[51] and

(ii) Wait 21 days.

(d) Limitations.

(i) DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.J.5, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

(ii) Army Limitations. AR 420-1, para. 4-56c(2) restricts the use of this authority for family housing projects.

(iii) Air Force Limitations. AFI 32-1021, para. 5.2.2.1, provides additional criteria for repairing damaged Air Force facilities.

(a) The damaged or destroyed facility must have been in use (or planned for use) at the time it was damaged or destroyed.

(b) The new or repaired facility must normally be the same size as the

[51] The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2854(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.J.3 (detailing the requirements for reprogramming requests).

damaged or destroyed facility; however, the MAJCOM may approve limited increases to achieve economy of design or compliance with new criteria. But see H.R. Rep. No. 97-612 (1982) (stating that "any replacement facility [may] use current design and material criteria and may be increased in size to meet current mission and functional requirements").

(c) A MAJCOM may not use this authority to correct space deficiencies.

(iv) Navy Limitations. Unless a shore activity must restore or replace a facility immediately to prevent an undue impact on mission accomplishment, the shore activity should include the restoration or replacement project in its annual budget program. OPNAVINST 11010.20G, para. 4.4.3 (noting that "[t]he Secretary of Defense has restricted the use of this authority to complete replacement or 'major restoration' of a facility which is urgently required").[52]

D. Statutory Thresholds.

1. If the approved cost of the project is $1 Million or less, use O&M funds. 10 U.S.C. § 2805 (c) & AR 420-1 para. 4-9 b. (9) (c) 1.

2. If the approved cost of the project is between $1 Million and $3 Million ($4 Million if the project is intended solely to correct a deficiency that threatens life, health, or safety), use UMMC funds, unless you have authority to use operation and maintenance funds pursuant to statutory authority listed above. 10 U.S.C. § 2805 a.

[52] OPNAVINST 11010.20G, para. 4.4.3, defines "major restoration" as "restoration costing in excess of 50 percent of the plant replacement value (PRV)."

3. If the approved cost of the project is greater than $3 million, use "specified" MILCON funds unless you have authority to use operation and maintenance funds pursuant to statutory authority listed above.

E. Exceeding a Statutory Threshold.

AR 420-1, app. D, para. D-4; AFI 32-1021, para. 4.7.

1. Exceeding a statutory threshold violates the Purpose Statute and may result in a violation of the Anti-deficiency Act. See AR 420-1, app. D, para. D-4a.

2. When a project exceeds—or is expected to exceed a statutory threshold—the department or agency must:

   a. Stop all work immediately;

   b. Review the scope of the project and verify the work classification; and

   c. Consider deleting unnecessary work.[53]

3. If the project still exceeds the statutory threshold, the department or agency must correct the Purpose violation by deobligating the improper funds and obligating the proper funds.

4. In addition, the department or agency should attempt to avoid a final Anti-deficiency Act report by obtaining proper funds that were available:

   a. When the violation occurred; and

   b. When the violation was discovered and corrected[54];

---

[53] The department or agency must avoid project splitting. Therefore, the department or agency should only delete truly unnecessary work. AR 420-1, app. D, para. D-4b(3).

[54] Obtaining the proper funds (i.e., funds that meet the 2-part test) does not obviate the commander's obligation to investigate and report the alleged Antideficiency Act violation. See 31 U.S.C. §§ 1351, 1517; OMB Cir. A-34, para. 32.1, DOD Reg. 7000.14-R, vol. 14, chs. 4-7; Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and Comptroller), subject: Supplemental Guidance to AR 37-1 for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (Aug. 17, 1995); DFAS-IN 37-1, ch. 4, para. 040204.

F. Authorized Variations.[55]

10 U.S.C. § 2853; AR 420-1, paras. 4-50 and 4-51; AFI 65-601, vol. 1, para. 9.4.3; AFI 32-1021, para. 4.6.5; OPNAVINST 11010.20G.

1. Cost Increases or Decreases.

a. No authority exists to increase the authorized scope of a project.

b. There are no cost increases authorized for O&M funded projects under 10 U.S.C. § 2805. The $1 million cap is absolute.

c. For MILCON funded projects, The Secretary of a military department may increase or decrease the cost of a "specified" military construction project by the lesser of:

(1) 25% from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition

(2) 200% of the UMMC ceiling (currently $3 million).

(3) Note that certain costs, such as contractor claims and certain environmental remediation costs, do not count. (10 USC 2853c)

d. However, the Secretary concerned must first determine that:

(1) The increase or decrease is required solely to meet unusual variations in cost; and

[55] These authorized variations apply only to "specified" military construction projects. 10 U.S.C. § 2853. They do not generally apply to UMMC projects. However, 10 U.S.C. § 2805(a)(1) permits the Secretaries of the military departments to carry out UMMC projects "within an amount equal to 125 percent of the amount authorized by law for such purpose." In addition, 10 U.S.C. § 2863 permits the SECDEF and the Secretaries of the military departments to use unobligated funds appropriated to the department and available for military construction or family housing construction to pay meritorious contractor claims arising under military construction contracts or family housing contracts "[n]otwithstanding any other provision of law." 10 U.S.C. § 2863 does not authorize SECDEF or the Secretaries of the military departments to exceed statutory funding ceilings for OMA funded unspecified minor military construction projects.

(2) The military department could not have reasonably anticipated the cost variation at the time Congress originally approved the project.

e. Note that these are changes to a project's authorization with thresholds based off of the project's appropriation.

2. Scope Increases and Reductions.

a. Scope Reductions. The Secretary of a military department may reduce the scope of a "specified" military construction project by not more than 25% from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition. 10 USC 2853(b)(1).

b. Scope Increases. The scope of work for a military construction project or for the construction, improvement, and acquisition of a military family housing project may not be increased above the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition. 10 USC 2853(b)(2)

3. Notification Requirements for Variations Exceeding Secretarial Authority. The Secretary concerned must notify the appropriate committees of Congress of any cost increases or decreases, or scope reductions, that exceed the authorized variations discussed above and then must wait for either 14 or 21 days (depending on type of notice). (10 USC 2853(c)).

IX. IDENTIFYING THE PROPER APPROVAL AUTHORITY.

A. Approval of Construction Projects.

1. Army. AR 420-1, app. D.

a. Commander, IMCOM may approve a minor construction project with total funded costs of $1 million or less. This authority may be delegated to HQIMCOM staff members and to IMCOM region directors. Commander, IMCOM may also permit redelegation of this authority.

b. The Deputy Assistant Secretary of the Army for Installation and Housing (DASA (IH)) approves UMMC projects costing between $1 million and $3 million.[56] AR 420-1, app. D.

2. Air Force. AFI 32-1032, 5.1.[57]

a. The Deputy Assistant Secretary of the Air Force (Installations) (SAF/MII) has delegated approval authority for UMMC projects costing $500,000 or less to the Civil Engineer (AF/ILE).[58]

b. The SAF/MII approves UMMC projects costing between $500,000 and $1.5 million.

3. Navy. OPNAVINST 11010.20G, app. C.

a. The Commanding Officer (C.O.) or Major Claimant approves projects costing $300,000 or less ($1 million or less if the project is intended solely to correct a deficiency that threatens life, health, or safety).

b. The Chief of Naval Operations (CNO) approves projects costing between $300,000 and $500,000.

4. Congressional notification and approval is required for projects expected to exceed $1.5 million. AR 415-15, app. B, para. B-2f; AFI 32-1032, para. 3.5.4; OPNAVINST 11010.20G, app. C.

B. Approval of Maintenance and Repair Projects.

1. Army. AR 420-1, para. 2-16.

a. Using funds available to the Secretary concerned for operation and maintenance, the Secretary concerned may carry out repair projects for an entire single-purpose facility or one or more functional areas of a multipurpose facility. 10 USC § 2811(a) Before a military department can carry out a repair project that costs more than $7.5

[56] There is a discrepancy between the increased UMMC amount of $3 million and the amount that is authorized by AR 420-1. JAs should verify whether the amount has increased to $3 million.

[57] This regulation predates the legislation that increased the statutory threshold for O&M projects to $1 million.

[58] The AF/ILE may further delegate this authority. AFI 32-1032, para. 1.4.

million, the Secretary concerned must approve the project. 10 U.S.C. § 2811(b). In addition, if the project costs more than $7.5 million, the Secretary concerned must submit a report to the appropriate committees of Congress containing information specified in 10 U.S.C. § 2811(d).

b. Commander, IMCOM may approve maintenance and repair projects when:

(1) The funded project cost does not exceed $3 million; and for a combined maintenance and repair project, the total of the maintenance cost and the repair cost does not exceed $3 million.

(2) The repair cost (or repair plus construction project cost for a combined undertaking) does not exceed 50 percent of the replacement cost of the facility for projects whose funded costs are greater than $750,000.

(3) WWII temporary buildings that have total repair and construction costs in excess of $40 per square foot in accordance with AR 420-1 paragraph 2–13.

(4) Environmental documentation has been completed in accordance with AR 200–1 and 32 CFR 651.

c. Commander, IMCOM may delegate and permit redelegation of this authority. AR 420-1, para. 2-16b.

2. Air Force. AFI 32-1032, paras. 3.7 and 4.4.1.

a. Installation commanders have unlimited approval authority for maintenance projects.

b. The AF/ILE may approve – or delegate approval authority for – repair projects costing $5 million or less.

c. The SAF/MII approves repair projects costing more than $5 million.

3. Navy. OPNAVINST 11010.20G, app. C.

a. Commander, Naval Installations Command, approval is required for all minor construction projects and combination projects over $500,000.

b. Commander, Naval Installations Command, approval is required for all repair projects over $500,000.

c. The DASN (I&F) approves general repair projects costing $5 million or more.

d. The C.O. approves recurring maintenance projects, and specific maintenance projects costing $500,000 or less. Commander, Naval Installations Command, approval is required for all maintenance projects over $500,000.

4. Congressional notification and approval is required for projects expected to exceed $7.5 million. 10 U.S.C. § 2811(d). The Secretary's notification to the appropriate committees of Congress containing information specified in 10 U.S.C. § 2811(d).

X. CONCLUSION.

A. It is important to take a systematic approach in reviewing a construction funding issue. The framework for such a review is located in herein. This checklist does not address every issue but identifies the major steps in the process for construction funding fiscal review.

B. Regardless of your opinion regarding a construction project, it is valuable to document the rationale that you used to come to your conclusion. Doing this allows others to isolate the issues that you identified within the project file and understand your logic and reasoning.

XI. NOTES

APPENDIX A - CONSTRUCTION FUNDING CHECKLIST

1. Define the Scope of the Project. (i.e., What is the construction project? Is there one, two, three, etc.? And how do they relate to one another?)

   a. A military construction project includes all construction work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Critical is whether the project, standing alone, meets this requirement.
   b. Avoid project splitting and/or incrementation of projects.
   c. Downscoping is permissible, provided it results in a complete and usable facility.
   d. Interrelated or Interdependent?

2. Classify the Work (Is it construction, maintenance, or repair?)

   a. Construction: Erection, installation, or assembly of a new facility, or the addition, expansion, or relocation of an existing facility.
   b. Maintenance: Work required to preserve or maintain a facility.
   c. Repair: Project to restore a facility to its designated purpose. Remember "failed or failing."

3. Determine the Funded and Unfunded Costs

   KEY: Funded costs are tied to relevant thresholds, while unfunded costs do not count towards these same thresholds. See AR 420-1 & DA- PAM 420-11

   a. Common funded costs: materials, supplies, services, installed capital equipment, transport of materials, civilian labor, supervision and inspection (Corps of Engineers).
   b. Common unfunded costs: military personnel labor, excess distributions (DRMO).

4. Select the Proper Appropriation (Construction Projects)[59]

   a. Less than $1 Million, O&M Funds
   b. $1 Million - $3 Million, UMMC Funds (LHS, up to $4 Million).
   c. Over $3 Million, Specified MILCON Funds (Congress).

5. Identify the Proper Approval Authority (Construction Projects)[60]

   a. Less than $1 Million, ARMY Command Commander (if delegated)/IMCOM .
   b. $1 Million - $3 Million, DASA (IH), (LHS, up to $4M).
   c. More than $3 Million, Congress.

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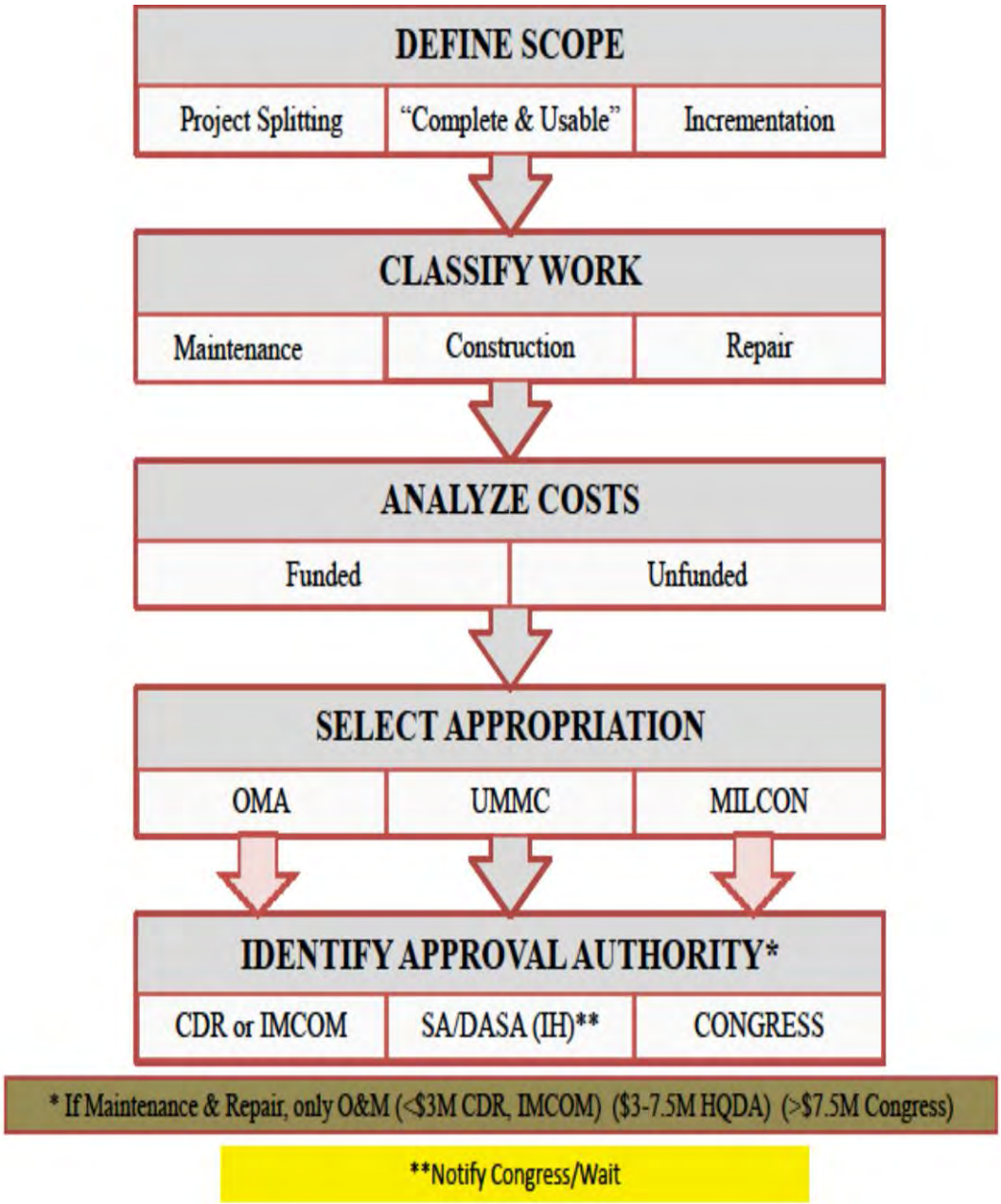
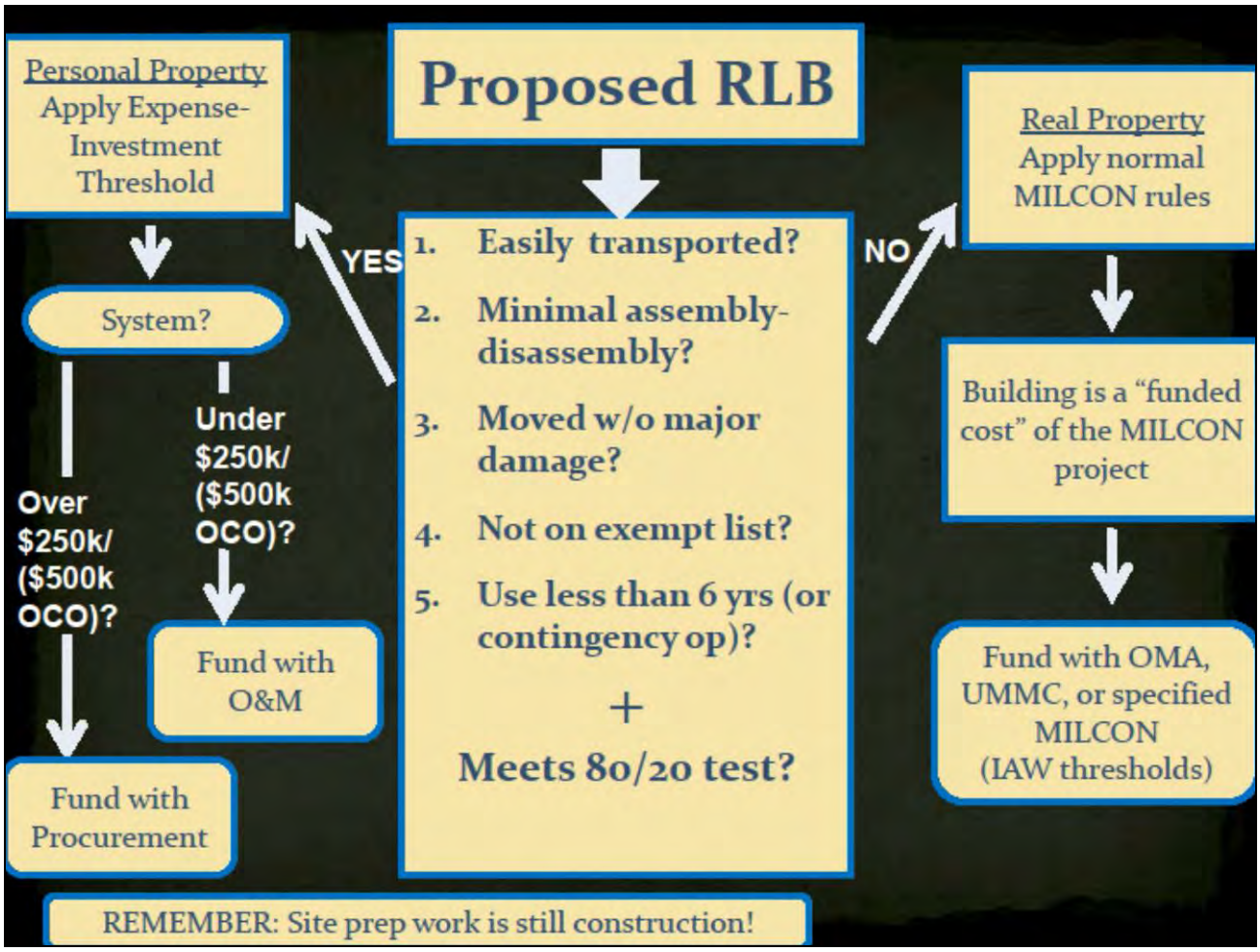
[59] Maintenance and Repair Projects are generally funded with O&M funds.

[60] Maintenance and repair projects have different approval thresholds from construction. MACOM commander/IMA Director may approve maintenance and repair projects costing less than $3 million (which can be delegated). Maintenance and repair projects exceeding $3 million must be approved by HQDA. The Secretary concerned must approve a repair project exceeding $7.5 million, and must notify Congress. 10 U.S.C. § 2811.

APPENDIX A - CONSTRUCTION FUNDING FLOW CHART



APPENDIX B – RELOCATABLE BUILDING FLOW CHART



APPENDIX C –MILITARY CONSTRUCTION THRESHOLDS

2015 NDAA: Construction Funding Changes

"OLD" Rule		"NEW" Rule	
O&M	$0 – $750,000	O&M	$0 - $1,000,000
UMMC	$750,000,001 - $2,000,000	UMMC	$1,000,001 - $3,000,000
	*LHS increases to $3,000,000		*LHS increases to $4,000,000
MILCON	>$2,000,000	MILCON	>$3,000,000

Chapter 9:

Continuing Resolution Authority & Funding Gaps

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CHAPTER 9

CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS

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CHAPTER 9

CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS

I. INTRODUCTION

II. REFERENCES

A. Office of Management and Budget Circular A-11, Section 123, Apportionments Under a Continuing Resolution, and Section 124, Agency Operations in the Absence of Appropriations (2013) [OMB Cir. A-11] (*available at* http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc).

B. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, Vol. II, Ch. 8, Continuing Resolutions, GAO-06-385SP (3d ed. 2006) and Annual Update of the 3rd Edition, March 2008, Ch. 8, Continuing Resolutions, GAO-08-450SP [GAO Red Book] (*available at* http://www.gao.gov/assets/210/202819.pdf).

C. Public Law 112-175 (28 September 2012), the 2013 Continuing Resolution (*available at* http://www.gpo.gov/fdsys/pkg/PLAW-112publ175/pdf/PLAW-112publ175.pdf).

D. DOD 7000.14-R, Department of Defense Financial Management Regulations (FMRs), Glossary, (*available at* http://comptroller.defense.gov/fmr.aspx).

E. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000 with changes through December 2012). [DFAS-IN 37-1] (*available at* http://www.asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200).

III. DEFINITIONS

A. Continuing Resolution (CR).

1. Definition: "An appropriation, in the form of a joint resolution, that provides **budget authority** for federal agencies, specific activities, or both to continue operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year." (emphasis added) GAO, A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Washington DC, Sep 2005) 35-36.

a. Budget Authority - Budget authority means "the authority provided by Federal law to incur financial obligations . . ." 2 U.S.C. § 622(2).

b. Examples of "budget authority" include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Cir. A-11, § 20.4.

2. The Continuing Resolution, in the absence of an appropriation act, provides authority for Agencies to continue current operations. Such continuing resolutions are subject to OMB apportionment in the same manner as appropriations DOD 7000.14-R, DOD Financial Management Regulation, Glossary.

3. [A]n interim appropriation to provide authority for specific ongoing activities in the event that regular appropriations have not been enacted by the beginning of the fiscal year or the expiration of the previous continuing resolution. A continuing resolution has a fixed life. DFAS 37-1, (May 2014), para. 080401.

4. Once the Continuing Resolution becomes a public law (after both houses of Congress have passed the bill and it has been signed by the President) it has the same force and effect as any other statute. Oklahoma v. Weinberger, 360 F. Supp. 724, 726 (W.D. Okla. 1973).

B. Funding Gap. A funding gap occurs when previous budget authority expires and there exists no regular appropriations act or continuing resolution. DFAS-IN 37-1, (May 2014) para. 0805.

C. Joint Resolution. A joint resolution, with the exception of proposed amendments to the Constitution, become law in the same manner as bills. Like a bill, it may originate in either the House of Representatives or in the Senate. A joint resolution originating in the House of Representatives is designated "H.J. Res." followed by its individual number. If it originates in the Senate, it is designated "S.J. Res." followed by its number. Joint resolutions contain a "resolving clause" that states, "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all, etc." See http://thomas.loc.gov/home/lawsmade.bysec/formsofaction.html#joint.

D. New Start. Initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year. GAO Redbook, Vol. II, p. 8-24 (Feb. 2006).

IV. INTRODUCTION TO THE LEGISLATIVE PROCESS

A. Background. The Constitution of the United States provides that positive authority is required to spend money. Art I, Sec 9, Clause 7. The Constitution gives Congress the authority to determine what rules will govern making the budget. Art I, Sec 5, Clause 2. Congress and the President must enact appropriations which provide funding for federal agencies to operate in a new fiscal year by October 1st, the first day of the fiscal year. Congressional Budget & Impoundment Control Act of 1974 (Pub. L. 94-344). Historically, one or more of the required appropriations acts are delayed well beyond Oct.1st. See Congressional Research Service, Duration of Continuing Resolution in Recent Years (April 28, 2011), available at http://www.fas.org/sgp/crs/misc/RL32614.pdf.

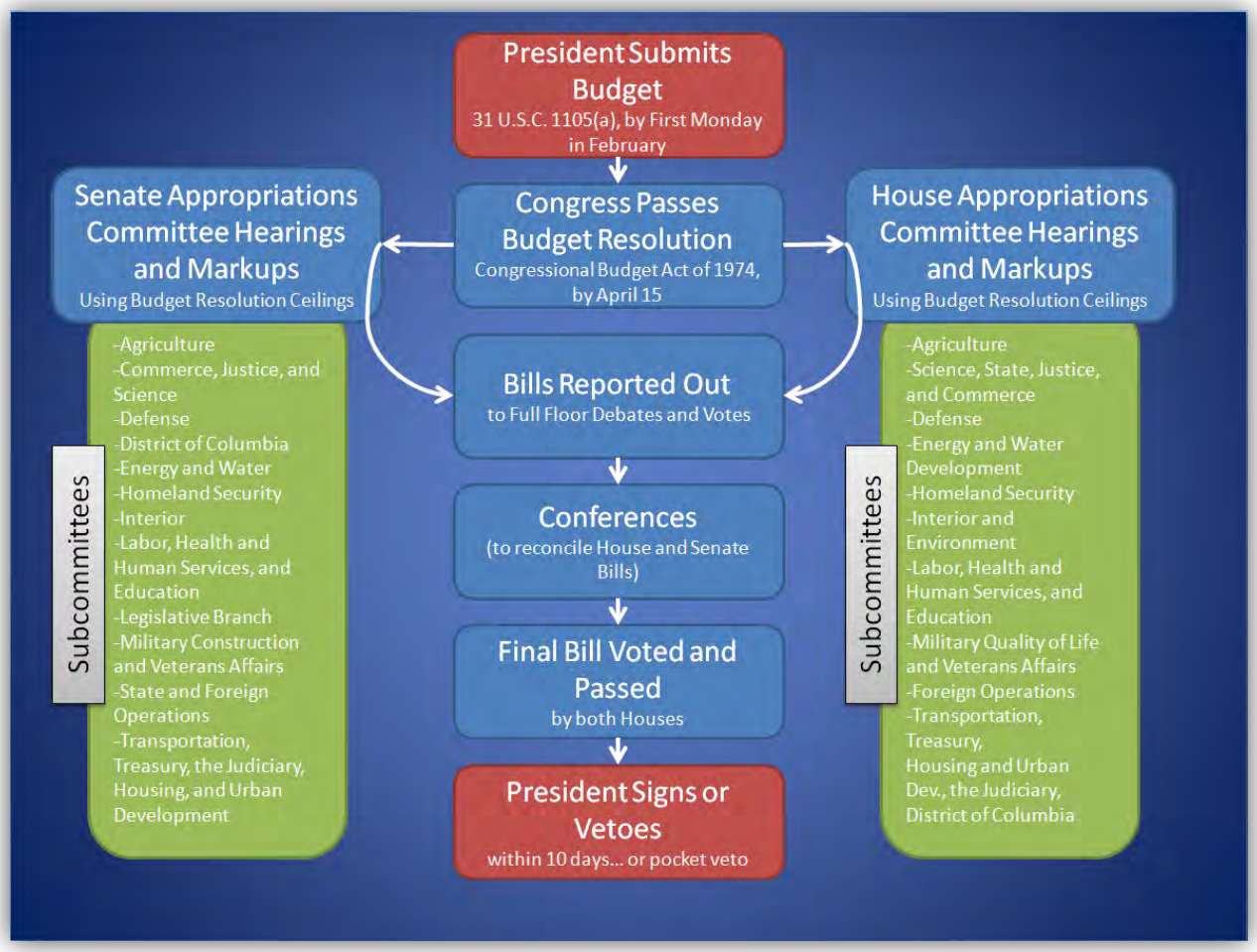
B. The Congressional Budget Process. The Congressional Budget & Impoundment Control Act of 1974 (Titles I-IX of Pub. L. 93-344, 2 U.S.C. 601-688) established the congressional budget process which provides timelines to ensure Congress completes its work on budgetary legislation by the start of the Fiscal Year. CRS Report for Congress, March 20, 2008, 98-472 GOV. The federal budget establishes the level of total spending and revenues as well as how the spending should be dividend up. The budgetary timetable is below[1]:

Table 1. Congressional Budget Process Timetable

Deadline	Action to be completed
First Monday in February	President submits budget to Congress.
February 15	CBO submits report on economic and budget outlook to Budget committees.
Six weeks after President's budget is submitted	Committees submit reports on views and estimates to respective Budget Committee.
April 1	Senate Budget Committee reports budget resolution.
April 15	Congress completes action on budget resolution.
June 10	House Appropriations Committee reports last regular appropriations bill.
June 30	House completes action on regular appropriations bills and any required reconciliation legislation.
July 15	President submits mid-session review of his budget to Congress.
October 1	Fiscal year begins.

[1] Congressional Research Service, Introduction to the Federal Budget Process (December 3, 2012), Table 1 at p. 12.

C. Appropriation Process. The overall appropriations process begins when the President submits the budget proposal for the next Fiscal Year. Congressional Budget & Impoundment Control Act of 1974 (Pub. L. 94-344) requires Congress to adopt a Budget Resolution setting spending limits for each appropriations sub-committee. Using those figures as a ceiling, the committees draft and mark up proposed legislation that is eventually approved by the full appropriations committees and reported out to the floor of the respective house (House or Senate) for debate and vote. Once passed within each house, the House and Senate versions are reconciled using a Conference Report. Once a final bill is agreed to by both houses, it is passed and submitted to the President for final signature or veto. The chart below illustrates this process:



D. Forms of Congressional Action. Congress introduces proposals in one of four forms: a bill, a joint resolution, a concurrent resolution, or a simple resolution. The most customary form is the bill. Continuing Resolutions are joint resolutions.

1. House & Senate Appropriations Committees draft the federal appropriations acts for consideration and passage by Congress. The level of appropriations is limited by the Budget Resolution, drafted by the Budget Committee. For more information, see http://appropriations.house.gov/ and http://www.appropriations.senate.gov/.

2. The House & Senate Armed Services Committees are responsible for the annual defense authorization bill. For more information, see http://armed-services.senate.gov and http://armedservices.house.gov.

E. Regular Appropriations Acts. There are 13 appropriations acts regularly passed by Congress. The Department of Defense generally operates under two appropriations acts - the Department of Defense Appropriations Act and the Military Construction Appropriations Act.

F. Options. Congress can pass appropriations acts separately or as a group.

1. When the appropriations acts are passed as a group, they are referred to as a Consolidated Appropriation Act (CAA) or an Omnibus Appropriations Act.

2. When passed separately, the DOD Appropriations Act (DODAA) provides funding for most of DOD's normal operations.

3. The Military Construction Appropriations Act (MILCON AA) provides funding for military construction projects.

4. Since deploying troops to Iraq and Afghanistan, Congress has typically used Emergency Supplemental Appropriations to fund overseas contingency operations.

G. The National Defense Authorization Act (NDAA) is an act that provides authority to execute the programs specified in it. An authorization act differs from the appropriations act in that the authorization act does not have any funding attached to it. It only provides authority to spend funds. It essentially gives us additional purposes that we can spend money on.

V. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS

A. Continued Operations – History as Potential Antideficiency Act Violations.

1. Background. The Attorney General issued two opinions in the early 1980s stating the language and history of the Anti-deficiency Act unambiguously prohibits agency officials from incurring obligations in the absence of appropriations. In 1995, following those two memorandums, the Office of Legal Counsel of the Department of Justice issued an opinion reaffirming and updating the prior memos. OMB Cir. No. A-11, Sec. 124.1. This 1995 memo is often referred to as the "Dellinger Memo."

2. Additionally, the Comptroller General opined that permitting federal employees to work after the end of one fiscal year and before the enactment of a new appropriations act or a Continuing Resolution violates the Antideficiency Act (ADA). Representative Gladys Noon Spellman, B-197841, March 3, 1980 (unpub).

3. Memorandum #1: The President asked the Attorney General if an agency can lawfully permit its employees to continue work after the expiration of the agency appropriation for the prior fiscal year and prior to any appropriation for the fiscal year. The Attorney General opined that absent an appropriations act or a Continuing Resolution, executive agencies must take immediate steps to cease normal operations. "Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations," Opinion of the U.S. Attorney General, Benjamin R. Civiletti, 43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16 (April 25, 1980). *See* Appendix A.

4. Memorandum #2: The President asked the Attorney General what activities could continue to occur during a funding gap. "Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations" Opinion of the U.S. Attorney General, Benjamin R. Civiletti, 43 U.S. Op. Atty. Gen. 293, 5 Op. O.L.C.1 (January 16, 1981).

5. Memorandum #3: The Dellinger Memo. In anticipation of a potential funding gap, the Clinton Administration requested updated guidance on the scope of permissible government activity. In response, the Department of Justice reemphasized the restricted level of allowable government activity. The Memo also noted, however, that a lapse in appropriations will not result in a total "government shut-down." DOJ Memorandum for Alice Rivlin, Office of Management and Budget, Aug. 16, 1995 (Appendix B).

B. Continued Operations - Permissible Activities.

1. The Office of Management and Budget (OMB) issues guidance concerning actions to be taken by agencies during funding gaps.

   a. Agencies must develop contingency plans to conduct an orderly shutdown of operations.

   b. During a funding gap, agencies may continue:

      (1) Activities otherwise authorized by law, e.g., activities funded with multi-year or no-year appropriations;

      (2) Activities authorized through extraordinary contract authority. *See, e.g.*, 41 U.S.C. § 11 (Feed and Forage Act).

      (3) Activities that protect life and property. See, e.g., 31 U.S.C. § 1342.

      (4) Activities necessary to begin phase-down of other activities. *See* Attorney General Opinion, Apr. 25, 1980 (Appendix A).

2. In 1990 Congress amended 31 U.S.C. §1342, to restrict the authority of agencies to cite the safety of life or the protection of property as the basis for continuing operations. Congress excluded "ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property" from the scope of permissible activities that may be continued during a funding gap. See Appendix C.

3. DFAS Guidance.

   a. DFAS-IN 37-1, para. 0805, provides the following guidance concerning operations during a funding gap:

      (1) No new obligations may be incurred unless they can be lawfully funded from prior appropriations or are specifically authorized by law.

      (2) Neither prior year unexpired funds of multi-year appropriations nor revolving funds are impacted by the absence of a new appropriation or a CRA.

b. DFAS-IN 37-1, para. 1604, provides additional details concerning disbursements permitted during funding gaps. Such disbursements may be made:

(1) To liquidate prior-year obligations;

(2) To liquidate new obligations for unexpired multi-year appropriations;

(3) To liquidate obligations for revolving funds and trust funds (no year) while cash balances exist; and,

(4) To liquidate obligations made during a previous CRA.

4. In April 2011, DOD issued detailed guidance addressing what activities the military departments and other DOD agencies could perform during the absence of appropriations (i.e., a funding gap). This information as well as additional guidance can be found in the CRA General Guidance. (*See* References & Appendix D).

a. Activities that could continue during the funding gap:

(1) Units and the administrative, logistical, and maintenance functions required in support of major contingency tasking;

(2) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations;

(3) Units and personnel preparing for or participating in operational exercises;

(4) Functions or activities necessary to protect life and property or to respond to emergencies;[2]

(5) Educational activities deemed necessary for immediate support of permissible activities;

(6) Educational activities not otherwise allowed if undertaken by active duty military personnel for other active military personnel only;

(7) Negotiation, preparation, execution, and administration of new/existing contracts for permissible activities/functions;[3]

[2] Among the activities exempted from the "shut-down" include: fire protection, physical security, law enforcement, air traffic control and harbor control, utilities, housing and food services for military personnel, trash removal, and veterinary services in support of exempt functions (i.e., food supply and service inspections).

(8) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session;

(9) Legal support for any permitted activities;

(10) MWR activities to the extent operated by NAF personnel; and

(11) Childcare activities, including Department of Defense Dependents Schools.

b. Activities required to be suspended during the funding gap:

(1) Basic, skill, and qualification training which will obligate current FY funds;

(2) Military Personnel Selection Boards and Administrative Boards;

(3) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel, and;

(4) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in otherwise non-exempt activities using current FY funding.

5. Funding Gap Issues.

a. Agencies generally cannot predict whether a funding gap will occur or estimate its duration. Consequently, it is difficult for agencies to plan for such gaps.

b. Efficient operation of government is clearly compromised. *See* General Accounting Office, Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76, June 6, 1991; General Accounting Office, Funding Gaps Jeopardize Federal Government Operations, No. PAD-81-31, Mar. 3, 1981.

c. What if we incur unauthorized obligations? *See, e.g.*, Department of Defense Appropriations Act, 1993, § 9049, Pub. L. No. 102-

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[3] For contract actions not within the scope of the original contract and that are in direct support of permissible activities, the contracting officer will cite one of the following three authorities in support of the new obligation: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2) 41 U.S.C. § 11 for obligations covered by the Food and Forage Act , and (3) 31 U.S.C. § 1342 for obligations for protection of life and property against imminent danger.

396, 106 Stat. 1876 ("All obligations incurred in anticipation of this Act are hereby ratified and confirmed if otherwise in accordance with this Act.").

d. Congress may provide funding for some operations that otherwise would not be funded. *See, e.g.*, Pay Our Military Act, 2013, H.R. 3210 (Providing during a funding gap in FY14 continuing appropriations for pay and allowances for active duty military members and civilian and contractors providing support to those military members); Honoring the Families of Fallen Soldiers Act, 2013, Pub. L. No. 113-44, 127 Stat. 555 (Providing during a funding gap in FY14 continuing appropriations for payment of death gratuities; funeral, burial, and transfer expenses; and basic housing allowance for dependents of a member who died on active duty).

VI. CONTINUING RESOLUTIONS

A. General Legal Implications of Continuing Resolutions.

1. If Congress fails to pass, or the President fails to sign, an appropriation act before 1 October, a funding gap occurs unless Congress passes, and the President signs, interim legislation authorizing executive agencies to continue incurring obligations. This interim legislation is referred to as a Continuing Resolution. It is a statute that has the force and effect of law. *See* Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973).

2. Comparison of Continuing Resolutions with Appropriation Acts.

a. Appropriation acts appropriate specified sums of money. Continuing Resolutions specify a "rate" based on the last year's appropriations (sometimes adjusted upwards or downwards), but do not specify sums of money.

b. Continuing Resolutions include language such as "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations" to signify the temporary nature of the appropriation.

(1) Traditional CRs do not usually appropriate specific sums of money, instead using terms such as "such amounts as may be necessary for continuing projects" at a certain "rate for operations."

(2) In order to determine the sum of money appropriated for a given activity it is necessary to examine documents other than the resolution. For example, you may need to apply a

formula to previous year's appropriations to determine the amount under the current resolution.

(3) The Continuing Resolution for FY 2013 provided:

"That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2013, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2012 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this joint resolution, that were conducted in fiscal year 2012, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: . . .

(3) The Department of Defense Appropriations Act, 2012 (division A of Public Law 112–74) . . ."[4]

B. Availability of Appropriations as to Purpose under a Continuing Resolution.

1. Continuing Resolutions provide interim funding for projects or activities for which funding or authority was available in the previous year's appropriation. Generally, the scope of a Continuing Resolution's applicability is quite broad:

"SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act."[5]

2. New Starts. Continuing Resolutions generally do not allow agencies to initiate new programs, or expand the scope of existing programs, projects, and activities. During a CR, a hot issue is generally how to define a "new

[4] Pub. L. 112-175 (September 28, 2012), the 2013 Continuing Resolution.

[5] Id.

start." There are several authorities to consult: Congress, GAO, and Agency policy.

3. Congress. In recent years, Congress has expressly resolved differing interpretations by explicitly defining "new starts" in the continuing resolution itself.

   a. For example, the FY 2013 Continuing Resolution provided, in part:

      "SEC. 102. (a) No appropriation or funds made available [in this CR] shall be used for: (1) the new production of items not funded for production in fiscal year 2012 or prior years; (2) the increase in production rates above those sustained with fiscal year 2012 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during fiscal year 2012."[6]

   b. Under the definition in the FY 2013 CR, if an agency had authority and sufficient funds to carry out a particular program in the preceding year, that program is not a new project or activity regardless of whether it was actually operating in the preceding year. This type of language would seem to permit minor O&M construction and UMMC unless further restricted by policy.

4. GAO's Take on New Starts. GAO has looked at the definition of "new start" in a series of cases.

   a. Default: When continuing resolutions contain a section stating that no funds made available under the resolution shall be available to initiate or resume any project or activity which was *not conducted* during the proceeding fiscal year, GAO has found the term "projects or activities" to refer to the individual program rather than the total appropriation. *See* Chairman, Nat'l Advisory Council on Extension and Continuing Educ., B-169472, 52 Comp. Gen. 270 (1972); Secretary of the Interior, B-125127, 35 Comp. Gen. 156 (1955).

   b. Construction: GAO has also found that where, in the previous fiscal year, funds were available generally for construction of buildings, including plans and specifications, it was not a new start to begin a construction project under a CR– even though the specific construction project was not actually under way in the previous year. GAO hung its hat on the idea that, because funds

[6] Id.

were available generally for construction in the previous year, this specific project was not a new project or activity and thus could be funded under the CR. *See* Lt. Gen. F.T. Unger, B-178131, Mar. 8, 1973.

c. Variations: Uncle Bud's, Inc., 206 B.R. 889 (Bankr M.D. Tenn., 1997)(affirmed Vergos v. Uncle Bud's, Inc., No. 3-97-0296(M.D. Tenn., Aug, 17, 1998)(finding that under a continuing resolution, the bankruptcy court could collect a new quarterly fee as part of the bankruptcy process because, while the fee was new, the U.S. Trustee has long been required to collect fees imposed by law); Availability of Higher Educ. Act Loan Funds, B-201898, 60 Comp. Gen. 263 (1981)(finding that the Dept of Education could release $25 million from its revolving fund for higher education loans, even though the authority to do so was not in the FY1980 appropriation, because Congress expressly specified that the funding for the continuing resolution was based on the FY1980 appropriation as passed by the House of Representatives, which included releasing funding for the loans); Environmental Defense Center v. Babbitt, 73 F.3d 867 (9th Cir. 1995)(finding that, under a FY1996 CR, the Dept of the Interior could not take final decision making on whether to list the California red-legged frog as an endangered species because Congress had banned use of FY 1995 funds from being used to make endangered species determinations and the FY1996 continuing resolution effectively continued the ban.)

5. Policy. When continuing resolutions are passed, typically agencies will come out with policy guidance that can further define the definition of a "new start."

a. In 1998, The Assistant Secretary of the Army (Financial Management & Comptroller) provided guidance in Continuing Resolution General Guidance, (OASA-FMC, August 1998) regarding "new starts." At that time:

(1) Definition: A new start is the initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year.

(2) Military Personnel Appropriations. New starts for Military Personnel include new entitlements and new recruitment bonuses, which were not approved in previous legislation, and are not permitted. An example of a new start is the

payment of adoption expenses approved for the first time in FY89.

(3) Operation and Maintenance (O&M). Continuation of normal operations is authorized. Obligations may be incurred for essential operating expenses, including expenses to cover annual contracts that are regularly awarded and obligated in full at the beginning of the fiscal year.

(4) Modifications to O&M programs are generally permitted; they are not considered new starts or scope increases as they do not change the overall purpose of the program. O&M-funded minor construction is not considered a new start and is permitted. An example of an increase in scope of an ongoing program that would not be permitted under CRA is the inception of the National Training Center, which was initiated as a new phase of the Army's training program.

(5) Procurement and Research, Development, Test and Evaluation (RDTE) Appropriations. Generally, a CRA allows previously approved programs to be released at rates sustained during the previous fiscal year. New start restrictions apply to the execution of new investment items not funded for production in the previous fiscal year. Items for which funding was provided in the previous year, or for which funding was provided in prior years and is still available for obligation (e.g., procurement items funded one or two years ago) are not considered new starts.

(6) Military Construction Appropriations. Any project or activity for which an appropriation, fund, or other authority was not provided during the previous fiscal year is considered a new start and will not be initiated under CRA. Minor construction funded with Military Construction funds is considered a new start and may not be initiated under CRA. Planning and design is not considered a new start. Therefore, in general, only planning and design funds may be executed under CRA.

b. When the actual appropriations act becomes law, expenditures made pursuant to the Continuing Resolution must be charged against the new appropriations act:

"Sec. 107. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or

authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law." FY 2013 Continuing Resolution.

C. Availability of Appropriations as to Time under a Continuing Resolution.

1. A Continuing Resolution provides budget authority:

a. Until a fixed cut-off date specified in the Continuing Resolution;

b. Until an appropriations act replaces it; or

c. For an entire fiscal year, if no appropriations act is passed

2. The FY 2013 Continuing Resolution provided:

"SEC. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act for fiscal year 2013, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until whichever of the following first occurs:

(1) the enactment into law of an appropriation for any project or activity provided for in this joint resolution;

(2) the enactment into law of the applicable appropriations Act for fiscal year 2013 without any provision for such project or activity; or

(3) March 27, 2013."

D. Availability of Appropriations as to Amount under a Continuing Resolution.

1. Continuing Resolutions provide the full amount of the previous year's appropriation (with increases or decreases as specified) regardless of the duration of the individual CR. A three-day CR appropriates the same amount as a full-year CR. (*But see* apportionment requirements, below).

2. Current rate. GAO defines "current rate" as "the rate of operations carried on within the appropriation for the prior fiscal year. B-152554, Nov. 4, 1974. The current rate is equivalent to the total appropriation, or the total funds which were available for obligation, for an activity during the previous fiscal year." GAO Redbook, Vol. II, ch. 8, Continuing Resolutions at p. 8-10 (2006).

a. Continuing Resolutions specifically establish the current rate with reference to the prior fiscal year's appropriation. For example, the FY 2013 Continuing Resolution provided funding "at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2012." Pub. L. 112-175 (2012).

b. Comptroller General Interpretations.

(1) One-year appropriation. When the program in question was funded by a one-year appropriation in the prior year, the current rate equaled the total funds appropriated for the program for the previous fiscal year. To the Hon. Don Edwards, House of Representatives, B-214633, 64 Comp. Gen. 21 (1984); In the Matter of CETA Appropriations Under 1979 Continuing Resolution Authority, B-194063, 58 Comp. Gen. 530 (1979).

(2) Multi-year appropriations. When the unobligated balance can be carried over from the prior fiscal year (e.g., under a multi-year appropriation), the amount available under the Continuing Resolution equaled the amount available for obligation in the prior fiscal year (i.e., the "current rate") less any unobligated balance carried over into the present year. National Comm. for Student Financial Assistance-Fiscal Year 1982 Funding Level, B-206571, 61 Comp. Gen. 473 (1982).

c. Apportionment. OMB apportions the funds appropriated by Continuing Resolutions. 31 U.S.C. § 1512.

(1) OMB provides apportionment guidance in the form of a Bulletin. For FY13, OMB Bulletin 12-02 (28 September 2012) gave agencies specific guidance for implementation of the 2013 CR.

(2) Some funds are apportioned automatically. OMB specified for the 2013 CRA amounts would be automatically apportioned in a sum equal to the smaller of two calculations:

(a) The percentage of the year covered by the CR (in this case, OMB specified 48.77% of the FY was covered by the CR, from 1 October 2012 to 27 March 2013). That percentage of the previous year's appropriation is the amount to consider in this option.

(b) The historical seasonal rate of obligations for the covered period. In other words, agencies must identify how much they obligated during the same period last year.

(c) NOTE: When the previous FY also began with a CR, the agency may have altered its normal pattern

of obligations to respond to limited fiscal resources during the CR period. This may lead to an artificially low pattern of obligation from the previous fiscal year and skew this calculation, resulting in insufficient automatic apportionments.

(d) In some cases, agencies that usually obligate or disburse their entire appropriation early in the FY (such as for grants, loans, and foreign aid) are prevented from doing so to preserve flexibility when the actual appropriations are debated and passed. Section 109 of the FY2013 CR made such a prohibition.

d. Obligations incurred under Continuing Resolutions remain valid even if the appropriations finally passed by Congress are less than the amounts authorized by the Continuing Resolution. Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, B-200923, 62 Comp. Gen. 9 (1982); Staff Sergeant Frank D. Carr, USMC-Transferred Service Member-Dislocation Allowance, B-226452, 67 Comp. Gen. 474 (1988).

3. Additional Budgetary Constraints.

a. Beginning in FY 1996, every Continuing Resolution contained the following provisions:[7]

"SEC. 109. Notwithstanding any other provision of this joint resolution, except section 106, for those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of fiscal year 2013 because of distributions of funding to States, foreign countries, grantees, or others, such high initial rates of operation or complete distribution shall not be made, and no grants shall be awarded for such programs funded by this joint resolution that would impinge on final funding prerogatives.

SEC. 110. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities."[8]

[7] GAO Redbook, Vol. II, ch. 8, Continuing Resolutions at p. 8-16 (2006).

[8] Pub. L. 112-175 (September 28, 2012), the 2013 Continuing Resolution.

b. The Average Rate Less Five Percent. During the life of the 1996 Continuing Resolution, agencies were required to reduce the rate of some operations by five percent.

"Sec. 115. Notwithstanding any other provision of this joint resolution, except section 106, the rates for operation for any continuing project or activity provided by section 101 that have not been increased by the provisions of section 111 or section 112 *shall be reduced by 5 percent but shall not be reduced below the minimal level defined in section 111 or below the level that would result in a furlough*." FY 1996 Continuing Resolution, H.J. Res. 108-4 (emphasis added).

c. Reductions to Amount Appropriated. During the life of the 2014 Continuing Resolution, the rate for operations was calculated to reflect reductions to the FY13 appropriations made by the Presidential Sequester and the Consolidated and Further Continuing Appropriations. *See* FY 2014 Continuing Resolution, Pub. L. 113-46.

E. Relationship of a Continuing Resolution to Other Legislation.

1. A Continuing Resolution appropriates funds that are "not otherwise appropriated." *See e.g.* Appendix D. The CRA does not apply to an agency program funded under another appropriation.

2. Specific inclusion of a program in a Continuing Resolution provides authorization and funding to continue the program despite expiration of authorizing legislation. Authority to Continue Domestic Food Programs Under Continuing Resolution, B-176994, 55 Comp. Gen. 289 (1976).

VII. CONCLUSION

A. Continuing Resolutions are appropriations that authorize agencies to obligate funds based on authorities in the previous appropriations act, and at levels specified for continued operations. Agencies have authority under most continuing resolutions to engage in programs, projects, or activities for which the agency had authority during the previous year's appropriation. However, no "new starts" are authorized. A new start is something the agency did not have budget authority to do under the last appropriations act.

B. Funding gaps are times during which no appropriation, continuing resolution, or other budget authority exists to cover new obligations. In such situations, agency operations are severely restricted. In some cases, civilian employees not in an exempted status must be furloughed (placed on leave without pay). Military operations can continue, but travel and other expenses are severely restricted.

C. In the case of both Continuing Resolutions and Funding Gaps, the Judge Advocate should look for recent guidance published by DOD or specific service comptroller offices. Properly advising commands on operations during continuing resolutions or funding gaps requires a detailed knowledge of applicable statutes and guidance

APPENDIX A
THE CIVILETTI MEMO

(43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16)
APRIL 25, 1980

MY DEAR MR. PRESIDENT:

You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980 opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer of employee of the United States to:

> involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.[9] On it's face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.10 On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although though Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of

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[9] An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. See 15 Op. A.G 209. See also 25 U.S.C. § 99 and 31 U.S.C. § 668.

[10] Act of March 3, 1905, Ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, Ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, Ch. 896, §1211, 64 Stat. 765; Pub. L. 85-170, § 1401, 71 Stat. 440 (1957); Pub. L. 93-198, § 421, 87 Stat. 789 (1973); Pub. L. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. 93-618, § 175(a)(2), 88 Stat. 2011 (1975).

appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.[11]

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956.[12] On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.[13] However, the legislative history of these provisions does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations.[14] Neither are we aware that the Executive branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.[15] Various agencies of the Executive branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the administrative problems posed by the Antideficiency Act. During lapses in appropriations during

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[11] The prohibition against incurring obligations in excess of appropriations was enacted in 1870, amended slightly in 1905 and 1906, and reenacted in its modern version in 1950. The relevant legislative debates occur at Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-298, 1623-624 (1906); 96 Cong. Rec. 6725-731, 6835-837, 11369-370 (1950).

[12] In 1954 and 1956, Congress enacted temporary appropriations measures later than July 1, the start of fiscal years 1955 and 1957. Act of July 6, 1954, ch. 460, 68 Stat. 448; Act of July 3, 1956, ch. 516, 70 Stat. 496. In 1952, Congress enacted, two weeks late, supplemental appropriations for fiscal year 1953 without having previously enacted a temporary appropriations measure. Act of July 15, 1952, ch. 758, 66 Stat. 637.

[13] Act of July 15, 1952, ch. 758, §1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

[14] In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor. In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, э 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954). In 1956, Congress's temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

[15] Pub. L. 94-473, 90 Stat. 2065 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-482, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal year until such appropriations are enacted by Congress. Agencies have thus been advised to avoid hiring, grant-making, nonemergency travel, and other nonessential obligations.

When the General Accounting Office suffered a lapse in its own appropriations last October, the Director of General Services and Controller issued a memorandum, referred to in the Comptroller General's opinion,[16] indicating that GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations." Employees could continue to work, however, because of the Director's determination that it was not "the intent of Congress that GAO close down."

In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

First, as a matter of logic, any "rule of thumb" excepting employee pay obligations from the Antideficiency Act would have to rest on a conclusion, like that of the Comptroller General, that such obligations are unlawful, but also authorized. I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act.

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive branch to carry out Congress' unambiguous mandates. It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventually appropriations.[17] Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the Government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the apparent authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing legal authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

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[16] The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

[17] Pub. L. 94-473, § 108, 90 Stat. 2066 (1976); Pub. L. 95-130, § 108, 91 Stat. 1154 (1977); Pub. L. 95-482, § 108, 92 Stat. 1605 (1978); Pub. L. 96-86, § 117, 93 Stat. 662 (1979).

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) [remarks of Rep. Dawes].

Having interpreted the Antideficiency Act, I would like to outline briefly the legal ramifications of my interpretation. It follows first of all that, on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.[18]

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,
BENJAMIN R. CIVILETTI

[18] See 21 Op. A.G. 288.

APPENDIX B
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GOVERNMENT OPERATIONS IN THE EVENT OF A LAPSE IN APPROPRIATIONS

A government agency may employ personal services in advance of appropriations only when there is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some significant degree by the delay in the performance of the function in question.

August 16, 1995

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET

This memorandum responds to your request to the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations.[1]

The Constitution provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law." U.S. Const. art. I, § 9, cl. 7. The treasury is further protected through the Antideficiency Act, which among other things prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel except in emergencies, unless otherwise authorized by law. *See* 31 U.S.C. § 1341 *et seq*.[2]

In the early 1980s, Attorney General Civiletti issued two opinions with respect to the implications of the Antideficiency Act. *See Applicability of the Antideficiency Act Upon A Lapse in an Agency's Appropriations*, 4A Op. O.L.C. 16 (1980); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations* , 5 Op. O.L.C. 1 (1981) ("*1981 Opinion*"). The *1981 Opinion* has frequently been cited in the ensuing years. Since that opinion was written, the Antideficiency Act has been amended in one respect, and we analyze the effect of that amendment below. The amendment amplified on the emergencies exception for employing federal personnel by providing that "[a]s used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property." 31 U.S.C. § 1342.

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With respect to the effects of this amendment, we continue to adhere to the view expressed to General Counsel Robert Damus of the Office of Management and Budget that "the 1990 amendment to 31 U.S.C. § 1342 does not detract from the Attorney General's earlier analyses; if anything, the amendment clarified that the Antideficiency Act's exception for emergencies is narrow and must be applied only when a threat to life or property is imminent." Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Robert G. Damus, General Counsel, Office of Management and Budget (Oct. 19, 1993) ("*1993 Letter*"). In order to ensure that the clarification of the 1990 amendment is not overlooked, we believe that one aspect of the *1981 Opinion's* description of emergency governmental functions should be modified. Otherwise, the *1981 Opinion* continues to be a sound analysis of the legal authorities respecting government operations when Congress has failed to enact regular appropriations bills or a continuing resolution to cover a hiatus between regular appropriations.

I.

Since the issuance of the extensive *1981 Opinion*, the prospect of a general appropriations lapse has arisen frequently. In 1981, 1982, 1983, 1984, 1986, 1987, and 1990, lapses of funding ranging from several hours to three days actually did occur. While several of these occurred entirely over weekends, others required the implementation of plans to bring government operations into compliance with the requirements of the Antideficiency Act. These prior responses to the threat of or actual lapsed appropriations have been so commonly referred to as cases of "shutting down the government" that this has become a nearly universal shorthand to describe the effect of a lapse in appropriations. It will assist in understanding the true extent of the Act's requirements to realize that this is an entirely inaccurate description. Were the federal Government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation's airports would be closed and commercial air travel and transport would be brought to a standstill. Were the federal government to shut down, the FBI, DEA, ATF and Customs Service would stop interdicting and investigating criminal activities of great varieties, including drug smuggling, fraud, machine gun and explosives sales, and kidnapping. The country's borders would not be patrolled by the border patrol, with an extraordinary increase in illegal immigration as a predictable result. In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate. Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed. Were the federal Government to shut down, medicare payments for vital operations and medical services would cease. VA hospitals would abandon patients and close their doors. These are simply a few of the significant impacts of a federal government shut down. Cumulatively, these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and

they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss.

The Antideficiency Act imposes substantial restrictions on obligating funds or contracting for services in advance of appropriations or beyond appropriated levels, restrictions that will cause significant hardship should any lapse in appropriations extend much beyond those we have historically experienced. To be sure, even the short lapses that have occurred have caused serious dislocations in the provision of services, generated wasteful expenditures as agencies have closed down certain operations and then restarted them, and disrupted federal activities. Nevertheless, for any short-term lapse in appropriations, at least, the federal Government will not be truly "shut down" to the degree just described, simply because Congress has itself provided that some activities of Government should continue even when annual appropriations have not yet been enacted to fund current activities.

The most significant provisions of the Antideficiency Act codify three basic restrictions on the operation of government activities. First, the Act implements the constitutional requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Second, when no current appropriations measure has been passed to fund contracts or obligations, it restricts entering into contracts or incurring obligations (except as to situations authorized by other law). Third, it restricts employing the services of employees to perform government functions beyond authorized levels to emergency situations, where the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property.[3] The *1981 Opinion* elaborated on the various exceptions in the Antideficiency Act that permit some continuing government functions, and we will only summarize the major categories here:

- <u>Multi-year appropriations and indefinite appropriations</u>.

Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation. Social security is a prominent example of a program that operates under an indefinite appropriation. In such cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.

- <u>Express authorizations: contracting authority and borrowing authority</u>.

Congress provides express authority for agencies to enter into contracts or to borrow funds to accomplish some of their functions. An example is the "food and forage" authority

given to the Department of Defense, which authorizes contracting for necessary clothing, subsistence, forage, supplies, etc. without an appropriation. In such cases, obligating funds or contracting can continue, because the Antideficiency Act does not bar such activities when they are authorized by law. As the *1981 Opinion* emphasized, the simple authorization or even direction to perform a certain action that standardly can be found in agencies' enabling or organic legislation is insufficient to support a finding of express authorization or necessary implication (the exception addressed next in the text), standing alone. There must be some additional indication of an evident intention to have the activity continue despite an appropriations lapse.

- Necessary implications: authority to obligate that is necessarily implied by statute.

The *1981 Opinion* concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well. Examples include the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations. Further examples include contracting for the materials essential to the performance of the emergency services that continue under that separate exception. In addition, in a 1980 opinion, Attorney General Civiletti opined that agencies are by necessary implication authorized " to incur those minimal obligations necessary to closing [the] agency." The *1981 opinion* reiterated this conclusion and consistent practice since that time has provided for the orderly termination of those functions that may not continue during a period of lapsed appropriations.

- Obligations necessary to the discharge of the President's constitutional duties and powers.

Efforts should be made to interpret a general statute such as the Antideficiency Act to avoid the significant constitutional questions that would arise were the Act read to critically impair the exercise of constitutional functions assigned to the Executive. In this regard, the *1981Opinion* noted that when dealing with functions instrumental in the discharge of the President's constitutional powers, the "President's obligational authority . . . will be further buttressed in connection with any initiative that is consistent with statutes — and thus with the exercise of legislative power in an area of concurrent authority — that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates." *1981 Opinion*, at 6-7.

- Personal or voluntary services "for emergencies involving the safety of human life or the protection of property."

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The Antideficiency Act prohibits contracting or obligating in advance of appropriations generally, except for circumstances just summarized above. The Act also contains a separate exception applicable to personal or voluntary services that deal with emergencies. 31 U.S.C.§ 1342. This section was amended in 1990. We will analyze the effects of that amendment inPart II of this memorandum.

Finally, one issue not explicitly addressed by the *1981 Opinion* seems to us to have been settled by consistent administrative practice. That issue concerns whether the emergency status of government functions should be determined on the assumption that the private economy will continue operating during a lapse in appropriations, or whether the proper assumption is that the private economy will be interrupted. As an example of the difference this might make, consider that air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded. The correct assumption in the context of an anticipated long period of lapsed appropriations, where it might be possible to phase in some alternatives to the government activity in question, and thus over time to suspend the government function without thereby imminently threatening human life or property, is not entirely clear. However, with respect to any short lapse in appropriations, the practice of past administrations has been to assume the continued operation of the private economy, and so air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of section 1342.

II.

The text of 31 U.S.C. § 1342, as amended in 1990, now reads:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1342. Because of the section 1342 bar on employing personal services, officers and employees may employ personal services in excess of other authorizations by law only in emergency situations.[5] This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

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The central interpretive task under section 1342 is and has always been to construe the scope of the emergencies exception of that section. When the *1981 Opinion* undertook this task, the predecessor to section 1342 did not contain the final sentence of the current statute, which was added in 1990. Examining that earlier version, the Attorney General concluded that the general language of the provision and the sparse legislative history of it did not reveal its precise meaning. However, the opinion was able to glean some additional understanding of the statute from that legislative history.

The Attorney General noted that as originally enacted in 1884, the provision forbade unauthorized employment "except in cases of sudden emergency involving the loss of human life or the destruction of property." 23 Stat. 17. He then observed that in 1950, Congress enacted the modern version of the Antideficiency Act and accepted revised language for section 1342 that originally had been suggested by the Director of the Bureau of the Budget and the Comptroller General in 1947. In analyzing these different formulations, the Attorney General stated that

> [w]ithout elaboration, these officials proposed that 'cases of sudden emergency' be amended to 'cases of emergency,' 'loss of human life' to 'safety of human life,' and 'destruction of property' to 'protection of property. These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern section [1341]. Act of September 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment.

5 Op. O.L.C. at 9.

The *1981 Opinion* also sought guidance from the consistent administrative practice of the Office of Management and Budget in applying identical "emergencies" language found in another provision. That other provision prohibits OMB from apportioning appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in cases of "emergencies involving the safety of human life, [or] the protection of property" — phraseology identical to the pre-1990 version of section 1342.[6] Combining these two sources with the statutory text, the Attorney General articulated two rules for identifying functions for which government officers may enter into obligations to pay for personal services in excess of legal authority other than section 1342 itself:

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

5 Op. O.L.C. at 8.

While we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment, *see1993 Letter*, we are aware of the possibility the second of these two rules might be read more expansively than was intended, and thus might be applied to functions that are not emergencies within the meaning of the statute. To forestall possible misinterpretations, the second criteria's use of the phrase "in some degree" should be replaced with the phrase, "in some significant degree."

The reasons for this change rest on our understanding of the function of the 1990 amendment, which comes from considering the content of the amendment, its structure, and its sparse legislative history. That history consists of a solitary reference in the conference report to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388:

The conference report also makes conforming changes to title 31 of the United States Code to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.

H.R. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990). While hardly articulating the intended scope of the exception, the conference report does tend to support what would otherwise be the most natural reading of the amendment standing alone: because it is phrased as identifying the functions that should be excluded from the scope of the term "emergency," it seems intended to limit the coverage of that term, narrowing the circumstances that might otherwise be taken to constitute an emergency within the meaning of the statute.

Beyond this, however, we do not believe that the amendment adds any significant new substantive meaning to the pre-existing portion of section 1342, simply because the most prominent feature of the addition — its emphasis on there being a threat that is imminent, or "ready to take place, near at hand," *see* Webster's Third New International Dictionary 1130 (1986) — is an idea that is already present in the term "emergency" itself, which means "an unforeseen combination of circumstances or the resulting state that calls for immediate action" to respond to the occurrence or situation. *Id*. at 741. [7] The addition of the concept of "imminent" to the pre-existing concept of "emergency" is thus largely redundant. This redundancy does, however, serve to emphasize and reinforce the requirement that there be a

threat to human life or property of such a nature that immediate action is a necessary response to the situation. The structure of the amendment offers further support for this approach. Congress did not alter the operative language of the statute; instead, Congress chose to enact an interpretive provision that simply prohibits overly expansive interpretations of the "emergency" exception.

Under the formulation of the *1981 Opinion*, government functions satisfy section 1342 if, inter alia, the safety of human life or the protection of property would be "compromised, in some degree." It is conceivable that some would interpret this phrase to be satisfied even if the threat were de minimis, in the sense that the increased risk to life or property were insignificant, so long as it were possible to say that safety of life or protection of property bore a reasonable likelihood of being compromised at all. This would be too expansive an application of the emergency provision. The brief delay of routine maintenance on government vehicles ought not to constitute an "emergency," for example, and yet it is quite possible to conclude that the failure to maintain vehicles properly may "compromise, to some degree" the safety of the human life of the occupants or the protection of the vehicles, which are government property. We believe that the revised articulation clarifies that the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to the near at hand and demanding of immediate response.

WALTER DELLINGER
Assistant Attorney
General Office of Legal
Counsel

1. We do not in this memorandum address the different set of issues that arise when the limit on the public debt has been reached and Congress has failed to raise the debt ceiling.

2. For the purposes of this inquiry, there are two relevant provisions of the Antideficiency Act. The first provides that "[a]n officer or employee of the United States Government or the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). The second provides that "[a]n officer or employee of the United States Government . . . may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." 31 U.S.C. § 1342.

3. These restrictions are enforced by criminal penalties. An officer or employee of the United States who knowingly and willfully violates the restrictions shall be fined not more than $5,000, imprisoned for not more than 2 years, or both. 31 U.S.C. § 1350.

4. The Attorneys General and this office have declined to catalog what actions might be undertaken this heading. In 1981, for example, Attorney General Civiletti quoted Attorney General (later Justice) Frank Murphy. "These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action." 5 Op. O.L.C. at 7 n.9 (quoting 39 Op. Att'y Gen. 343, 347-48 (1939)). This power should be called upon cautiously, as the courts have received such Executive Branch assertions skeptically. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *George v. Ishimaru*, 849 F. Supp. 68 (D.D.C.), *vacated as moot*, No. 94-5111, 1994 WL 517746 (D.C. Cir., Aug. 25, 1994). *But see Haig v. Agee*. 453 U.S. 280 (1981); *In re Neagle*, 135 U.S. 1 (1890).

5. The *1981Opinion* concluded that:

[d]espite the use of the term 'voluntary service,' the evident concern underlying this provision is not government agencies' acceptance of the benefit of services rendered without compensation. Rather, the original version of Section [1342] was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1994, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non- employees, and claims for additional compensation asserted by government employees performing extra services after hours. This is, under [section 1342), government officers and employees may not involve government in contract for *employment*, i.e., for compensated labor, except in emergency situations. 30 Op. Att'y Gen. 129, 131 (1913).

6. 31 U.S.C. § 1515 (recodified from § 665(e) at the time of the Civiletti opinion). Analyzing past administrative practice under this statute, Attorney General Civiletti found that:

Directors of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis

> include [FBI] criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided [the interpretation] of Section 665(e). Most important, under Section 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).
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> 5 Op. O.L.C. at 9-10.

7. *See also* Random House Dictionary of the English Language Unabridged 636 (2d ed. 1987) ("emergency" means "a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action"); Webster's II New Riverside University Dictionary 427 (1988) ("an unexpected, serious occurrence or situation urgently requiring prompt action").

APPENDIX C
OMB CONTINUING RESOLUTION BULLETIN 12--02

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 28, 2012

OMB BULLETIN NO. 12-02

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Apportionment of the Continuing Resolution(s) for Fiscal Year 2013

1. Purpose and Background. H.J. Res. 117 will provide continuing appropriations for the period October 1, 2012 through March 27, 2013. Section 110 of H.J. 117 requires that the joint resolution be implemented so that only the most limited funding actions shall be taken in order to provide for continuation of projects and activities, and section 109 requires that programs restrict funding actions so as not to impinge on the final funding prerogatives of the Congress. I am automatically apportioning amounts provided by sections 101(a) and 101(b) of this continuing resolution (CR) as specified in section 3. The amounts provided by the 0.612 percent across-the-board (ATB) increase in section 101(c) will be subject to the procedures for apportioning that funding as outlined in section 4. This Bulletin supplements instructions for apportionment of CRs in OMB Circular No. A-11, sections 120 and 123.

The Administration continues to urge Congress to pass a balanced package of deficit reduction that would replace the potential sequestration on January 2, 2013, under section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended (BBEDCA). If necessary, the Bulletin will be amended to address that sequestration. Unless and until the Bulletin is amended, however, agencies should continue normal spending and operations, as instructed in the July 31 memo from OMB to executive departments and agencies which addressed operational and other issues raised by the potential January 2 sequestration. Unless the Bulletin is subsequently amended, it should be assumed to apply to both this CR and any extensions of this CR.

NOTE: Although the CR Bulletin does not automatically or otherwise apportion budgetary resources for accounts that are not determined by current appropriation action of the Congress (such as mandatory funding and balances of prior year budget authority), those apportionments will also be amended if necessary, to reapportion sequestrable resources to account for the potential January 2 sequestration. The guidance above to spend and operate normally until further notice also applies to these other resources.

2. Amounts Provided. Section 101(a) of H.J. Res. 117 provides such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year (FY) 2012 and under the authority and conditions provided in such stated Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in H.J. Res. 117, that were conducted in FY 2012, and for

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Appropriations Act, 2012 (Public Law 112-55), except for appropriations in that Act designated by the Congress as being for disaster relief, the Consolidated Appropriations Act, 2012 (Public Law 112-74), and the Disaster Relief Appropriations Act, 2012 (Public Law 112-77), except for appropriations in that Act under the heading "Corps of Engineers-Civil".

Section 101(b) provides that notwithstanding section 101 whenever an amount designated for Overseas Contingency Operations (OCO)/Global War on Terrorism (GWOT) pursuant to section 251(b)(2)(A) of BBEDCA in either the Department of Defense Appropriations Act, 2012 (division A of Public Law 112-74) or in the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2012 (division H of Public Law 112-74) that would be made available for a project or activity is different from the amount requested in the President's FY 2013 Budget request, the project or activity shall be continued at a rate for operations that would be permitted by, and such designation shall be applied to, the amount in the President's FY 2013 Budget request. For purposes of calculating the rate for operations, the reference to "amount" in section 101(b) is assumed to mean the budget account total.

Section 101(c) increases the rate for operations provided by subsection (a) by 0.612 percent. Such increase does not apply to OCO/GWOT amounts or to amounts incorporated in the joint resolution by reference to the Disaster Relief Appropriations Act, 2012 (Public Law 112-77).

3. Automatic Apportionments. Attachment A contains more detailed instructions on calculating the annualized amount provided by the CR. In order to calculate the amount automatically apportioned through the period ending March 27, 2013 (and any extensions thereof) multiply the annualized amount provided by the CR in sections 101(a) and 101(b) by the lower of:

- the percentage of the year (pro-rata) covered by the CR (e.g., for H.J. Res. 117 use 48.77 percent), or
- the historical seasonal rate of obligations for the period of the year covered by the CR.

Unless determined otherwise by your RMO, all automatically apportioned CR funds are apportioned as Category B (lump sum), regardless of quarterly restrictions (i.e., amounts on Category A) imposed in last year's apportionments. Limitations on programs (i.e., other Category Bs) and footnotes included in last year's apportionments remain in effect under the CR.

Apportionment of the 0.612 percent ATB increase in section 101(c) is discussed in section 4.

4. Amounts Provided by Section 101(c) Excluded from Automatic Apportionment. This automatic apportionment does not apply to amounts provided by the 0.612 percent ATB increase in section 101(c) of H.J. Res. 117. The agency may submit a written apportionment to OMB to request these funds during the period of the CR.

5. Accounts with Zero Funding Excluded from Automatic Apportionment. As has been the case in recent CR Bulletins, including FY 2012, if either the House or Senate has reported or passed a bill that provides no funding for an account at the time the CR is enacted or extended, this automatic apportionment does not apply to that account. (Reported bills are those that have been filed by the full House or Senate Appropriations Committee for floor action.) The agency may

filed by the full House or Senate Appropriations Committee for floor action.) The agency may submit a written apportionment to OMB to request funds for the account during the period of the CR, if needed.

6. Programs under Section 111. Funds for appropriated entitlements and other mandatory payments, and activities under the Food and Nutrition Act of 2008, are automatically apportioned amounts as needed to carry out programs at a rate to maintain program levels under current law, i.e., at the FY 2013 level. However, this automatic apportionment does not apply to programs with more complex funding structures. Agencies should contact their RMO representatives to determine if their account is automatically apportioned or if a written apportionment is required.

With regard to the associated administrative expenses for those programs, section 111 does not apply. The associated administrative expenses are automatically apportioned at the pro-rata level based on FY 2012 annualized levels in section 101(a).

As noted in section 1, this automatic apportionment will be amended, if necessary, to reapportion sequestrable resources to account for the sequestration order that the President may be required to issue on January 2, 2013, under section 251A of BBEDCA. Until such time as the Bulletin is amended, agencies should continue normal spending and operations, as instructed in the July 31 memo from OMB to executive departments and agencies which addressed operational and other issues raised by the potential January 2 sequestration.

7. Credit Limitations. If there is an enacted credit limitation (i.e., a limitation on loan principal or commitment level) in FY 2012, then the automatic apportionment is the pro-rata share of the credit limitation or the budget authority (i.e., for subsidy cost), whichever is less. To calculate amounts available, see exhibit 123B of OMB Circular No. A-11.

8. Written Apportionments for Amounts Provided by Sections 101(a) and 101(b). If an agency seeks an amount for a program that is more than the amount automatically apportioned under sections 101(a) and 101(b), a written apportionment must be requested from OMB. OMB expects to grant only a very limited number of these written apportionment requests. Each of these requests must be accompanied by a written justification that includes the legal basis for the exception apportionment. Similarly, an RMO or an agency may determine that an amount for a program should be less than the amount automatically apportioned by sections 101(a) and 101(b) in order to ensure that an agency does not impinge on the final funding prerogatives of the Congress. In these cases, a written apportionment will also be required.

Agencies do not need to request a new written apportionment for each extension of the CR (unless otherwise required by your RMO). Instead, in the case of accounts that receive a written apportionment at any time during the CR period, the automatic apportionment will apply to such accounts under any subsequent extensions of the CR, provided that the total amount apportioned during the CR period does not exceed the total annualized level of the CR. However, any footnotes on the written apportionment continue to apply to the accounts, when subsequently operating under the automatic apportionment.

APPENDIX C
OMB CONTINUING RESOLUTION BULLETIN 12--02

The written apportionments described in this section are not intended to address the written apportionment requirements for amounts provided by section 101(c) or accounts with zero funding. Those requirements are described in sections 4 and 5 above, respectively.

Jeffrey D. Zients
Deputy Director for Management

Attachment(s)

Attachment A: Continuing Resolution Frequently Asked Questions
Attachment B: Non-CHIMP Cancellations Recurring in a 2013 Continuing Resolution
Attachment C: Changes in Mandatory Programs Recurring in a 2013 Continuing Resolution

APPENDIX D
DOD FUNDING GAP GUIDANCE (2011)

DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

APR 07 2011

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
COMMANDERS OF THE COMBATANT COMMANDS
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Guidance for Continuation of Operations in the Absence of Available Appropriations

The current Continuing Resolution providing FY 2011 appropriations for the Department of Defense (DoD) expires at midnight on April 8, 2011. The Secretary and I still hope that we receive continued appropriations beyond this date. However, we must plan for possible expiration of the Department's appropriations.

The attachment to this memorandum provides instructions for continuation of essential operations in the absence of appropriated funds. The Department will, of course, continue to prosecute the war in Afghanistan, including preparation of forces for deployment into that conflict. The DoD will also continue completing the military commitment in Iraq as well as Libya and Japan operations. The Department must, as well, continue many other operations necessary for the safety of human life and protection of property including operations essential for the security of our nation. These activities will be "excepted" from cessation; all other activities would need to be shut down in an orderly and deliberate fashion, including—with few exceptions—the cessation of temporary duty travel.

All military personnel will continue in a normal duty status regardless of their affiliation with excepted or non-excepted activities. Military personnel will serve without pay until such time as Congress makes appropriated funds available to compensate them for this period of service. Civilian personnel who are engaged in excepted activities will also continue in normal duty status and also will not be paid until Congress makes appropriated funds available. Civilian employees not engaged in excepted activities will be furloughed, i.e., placed in a non-work, non-pay status.

The responsibility for determining which functions would be excepted from shut down resides with the Military Department Secretaries and Heads of DoD Components, who may

OSD 04092-11

delegate this authority as they deem appropriate. The attached guidance should be used to assist in making this excepted determination. The guidance does not identify every excepted activity, but rather provides overarching direction and general principles for making these determinations. It should be applied prudently in the context of a Department at war, with decisions guaranteeing our continued robust support for those engaged in that war, and with assurance that the lives and property of our nation's citizens will be protected.

This memorandum contains guidance to begin detailed planning; no specific employee furlough notifications are yet authorized. Nor should any shutdown actions be taken until you receive further notice.

Within the Office of the Secretary of Defense, the Under Secretary of Defense (Comptroller) will take the lead in preparing for operations in the absence of appropriations, assisted by other offices as necessary.

To repeat, the Secretary and I hope that DoD will receive continued appropriations. This guidance is intended to support prudent planning.

Attachment:
As stated

cc:
Director for National Intelligence

APPENDIX D
DOD FUNDING GAP GUIDANCE (2011)

GENERAL INFORMATION

This document provides guidance for identifying those missions and functions of the Department of Defense that may continue to be carried out in the absence of available appropriations. The information provided in this document is not exhaustive, but rather illustrative, and is intended primarily to assist in the identification of those activities that may be continued notwithstanding the absence of available funding authority in the applicable appropriations (excepted activities). Activities that are determined not to be excepted, and which cannot be performed by utilizing military personnel in place of furloughed civilian personnel, will be suspended when appropriated funds expire. The Secretary of Defense may, at any time, determine that additional activities shall be treated as excepted.

Military Personnel

Military personnel are not subject to furlough. Accordingly, military personnel on active duty, including reserve component personnel on Federal active duty, will continue to report for duty and carry out assigned duties. In addition to carrying out excepted activities, military personnel on active duty may be assigned to carry out non- excepted activities, in place of furloughed civilian personnel, to the extent that the non- excepted activity is capable of performance without incurring new obligations.

Reserve component personnel performing Active Guard Reserve (AGR) duty will continue to report for duty to carry out AGR authorized duties. Reserve component personnel will not perform inactive duty training resulting in the obligation of funds, except where such training directly supports an excepted activity, and may not be ordered to active duty, except in support of those military operations and activities necessary for national security listed in Attachment 2, including fulfilling associated pre-deployment requirements. Orders for members of the National Guard currently performing duties under 32 U.S.C. 502(f) will be terminated unless such duties are in support of excepted activities approved by the Secretary of Defense.

Movement of military personnel will be limited as follows:

1) Moves TO an excepted activity will continue.

2) Moves FROM an excepted activity will continue only to the extent the commander of the excepted activity determines it essential to mission (e.g., overburden of local infrastructure), or required to enhance support of excepted activities.

3) Accession and training moves associated with recruitment and initial entry training will continue, along with subsequent movement to first station when required by "1" above.

4) Movement to comply with separation instructions will continue.

Civilian Personnel

Civilian personnel, including military technicians, who are not necessary to carry out or support excepted activities are to be furloughed. Only the minimum number of civilian employees necessary to carry out excepted activities will be exempt from furlough. Positions that provide direct support to excepted positions may also be deemed except if they are critical to performing the excepted activity. Determinations regarding the status of civilian positions will be made on a position by position basis, using the guidance in this document. Determinations shall be made for all positions, including those in the Senior Executive Service or equivalent, as well as those located overseas.

Following the expiration of appropriations, a minimum number of civilian employees may be retained as needed to execute an orderly suspension of non- excepted activities within a reasonable timeframe.

Senate-confirmed officials appointed by the President are not subject to furlough. Their immediate office personnel necessary to support excepted activities may be exempt from furlough at the discretion of the appointee.

Foreign national employees paid with host country funds are exempt from furlough. Additionally, foreign national employees governed by country-to-country agreements that prohibit furloughs are exempt from furlough.

Civilian personnel whose salaries are paid with expired appropriations and later reimbursed from a non-DoD source (e.g., the Foreign Military Sales Trust Fund) are not exempt from furlough solely on that basis. Personnel whose salaries are paid from a DoD appropriation or fund that has sufficient funding authority (e.g., multiyear appropriations with available balances from prior years) will not be subject to furlough. Heads of activities may, on their authority, require the return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to life or property.

Temporary Duty (TDY) Travel

In the absence of appropriations, TDY travel scheduled to begin after the shutdown occurs should be cancelled, except as noted below. Any TDY travel that began prior to the shutdown should, except as noted below, be terminated as quickly as possible, but in an orderly fashion.

All TDY travel in direct support of the war in Afghanistan, the transition in Iraq, and operations in Libya and Japan, and other travel directly related to safety of life and protection of property, as well as foreign relations (e.g., negotiating international agreements), may be undertaken or continued only if approved, in writing, by the appropriate approval authority listed below and only in the most limited circumstances. The approval authority (which may be delegated to appropriate senior officials) for any such TDY travel is the:

- Secretary of a Military Department for personnel assigned to that Military Department
- Head of the agency for personnel assigned to that defense agency

- Chairman of the Joint Chiefs of Staff for personnel assigned to the Joint Staff
- Combatant Commander for personnel assigned to that combatant command
- Principal Staff Assistant (PSA) for personnel assigned to that office

Notwithstanding the approval authority stated above, all TDY travel by Presidential Appointed – Senate Confirmed (PAS) personnel must be approved by the Deputy Secretary of Defense.

Approving officials will implement a mechanism within their organizations for approving such travel.

Contracts

Contractors performing under a contract that was fully obligated upon contract execution (or renewal) prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities or not. However, new contracts (including contract renewals or extensions, issuance of task orders, exercise of options) may not be executed unless the contractor is supporting an excepted activity. No funds will be available to pay such new contractors until Congress appropriates additional funds.

The expiration of an appropriation does not require the termination of contracts (or issuance of stop work orders) funded by that appropriation unless a new obligation of funds is required under the contract and the contract is not required to support an excepted activity. In cases where new obligation is required and the contract is not required to support an excepted activity, the issuance of a stop work order or the termination of the contract will be required.

The Department may continue to enter into new contracts, or place task orders under existing contracts, to obtain supplies and services necessary to carry out or support excepted activities even though there are no available appropriations. It is emphasized that this authority is to be exercised only when determined to be necessary - where delay in contracting would endanger national security or create a risk to human life or property.

Additionally, when authorized by the Secretary of Defense, contracts for covered items may be entered into under the authority of the Feed and Forage Act.

APPENDIX D
DOD FUNDING GAP GUIDANCE (2011)

PROTECTION OF LIFE AND PROPERTY
NATIONAL SECURITY

Excepted	• Military operations and activities authorized by deployment or execute orders, or otherwise approved by the Secretary of Defense, and determined to be necessary for national security, including administrative, logistical, medical, and other activities in direct support of such operations and activities; training and exercises required to prepare for and carry out such operations. • Activities of forces assigned or apportioned to combatant commands to execute planned or contingent operations necessary for national security, including necessary administrative, logistical, medical, and other activities in direct support of such operations; training and exercises required to prepare for and carry out such operations. • Activities necessary to continue recruiting for entry into the Armed Forces during contingency operations (as such term is defined in 10 U.S.C 101(13)), including activities necessary to operate Military Entrance Processing Stations (MEPS) and to conduct basic and other training necessary to qualify such recruited personnel to perform their assigned duties. • Command, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security or to support other excepted activities, including telecommunications centers and phone switches on installations, and secure conference capability at military command centers. • Activities required to operate, maintain, assess, and disseminate the collection of intelligence data necessary to support tactical and strategic indications and warning systems, and military operational requirements. • Activities necessary to carry out or enforce treaties and other international obligations.
Footnotes	Activities involving technical intelligence information collection, analysis and dissemination functions not in direct support of excepted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation, intelligence policy security promulgation and development, systems development and standards, policy and architecture) are not excepted activities.

APPENDIX D
DOD FUNDING GAP GUIDANCE (2011)

PROTECTION OF LIFE AND PROPERTY
NATIONAL SECURITY

Excepted	• Military operations and activities authorized by deployment or execute orders, or otherwise approved by the Secretary of Defense, and determined to be necessary for national security, including administrative, logistical, medical, and other activities in direct support of such operations and activities; training and exercises required to prepare for and carry out such operations. • Activities of forces assigned or apportioned to combatant commands to execute planned or contingent operations necessary for national security, including necessary administrative, logistical, medical, and other activities in direct support of such operations; training and exercises required to prepare for and carry out such operations. • Activities necessary to continue recruiting for entry into the Armed Forces during contingency operations (as such term is defined in 10 U.S.C 101(13)), including activities necessary to operate Military Entrance Processing Stations (MEPS) and to conduct basic and other training necessary to qualify such recruited personnel to perform their assigned duties. • Command, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security or to support other excepted activities, including telecommunications centers and phone switches on installations, and secure conference capability at military command centers. • Activities required to operate, maintain, assess, and disseminate the collection of intelligence data necessary to support tactical and strategic indications and warning systems, and military operational requirements. • Activities necessary to carry out or enforce treaties and other international obligations.
Footnotes	Activities involving technical intelligence information collection, analysis and dissemination functions not in direct support of excepted activities (e.g., general political and economic intelligence unrelated to ongoing or contingency military operations, support of acquisition programs, support to operational test and evaluation, intelligence policy security promulgation and development, systems development and standards, policy and architecture) are not excepted activities.

LEGAL ACTIVITIES

Excepted	• Litigation activities associated with imminent or ongoing legal action, in forums inside or outside of DoD, to the extent required by law or necessary to support excepted activities. • Legal support for excepted activities, including legal assistance for military and civilian employees deployed, or preparing to deploy, in support of military or stability operations. • Legal activities needed to address external (non-judicial) deadlines imposed by non-DoD enforcement agencies, to the extent necessary to continue excepted activities.

AUDIT AND INVESTIGATION COMMUNITY

Excepted	• Criminal investigations related to the protection of life or property, including national security, as determined by the head of the investigating unit, and investigations involving undercover activities. • Counterterrorism and counterintelligence investigations.

MORALE WELFARE & RECREATION/NONAPPROPRIATED FUNDS

Excepted	• Morale, Welfare, and Recreation (MWR) and Non-Appropriated Fund (NAF) activities necessary to support excepted activities, e.g., operation of mess halls; physical training; child care activities required for readiness.
Footnotes	• Activities funded entirely through NAF sources will not be affected. • Military personnel may be assigned to carry out or support non-excepted MWR activities, where deemed necessary or appropriate, to replace furloughed employees.

FINANCIAL MANAGEMENT

Excepted	• Activities necessary to control funds, record new obligations incurred in the performance of excepted activities, and manage working capital funds. • Activities necessary to effect upward adjustment of obligations and the reallocation of prior-year unobligated funds in support of excepted activities.
Footnote	• Preparation of financial reports, research and correction of problem disbursements, adjustments to prior-year funds (excepted as noted above) including those related to programs and contracts that do not support excepted activities, and approval of the use of currently available funds to pay obligations against closed accounts are not excepted activities.

APPENDIX D
DOD FUNDING GAP GUIDANCE (2011)

WORKING CAPITAL FUND/REVOLVING FUNDS

Excepted	• **Defense Working Capital Fund (DWCF)/Revolving Fund (RF) activities with positive cash balances may continue to operate until cash reserves are exhausted.** • **When cash reserves are exhausted, DWCF/RF activities must continue operations in direct support of excepted activities.** • **DWCF/RF activities may continue to accept orders financed with appropriations enacted prior to FY 2011 or unfunded orders from excepted organizations. Unfunded orders will be posted to accounts receivable and not actually billed until appropriations are enacted.**
Footnotes	• **DWCFs/RFs are not directly impacted by a lapse in annual appropriations.** • **Management actions should be taken to sustain operations and minimize operational impact resulting from late approval of annual appropriations.** • **Management actions which could be taken to conserve cash reserves include: delay of training, minimal travel, reduction in supplies, and other actions consistent with management objectives.** • **Inter-DWCF/RF billings will continue unless a suspension request is approved by the Office of the Under Secretary of Defense (Comptroller),** • **Approval may be requested for advance billing of funded customer orders.** • **Plan guidance for excepted activities is applicable to DWCF/RF internal operations.**

APPENDIX E
CONTINUING RESOLUTIONS 1998-2010

Table 2. Number and Duration of Continuing Resolutions: FY1998-FY2010

Fiscal Year	Number of Continuing Resolutions	Duration in Days[a]	Average Duration for Each Act	Final Expiration Date
1998	6	57	9.5	11-26-1997
1999	6	21	3.5	10-21-1998
2000	7	63	9.0	12-02-1999
2001	21	82	3.9	12-21-2000
2002	8	102	12.8	01-10-2002
2003	8	143	17.9	02-20-2003
2004	5[b]	123	24.6	01-31-2004
2005	3	69	23.0	12-08-2004
2006	3	92	30.7	12-31-2005
2007	4	365	91.3	09-30-2007
2008	4	92	23.0	12-31-2007
2009	2	162	81.0	03-11-2009
2010	2	79	39.5	12-18-2009
Total	**79**	**1,450**	**—**	**—**
Annual Average	**6.1**	**111.5**	**18.4**	**—**

Source: Prepared by the Congressional Research Service.

a. Duration is measured, in the case of the initial continuing resolution for a fiscal year, from the first day of the year (October 1). For subsequent continuing resolutions for a fiscal year, duration is measured from the expiration date of the preceding continuing resolution.

b. The fifth continuing resolution for FY2004 did not change the expiration date of January 31, 2004, established in the preceding continuing resolution.

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Chapter 10:

Operational Funding

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CHAPTER 10

OPERATIONAL FUNDING

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CHAPTER 10

OPERATIONAL FUNDING

I. OBJECTIVES

A. Appreciate the roles and responsibilities of the Department of Defense (DoD) and the Department of State (DoS) in funding military foreign assistance.

B. Develop tools to analyze and compare the "purpose" of proposed military foreign assistance operations with the "purpose" of particular appropriations and authorizations.

C. Achieve general familiarity with past and current appropriations and authorizations for military foreign assistance operations.

II. INTRODUCTION AND ANALYTICAL FRAMEWORK

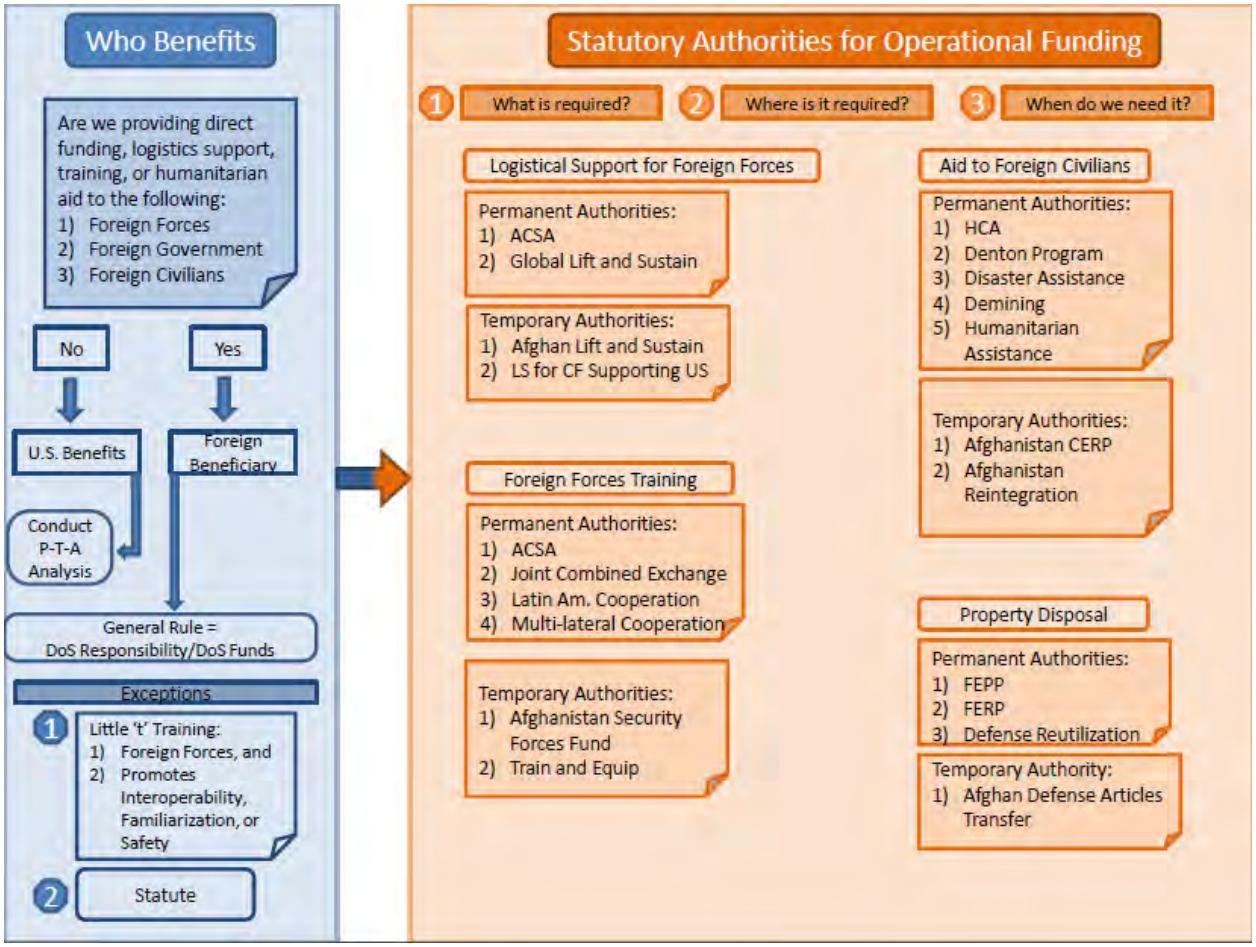
A. "Military Operation"

1. Joint Publication (JP) 1-02 defines a military operation as follows: a series of tactical actions with a common purpose or unifying theme; a military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission.

2. JP 3-0, *Joint Operations*, identifies the realm of military operations including, but not limited to, major operations, homeland defense, civil support, show of force, enforcement of sanctions, peace operations, counterinsurgency operations, combating terrorism, foreign humanitarian assistance, and routine/recurring military activities (*see* Figure V-2 of JP 3-0).

3. Joint Publication (JP) 1-02 defines combined, as in combined operations, as between two or more forces or agencies of two or more allies.

B. Framework for Analysis: Who Benefits?



1. Most fiscal issues concerning the funding of "operations" will follow the traditional Purpose-Time-Amount analysis. Operational Funding is an in-depth analysis of the "purpose" prong with special emphasis on contingency operations and funding foreign militaries, foreign governments, and other entities not traditionally funded by the military departments' Operation and Maintenance (O&M) funds.

2. Judge Advocates may find the tools located at Appendices A and B to be helpful when analyzing recommended projects and missions for their commanders in an operational environment. ***While both are intended to provide assistance to the practitioner, neither is a substitute for careful research based on unique facts for each situation***.

III. THE CONSTITUTIONAL AUTHORITY TO FUND UNITED STATES MLITARY OPERATIONS.

A. The President's Commander-in-Chief Powers

Under the U.S. Constitution, the President has the power to conduct foreign affairs, to exercise the Commander in Chief authority, to enter into treaties with other nations, and to receive foreign ambassadors to the United States.

1. U.S. Const. Art II, § 2, cl. 1: "The President shall be the Commander in Chief of the Army and Navy of the United States . . . . "

2. U.S. Const. Art II, § 2, cl. 2: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."

B. The Congressional Power of the Purse

Congress can indirectly affect the conduct of foreign affairs by restricting or expanding the appropriated funds available for foreign affairs activities conducted by the executive agencies, including the DoD.

1. *U.S. Const. Art I, § 9, cl. 7*: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ."

2. *U.S. Const. Art IV, § 3, cl. 2*: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . . "

3. *United States v. MacCollom*, 426 U.S. 317, 321 (1976). "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

C. Beyond the Constitutional Framework.

While the Constitution provides the underlying foundation for understanding congressional authority to issue appropriations, Congress further relies upon a robust legislative framework for regulating how those appropriations are expended. In the field of foreign assistance, fully understanding the fiscal legislative framework is critical to determining how to properly fund certain military operations.

IV. THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING

A. Fiscal Legislative Controls

For military commanders, there is NO deployment exception to the fiscal law framework! The same congressionally imposed fiscal limitations regulating the obligation and expenditure of funds for U.S. military forces still applies to funding training and operating with foreign military forces (See Deskbook chapters 2-4). However, Congress requires military commanders to only expend funding for foreign assistance when there is express authority to do so – even during contingency operations.

1. 31 U.S.C. § 1301(a): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." However, appropriation and/or authorization acts may specifically authorize the secretary to transfer amounts appropriated to other programs, generally with intense congressional oversight.

2. Necessary Expense Doctrine (Three-Part Purpose Test).[1]

   a. "[T]he expenditure must be reasonably related to the purposes for which the appropriation was made." (commonly referred to as "necessary and incident").

   b. "[T]he expenditure must not be prohibited by law."

   c. "[T]he expenditure must not fall specifically within the scope of some other category of appropriations." (note that this applies even where a more appropriate funding source is exhausted and unavailable).

B. Appropriations vs. Authorizations

An appropriation is the statutory authority to incur obligations and make payments out of the U.S. Treasury for specified purposes. The appropriation draws the "pot of money" from the U.S. Treasury with a basic purpose attached to

[1] *See The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984). In response to a request for an opinion by Congressman Bill Alexander, the General Accountability Office (GAO) Comptroller General reviewed the use of DoD O&M funds to fully fund the foreign assistance activities of DoD during combined joint military exercises with Honduras.

it, while an authorization may provide additional purposes for which that "pot of money" may be used.

1. Congress provides an annual National Defense Authorization Act (NDAA) as a vehicle to provide additional authorizations for the funds that are appropriated in the yearly DoD Appropriations Act (DoDAA). Many of these additional authorizations exceed the basic purpose of the appropriation to which they were linked.[2]

2. Traditionally, Congress appropriates funds and authorizes additional purposes for those funds in three annual public laws:

   a. National Defense Authorization Act (NDAA): provides the maximum amounts that may be appropriated to the DoD and additional purposes for which the funds drawn by the appropriations act may be used.

   b. Department of Defense Appropriations Act (DoDAA): Appropriates funds for annual DoD military activities. These activities are often referred to as "baseline operations."

   c. Military Construction Appropriation Act (MILCONAA): Appropriates Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD.

3. The current DoD authorization and appropriation acts are as follows (as of February 2015):

   a. 2015 Consolidated Appropriations Act (CAA) [Division C – DoDAA]: Provides an appropriation which permits individuals with requisite authority to draw against the U.S. Treasury for legal expenditures. Enacted by the President on 16 December 2014.

   b. 2015 NDAA: Authorizes appropriations for FY 2015 DoD military activities. Enacted by the President on 19 December 2014.

C. "Permanent" vs. "Temporary" Authorizations

1. Permanent appropriations and authorizations are incorporated into U.S. statutory code (e.g., Title 10 for DoD authorities). These are presumed to

[2] For example, the FY 2015 NDAA, Sec. 1221, Commander's Emergency Response Program (CERP) for Afghanistan authorizes military commanders to use available DoD O&M funding, up to $10,000,000, for small scale projects, urgent humanitarian or urgent reconstruction needs that will benefit the Afghanistan civilian population.

be permanent until Congress modifies or eliminates the authorization in a later statute.

2. Unlike permanent funding authorities, temporary authorizations are not incorporated into the U.S. Code. Their period of availability is complete unless, or until Congress subsequently re-authorizes the specific funding authority.

V. DEPARTMENT OF DEFENSE AUTHORIZATIONS AND APPROPRIATIONS

A. The Military's Role in Funding Foreign Assistance

1. General Rule. The DoS has the executive responsibility, legal authority, and congressional funding to conduct Foreign Assistance on the U.S. Government's behalf. Foreign assistance includes security assistance to a foreign military or government, development assistance for the physical and governmental infrastructure projects benefiting a foreign nation, and humanitarian assistance benefiting a foreign population.[3]

2. The DoD has the executive responsibility, legal authority and congressional funding to secure and defend U.S. interests at home and abroad with military forces. Absent express congressional authority, the Secretary of Defense (SECDEF) may only obligate defense funding when it benefits U.S. military forces. DoD may conduct foreign assistance under the following two exceptions: (1) "Little t" training and (2) specific appropriation or authorization from Congress for the DoD to conduct foreign assistance.

   a. "Little t" training: conducting training or instruction for foreign forces for the primary purpose of promoting interoperability, safety, and/or familiarization with U.S. military forces (i.e., interoperability training). "Little t" training provides an overall benefit to U.S. military forces and may therefore be conducted using O&M appropriations.[4]

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[3] The Foreign Assistance Act of 1961 created the authority for the executive branch to conduct foreign assistance on behalf of the United States. *See* Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2012); *see also* Exec. Order No. 10973, 26 C.F.R. 639 (1961) which delegated the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State.

[4] The Honorable Bill Alexander, *supra* note 1. "[M]inor amounts of interoperability and safety instruction [do] not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations."

b. "Big T" training: foreign military security assistance is primarily undertaken to improve a foreign military force's operational readiness; it must therefore be funded with DoS authorizations and appropriations.

(1) Evaluation factors: cumulative financial costs, training duration; size of foreign military training force; expected foreign military, training proficiency outcome, training location, and primary training beneficiary.

(2) Examples:

(a) "Little t" training: A two day, airborne insertion exercise involving a company sized element of foreign military paratroopers. The training is of short duration, costs are limited, unit size is small, and training will promote interoperability with U.S. military forces. Certain training expenses may be funded with O&M appropriations.

(b) "Big T" Training: Training a battalion's worth of foreign military forces to become airborne paratroopers during a month-long airborne training program. The training duration and costs are likely significant, doesn't promote interoperability/safety and the training primarily benefits the foreign paratroopers. Training expenses will have to be funded using DoS security assistance appropriations, unless DoD has express congressional authority to conduct this training.

c. Statutory Appropriation or Authorization. Express congressional authority for DoD to conduct foreign assistance training and operations under codified statutory authority or a temporary, annual authorization/appropriation.

B. Framework for Defense Authorizations and Appropriations.

In order to determine whether or not a military commander has authority to conduct foreign assistance operations, JAs should first assess the operation's nature and type for funding purposes. Since Congress does not provide authorities and authorization in specified categories, it may be helpful to consider funding authorities in three general categories: 1. Building and Funding Foreign Partners, 2. DoD Aid and Assistance to Foreign Civilians, 3. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations

(OCO). Within these three general categories, JAs will find both permanent and temporary authorities to fund foreign assistance operations. Judge Advocates should be engaged early in the operational planning process to identify how to properly fund these various mission types.

C. Building and Funding Foreign Partners.

Within this functional category, there are two general subgroups of funds. The first group funds joint exercises and training, while the second provides logistical support to foreign forces. When foreign forces are our partners in contingency operations, Congress may provide temporary authorities that can fund both training and logistical support. The commander's legal counsel assists with determining the proper authority and funding source for providing security assistance to foreign military forces.

1. Emergency & Extraordinary Expenses ("Triple E" or "15"): 10 U.S.C. § 127.

a. Purpose: "for any emergency or extraordinary expense which cannot be anticipated or classified."

Time: 1 year O&M funds

b. Amount: the 2015 CAA appropriates the following

(1) Secretary of Defense: $36,000,000 in DoD O&M

(2) Secretary of the Army: $12,478,000 in DA O&M

(3) Secretary of the Navy: $15,055,000 in Navy O&M

(4) Secretary of the Air Force: $7,699,000 in AF O&M

c. Approval Authority: Secretary of Defense, Secretaries of the military departments, and Inspector General. Authority may be delegated (and re-delegated).

d. Congressional Notification: Secretary of Defense must provide 15 days advance notice before expending or obligating funds in excess of $1,000,000, and 5 days advance notice before expending or obligating between $500,000 and $1,000,000.

e. Practitioner Notes:

(1) Common Use: Official Representation Funds (ORF) pursuant to DoDI 7250.13 and AR 37-47. These funds are for official courtesies and other representation.

(2) Generally, aside from ORF, these funds are not likely to be tapped other than as a last resort for funding a unique emerging requirement.

(3) Though highly regulated, from a legislative perspective, "Triple E" or EEE funds are exceptionally flexible. From a purpose perspective they are often available for any mission; however, from a practical perspective, they are unlikely to be tapped due to regulatory controls.

2. Combatant Commander Initiative Funds (CCIF): 10 U.S.C. § 166a.

a. Purpose: Enables the Chairman of the Joint Chiefs of Staff to act quickly to support the Combatant Commanders when they lack the flexibility and resources to solve emergent challenges and unforeseen contingency requirements critical to joint war fighting readiness and national security interests.

(1) Limited by statute to (1) force training, (2) contingencies, (3) selected operations, (4) command and control, (5) joint exercises (including activities of participating countries), (6) humanitarian and civic assistance (including urgent and unanticipated humanitarian relief and reconstruction assistance), (7) military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses), (8) personnel expenses of defense personnel for bilateral or regional cooperation programs, (9) force protection, and (10) joint warfighting capabilities.

(2) CJCS priority consideration for:

(a) Activities that enhance war fighting capability, readiness, and sustainability of the forces assigned to requestor

(b) Activities not within the AOR of a commander that would reduce threat to or increase national security of the U.S.

(c) Urgent and unanticipated humanitarian relief and reconstruction- particularly where engaged in contingency operation.

b. Time: 1 year O&M funds

c. Amount: 2015 CAA not to exceed $36,000,000 of DoD O&M.

d. Limitations:

(1) No more than $20,000,000 may be used to buy end items with a cost greater than the expense/investment threshold of $250,000.

(2) No more than $10,000,000 may be used to pay the expenses of foreign countries participating in joint exercises.

(3) No more than $5,000,000 may be used to provide military education and training to military and related civilian personnel of foreign countries.

(4) No funds may be used for any activity which Congress has denied authorization.

e. Approval Authority: Initiatives nominated by Combatant Commanders with final approval authority of CJCS.[5]

f. Practitioner Notes:

(1) Funding: Funds are controlled by CJCS, and projects are competitively selected from amongst the COCOMs.

(2) Common Use: Unforeseen or emergent contingency operation requirements.

[5] CJCSA 7401.01E (1 July 2009): Combatant Commander Initiative Fund. NOTE: this is a limited release instruction and not for public release.

3. Subgroup One: Funding Joint and Combined Exercises and Training.

a. Joint Combined Exchange Training (JCET): 10 U.S.C. § 2011

(1) Purpose: Primary purpose is to pay the training expenses for SOF forces assigned to a combatant command. (SOF includes civil affairs and psychological operations forces).

(2) Time/Amount: 1 year, Defense Wide, O&M funds; as authorized by Congress.

(3) Practitioner's Notes: Where available, the SOCOM Commander or commander of any other specified or unified combatant command may pay any of the following expenses:

(a) Expenses of SOF assigned to that command in conjunction with training, and training with, the armed forces and other security forces of a friendly foreign country.

(b) Expenses of deploying SOF for training.

(c) In the case of training in conjunction with a friendly developing country, the incremental expenses incurred by that country as the direct result of such training.

(d) Includes reasonable and proper cost of goods/services consumed by a developing country as a result of direct participation, such as rations, fuel, training ammunition, and transportation.

(e) Does not include pay, allowances, and other normal costs of the country's personnel.

b. General Purpose Forces Training Friendly Foreign Militaries: § 1203 of the 2014 NDAA

(1) Purpose: authorizes forces not under the Special Operations Command to conduct training with friendly foreign forces for the purpose of improving the ability of U.S. forces to train foreign militaries during contingency operations.

(2) Time/Amount: 1 year; incremental expenses incurred by the friendly foreign country as the direct result of the training may not exceed $10,000,000. This authority is currently set to expire on 30 September 2017.

(3) Limitations: Any training conducted by U.S. forces under this authority shall, to the maximum extent practicable –

(a) must support the mission essential tasks for which the training unit providing the training is responsible;

(b) be with a foreign unit or organization with equipment that is functionally similar to such training unit; and

(c) include elements that promote both the observance/respect for human rights and respect for the legitimate civilian authority within the foreign country.

(4) Approval Authority: Approval by SECDEF with concurrence of SECSTATE.

(5) Practitioner Notes: This authority was newly created in the 2014 NDAA and still will likely see some regulatory guidance for implementation at the DoD and Service level. In addition to the limitations on incremental expenses, Congress has also included the following notice and reporting requirements for this authority:

(a) 15 day notice to the House and Senate Armed Service Committees prior to commencing any training.

(b) No later than 1 April of each year following the fiscal year in which this type of training is conducted, SECDEF must submit a report to Congress on the training conducted.

c. Latin American Cooperation (LATAM COOP): 10 U.S.C. § 1050.

(1) Purpose: to fund the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses considered necessary for Latin American cooperation.

(2) Time/Amount: 1 year O&M funds; limited by the services' individual implementing guidance.[6]

(3) Approval Authority: SECDEF or Service Secretaries.

d. African Cooperation: Payment of Personnel Expenses: 10 U.S.C. § 1050a.

(1) Purpose: to fund the travel, subsistence, and special compensation of officers and students of African countries and other expenses considered necessary for African cooperation.

(2) Time/Amount: 1 Year O&M funds

(3) Approval Authority: SECDEF or Service Secretaries.

e. Multilateral, Bilateral or Regional Cooperation Programs: 10 U.S.C. § 1051.

(1) Purpose: to fund the travel, subsistence, and similar personal expenses, of defense personnel from developing countries in connection with the attendance of such personnel at a multilateral, bilateral, or regional conference, seminar, or similar meeting if the SECDEF determines attendance is in the U.S. national security interests.

(2) Approval Authority: SECDEF

(3) Practitioner's Notes:

(a) Authorized expenses may be paid on behalf of developing country personnel only in connection with travel to, from, and within the unified combatant commander's AOR in which the multilateral, bilateral, or regional conference, seminar, or similar meeting for which expenses are authorized is located in or in connection with travel to Canada or Mexico.

[6] For the Army, the Deputy Chief of Staff, G 3/5/7, has responsibility for implementing this program. *See* AR 11-31 (21 March 2013).

(b) In a case where travel is to a unified combatant command HQs located in the U.S., authorized expenses may be paid in connection with travel of personnel to the U.S. to attend a multilateral, bilateral, or regional conference, seminar or similar meeting.

(c) In the case of personnel from a developing country that is not a NATO member and that is participating in the NATO Partnership for Peace (PFP) program, expenses may be paid in connection with the travel of personnel to the territory of any PFP participating countries or territory of any NATO member country.

(d) Expenses paid may not exceed that which would be paid to a member of the U.S. Armed Forces of comparable grade for similar authorized travel.

(e) This authority is in addition to LATAM COOP.

(f) Funds available to carry out this section shall be available, to the extent provided in an appropriations act, for programs and activities that begin in one fiscal year and subsequently end in the next fiscal year.

f. Regional Centers for Security Studies (RSC): 10 U.S.C. § 184(f)(3) (DoD Directive 5200.41)

(1) Purpose: authorizes SECDEF to waive costs of RSC activities for foreign military officers and foreign defense and security civilian government officials if the Secretary determines that attendance of such personnel without reimbursement is in U.S. national security interests.

(2) Funds available for the payment of personal expenses under the LATAM COOP are also available for the operation of the Center for Hemispheric Defense Studies.

(3) Time/Amount: Waived costs are paid from appropriations available to the RSCs and funds made available, to the extent provided in an appropriations act, for programs that

begin in one fiscal year and are completed in the subsequent fiscal year.

(4) Approval Authority: SECDEF

g. Military-to-Military Contact Program: 10 U.S.C. § 168

(1) Purpose: to conduct military-to-military contacts and comparable activities designed to encourage a democratic orientation of defense establishments and military forces of other countries. Specific authorized activities and expenses are delineated in 10 U.S.C § 168.

(2) Time/Amount: The statute specifically requires Congress to appropriate funds in order to undertake activities for this authority. No funds have thus far been appropriated for activities.

(3) Practitioner's Notes: this is a good example that authority by statute does not automatically allow DoD to fund activities. There must be authority and appropriation.

h. Bilateral & Multilateral Exercise Programs (Developing Countries Combined Exercise Program (DCCEP): 10 U.S.C § 2010 (CJCSM 3500.03C, 15 AUG 2012, Appendix D))

(1) Purpose: authorizes the payment of incremental expenses incurred by a developing country as a direct result of participation in a bilateral or multilateral military exercise

(2) Time/Amount: funds are available for exercises that begin in a fiscal year and end in the following fiscal year

(3) Limitations:

(a) Exercise must be undertaken primarily to enhance U.S. security interests; and

(b) Secretary of Defense must determine that participation of the country is necessary to achieve the (a) fundamental objectives of the exercise and (b) those objectives cannot be achieved unless the U.S. pays the incremental expenses

(4) Approval Authority: SECDEF after consultation with SECSTATE.

(5) Practitioner's Notes: "incremental expenses" are reasonable and proper costs of goods and services consumed as a direct result of participation in the exercise to include rations, fuel, training, ammunition, and transportation. Pay, allowances, and other normal costs are not included.

4. Subgroup Two: Providing logistical support to foreign forces.

a. Acquisition & Cross-Servicing Agreements (ACSA): 10 U.S.C. §§ 2341–2350[7] (DoDD 2010.9 and CJCSI 2120.01).

(1) Purpose: bilateral agreements for the reimbursable mutual exchange of Logistical Supplies, Services, and Support (LSSS) excluding Significant Military Equipment (SME).[8] Commanders must still use proper appropriated funds for acquiring LSSS from foreign forces.

(a) Two authorities/methods exist:

(i) Acquisition Only Authority (AoAs) (10 U.S.C. § 2341): Limited authority for SECDEF to acquire LSSS for deployed forces from eligible countries and organizations.[9]

(ii) Cross-Servicing Agreement (10 U.S.C. § 2342): Permits SECDEF, after consultation with SECSTATE, to both purchase LSSS as well as

[7] *See* DoDD 2010.9 (28 April 2003): Acquisition and Cross-Servicing Agreements; Implemented by CJCSI 2120.01 (13 February 2013): Acquisition and Cross-Servicing Agreements.

[8] *See* 10 U.S.C. § 2350, Authorized logistical support includes: food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Logistical support also includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List promulgated under the Arms Export Control Act.

[9] Eligible countries and organizations include: (a) NATO countries, (b) NATO subsidiaries, (c) UN or any other international organization of which the U.S. is a member, (d) any non-NATO member if it has a defense alliance with the U.S, permits stationing of U.S. Forces, allows preposition of U.S. materiel in their country, or serves as host for U.S. military exercises and operations in the country. The Joint Staff J-4 maintains a list of current ACSAs, as well as frequently asked questions and training tools. You may find info at: https://www.intelink.gov/wiki/Acquisition_and_cross-servicing_Agreements_%28ACSA%29.

provide LSSS on a reimbursable basis with eligible countries.

(2) Time:

(a) Funds may not be obligated for acquisitions beyond or before the period of availability. ACSA orders may not be placed in one fiscal year for a future fiscal year unless a "subject to availability of funds" clause is inserted.

(b) ACSA reimbursement must be by three methods and within the following time periods[10]:

(c) Payment-in-Kind (PIK): Reimbursement must occur within 90 days of initial provision of LSSS.[11]

(i) Defined: The receiving defense department reimburses the providing defense department the full value of the LSSS in currency.

(ii) Example: DoD provides $10,000 in tents to a foreign defense department and receives $10,000 in currency.

(d) Replacement-in-Kind (RIK): Reimbursement must occur within 1 year of initial provision of LSSS.[12]

(i) Defined: the receiving defense department reimburses the providing defense department by providing the same type of LSSS.

(ii) Example: DoD provides tents to a foreign defense department and receives the exact same type of tents.

[10] ACSA authority is the only congressional authorization for DoD to receive direct reimbursement from foreign nations for the costs of DoD-provided support in combined exercises and operations.
[11] DoD FMR, Volume 11A, Chapter 8, para. 080202A.
[12] *Id.* at para. 080202B.

(e) Equal Value Exchange (EVE): Reimbursement must occur within 1 year of initial provision of LSSS.[13]

(i) Defined: the receiving defense department reimburses the providing defense department by providing LSSS with the same value as the LSSS initially provided.

(ii) Example: DoD provides $10,000 in tents and is reimbursed by the foreign defense department with $10,000 of fuel.

(3) Amount: during any fiscal year, DoD is limited to the following amounts in obligations and reimbursable (applies to PIK transactions only, not exchange transactions)

(a) Acquisitions from NATO countries, etc. may not exceed $200,000,000 (with no more than $50,000,000 for supplies other than petroleum, oil, and lubricants (POL).

(b) Acquisitions from non-NATO countries may not exceed $60,000,000 (with no more than $20,000,000 for supplies other than POL).

(c) Transfers to NATO countries, etc. may not exceed $150,000,000.

(d) Transfers to non-NATO countries may not exceed $75,000,000.

(e) Waiver: the above limitations are not applicable during contingency operations or non-combat operations (including humanitarian or foreign disaster assistance and UN peacekeeping missions) for the purposes of that operation.

(4) Approval Authorities:

(a) Authority to Enter/Revise Agreements: SECDEF (after consultation with SECSTATE for non-NATO

[13] *Id.*

members). Authority may also be delegated CJCS.[14]

(b) Transaction Approval Authority: Personnel are designated specifically based on knowledge and experience to carry out transactions.

(5) Practitioner's Notes:

(a) ACSA's may not be used to procure goods or services that are reasonably available from U.S. commercial sources.

(b) Size and scope of support under ACSA should be considered in relation to that nation's capability to reimburse the U.S. for the LSSS. Developing nations with little reimbursement capability will not be required to reimburse the U.S. for LSSS provided there are available U.S. appropriations or authorizations to otherwise fund the request.

(c) Common Use: Providing food, transportation, and lodging.

b. ACSA-Lend Authority: 2015 NDAA §1207 (amending §1202(3), FY 2007 NDAA by extending authority lending authority to 30 SEP 2019).

(1) Purpose: Temporary Authority exists to lend military equipment, on a non-reimbursable basis to our coalition partners (1) in Afghanistan; (2) when participating in combined UN peacekeeping operations; or (3) in connection with training for either of the first two categories.

(2) Time: This authorization is available until 30 September 2019.

(3) Approval Authority:

[14] DoDD 2010.9 para.5 allows Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L) to delegate (with coordination) to the CJCS who may further delegate to lead agents. However, all new/revised agreements must still be referred to USD(AT&L) for review and provision of authority to conclude the agreements.

(a) SECDEF designates COCOM CDRs as approval authorities.

(b) When lending in connection with training, a notice and wait period is required. SECDEF must submit intent to congressional committees and wait 15 days.

(4) Practitioner Notes:

(a) This may NOT be used to lend military equipment to the Afghan military.

(b) Requires COCOM determination of "no unfilled requirements" prior to lending.

(c) Lend period is for 1 year.

(d) Operates as a "reimbursement-in-kind" ACSA transaction, because equipment is returned. By policy, normal wear and tear is acceptable; however, recipient must sign agreement to cover non-routine damage or loss. SECDEF has authority to waive the reimbursement required to equipment that is damaged or destroyed as a result of combat operations.

c. Global Lift and Sustain: 10 U.S.C. § 127d

(1) Purpose:

(a) To provide LSSS, including air-lift and sea-lift, to partner nation forces worldwide in support of the combined operations world-wide (defined below) with U.S. armed forces.

(b) To provide LSSS to allied forces solely for enhancing interoperability of logistics support systems of those military forces participating in combined operations with the U.S. Logistical supplies, support and services may also be provided to nonmilitary logistics, security, or similar agency

of an allied government if such provision would benefit the U.S. Armed Forces.

(2) Time: 1 year DoD O&M funds.

(3) Amount: not to exceed $100,000,000 per fiscal year (if to support interoperability only, may not exceed $5,000,000 per fiscal year).

(4) Approval Authority: Secretary of Defense

(a) Requires Secretary of State concurrence.

(b) Secretary of Defense must determine:

(i) Provision of LSSS is essential to the success of the combined operation, and

(ii) Partner forces would not be capable of participating without the LSSS support

(5) Practitioner Notes:

(a) NOT for joint training exercises — may only be used for combined operations with U.S. forces during active hostilities, as part of a contingency operation, or noncombat operation (such as humanitarian/foreign disaster assistance, country stabilization operation, or UN peacekeeping operation).

(b) Not available for OEF/Afghanistan due to the availability of specific temporary authority—Afghanistan Lift and Sustain.

(c) DSCA managed program.

d. Personnel Details: 10 U.S.C. § 712

(1) Purpose: authorizes the armed forces to assist in military matters in any foreign nation of North/Central/South America, Republics of Haiti and Santo Domingo, or in any other country during a war or declared national emergency.

(2) Time/Amount: on a reimbursable or non-reimbursable basis. No other limits provided.

(3) Approval Authority: the President.

e. Authority to Support Office of Security Cooperation in Iraq (OSCI): 2015 NDAA § 1237

(1) Purpose: SECDEF may, with SECSTATE concurrence, conduct non-operational training activities supporting the Iraqi Ministry of Defense and Counter Terrorism Service personnel in an institutional environment

(a) To address capability gaps, integrate processes relating to intelligence, air sovereignty, combined arms, logistics and maintenance and to manage and integrate defense related institutions

(2) Time/Amount: 1 year; $140,000,000

f. Coalition Support Fund (CSF): (2015 NDAA§ 1222; Extension and Modification of Authority for Reimbursement of Certain Coalition Nations for Support Provided to U.S. Military Operations)

(1) Purpose: reimburse key cooperating nations for logistical, military, and other support (including country access) provided to support the U.S. in OEF and OSCI security ops. Reimbursement may be monetary or through "in kind" reimbursement:

(a) Specialized training in connection with operations

(b) Procurement and provision of supplies

(c) Procurement of specialized equipment and loaning of equipment on a non-reimbursable basis

(2) Time: 1 year DoD O&M (Overseas Contingency Operating Budget)

(3) Amount: Not to exceed $1,200,000,000 ($1,000,000 limit on support to Pakistan).

(4) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior notice to Congress (unless reimbursement is for access based on international agreement); No amounts available for obligation before or after 2014 may be used for Pakistan reimbursements under 2008 NDAA § 1233, until SECDEF makes certain certifications to congress about Pakistan's security cooperation achievements.

(5) Practitioner Notes:

(a) Notably, the CSF includes reimbursements for "access," and also includes a provision for specialized training, or loan of supplies and equipment on a non-reimbursable basis known as the Coalition Readiness Support Program (CRSP). Thus, the CSF authorization contains components of both training and logistic support.

(b) Prohibition on reimbursement to Pakistan for support during periods closed to transshipment when the ground lines from Pakistan to Afghanistan were closed to U.S. supply shipments.

(c) Funding administered by DSCA.

g. Afghanistan and Iraq Lift and Sustain: currently at 2015 NDAA §1223

(1) Purpose: Providing supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Afghanistan. Time: 1 year, DoD O&M funds. Authority expires on 31 DEC 2015

(2) Amount: not to exceed $450,000,000.

(3) Reporting requirements: SECDEF must provide quarterly reports to the congressional defense committees.

(4) Practitioner Notes:

(a) Limitation: Separate funding authority to support coalition military operations in Afghanistan.

(b) Key distinction between coalition support and lift and sustain funds:

(i) CSF: used to reimburse countries for costs they incur.

(ii) L&S: used by the military departments to fund costs incurred for services provided to support eligible countries.

h. Building Partner Capacity (BCP) and Equip Authority: 10 U.S.C § 2282 (sometimes referred to as "Train and Equip" funding authority)

(1) Purpose: provide equipment, supplies, training, and small-scale military construction activities to:

(a) build the capacity of foreign military forces in order for that country to: (1) Conduct counterterrorist operations; or (2) Participate in or support military and stability operations in which the U.S. Armed Forces are a participant.

(b) build the capacity of a foreign maritime security forces to conduct counterterrorism operations.

(c) build the capacity of a foreign country' national level security forces that have among their functional responsibilities a counterterrorism mission

(2) Time: 1 year DoD O&M funds

(3) Amount: $350M

(4) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior Congressional notification. (NOTE: this has NOT been delegated).

(5) Practitioner Notes:

(a) All programs MUST include elements that promote:

(i) observance and respect for human rights and fundamental freedoms and

(ii) respect for legitimate civilian authority within that country

(iii) available for military forces only, not security forces (though a subsequent amendment authorizes use for maritime security forces).

(b) small-scale military construction activities are within the scope of permissible funding activities.

(i) not more than $750K may be obligated or expended for small-scale, authorized military construction activities (per project)

(ii) Not more than five percent of the amount made available to DoD under this authority may be obligated or expended for small-scale military construction activities under all authorized programs (cumulative total)

i. Special Operations Forces (SOF) Support: last reported in 2015 NDAA § 1208 (annual authority extension through FY 2017)

(1) Purpose: provides support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing operations by U.S. SOF combating terrorism

(2) Time: 1 year DoD O&M funds

(3) Amount: $75,000,000 annually

(4) Approval Authority: SECDEF (may not be delegated)

(a) requires the concurrence of the relevant Chief of Mission assigned to the country where the forces,

groups, or individuals supporting U.S. SOF are located prior to disbursing funds.

(b) SECDEF must notify congressional defense committees within 48 hours of use.

(5) Practitioner Notes:

(a) Though temporary funding authority exists through FY 2015, JAs need to review annual NDAA for any possible funding changes.

D. DoD Aid and Assistance to Foreign Civilians[15]

1. Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA): 10 U.S.C. §§ 401, 402, 404, 407, 2557, 2561.[16]

a. Purpose: The Overseas Humanitarian, Disaster and Civic Aid (OHDACA), http://www.dsca.mil, appropriation supports the SECDEF and COCOMs' security cooperation strategies to build indigenous capabilities and cooperative relationships with allies, friends, civil society, and potential partners. The appropriation provides low cost, non-obtrusive and highly effective activities that help partners help themselves, improves access to areas not otherwise available to U.S. Forces, and build collaborative relationships with host nation's civil society.

Time/Amount: Generally 2 year funds. The 2015 CAA provided $103 million to finance the humanitarian assistance and mine action programs as well as foreign disaster relief initiatives

2. Individual Authorizations:

a. 10 U.S.C. § 401: Humanitarian and Civic Assistance (HCA)[17]

(1) Purpose: provide HCA in Conjunction with Military Operations.

[15] *See* The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq. general authority for humanitarian assistance for civilian populations.
[16] Defense Security Cooperation Agency (DSCA) manages the OHDACA appropriation. DoD 5105.38-M, Security Assistance Management Manual (SAMM) contains guidance for DoD's civilian assistance programs.
[17] *See* DoDI 2205.02, Humanitarian and Civic Assistance Activities, 2 December 2008 (establishing DOD policy and assigning responsibility for conducting HCA activities).

(a) Secretary concerned must determine that HCA activities will promote both U.S security interests and the country where such activities will be carried out, while also utilizing specific U.S. service members' operational readiness skills to conduct the activities.

(b) U.S. Armed Forces personnel participate in HCA activities to create strategic, operational, and/or tactical effects that support a COCOM's objectives in theater security cooperation or designated contingency plans while concurrently reinforcing skills required for the operational readiness of the forces executing the HCA mission. U.S. military occupational specialists shall provide services relevant to their specialty.

(c) HCA activities include providing:

(i) Medical, surgical, dental, veterinary care in rural or underserved areas (includes training of such care);

(ii) Construction of rudimentary surface transportation systems;

(iii) Well drilling and construction of rudimentary sanitation facilities;

(iv) Rudimentary construction and repair of public facilities[18]

(2) Funding: Section 401 requires "specific appropriations to carry out HCA activities. There are three sources of "specific" funding for section 401 projects:

(a) The OHDACA appropriation expressly funds section 401.

[18] In FY07, DoD sought express language in 10 U.S.C. § 401 to authorize certain types of communications and information technology (IT) assistance. Although Congress did not add the language, the Joint Explanatory note to the FY07 NDAA noted that "restoring basic information and communications capacity is a fundamental element of humanitarian and civic assistance....rudimentary construction and repair of public facilities...includes information and communications technology as necessary to provide basic information and communication services."

(b) 2015 DoDAA §8011: O&M is appropriated for 401 purposes in two ways.

(i) Annual DoD O&M HCA funding request:

(ii) Incremental expenses incurred as a direct result of providing HCA (other than minimal cost HCA) to a foreign country shall be paid for with funds specifically appropriated for such purposes (included in Military Department O&M accounts)

(a) The 2015 DoDAA states that "funds may also be authorized for costs *incidental to authorized operations and pursuant to authority granted in section 401….*" (emphasis added).

(b) Funding "incidental" costs of HCA. Both section 401 and its annual appropriation from O&M contain language about funding "costs incidental to authorized operations … in section 401."[19] OHDACA or O&M funds may be expended for "incidental costs" associated with conducting HCA activities.

(c) Unauthorized HCA expenses that cannot be paid from HCA funds include costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; and equipment repair). These costs are covered by funds available for the military op.

[19] The specific language in 10 USC 401(c)(4) is, "Nothing in this section may be interpreted to preclude the incurring of minimal expenditures by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated…, except that funds appropriated to the [DoD] for operation and maintenance… may be obligated for humanitarian and civic assistance under this section *only for incidental costs of carrying out such assistance.*" (emphasis added).

(d) Other unauthorized expenses include salaries of host-nation participants and per diem expenses of U.S. Armed Forces conduct HCA activities.

(3) Approval Authority:

(a) The Undersecretary of Defense for Policy's is responsible for reviewing and approving proposed HCA project submissions, in coordination with the Joint Chiefs of Staff Chairman to ensure regulatory compliance. COCOM's are responsible for ensuring that HCA projects, other than minimal cost HCA, are conducted with SECSTATE's approval.

(b) Command Approved HCA: Combatant commanders approve these small scale projects and forward any that exceed the cost limitation to the USD. Combatant commanders ensure that command approved HCA projects are:

(i) For activities within their respective AORs.

(ii) In the exercise of the Commander's reasonable judgment.

(iii) In light of the overall cost of the military operation in which such expenditure is incurred.

(iv) For an activity that is incidental to the military operation.

(v) Do not exceed $15,000

(c) Command Approved HCA examples:

(i) A unit doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purpose of providing mass inoculations to the local populace.

(ii) The opening of an access road through trees and underbrush for several hundred yards, but not the asphalting of a roadway.

(d) Practitioner's Notes:

(i) Must have SECSTATE approval (though DoDD 2205.02 does not require State's approval for "minimal cost HCA.")

(ii) Limitations: (1) cannot duplicate other forms of U.S. economic assistance; (2) not for military or paramilitary activities; (3) expenses may not include costs of the military operation that would have occurred regardless of the HCA.

(iii)Because HCA may be funded with O&M appropriations, the Defense Security Cooperation Agency (DSCA) does not expend OHDACA funds on authorized HCA activities. However, all HCA projects are reported to DSCA for accountability purposes.

b. 10 U.S.C. § 402: Transportation of Humanitarian Relief Supplies to Foreign Countries (Denton program).

(1) Purpose: transport to any country, without charge,[20] supplies furnished by NGO's for humanitarian assistance on a space-available basis.

(2) Practitioner's Notes:

(a) Before transporting supplies, the Secretary of Defense must determine:

(i) The transport of the supplies is consistent with U.S. foreign policy;

(ii) The supplies are suitable for humanitarian purposes and in usable condition;

[20] 10 U.S.C. § 402(d)(2) authorizes the Secretary of Defense to require reimbursement for incurred transportation costs.

(iii) Legitimate humanitarian need exists for the supplies by the people for whom intended;

(iv) Supplies will, in fact, be used for humanitarian purposes; and

(v) Adequate arrangements have been made for the distribution of the supplies in the destination country.

(b) Charity group must coordinate through USAID for approval to utilize Denton Program

(c) DSCA coordinates with USAID during the application process.

c. 10 U.S.C. § 404: Foreign Disaster Assistance

(1) Purpose: to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Assistance provided may include transportation, supplies, services, and equipment.[21]

(2) Approval Authority: POTUS has delegated authority to SECDEF who must have SECSTATE's concurrence.[22]

(3) Practitioner's Notes:

(a) Within 48 hours of commencing relief activities, POTUS must transmit a report to Congress.

(b) Example: providing assistance to Haiti after the significant earthquake in January 2010. Operation Unified Response, JTF- Haiti, provided logistics supplies, medical care to the victims.

d. 10 U.S.C. § 407: Humanitarian Demining Assistance and Stockpiled Conventional Munitions Assistance[23]

[21] Transportation may be provided to prevent serious harm to the environment and where human lives are not at risk only if no other means of transportation is reasonably available.

[22] Executive Order 12966 (60 Fed. Reg. 36949) (July 14, 1995) authorizes the Secretary of Defense to authorize disaster relief and begin execution in emergency situations where there is insufficient time to seek Secretary of State concurrence provided such concurrence is sought as soon as practicable thereafter.

(1) Purpose: to carry out humanitarian demining and stockpiled conventional munitions assistance that promote either (1) the U.S. and the country where the activities will be carried out; or (2) the operational readiness skills of the armed forces who participate in the activities.

(2) Time/Amount: No more than $10,000,000 may be spent for equipment, services, and supplies for humanitarian demining activities per year.

(3) Approval Authority: Service Department Secretary with specific Secretary of State approval.

(4) Practitioner's Notes:

(a) No duplication of other services provided.

(b) Expenses covered include: travel, transportation, and subsistence expenses of DoD personnel; equipment, supplies, and services acquired for the activities.

(c) This authority was part of section 401 until section 407 was created (and section 401 amended) in the 2007 NDAA. Some implementing guidance, including the SAMM, still refer to demining as part of 401, but as of 17 Oct 2006, demining activities are authorized by section 407 instead of section 401.

e. 10 U.S.C. § 2557: Excess Non-Lethal Supplies.

(1) Purpose:

(a) For Humanitarian Relief, SecDef may transfer excess non-lethal supplies to DoS for distribution to foreign governments and civilian organizations when requested by the local U.S. embassy.

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[23] Section 1092 of the 2012 NDAA expanded the scope of 10 USC 407 to also include "stockpiled conventional munitions assistance."

(b) For homeless veterans, SecDef may make excess clothing, shoes, sleeping bags, and related nonlethal excess supplies available to Secretary of Veteran's Affairs on a non-reimbursable basis.

(c) In addition, SecDef may transfer such supplies to the Department of Homeland Security (HS) at the request of the Secretary of HS in support of domestic emergency assistance activities.[24]

(2) Practitioner's Notes:

(a) DoD transfers the property to the appropriate Department Secretary concerned who then has the responsibility to distribute the property. **NOTE: There are several ways to transfer property to DoS (see Property Disposal section of this outline).**

(b) Property must primarily benefit the intended recipient country civilians or Veterans. For foreign assistance, this may be used in conjunction with §2561 Humanitarian Assistance funds to get materials to location.

(c) Nonlethal Excess Supplies = property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment/material designed to inflict serious bodily harm or death.

f. 10 U.S.C. § 2561: Humanitarian Assistance (HA).

(1) Purpose: Authorization to use DoD Humanitarian appropriations in order to support the national security and foreign policy goals of the U.S.

(a) Transportation of Humanitarian Relief

(b) HA – other(O)

(2) Practitioner's Notes:

[24] 2011 NDAA §1074 expanded this authority to include domestic emergencies.

(a) Example uses of HA(O) include construction or refurbishment of local infrastructure facilities, disaster preparedness or refugee repatriation training, exercises or seminars, assessment visits, and technical and logistics assistance for foreign recipients.

(b) May be executed by contract rather than service members. This is distinguished from § 401 HCA, which precludes contracting due to requirement for development of operational readiness skills.

(c) As a transportation authority, section 2561 is the primary means to ship goods and supplies donated by NGOs/private charities to foreign countries *on a funded basis*. OHDACA funds all costs of transportation, and there is no "space available" requirement. (Compare to section 402, the Denton program.)

(d) Section 2561's transportation authority is often used in conjunction with section 2557 to ship the non-lethal excess supplies to a recipient country.

E. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO).

The nature of operations must adapt to specific environments, and commanders often request additional or special fiscal authorities to fill any capability gaps in the general fiscal framework. Many current operating environments require counterinsurgency and counterterrorism authorities that Congress has provided to DoD upon request. These authorities, which are generally temporary, can and do change overtime, as operational environments and needs likewise change. Often, these authorities are tailored to specific locations, or they are only available for a limited period of time.

1. Using O&M in contingency operations:

a. Operations Enduring Freedom, Resolute Support, and Inherent Resolve are funded with OCO appropriations. As part of the purpose analysis, you must therefore determine whether the particular expenditure should be funded with base or OCO appropriations. This distinction is particularly important with the decreased amount in OCO appropriations. In order to use OCO appropriations, the following must apply:

(1) The mission has to involve combat or direct combat support operations in Afghanistan, the Persian Gulf, Gulf nations, or in other specified areas.

(2) The expense falls within an authorized funding category. *See* Department of the Army Financial Management Guidance for Contingency Operations, 28 June 2012.

b. The OCO appropriation generally contains several subdivisions similar to the base appropriation (O&M, MILCON, etc.). The use of OCO O&M requires additional analysis. This analysis focuses on incremental costs, which are costs the Army has incurred as the result of a contingency operation. Therefore, expenditures are funded with OCO O&M appropriations if they involve combat or direct combat support operations in the specified geographic areas, and are costs the Army would not have incurred absent the contingency operation.

2. Commander's Emergency Response Program in Afghanistan (CERP): 2015 NDAA §1221; 2015 CAA §9005

a. Purpose:

(1) "authorizes United States military commanders ***in Afghanistan*** to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within their areas of responsibility; and

(2) provides an immediate and direct benefit to the people of Afghanistan."[25]

b. Implementing Guidance: DoD FMR vol 12, ch. 27 (Note: the current version is from January 2009—Judge Advocates must ensure that guidance in the FMR, until updated, does not conflict with the most recent legislation.)

(1) Specific Purposes: includes, but not limited to:

(a) water & sanitation, food production & distribution, agriculture/irrigation, electricity, healthcare,

[25] 2012 NDAA §1201 repeals section 1202 of the 2006 NDAA (as most recently amended by section 1212 of the 2011 NDAA. Thus, Iraq is no longer an authorized geographic location for the use of CERP.

education, telecommunications, economic, financial mgmt improvements, transportation,

(b) rule of law & governance, civic clean-up, civic support vehicles, repair civic & cultural facilities, other humanitarian reconstruction projects, battle damage, condolence payments, temporary contract guards for critical infrastructure.[26]

(2) Specific Prohibitions:

(a) direct or indirect benefit to US or coalition military forces; goods/services/funds to national armies; entertainment; purchase of firearms/ammo/UXO;

(b) rewards; duplicative services; salaries/pensions for government employees; Psychological Operations; direct support for individuals or individual businesses.

c. Time: 1 year DA O&M funds

d. Amount:

(1) FY2015:

(a) NDAA § 1221: $10,000,000 DoD O&M

(b) CAA §9005: $10,000,000 DA O&M

(c) In FY2014, Congress included a requirement that the DoD, in consultation with the DoDIG, SIGAR, SIGIR, and the GAO shall submit a comprehensive report on the lessons learned and best practices for the execution of CERP to Congress.

e. Approval Authority: as designated by theater specific policy in Afghanistan. Authority is tiered by level of command and dollar amount.

[26] Exhaustive list is contained in DoD FMR vol 12, chap. 23 para 270104. Contains DoD guidance for CERP and primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures.

f. Limitations:

(1) No CERP project, to include any ancillary or related elements of the project, may be in excess of $2,000,000.

(2) Projects ≥$500,000:

(a) Require 15 days prior written notice to Congressional Defense Committees of:

(i) Location, nature, purpose of proposed project, including how it is intended to directly benefit the people of Afghanistan

(ii) Budget and implementation timeline

(iii) Sustainment plan

(b) Require approval of the Afghanistan Resources Oversight Council (AROC) of the DoD. (see 2012 DoDAA §9009)

(3) Construction: DoD FMR para 270102 no longer includes the concept of "build" and instead focuses on "reconstruction" and "restore." However, it specifically indicates that this does not limit efforts to restore previous conditions/structures in Afghanistan. Judge Advocates should look to the most recent version of the MAAWS-A when in theater for more specific guidance on the extent of construction authorized using CERP.

g. Practitioner's Notes:

(1) The focus is on small-scale projects that immediately assist the local population and are sustainable. Small-scale would generally be considered less than $500,000 per project according to the DoD FMR.

(2) Urgent is defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action.

(3) Section 1201 of the 2012 NDAA contains authority for the Secretary of Defense to waive any other provision of law that would prohibit, restrict, limit, or otherwise constrain exercise of the CERP authority. In the past, SecDef has waived certain requirements of the FAR as well as the Foreign Claims Act (FCA). As Congress repealed CERP authority in previous versions of the NDAA, practitioners should look for new waiver authorities before assuming that the certain FAR provisions or FCA do not apply.

(4) Historical Information: CERP was originally funded with seized Iraqi assets.[27] The Coalition Provisional Authority (CPA) accounted for the seized funds, administered, and distributed the funds to U.S. Commanders in Iraq for "reconstruction assistance" to the Iraqi people.[28] Congress first appropriated funds under CERP for both Iraq and Afghanistan in the FY 2004 ESAA.

3. Reintegration Activities in Afghanistan: currently in 2015 NDAA §1232 (originally created in 2011 NDAA§1216)

a. Purpose: to support the reintegration into Afghan society of those individuals who pledge—

(1) To cease all support for the insurgency in Afghanistan

(2) To live in accordance with the Constitution of Afghanistan

(3) To cease violence against the Government of Afghanistan and its international partners, AND

(4) Have no material ties to al Qaeda or affiliated transnational terrorist organizations.

b. Time: authority through 31 December 2015.

c. Amount: no more than $5,000,000 of DoD O&M.

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[27] *See* CJTF-7 FRAGO 89; *see also* Memorandum, The President to the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003).

[28] CJTF-7 FRAGO 89. *Id.* The Coalition Provisional Authority (CPA) initially defined reconstruction assistance as "the building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq." The CPA provided approximately $78.6M for over 11,000 projects, such as financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

d. Limitations:

(1) 2012 NDAA§1219 requires that no more than 50% of funds available may be used until SecDef (in consultation with SecState) certifies to Congress that women are an "integral part of the reconciliation process" with GIRoA and the Taliban.

(2) 2012 DoDAA §9009 requires that AROC approve all projects and the execution plan.

e. Practitioner Notes:

(1) This authority was initially created as an authorized use of CERP in FY 2010 NDAA §1222. The MAAWS-A includes a separate Reintegration SOP that discusses the program as a part of CERP.

(2) The 2011 CAA specifically authorizes the use of the DoS ESF and INCLE appropriations for reintegration activities as well.

4. Rewards Program: 10 U.S. C. § 127b

a. Purpose: to allow the military to pay monetary rewards to people for providing 10 U.S. Government with information or nonlethal assistance (NOT a weapons buyback) that is beneficial to:

(1) An operation or activity of the armed forces conducted outside the U.S. against international terrorism; or

(2) Force protection of the armed forces or of allied forces participating in a combined operation.

b. Time: 2015 NDAA § 1031 reauthorizes O&M funding for this authority until 30 September 2015.

c. Amount: An individual award cannot exceed $5 million

d. Approval Authority: By statute, SECDEF is the primary approval authority. (Secretary of State concurrence required over $2M.) Also by statute, SECDEF may delegate this authority as follows:

(1) To the Deputy, SECDEF or an Under SECDEF without further redelegation; and

(2) To the COCOM Commander authority to approve individual awards not in excess of $1M. The COCOM Commander may further delegate (with SECDEF or primary delegate approval) authority to approve individual awards up to $10,000 to his or her deputy commander or to a direct subordinate commander.

e. Practitioner's Notes:

(1) Implemented in DoD FMR vol 12, ch 17

(2) Not a weapons buy-back program.

(3) U.S. citizens, U.S. officers/employees, or employees of a contractor of the U.S. are not eligible to receive rewards.

(4) Theater regulations will provide delegation amounts to subordinate commanders. Practitioners must note that the dollar thresholds are subject to both legislative and policy changes frequently.

5. Afghanistan Security Forces Fund (ASFF): currently in 2015 NDAA § 1532

a. Purpose: to provide assistance, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, Facility and infrastructure repair, renovation, and construction, and *funding*."

b. Time/Amount:

(1) 2015 CAA: $4,109,333,000 (avail. Thru 30 Sep 2016)

(2) 2014 CAA: $4,726,720,000 (avail. thru 30 Sep 2015)

c. Approval Authority: Commander, Combined Security Transition Command-Afghanistan (CSTC-A)

d. Limitations:

(1) no funds may be obligated until approval of a financial and activity plan by the Afghanistan Resources Oversight Council (AROC) of the DoD

(2) AROC must approve all annual service requirements over $50,000,000 and any non-standard equipment request over $100,000,000.

e. Practitioner Notes:

(1) These funds are an exception to the general rule that no funds shall be used to provide training or advice to police, prisons, or other law enforcement forces or military training for any foreign government.

(2) Security Forces of Afghanistan: those forces under the control of the GIRoA

(a) Afghan National Army (ANA),

(b) Afghan National Police (ANP),

(c) Afghan Local Police (ALP)

6. Office of Security Cooperation-Iraq (OSC-I) Support: 2015 NDAA § 1237

a. Purpose: life support, transportation and personal security, construction and renovation of facilities for

(1) operations/activities of OSC-I;

(2) (2) operations and activities of security assistance teams in Iraq

b. Time/Amount: up to $140,000,000 of AF O&M

c. Practitioner Notes:

(1) Sec. Def must provide 15 day prior written notice to congressional defense committees with detailed justification and timeline for each proposed site and use of funds

(2) The primary beneficiary of these funds is the U.S., although not necessarily just DoD.

VI. PROPERTY DISPOSAL

A. Overview of DoD Property Disposal.

1. Statutory authority is required for any transfer or sale of government owned or purchased property, particularly if transferred to a foreign military, government, or population. Although the overarching principles of the Federal Property and Administrative Services Act apply to both real and personal property, this outline will focus on personal property disposition.

2. An understanding of the statutorily mandated processes for the disposition of excess personal property is necessary to properly evaluate the authority for a proposed disposition. Generally speaking, the mandated processes involve reutilization, transfer, donation, and sale (R/T/D/S), and if none of these are possible, abandonment/destruction (A/D) through "donation" or disposal contracts. The order in which these processes are executed and the priority assigned to potential requisitioners or transferees is also mandated. Thus, reutilization screening within the DoD must occur before the property can be considered for transfer, donation, or sale. Similarly, transfer to federal civilian agencies must be ruled out before property can be offered for sale. No property can be put on a disposal contract unless it is not eligible for a "higher priority" process, or the opportunities for such transfers have been exhausted, and the property is not wanted by a qualified[29] higher priority transferee.

3. The operational funding framework is useful in determining proper statutory authority for disposal of DoD property. Specifically to identify the proper authority and process for property transfer, judge advocates must determine who is receiving the property, what is the property classification, when will the property be transferred, where will it be transferred, and why will it be transferred. The following is an overview of (1) the general authority related to property disposal, (2) the process variations involved in planning for property disposition within contingency operations. Although specific guidance changes frequently in the operational environment, the basic framework of disposition and transfer authorities has been in place for decades.

[29] Due to regulatory limitations on certain types of property, especially defense articles, release of many items are restricted to specified transferees such as military requisitioners.

B. General Authority and Mechanism for Disposal of DoD Property – 40 U.S.C. § 501-574 and 701 et seq.

1. Purpose:

a. To give the Administrator, GSA the responsibility for management of U.S. Government owned property, to include procurement, storage, use, and disposition.[30]

b. Within the DoD, the disposal authority has been delegated to the Defense Logistics Agency (DLA) Disposition Services (formerly known as Defense Reutilization and Marketing Service – DRMS)[31] to establish a standardized process for the disposal of durable (investment item) DoD property (including military equipment) purchased with appropriated funds.

c. For property located overseas, Agency heads are given responsibility for management of property owned by their Agency subject to the requirement that such use and disposition be consistent with US foreign policy (*see* 40 USC 701).

d. Relevant Statutory and Regulatory Definitions:[32]

(1) Surplus: excess property that is no longer required to meet the needs or responsibilities of *any* federal agency.

(2) Excess: property that is not required to meet the needs of the federal agency that initially procured the property, but may be required by other federal agencies. For example, with respect to DoD property, "excess" means property no longer needed by **any** DoD component. However, note that individual service regulations will define "excess" as property no longer needed by that individual service component, thus warranting turn-in to Disposition Services. From a statutory perspective; however, property is not

[30] The Secretary of Defense may exempt itself for national security purposes (see § 501).
[31] With respect to disposition of excess DoD property located within the United States, Disposition Services derives its statutory authority from a delegation of disposal authority to the Secretary of Defense by the Administrator of the GSA. Disposition Services is a subordinate element of the DLA; subsequent delegations within the DoD result in Disposition Services having responsibility for disposal of excess property. With respect to foreign excess personal property, the statute provides Agency heads with the responsibility for property disposition. See 40 USC 701. Again, several delegations from the Secretary of Defense to DLA to Disposition Services result in the latter's responsibility for property disposal.
[32] 40 U.S.C. § 102

"excess" unless it is not required by a component or activity within that Agency.

(3) Disposal: the reutilization, transfer, donation, sale, abandonment, or destruction of excess and surplus federal government property.

(4) Foreign Excess Property: excess property that is not located in the States of the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands.[33] Foreign excess personal property is simply the subset of foreign excess property that is "personal" or "moveable" rather than consisting of real property. FEPP includes all personal property held by the Agency regardless of property class or type.

(5) Reutilization: when an element of a federal agency receives ownership of, and reuses, federal government property that was initially procured by another element of the same federal agency. Within DoD, "reutilization" means transfer to another military service or DoD component or transfer under a program that has top level priority (Priority 1) per statutes applicable to DoD property.

(6) Transfer: when a federal agency receives ownership of federal government property that was initially procured by another federal agency. Within DoD such transfers are referred o as Federal Civilian Agency (FCA) transfers.

(7) Donation: when surplus federal government property is given to authorized state governments/agencies, or to a small group of designated private organizations.

(8) Property: limiting definition which excludes certain real property and also expressly excludes certain military items such as "naval vessels that are battleships, cruisers, aircraft carriers, destroyers, or submarines." Likewise, it excludes "records of the Government."

[33] 40 USC 701

(9) Usable Sales: sales of federal government property to the general public (usually via auctions) for full use in the manner originally intended.

(10) Scrap Sales: sales of federal government property to the general public (usually via auctions) for use of the components.

(11) Abandoned: federal government property without any private or public value.[34]

(12) Destroyed: federal government property that may not be sold or abandoned must be destroyed. In cases where property is not appropriate to be transferred to other parties, or there are no eligible parties interested in a no cost transfer/abandonment, the Agency must pay for property destruction of the material. Hazardous and non-recyclable wastes are examples of such properties.

2. Limitations:

a. The disposal procedure chosen for a specific piece of government property must conform to all DoD and U.S. government (USG) statutory and regulatory restrictions. For example, although Disposition Services may "abandon" some types of government property, it may not "abandon" an article that is a defense article (for example: a nuclear warhead), because this would violate statutory and regulatory procedures for the disposal of such items. Similarly, in order to effect a specific type of disposition transaction, opportunities for any higher priority transfer or disposition must have been exhausted or properly waived. For example, before competitive sales to the public can be undertaken, screening for potential reutilization, transfer or donation transactions must have been performed and failed to identify a potential recipient for the property. Before transfer or donation of FEPP to a foreign government, world-wide DoD screening must fail to produce results unless the requirement to screen he property has been waived at the DUSD, (L&MR) level.[35]

[34] Proper procedures for abandonment and destruction are found in DoD 4160.21-M, chapter 8. *See also* DRMS-I 4160.14, chapter 8 for environmental compliance rules.
[35] DoD 4160.21-M, Ch. 9.

b. Property is requisitioned on an "as is/where is" basis.[36]

c. Non-DoD requisitioners and purchasers must pay for all costs related to Packaging, Crating, Handling, and Transportation (PCH&T) of the property. PCH&T costs include the costs of inspection of the items by other USG agencies whenever the items re-enter the United States from their OCONUS locations.

3. Practitioner Notes:

a. Disposition Services co-locates its subordinate Disposition Services Officers (formerly DRMO's) with DoD units world-wide, usually at the post/installation level or the CJTF (Division) level in contingency environments.

b. DLA Disposal Process*:* In accordance with statutorily mandated processes, Disposition Services assigns the following four priorities to government elements requesting Disposition Services –managed property (*See* DRMS-I 4160.14):

(1) Priority 1 – Reutilization: Initial 14-day window where DoD property that is turned into disposition services may only be requisitioned by another DoD component or designated non-DoD "Special Programs" such as the DoS Foreign Military Sales program.[37]

(2) Priority 2 – Transfer: the next 21-day window where property not reutilized during priority 1 phase may be requisitioned by another USG agency.

(3) Priority 3 – Donation: the next 5-day window where property not transferred to another USG agency may be donated to an approved state government or organization.

(4) Priority 1-3 "Final Screening": the 2-day window where property not donated undergoes a final screening and "last chance" requisition window for all priority 1-3 components, agencies, and approved governments and organizations.

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[36] *See* DRMS-I 4160.14.

[37] Other special programs include Computers for Schools (Dep. Of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

(5) Priority 4 – Sales: window of time where property not requisitioned during priority 1-3 periods may be now sold to the general public via "usable sales" or "scrap sales." Property with military capabilities must be demilitarized to be eligible for sale. If unable to demilitarize, the property must be destroyed.

(6) Abandonment or Destruction: property not requisitioned during priorities 1-4 may now be abandoned or destroyed. Abandonment includes the "donation in lieu of abandonment" process for property utilizing the Economy formula which essentially provides that property may be given away when efforts at sale have failed or the cost of its care and handling incident to sale would exceed any estimated proceeds. This is a "cost avoidance" principle. However, ordinary limitations on transfer apply precluding release of such items as defense articles or hazardous waste to the public.

C. Foreign Excess Personal Property (FEPP) – 40 U.S.C. 701(b)(2)(B).

1. Purpose: an overview of requirements and transfer

a. Authorizes the head of an executive agency to "dispose of foreign excess property in a manner that conforms to the foreign policy of the United States." [38]

b. This law has received recent attention and application, as the U.S. continues drawdown in Afghanistan. Practitioners of fiscal law are often asked about "retrograde" operations, a term that loosely encompasses the process of transferring equipment.[39]

c. The statutory and regulatory guidance applies to FEPP regardless of whether it is generated in the "installation" (i.e., bases under arrangements with foreign states) or "operational" setting (i.e., contingency operations).

[38] Chapter 9 of the Defense Material Disposition Manual, DoD 4160.21-M provides DoD guidance on FEPP disposal.

[39] Army Doctrine Reference Publication 3-0 defines "retrograde" as a defense task. Many operators and fiscal attorneys use this term when referring to the property disposition process. The term as it is used in the context of property transfer in Afghanistan, does not squarely fit within the doctrinal definition. Judge Advocates should ensure they understand the actual command intent with regard to a "retrograde" operation in order to avoid confusion.

(1) The processes are the same as for excess property generated stateside. That is, "reutilization, transfer, donation, sale, abandonment/destruction" unless screening waivers apply. These processes apply as policy guidance set forth in Agency regulation, rather than statutory mandate.

(2) There is greater ability to vary screening and reutilization processes in the operational setting in order to meet operational needs or due to resource limitations. In Afghanistan, for example, fragmentary orders set forth the multi-step screening and reutilization process that applied before usable property could be transferred to the host nation or turned into DLA Disposition Services as unserviceable excess. Although the screening time frames and methods varied from what DoD property would undergo in CONUS, the statutory requirements with respect to priority of requisitioners/transferees were maintained.

d. Prior to conducting public sales of surplus property on the local economy, coordination of an agreement with the host nation authorizing sales of DoD excess property or the approval of DoS must be obtained.[40] When DoD brings property into the territory of the host nation, it does so "duty free." The later transfer or sale of excess property to private parties in the host nation ordinarily triggers the incidence of import taxes or duties as the property loses its "tax exempt" status. There may be other restrictions related to the entry of used property on the local economy which also need to be addressed.

e. "Retrograde" or "re-set" are not truly property "disposal" processes as they are not actions involving "excess" property. Instead the terms refer to property management processes or actions taken to return "non-excess" property to its pre-deployment location or to re-set it to another setting for continued future use by a DoD entity or military service. Property not selected for retrograde or re-set may be declared "excess" by the owning unit or service and, assuming no higher priority transfers are available may become eligible for transfer to a foreign government for the following purposes. Judge Advocates should ensure that they

[40] See DoD 4160.21-M, ch. 9.

understand the actual command intent with regard to "retrograde."[41]

(1) As a "donation of medical supplies to a non-profit medical or health organization" in accordance with 40 USC 703;

(2) In "exchange for substantial benefits or the settlement of claims," in accordance with 40 USC 704(b)(2)(B), if approved by the ASD for Logistics & Material Readiness; or

(3) As a donation in lieu of abandonment in accordance with 40 USC 704(b)(3) and DoD 4160.21-M, ch. 8 where the economy formula requirements are met.

2. Time/Amount for "Substantial Benefits" FEPP Transfers:

a. Implemented by delegation memorandum in response to specific requests. Often such authorities provide "blanket" authority for a certain period or as long as certain conditions apply in the operational setting. OEF requests have focused on transfers of FEPP incident to a FOB closure or transfer, and transfers of FEPP in situations that do not involve a base closure.

b. Current monetary limit for property value for a single base closing or transferring of a FOB in Afghanistan is $30,000,000.[42]

c. Approval Authority Levels for individual property transfer amount is tiered by rank and designated in delegation memorandum. Current approval authority levels for individual property transfers in Afghanistan (Note: monetary value is based on depreciated value):

(1) $0 - $75,000: O-6 Level Commander

(2) $75,000.01 - $500,000: First GO/FO in the Chain of Command

[41] F.M. 3.0 defines "retrograde" as a defense task involving "movement away from the enemy. This includes delays, withdrawals, and retirements." Many operators and fiscal attorneys use this term incorrectly when referring to the property disposition process. Instead of effecting a disposal, retrograde involves the management of property that will be retained somewhere by a component of the DoD.

[42] *See* Memorandum, Alan F. Estevez, Principal Deputy to the Assistant Secretary of Defense for Logistics and Material Readiness, to Commanding General, US Forces, Afghanistan, Subject: Authority to Transfer U.S. Foreign Excess Personal Property (FEPP) in Afghanistan (23 JAN 2012).

(3) $500,000.01 - $30,000,000: CDR or DCSR-A, USFOR-A

(4) $30,000,000.01 and above: ASD (L&MR)

3. Practitioner Notes:

a. "FEPP is a distinct category of property not to be confused with "excess and surplus."[43] This distinguishing definition is important to practitioners, as the process required by law and statute for "excess and surplus" and "FEPP" may be different. The disposal process outlined in section B above is statutorily mandated for "excess and surplus" property. However, per DoD disposal policy, the standard R/T/D/S processes should also apply to the management and disposition of FEPP unless waivers have been obtained.

(1) Screening waivers are often granted in conjunction with the grant of specific FEPP transfer authority in the operational setting. This is often due to system and resource limitations for federal civilian agency and state agency screening in the operational setting.

(2) Judge Advocates involved in "retrograde" operations (return of property that will remain under DoD control) and transfer (for purposes of disposal under 40 USC chapter 7 or security assistance under Title 10) should understand that transfers under the FEPP program will also affect procedures for property accountability under AR 735-5. This regulation explains, among other topics, the methods to account for and remove government property on the "property book" of a military unit.

b. To date, there have been numerous memoranda that authorize FEPP transfers in Afghanistan. These memoranda initially involved transfers authorized under 40 USC 704(b)(3) and currently pursuant to 40 USC 704(b)(2)(B).

(1) Based on various requests from the theater or combatant command, the authorizations have increased the value of property to be transferred, how the values were calculated. Types of property involved, added eligible transferees, added locations from which property could be transferred,

[43] DoD 4160.21-M, ch. 9, para. A(1).

and increased transfer justification and documentation requirements. Judge Advocates should ensure that they are operating with the most current authorization if engaged in FEPP in these environments.

(2) The transfer authorities cited in Title 40 are "disposition" based and do not authorize the transfer of defense articles. "Security Assistance" based authorities must be used to properly justify the transfer of defense articles.

D. Excess Defense Articles (EDA) Transfers: See section VII.C.2.(c) *infra*.

E. Afghanistan Defense Articles and Services Transfer: 2010 NDAA § 1234 (current extension at 2015 NDAA § 1231)

1. Purpose: to transfer defense articles from DoD stocks and to provide defense services in connection with the transfer to the military and security forces of Iraq and Afghanistan to support the efforts of those forces in restoring and maintaining peace and security

2. Time: authority expires Dec. 31, 2015.

3. Amount: aggregate replacement value of articles transferred and services provided may not exceed $250,000,000 (value of Excess Defense Articles transferred under Foreign Assistance Act do not count against this amount)

4. Approval Authority: Secretary of Defense with concurrence of Secretary of State. Prior to the exercise of this authority, SECDEF must provide a report on the plan for disposition of equipment in Afghanistan to appropriate congressional committees.

VII. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS (TITLE 22)

A. Introduction

1. General Rule: The Department of State (DoS) has the primary responsibility to establish policy and conduct Foreign Assistance on behalf of the USG– even during U.S. Military Operations.[44] The legal authority

[44] *See The Honorable Bill Alexander,* B-213137, 63 Comp. Gen. 422 (1984)

for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.[45]

2. Foreign assistance encompasses any and all assistance to a foreign nation, including Security Assistance (assistance to the internal police forces and military forces of the foreign nation), Development Assistance (assistance to the foreign government in projects that will assist the development of the foreign economy or their political institutions), and Humanitarian Assistance (direct assistance to the population of a foreign nation, including disaster relief).

3. Human Rights and Foreign Assistance.

a. The "Leahy Amendment," first enacted in the 1997 Foreign Operations Appropriation Act (DoS Appropriations Act)[46] prohibits the USG from providing funds to the security forces of a foreign country if the DoS has credible evidence that the foreign country or its agents have committed gross violations of human rights unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.

b. This language is found in yearly DoD Appropriations Act prohibiting the DoD from funding any training program involving a unit of the security forces of a foreign country if the DoS has credible information that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken..

B. Framework for DoS Foreign Assistance Authorizations and Appropriations

1. As the primary agency responsible for foreign assistance, DoS, (through its Director for Foreign Assistance (DFA)) has identified five broad foreign assistance objectives: (1) Peace & Security; (2) Governing Justly

[45] The Director of U.S. Foreign Assistance within the Department of State is charged with directing U.S. foreign assistance in accordance with foreign policy objectives. Information can be found at http://www.state.gov/f/index.htm.

[46] *See* Pub. L. No. 105-118, Foreign Operations, Export Financing, and Related Programs Appropriations Act, section 570, "Limitation on Assistance to Security Forces."

& Democratically; (3) Investing in People; (4) Economic Growth; and (5) Humanitarian Assistance.[47]

2. Funding these objectives involves multiple funding sources. A complete review of all DoS funding sources and initiatives for foreign assistance is beyond the scope of what Judge Advocates will encounter in the military operating environment. Therefore, this outline will focus on those DoS foreign assistance authorizations and appropriations that interface with DoD operations.

3. "The Players": Administering and performing foreign assistance missions under DoS policy and funding authority involves multiple agencies and/or departments. Of primary importance for Judge Advocates are:

   a. DoS: assists the President in formulating and executing the foreign policy and relations of the United States of America. The Director, U.S. Foreign Assistance coordinates foreign assistance programs of both DoS and the United States Agency for International Development (USAID). [48]

   b. USAID: reports to and serves under the "direct authority and foreign policy guidance" of the Secretary of State. USAID administers the bulk of bilateral economic aid, including disaster relief, economic growth, global health, and food assistance. USAID appropriations are generally included under the DoS Title within the current CAA.

   c. DoD:

      (1) Defense Security Cooperation Agency (DSCA): DoD organization charged with implementing multiple DoS funded and controlled security assistance programs involving transfer of defense articles and services.

      (2) Military Departments and Combatant Commanders: execute many of the programs implemented by DSCA.

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[47] *See* "Foreign Assistance Standardized Program Structure and Definitions," April 8, 2010, *available at* http://www.state.gov/documents/organization/141836.pdf (last accessed Feb. 19, 2014). Each of these broad programs contains several sub-elements.

[48] United States Agency for International Development (USAID) is an independent federal government agency that receives overall foreign policy guidance from the Secretary of State. USAID was created by Executive Order after the enactment of the 1961 Foreign Assistance Act and became an independent agency in 1999.

4. Accessing the DoS Appropriations and Authorizations. For the deployed unit, properly coordinating for access to the DoS/USAID appropriations and authorizations becomes critical. In a non-deployed environment, a DoD unit would normally coordinate with the Defense Security and Cooperation Agency (DSCA) and follow the procedures of the Security Assistance Management Manual (SAMM).[49]

5. Within this narrowed framework, DoS authorizations and appropriations for conducting foreign assistance that interact with DoD may be grouped into three general subcategories consistent with DoS objectives: (1) Peace & Security Assistance, (2) Governing Justly & Democratically, and (3) Humanitarian Assistance.

C. Peace & Security Assistance (SA).

The majority of interaction of DoD with the DoS SA programs falls under the authorizations within The Foreign Assistance Act of 1961(FAA)[50] and The Arms Export Control Act of 1976 (AECA).[51] Congress frequently amends these Acts in the annual DoS and DoD appropriation acts. Judge Advocates may find it beneficial to consider these programs in two general subcategories: reimbursable and U.S.-financed.

1. Reimbursable Security Assistance

a. Foreign Military Sales (FMS) - 22 U.S.C. § 2761 (AECA §§ 21-27).

(1) Purpose: Contracts or agreements between an authorized foreign purchaser and the U.S. for the sale of DoD defense articles, services, and training from existing stocks or new procurements for the purpose of internal security, legitimate self-defense, participation in regional/collective arrangements consistent with the UN charter, or to enable foreign military contribution to public works and civic action programs.

(2) Time/Amount: FMS is a "Revolving Fund," with the intent of being self-funded. As such, no annual appropriation is required.

[49] DSCA implements those security assistance programs involving the transfer of defense articles or services. Regulatory guidance can be found in DoD 5105.38-M, "Security Assistance Management Manual," [hereinafter SAMM], *available at* http://www.dsca.osd.mil/samm/.
[50] 22 U.S.C. § 2151 et seq.
[51] 22 U.S.C. § 2751 et seq.

(a) DoS is authorized to charge an administrative fee to the foreign purchasing nation for each "case" (sale) to reimburse the U.S. for administrative costs.

(b) This fee allows DoS to generate the funds necessary to reimburse the appropriate DoD account via an Economy Act transaction, or other reimbursement authority in another statute.

(c) Unless an exception applies under the statute, payment must be made in advance of delivery of the defense article/service and must be made in U.S. dollars.

(3) Approval Authority:

(a) Countries or international organizations are only eligible for FMS transactions if the POTUS makes a determination of their eligibility.[52] DoS then determines whether an FMS case is approved. Current eligibility criteria:

(i) Furnishing of defense articles / services must strengthen U.S. security and promote world peace.

(ii) No re-transfers without Presidential consent.

(iii) No use of articles / services for purposes other than for which furnished, unless consent of the President has first been obtained.

(iv) Recipient must maintain security of such article.

(b) The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on behalf of DoS via the Defense Security Cooperation Agency (DSCA). Practitioners can find additional information on this implementation in the Security

[52] SAMM, Table C4.T2 contains a list of current eligibility status for Countries and International Organizations.

Assistance Management Manual (SAMM) chapters 4-6 as well as online at http://www.samm.dsca.mil/.

(4) Limitations:

(a) The military equipment, weapons, ammunition, and logistics services, supplies, and other support must conform to the restrictions of the DoS International Traffic in Arms Regulations (ITARs). [53]

(b) ITAR-designated Significant Military Equipment (SME) may only be purchased via the FMS, and may not be purchased via the Direct Commercial Sales (DCS) program. (See *infra*, V.C.1.c.).

b. Foreign Military Lease Program (FML)- 22 U.S.C. § 2796-2796a (AECA §§ 61-62).

(1) Purpose: Authorizes leases of Defense articles to foreign countries or international organizations provided there is a compelling foreign policy and national security reason for lease rather than sale.

(2) Time/Amount:

(a) The leases generally occur on a reimbursable basis. The U.S. may, however, provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program (*See infra*, III. C. 1.).

(b) The lessee must pay in U.S. dollars all costs incurred by the U.S. in leasing, to include depreciation.

(c) Leases must be for a fixed duration not to exceed 5 years.

(3) Practitioner's Notes: DSCA executed program on behalf of DoS.

[53] 22 CFR part 121

c. Direct Commercial Sales (DCS) Program - 22 U.S.C. § 2778

(1) Purpose: Authorizes eligible governments to purchase defense articles or services directly from defense contractors.

(2) Time/Amount: DoD is not involved in the management of the sale from the contractor to the foreign nation.

(3) Practitioner Notes:

(a) A DoS review and "export license" is required from the Directorate of Defense Trade Controls before the contractor may provide the products to the foreign nation.[54]

(b) Some Significant Military Equipment (SME) must be purchased through FMS.

2. U.S. Financed DoS Security Assistance.

a. Foreign Military Financing (FMF) Program - 22 U.S.C. § 2763 (AECA § 23); 22 U.S.C. § 2311 (FAA Part II, Ch. 2).

(1) Purpose: to finance, through grants or loans, the acquisition of defense articles, services, and training (through the FMS/FML or DCS programs) by friendly foreign countries to strengthen U.S. security and foreign policy.

(2) Time: 1 year period of availability.[55] Loaned funds must be repaid over a period not to exceed 12 years unless otherwise approved by Congress.

Amount: FY 2015 CAA appropriated $5,014,109,000 (note: there are additional caveats and instructions on use).

(3) Practitioner's Notes:

[54] *See* ITAR part 123for regulatory procedures for licensing to export defense articles.

[55] Sec 7011 of 2010 CAA (Pub. L. No. 111-117), provides that if such funds are initially obligated before the expiration of period of availability, they shall remain available for an additional 4 years. *Available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf.

(a) Responsibility of the Asst. Sec. for Political-Military Affairs/ Under Sec. for Arms Control & International Security.

(b) DSCA executed program on behalf of DoS.

(c) U.S. financing through Foreign Military Financing (FMF- discussed *infra* section V.C.2.a) is only approved on a limited case-by-case basis.[56]

b. Presidential Drawdowns- Foreign Assistance Act of 1961 and Special Legislative Authorities.

Directives by the President pursuant to the FAA or other special legislation for DoD to transfer on-hand defense articles and services (including military education and training) to a foreign country, their military their military or security services, or the foreign civilian population. The items need not be "surplus" or "excess."

(1) Emergency Drawdown Authority - 22 U.S.C. § 2318(a)(1)[57]

(a) Purpose: for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization that can't be addressed under AECA or any other law.

(b) Time/Amount: defense articles and services of an aggregate value of up to $100,000,000 in any fiscal year.

(c) Limitations: Requires presidential determination (PD) and prior congressional notification (CN).

(2) Nonemergency Drawdown Authority - 22 U.S.C. § 2318(a)(2).[58]

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[56] *See* "Defense Security Cooperation Agency Guidelines for Foreign Military Financing of Direct Commercial Contracts," August 2009.

[57] Foreign Assistance Act (FAA) § 506(a)(1)
[58] FAA § 506(a)(2

(a) Purpose: for international narcotics control, disaster relief, antiterrorism assistance, nonproliferation assistance, and migration and refugee assistance.

(b) Time/Amount: articles and services of an aggregate value of up to $200,000,000 from any agency of the U.S. in any fiscal year.

(i) Of that amount, not more than $75M may come from DoD resources;

(ii) not more than $75M may be provided for counternarcotics;

(iii) and not more than $15M to Vietnam, Cambodia and Laos for POW accounting.

(c) Limitations: Drawdowns supporting counternarcotics and refugee or migration assistance require PD 15-day prior CN.[59]

(3) Peacekeeping Operations Drawdown Authority -, 22 U.S.C. § 2348a(c)(2).[60]

(a) Purpose: provision of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.

(b) Time/Amount: of an aggregate value up to $25,000,000 in any fiscal year.

(c) Limitations: Requires PD and prior CN.

(4) Special Legislation Drawdown Authorities.

(a) Iraq Liberation Act of 1998 - Pub.L. No. 105-338, 112 Stat. 3178 (Oct. 31, 1998).

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[59] *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996); FY 2001 Security Assistance Act, Pub. L. 106-280, 114 Stat. 850 (2000).
[60] FAA § 552(c)(2).

(i) Purpose: defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations.

(ii) Time/Amount: may not exceed $97 million.[61]

(iii) Limitations: requires 15 day prior CN.

(b) Afghanistan Freedom Support Act of 2002 – 22 U.S.C. § 7532.

(i) Purpose: Presidential authority to drawdown defense articles and services, and military education and training for the Government of Afghanistan and other eligible foreign countries/ international organizations.[62] The assistance may also be provided by contract.

(ii) Time/Amount: of an aggregate value not to exceed $550,000,000. Amounts appropriated for reimbursement of this authority increase this limitation on aggregate value.[63]

c. Excess Defense Articles (EDA) - 22 U.S.C. § 2321j.

(1) Purpose: to offer, at reduced or no cost, lethal and non-lethal defense articles declared as excess by the Military Departments to foreign governments or international organizations in support of U. S. national security and foreign policy objectives.

(2) Time/Amount: the aggregate current market value of EDA transferred in a fiscal year may not exceed $425,000,000.

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[61] President Bush subsequently directed $92 million in drawdown assistance in 2002. *See,* Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (Dec. 23, 2002). Unique to drawdowns, Congress subsequently appropriated $63.5M reimbursement for IFSA drawdown support. *See,* Sec. 1309 of the FY03 Emergency Wartime Supplemental Appropriation.

[62] This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act.

[63] For example, Congress also provided $165M reimbursement for the AFSA Drawdown. *See,* Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.

(a) Prior to sale, the value of the item may be depreciated.

(b) EDA may be purchased by foreign nations, or they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program. While both sales and grants are authorized, sales are rarely conducted under this authority – grants are the primary type of transfer.

(c) DoD procurement funds may not be expended in connection with the transfer.

(3) Limitations:

(a) Must notify Congress 30 days prior to transfer of any SME or EDA valued at $7,000,000 or more.

(b) Generally, DoD funds may not be expended for packing and transport of EDA. As an exception, where DoS determines it is in the U.S. national interest, no-cost space available transportation is authorized for countries receiving less than $10M FMF or IMET in any fiscal year.

(4) Practitioner Notes:

(a) EDA are those defense articles no longer needed by DoD, even if that type of item is still regularly used by DoD units.[64] The determination of excess is made by Defense Logistics Agency (DLA) Disposition Services.

(b) Articles must be drawn from existing stocks of DoD (for purposes of EDA, the Coast Guard is considered part of DoD).

(c) Transfer of articles must not have an adverse impact on military readiness.

(d) DSCA executed program on behalf of DoS.

[64] SAMM, paragraph C11.5.1

d. Complex Crises Fund (CCF) –FY 2015 Continuing Appropriations Act (CAA).

(1) Purpose: support activities to prevent or respond to emerging or unforeseen crises that address reconstruction, security, or stabilization needs.

(2) Time: through 30 September 2016

(3) Amount: $30,000,000

(4) Practitioner Notes:

(a) The CCF replaces the §1207 Security and Stabilization Assistance Transfer Authority as authorized and appropriated for DoD.

(b) The CCF will focus on "advancing peace and stability" with projects aimed to "address and prevent root causes of conflict and instability…"[65]

e. International Military Education & Training (IMET) - 22 U.S.C. §§ 2347-2347d.

(1) Purpose: program to fund the military training of foreign soldiers and certain related civilian personnel[66] at U.S. military schools in order to:

(a) Encourage effective relationships and understanding between the U.S. and foreign countries to further international peace and security;

(b) Improve ability of participating countries to utilize their resources for greater self-reliance; and

[65] DoS Executive Budget Summary, Function 150 & Other International Programs, available at http://www.state.gov/documents/organization/135888.pdf.

[66] Foreign civilians who are not members of the government may only be provided training under this authority if it (1) would contribute to responsible defense resource management, (2) foster greater respect for and understanding of the principle of civilian control of the military, (3) contribute to cooperation between military and law enforcement personnel with respect to counternarcotics efforts, and (4) improve military justice procedures in accordance with internationally recognized human rights.

(c) Increase awareness of internationally recognized human rights.

(2) Time/Amount: FY 2015 CAA appropriates $106,074,000 available for the fiscal year.

(a) Of this amount, $4,000,000 remains available until expended only through the regular notification procedures of the Committees on Appropriations.

(b) Reimbursement should be sought for provided IMET.

(3) Practitioner Notes: DSCA executed program on behalf of DoS. Guidelines can be found in the SAMM, chapter 10.[67]

f. Peacekeeping Operations (PKO) - 22 USC § 2348

(1) Purpose: necessary expenses for PKO in furtherance of the national security interests of the United States, to include enhancing the capacity of foreign civilian security forces.

(2) Time: 1 year funds.

(3) Amount: 2015 CAA appropriated $144,993,000.

(4) Practitioner's Notes: current focus for these programs is in Africa. Judge Advocates assigned to AFRICOM should be familiar with DoS PKO programs for which DoD provides military expertise and assistance. One such initiative is the Global Peace Operations Initiative (GPOI). No funds may be used in Africa to support any military training or operations that include child soldiers.

D. Governing Justly & Democratically

DoS and USAID finance a number of Governing Justly & Democratically programs, including: Rule of Law and Human Rights, Good Governance, Political Competition and Consensus Building, and Civil Society. Several of these

[67] The Defense Institute of Security Assistance Management operates the IMET for DSCA and maintains an online database of procedures and programs, *available at* http://www.disam.dsca.mil/itm/.

programs do involve DoD. The most prominent funding sources for these programs are the Economic Support Fund (ESF) and the Bureau of International Narcotics and Criminal Law Enforcement (INCLE), both of which provide DoS funds to Provincial Reconstruction Teams in Iraq and Afghanistan, and important element for development and the Rule of Law. Judge Advocates are often key participants in the Rule of Law mission while deployed and should be familiar with the interagency aspect of funding such missions.

1. Economic Support Fund (ESF), 22 USC §2346.

a. Purpose: to advance U.S. interests by helping countries meet short and long-term political, economic, and security needs. In other words, the primary function is to build the governance capacity of a foreign country.[68]

b. Time: generally 2 year period of availability.

Amount: 2015 CAA: $2,632,529,000 (avail. thru 30 Sep 2016)

c. Limitations:

(1) Under §2346(e), these funds may NOT be used for military or paramilitary purposes.

(2) These funds are sometimes earmarked for certain countries within the appropriations act. They are not exclusively for Afghanistan.

(3) No ESF (or INCLE) may be used to assist the Government of Afghanistan until the Sec. of State, in consultation with the Administrator of USAID, certifies and reports to appropriations committees several key factors concerning corruption.

(4) Funds should also be used to the maximum extent practicable to emphasize participation of women.

d. Practitioner Notes: ESF OCO funds are often used to fund PRT's and Rule of law activities.

[68] USAID is the Agency primarily responsible for expenditure of these funds.

2. International Narcotics and Criminal Law Enforcement (INCLE) Funds - 22 USC §2291.

a. Purpose: to "furnish assistance to any country or international organization . . . for the control of narcotic and psychotropic drugs and other controlled substances, or for *other anticrime purposes*."[69]

b. Time: generally 2 year period of availability.

Amount: FY 2015 CAA: $853,055,000 available through 30 September 2016

c. Practitioner Notes:

(1) The DoS Bureau of International Narcotics and Criminal Law Enforcement (INL) has a broad mandate to "(1) to reduce the entry of illegal drugs into the United States; and (2) to minimize the impact of international crime on the United States and its citizens. Counternarcotics and anticrime programs also complement the war on terrorism, both directly and indirectly, by promoting modernization of and supporting operations by foreign criminal justice systems and law enforcement agencies charged with the counter-terrorism mission."[70]

E. Humanitarian Assistance.

1. DoS and USAID are the U.S. agencies designated as the lead to provide humanitarian assistance in response to emergencies and natural disasters overseas. Judge Advocates should be generally aware that DoS/USAID has authority and appropriations to fund humanitarian assistance from several different accounts. These accounts include, but aren't limited to: Development Assistance Funds, the Economic Support Fund, and International Disaster Assistance Funds.

2. Although DoS/USAID have the primary responsibility and are appropriated funds to carry out humanitarian assistance, DoD possesses

[69] 22 U.S.C. § 2291 (4) (emphasis added).
[70] Bureau of International Narcotics and Law Enforcement Affairs Department of State Webpage, *available at* http://www.state.gov/p/inl/.

the logistics infrastructure and may be called upon to assist with transport and provision of supplies and aid. (see VI.D.).[71]

a. Iraq operations and presence in Iraq or Kuwait (as noted above) are met.

VIII. CONCLUSION.

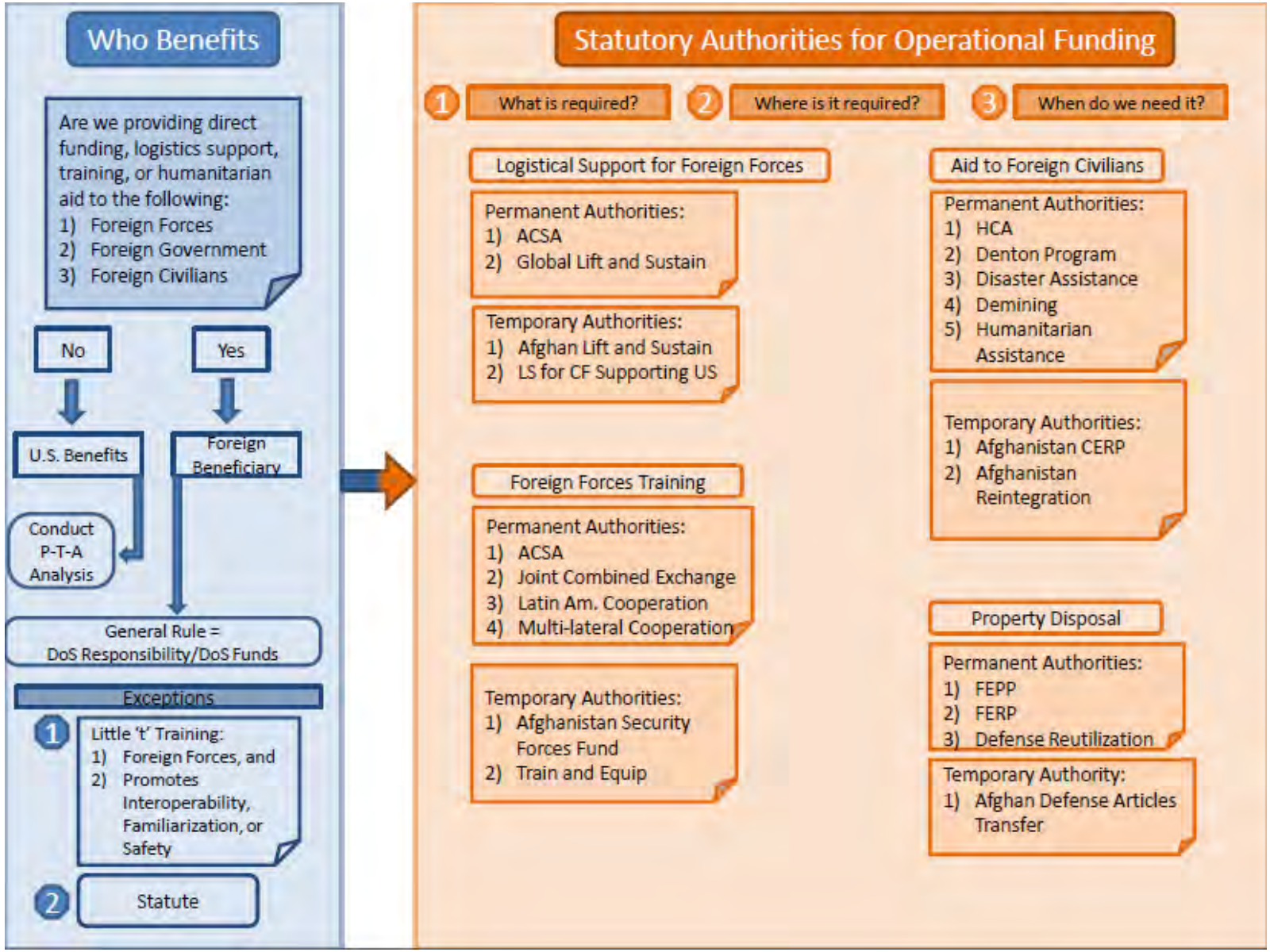
A. The Department of State, and not the Defense Department, is primarily responsible for all foreign assistance.

B. Department of Defense funds foreign assistance, including security and humanitarian assistance, by statutory exception only.

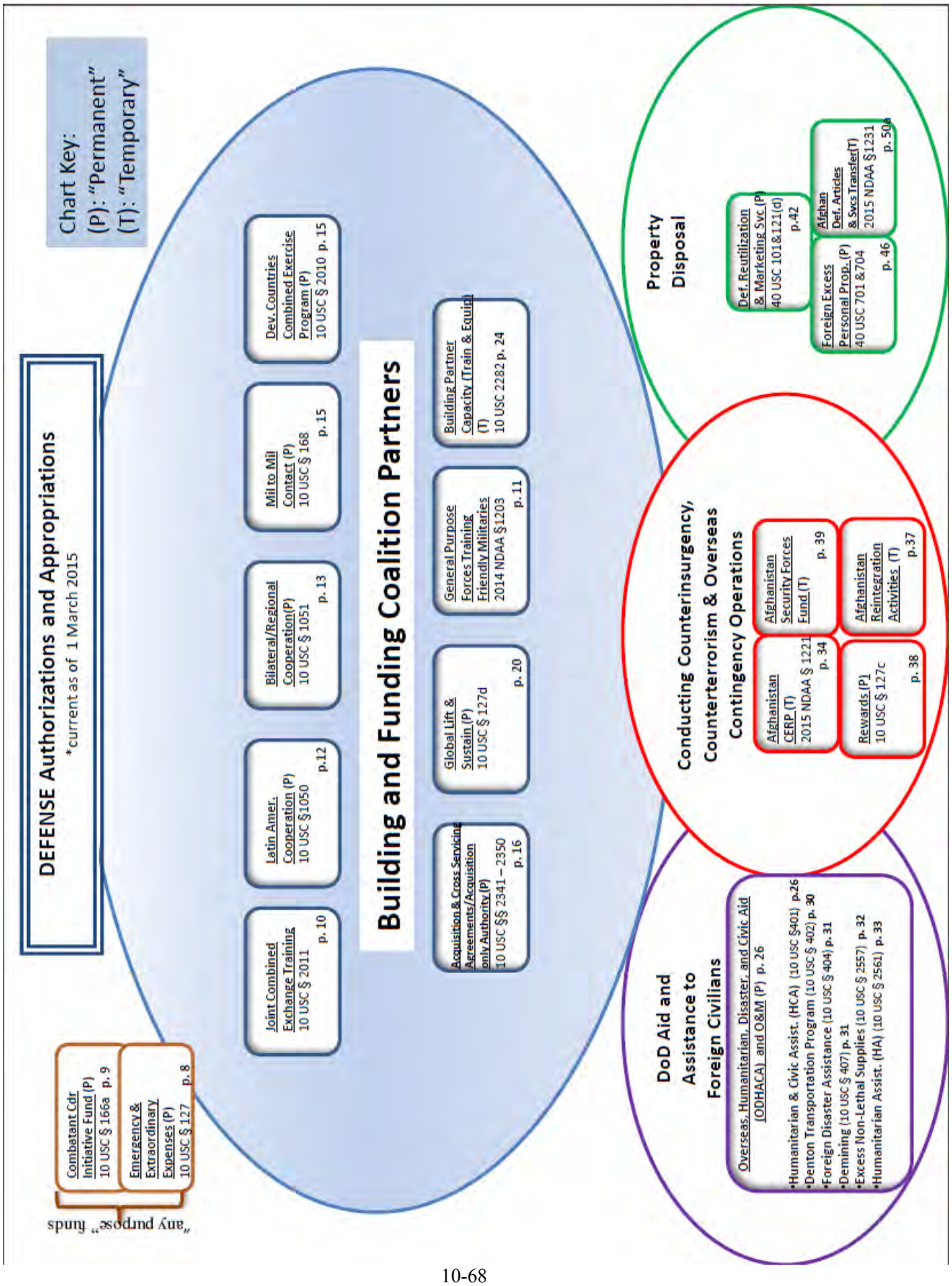
Practitioners must find either permanent (usually Title 10) or temporary statutory authority for the Department of Defense to fund foreign assistance, unless a limited exception of "little t" training applies to the operation.

APPENDIX A: OPERATIONAL FUNDING ANALYSIS FLOW CHART

[71] DoS exceptional requests to DoD for Humanitarian and Disaster Assistance are initiated and coordinated Office of International Security Operations (falling within the Under Secretary for Arms Control and International Security's Bureau of Political-Military Affairs). *See* http://www.state.gov/t/pm/iso/c21542 .htm#dos-ihada (last accessed June 22, 2010).


Who Benefits
Are we providing direct funding, logistics support, training, or humanitarian aid to the following:
1) Foreign Forces
2) Foreign Government
3) Foreign Civilians
No
Yes
U.S. Benefits
Foreign Beneficiary
Conduct P-T-A Analysis
General Rule = DoS Responsibility/DoS Funds
Exceptions
1
Little 't' Training:
1) Foreign Forces, and
2) Promotes Interoperability, Familiarization, or Safety
2
Statute
Statutory Authorities for Operational Funding
1 What is required?
2 Where is it required?
3 When do we need it?
Logistical Support for Foreign Forces
Permanent Authorities:
1) ACSA
2) Global Lift and Sustain
Temporary Authorities:
1) Afghan Lift and Sustain
2) LS for CF Supporting US
Foreign Forces Training
Permanent Authorities:
1) ACSA
2) Joint Combined Exchange
3) Latin Am. Cooperation
4) Multi-lateral Cooperation
Temporary Authorities:
1) Afghanistan Security Forces Fund
2) Train and Equip
Aid to Foreign Civilians
Permanent Authorities:
1) HCA
2) Denton Program
3) Disaster Assistance
4) Demining
5) Humanitarian Assistance
Temporary Authorities:
1) Afghanistan CERP
2) Afghanistan Reintegration
Property Disposal
Permanent Authorities:
1) FEPP
2) FERP
3) Defense Reutilization
Temporary Authority:
1) Afghan Defense Articles Transfer

APPENDIX B: DOD FUNDING SOURCES



Chapter 11:

The Judgment Fund

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CHAPTER 11

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

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CHAPTER 11

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

I. REFERENCES.

A. 31 U.S.C. § 1304 (providing a permanent appropriation from which to make payments for compromise settlements, awards, and judgments).

B. 41 U.S.C. § 7108 (authorizing payment of claims under the Contract Disputes Act from the Judgment Fund).[1]

C. Treasury Financial Manual (TFM) 6-3100, vol I, Certifying Payments and Recording Corresponding Intragovernmental Receivables in the Federal Government's Judgment Fund (Apr. 2009) [hereinafter TFM 6-3100]. Available at http://tfm.fiscal.treasury.gov/v1/p6/c310.pdf.

D. General Accounting Office, *Principles of Fed. Appropriations Law*, vol. III, ch. 14, GAO-08-978SP (3d ed. 2008) [hereinafter GAO Red Book].

E. DoD Regulation 7000.14-R, *Financial Management Regulation*, vols. 3 & 10 [hereinafter DoD FMR]. Available at http://comptroller.defense.gov/fmr.

F. Defense Finance and Accounting Service--Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation [hereinafter DFAS-IN 37-1]. Available at http://www.asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200.

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[1] Title 41 has undergone reorganization in order to remove "ambiguities, contradictions, Public Law No. 111-350, 124 Stat. 367 (Jan. 4, 2011) effected a renumbering of Title 41 and gave new section numbers to many of the most important government contract laws. Some examples of the revised citations—

The Buy American Act, formerly at 41 U.S.C. §§ 10a-10d, will be found at 41 U.S.C. §§ 8301-8305.

The Anti-Kickback Act, formerly at 41 U.S.C. §§ 51-58, will be found at 41 U.S.C. §§ 8701-8707.

The Competition in Contracting Act, formerly at 41 U.S.C. § 253, will be found at 41 U.S.C. §§ 3301-3311.

The Service Contract Act, formerly at 41 U.S.C. §§ 351-358, will be found at 41 U.S.C. §§ 6701-6707.

The Contract Disputes Act, formerly at 41 U.S.C. §§ 601-613, will be found at 41 U.S.C. §§ 7101-7109.

The changes will require updating your references to these and other commonly cited statutes.

G. Army Federal Acquisition Regulation Supplement, pt. 5133.212-90-9 [hereinafter AFARS].

H. Air Force Instr. 65-601, vol I, Budget Guidance And Procedures (16 August 2012) [hereinafter AFI 65-601].

II. DEFINITIONS.

A. Judgment. A judgment is a "decision issued by a court . . . that resolves a case, as far as that court is concerned, by ruling on the issue in that case." *See* Ralph C. Nash et al., *The Government Contracts Reference Book*, p. 305 (4th ed., 2013).

B. Consent Judgment. A consent judgment (or "consent decree") is a judgment issued by a court in which the court sanctions an agreement reached by the parties.

C. Settlement. A settlement is an administrative determination that disposes of a claim. *See e.g.*, 10 U.S.C. § 2731 (defining the verb to "Settle" as to "consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance").

D. Compromise Settlement. A compromise settlement is an "agreement reached by the parties involving mutual concessions." *GAO Red Book*, vol. III, ch. 14, 14-34 (citing 38 Op. Att'y Gen. 94, 95-96 (1933)).

E. Award. An award is a decision issued by an administrative board such as the agency-level Boards of Contract Appeals.

F. Unexpired Appropriation (Unexpired Account). An appropriation account available for obligation during the current fiscal year (current funds). *See* DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.

G. Expired Account or Appropriation. An appropriation or fund account in which the balances are no longer available for incurring new obligations because its period of availability has ended, but which retains its fiscal identity and remains available to adjust and liquidate previous obligations. *See* 31 U.S.C. § 1553(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.

H. Closed (or Canceled) Account or Appropriation. An appropriation that is no longer available for any purpose. An appropriation is closed/canceled five years after the end of its period of availability. *See* 31 U.S.C. § 1552(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.

III. OBLIGATION OF FUNDS FOLLOWING AGENCY-LEVEL SETTLEMENT OF A CONTRACT CLAIM. Generally, obligate funds using the same obligation rules that are used for normal contract changes. *See* DFAS-IN 37-1, Table 8-6, paras. 13-14; *see also supra* Chapter 3, *Availability of Appropriations as to Time*; Chapter 5, *Obligating Appropriated Funds*.

A. If the settlement relates to an in-scope contract change (the "relation-back theory"), that settlement should be funded from the appropriation cited on the original contract.
See DoD FMR, vol. 3, ch. 8, para. 080304.B; DFAS-IN 37-1, Table 8-7, para. 4; AFI 65-601, vol. I, para. 6.3.7 and Figure 6.1; *The Honorable Andy Ireland, House of Representatives*, B-245856.7, 71 Comp. Gen. 502 (1992) ("the liability relates back to the original contract and the price increase to pay the liability is charged to the appropriation initially obligated by the contract").

1. If the appropriation that was used to fund the original contract has expired, it may still be used to obligate against the settlement, subject to agency restrictions. *See* DoD FMR, vol. 3, ch. 8, para. 080304.B, E; DFAS-IN 37-1, Table 8-7, note 1 (requiring submission of written documentation); AFI 65-601, vol. I, para. 6.4.2 and Figure 6.1 (limiting local level approval authority to adjustments under $100,000); AFARS 5133.212.90-9(b) and (c)(2); *see also* DoD FMR, vol. 3, ch. 10, para. 100202.

2. If the appropriation that was used to fund the original contract has expired (and is not yet closed) but is exhausted, a consent judgment is required with payment of that judgment from the Judgment Fund and reimbursement using current funds. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.90-9(b) and (c)(2)(iii) (contracting officer must contact ASA(FM&C) for authorization prior to entering into a consent judgment).

3. If the appropriation that was used to fund the original contract has closed/canceled, current funds must be obligated. *See* 31 U.S.C. § 1553; AFI 65-601, vol. I, para. 6.3.7, para. 6.4.1.1, and Figure 6.1; AFARS 5133.212.90-9(b) and (c)(2)(iv). However, the total amount of such charges to the current account may not exceed an amount equal to one percent of the total appropriations for that account. 31 U.S.C. § 1553(b)(2).

B. If the settlement relates to an out-of-scope change, fund it from appropriations available for current obligation. *See* DoD FMR, vol. 3, ch. 8, para. 080304.C-E; AFI 65-601, vol. I, para. 6.3.8 and Figure 6.1.

IV. OBLIGATION OF FUNDS FOLLOWING A JUDGMENT OR AWARD.

A. If the agency has current funds available, pay the judgment/award using current funds (not the Judgment Fund). *See* AFARS 5133.212.90-9(d)(1).

B. If insufficient current funds are available, the Judgment Fund must be used to pay the judgment/award. *See* AFARS 5133.212.90-9(d)(2). The Contract Disputes Act requires the agency to reimburse the Judgment Fund from its operating appropriations current at the time of judgment/award. 41 U.S.C. § 7108(c). *See also* DoD FMR, vol. 3, ch. 8, para. 080304.F; AFI 65-601, vol. I, para. 6.3.6.7.1; DFAS-IN 37-1, Table 8-6, para. 15.

V. BACKGROUND BEHIND THE NEED FOR AND CREATION OF THE JUDGMENT FUND.

A. The Appropriations Clause (Article I, § 9, cl. 7) prohibits the withdrawal of funds from the Treasury absent an appropriation. This Constitutional requirement applies to both the executive branch and the judiciary. *See Collins v. United States*, 15 Ct. C1. 22, 36 (1879) (holding that the Appropriations Clause does not prohibit the incurrence of legal liabilities through issuance of a judgment, but likewise does not authorize the withdrawal of money to satisfy that judgment).

B. Judgments can be satisfied through one of the following methods:

1. A specific appropriation covering a specific judgment;

2. A general appropriation covering multiple or a class of judgments; or

3. An authorization from Congress to use existing appropriations.

C. The Judgment Fund was established in 1956 to alleviate the need for specific authorizing and/or appropriating legislation following each successful claim against the United States thereby reducing or eliminating the amount of interest successful claimants would receive pending such legislation. *See* H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

VI. THE JUDGMENT FUND. 31 U.S.C. § 1304.

A. General Concept of the Fund. The primary purpose behind the Judgment Fund is to establish a permanent appropriation, which would allow the prompt payment of judgments and compromise settlements, thereby reducing the cost to the Government of post-judgment interest. *See United States v. Varner*, 400 F.2d 369 (5th Cir. 1968); H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

B. Characteristics.

1. Permanent and Indefinite. The Judgment Fund is "standing authority" to access and disburse appropriations from the Treasury. The Judgment Fund has no fiscal year limitations, nor are there any limits with respect to the amount of funds available. Consequently, there is no requirement that Congress appropriate or "replenish" the Fund either annually or at any other time. 31 U.S.C. §1304(a).

2. Applicability. Only those judgments, awards, and compromise settlements that are statutorily specified are eligible for payment out of the Judgment Fund. 31 U.S.C. § 1304(a)(3), (b), and (c); *see also GAO Red Book*, vol. III, ch. 14, 14-32. These statutorily specified judgments, awards, and compromise settlements consist of the following:

a. Judgments:

(1) A United States District Court judgment made pursuant to 28 U.S.C. § 2414;

(2) A Court of Federal Claims judgment made pursuant to 28 U.S.C. § 2517 or 41 U.S.C. § 7108(a); and

(3) A state or foreign court judgment made pursuant to 28 U.S.C. § 2414 if the Attorney General certifies that payment is in the best interest of the United States.

b. Awards (administrative adjudications) made pursuant to:

(1) The Federal Tort Claims Act (28 U.S.C. § 2672);

(2) The Small Claims Act (31 U.S.C. § 3723);

(3) The Military Claims Act (10 U.S.C. § 2733);

(4) The Foreign Claims Act (10 U.S.C. 2734);

(5) The National Guard Claims Act (32 U.S.C. § 715);

(6) The National Aeronautics and Space Act of 1958 (50 U.S.C. § 20113); and

(7) The Contract Disputes Act of 1978 by a Board of Contract Appeals (41 U.S.C § 7108(b)).

c. Compromise Settlements. When Congress created the Judgment Fund in 1956, it initially did not permit payment out of the fund for compromise settlements. In the late 1950's, many people resorted to reducing compromise settlements to consent judgments for the sole purpose of taking advantage of the Judgment Fund. In 1961, Congress cured this situation by making the Judgment Fund available for compromise settlements to the same extent that it was already available for judgments in similar cases. *See* P.L. 87-187, 75 Stat. 416 (1961). Payment from the Judgment Fund is now statutorily authorized for the following compromise settlements:

(1) Compromise settlements negotiated by the Department of Justice (DOJ) to dispose of actual or imminent litigation (28 U.S.C. § 2414); and

(2) A compromise settlement pursuant to the Federal Tort Claims Act (28 U.S.C. § 2677).

3. Finality. The Judgment Fund is only available for judgments, awards, and compromise settlements that are final. 31 U.S.C. § 1304(a). For payments under the Judgment Fund, finality attaches to those judgments which "have become conclusive by reason of loss of the right to appeal." B-129227, Dec. 22, 1960 (unpub.) Judgments become final under the following circumstances:

   a. The court of last resort renders a decision or elects not to hear an appeal;

   b. The parties elect to not seek further review; or

   c. The time allowed for appeal expires. *The Judgment Fund and Litigative Awards under the Comprehensive Environmental Response, Compensation and Liability Act*, B-253179, 73 Comp. Gen. 46 (1993); *see also Herman I. Kamp*, B-198029, 1980 U.S. Comp. Gen. LEXIS 3133 (May 19, 1980) (unpub.) (noting that the rationale for this requirement is to protect "the United States against loss by premature payment of a judgment which might later through appeal be amended or reversed").

4. Money Damages Only. The Judgment Fund addresses only those judgments where the court directs the government to pay money, as opposed to performing or refraining from performing some specific act (i.e., injunctive relief). *Availability of Expired Funds for Non-Monetary Judicial Awards*, B-238615, 70 Comp. Gen. 225, 228 (1971) (finding that a court order to implement extended GI Bill benefits should be paid for out of unobligated but expired VA appropriations rather than the Judgment Fund); *see also United States v. Garney White - Funding of Judgment*, B-193323, 1980 U.S. Comp Gen LEXIS 3730 (Jan. 31, 1980) (unpub.) (finding that a court order to take all steps necessary to correct structural defects in house of rural home loan borrowers should be paid from funds appropriated to Department of Agriculture for administrative expenses of programs).

5. Payment Must Not Be Provided For Otherwise. One of the fundamental tenets for access to the authority under the Judgment Fund is that no other appropriation or funding vehicle exists for payment of the judgment, award, or compromise settlement. 31 U.S.C. § 1304(a)(1). *See, e.g., Lieutenant Colonel Hervey A. Hotchkiss*, B-249060.2, 1993 U.S. Comp. Gen. LEXIS 1070 (Oct. 19, 1993) (unpub.) (because 10 U.S.C. §§ 2733(d) and 2734(d) otherwise provide the funding source for $100,000 on a Military Claims Act settlement, the Judgment Fund may only be used to pay that portion of any settlement in excess of $100,000); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block--Payment of Judgment*, B-202083, 62 Comp. Gen. 12, 14 (1982) (since the HUD's Special Risk Insurance Fund was available to pay a housing contractor's judgment, the Judgment Fund was unavailable). *See also* S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961) (the Judgment Fund can pay settlements only to the extent that agency appropriations are not otherwise available); 31 U.S.C. § l304(a)(3)(D) (the Judgment Fund may be used to make payment only on that portion of any claim settlements in excess of the amount the agency is capable of paying from its appropriations when the claim arises under the Military Claims Act, the Foreign Claims Act, the National Guard Claims Act, or the National Aeronautics and Space Act of 1958).

a. The issue of whether funds are "otherwise provided for" centers on whether, as a matter of law, a specific appropriation exists to cover the judgment and not on whether the there are sufficient funds in the account to cover payment of the judgment. *The Honorable Strom Thurmond*, B-224653, 66 Comp. Gen. 157, 160 (1986); 22 Op. Off. Legal Counsel 141 (1998). *See also GAO Red Book*, vol. III, ch. 14, 14-39 (The agency's only recourse in this situation is to seek additional appropriations from Congress, as it would have to do in any other deficiency situation. For judgments legally payable from agency appropriations, the amount and time limitations imposed on that appropriation apply just as with any other expenditure from that appropriation.)

b. Source-of-Funds Determination. In every case, there is only one proper source of funds with which to make payment, and therefore no election to be made. If agency funds are available, the Judgment Fund is not. Conversely, if the Judgment Fund is the proper source, then agency funds may not be used to pay the judgment. *GAO Red Book*, vol. III, ch. 14, p. 14-40. *See* 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made); *See, e.g., In the matter of Payment of Judgments under Back Pay Act and Title VII of Civil Rights Act*, B-178551, 58 Comp. Gen. 311 (1976) (the Air Force erred by charging agency appropriations rather than Judgment Fund in paying a court judgment resulting from the Back Pay Act).

VII. ACCESS TO JUDGMENT FUND UNDER THE CONTRACT DISPUTES ACT.

A. The Contract Disputes Act (CDA) of 1978. Prior to 1978, monetary awards by the boards of contract appeals were payable from agency appropriations only. The CDA requires that awards by the boards of contract appeals be treated in a manner similar to federal court judgments. 41 U.S.C. § 7108.

1. Any monetary judgment against the United States must be paid in accordance with the procedures applicable under the Judgment Fund statute. *See* DoD FMR, vol. 10, ch. 12, paras. 120208-10.

2. The agency must reimburse the Judgment Fund for any payment made by the agency using the Fund. *See* 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210; DFAS-IN 37-1, Table 8-6, para. 15; AFI 65-601, vol. I, para. 6.3.6.7.1.

B. Consent Judgments. The Judgment Fund is generally not available to pay agency settlements (i.e., settlements between the contracting officer and the contractor). One way to work around this restriction is for the agency and the contractor to stipulate or consent to entry of award based upon the terms of the settlement. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.90-9(b) and (c)(2)(iii); *See, e.g., Casson Constr. Co.*, GSBCA No. 7276, 84-1 BCA ¶ 17,010. The Army policy, however, is that personnel must provide prior notification to DA of their intent to enter into a consent judgment and must also determine whether sufficient non-closed funds are available. *See* AFARS 5133.212.90-9(b) and (c)(2)(iii) (contracting officer must contact ASA(FM&C) for authorization prior to entering into a consent judgment).

C. Compromise Settlements. The Judgment Fund will provide necessary appropriations for compromise settlements reached by the DOJ. *See* 31 U.S.C. § 1304(a); 28 U.S.C. § 2677; 28 U.S.C. § 2414 (compromise settlements "shall be settled and paid in a manner similar to judgments in like causes, and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.").

D. Reimbursement of the Judgment Fund.

1. The CDA requires the agency to reimburse the Judgment Fund. 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210. In 2002, the Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002 (Pub. L. No. 107-174, 116 Stat. 566) was enacted. This Act requires agencies to reimburse the Judgment Fund for payments arising out of discrimination or whistleblower causes of action. *See* DoD FMR, vol. 3, ch. 8, para. 080304.F.

2. Prior to passage of the CDA in 1978, there was no requirement to reimburse the Judgment Fund. *See* S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978). This, combined with the fact that agency funds were used to pay off pre-CDA adjudications by the boards of contract appeals, resulted in a natural incentive on the part of agencies "to avoid settlements and prolong litigation in order to have the final judgment against the agency occur in court, thus avoiding payment out of agency funds." *Id*.

3. Reimbursement must be made with funds current at the time of judgment against the agency. *Id*.; *see also* DoD FMR, vol. 3, ch. 8, para. 080304.F (if the funds were current at the time of judgment, they may be used even if they are expired by the time reimbursement is made); *Bureau of Land Management--Reimbursement of Contract Disputes Act Payments*, B-211229, 63 Comp. Gen. 308, 312 (1984); S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978) (indicating that forcing "agencies to shoulder the responsibility for interest and payment of judgment brings to bear on them the only real incentives available to induce more management involvement in contract administration and dispute resolution.").

4. While reimbursement is mandatory, neither the CDA nor any other guidance establishes a specified time during which payment by the agency must occur. Indeed, sensitive to the potential for disruption of "ongoing programs or activities in order to find the money," the GAO has opined that the earliest an agency may be in violation of the CDA requirement to reimburse the Judgment Fund "is the beginning of the second fiscal year following the fiscal year in which the award is paid." *Reimbursements to Permanent Judgment Appropriation under the Contract Disputes Act*, B-217990.25-O.M., Oct. 30, 1987 (unpub.).

5. For reimbursements greater than $ 1 million, DOD agencies must first obtain approval from their respective comptrollers. *See* DoD FMR, vol. 3, ch. 8, para. 080304.F 5.

E. Payment of Interest. Unless otherwise allowed by statute or contract, interest associated with disputes is generally not recoverable from the United States. *See, e.g., Monroe M. Tapper & Assocs. v. United States*, 611 F.2d 354, 357 (Ct. Cl. 1979). The Contract Disputes Act of 1978 (CDA) is one of the statutes that allow the payment of interest—it requires agencies to pay interest on all meritorious CDA claims from the date received by the contracting officer to the date of payment. 41 U.S.C. § 7109; *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 862-63 (Fed. Cir. 1991).

1. Interest on CDA claims is calculated as simple interest according to rates established by the Department of Treasury pursuant to the Renegotiation Act. FAR 33.208(b); *ACS Constr. Co. v. United States*, 230 Ct. C1. 845 (1982). *See also A.T. Kearney. Inc.*, 86-1 BCA ¶ 18,613 at 93,509 (interest tolled by contractor's unreasonable delay in processing claim).

2. Claims that exceed $100,000 must be accompanied by a CDA certification to be considered a valid claim. FAR 33.201; FAR 52.233-1.

3. Claims accompanied by defective CDA certifications accrue interest from the date of receipt by the contracting officer or 29 October 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate. FAR 33.208(c).

F. Payment of Attorney Fees. The general rule is that each party pays its own legal expenses. The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), is a statutory exception to this general rule which permits a prevailing party to recover legal fees from the Government when the position of the Government was not substantially justified. 5 U.S.C. § 504(a)(1).

1. Substantially Justified. A plaintiff is not entitled to an award under the EAJA if "the position of the United States was substantially justified." "The Government bears the burden of showing that its position was substantially justified." *Freedom, N.Y., Inc. v. United States*, 49 Fed. Cl. 713, 717 (2001) (citing *Helfer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999)). "[S]ubstantially justified" means "'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Government's "position" includes "both the underlying agency action that gave rise to the civil litigation and the arguments made during the litigation itself." *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012) (citations omitted). This standard does not raise a presumption that the Government's conduct was not substantially justified just because it lost the case. *See Scarborough v. Principi*, 541 U.S. 401, 415 (2004). As then-Judge Roberts stated, the law does not even require that the Government establish that it entered litigation with a "substantial probability of prevailing." *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting *Spencer v. NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983)). Rather, a presiding court is to look at the totality of the Government's conduct and "make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). *See 360Training.com, Inc. v. United States*, No. 12-197 C (Fed. Cl. June 7, 2013) (COFC grants EAJA motion for attorneys fees and expenses incurred in successful bid protest, including attorneys fees incurred in unsuccessful motions during protest, except for fees associated with an ultimately unsuccessful government motion to dismiss for lack of jurisdiction (because the jurisdictional issue was one of first impression) and fees associated with related district court litigation by another protester).

2. Attorneys fees awarded under the EAJA are <u>not</u> payable from the Judgment Fund. Instead, the agency must use funds current at the time of the award. *See* 5 U.S.C. § 504(d); DoD FMR, vol. 10, ch. 12, para. 120203; DFAS-IN 37-1, Table 8-6, para. 16.

G. The Judgment Fund may be used to pay certain costs to the prevailing party in litigation, see 28 U.S.C. §§1920 and 2412(d); for example, court fees and compensation for court-appointed experts. Access to EAJA funds is not automatic; eligibility is limited by factors such as the party's net worth. *See* 28 U.S.C. § 2412(d).

VIII. CERTIFICATION.

A. Requirement for Certification. As discussed above, in order to qualify for payment an award or judgment must be final, require payment of specific sums of money, and may not be legally payable from another source of funds. Before payment may be made from the Judgment Fund, judgments and administrative awards must be "certified" as having met these prerequisites. Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)); *see also* 31 U.S.C. § 1304(a)(2).

B. Who Performs the Certification. When the Judgment Fund was initially established, Congress gave this "certification" responsibility to GAO, but then later decided to transfer the responsibility to OMB effective June 30, 1996. *See* Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)). Shortly thereafter, certification responsibility was given to the Secretary of the Treasury. *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, tit. II, § 202(m), 110 Stat. 3826, 3843 (codified at 31 U.S.C. § 1304(a)(2) (2000)). The Secretary of the Treasury has delegated this responsibility to the Department of the Treasury's Financial Management Service (FMS).

C. Mechanics of the Certification Process. 31 C.F.R. 256.

1. The "responsible agency" must submit a request for payment to the FMS which certifies that the request complies with all prerequisites for qualifying for payment under the Judgment Fund statute. A "responsible agency" is either the agency responsible for defending the United States in federal courts (typically the DOJ), or the agency authorized to settle the claim (e.g., the contracting officer may settle appeals before the board of contract appeals). *See* Treasury Financial Manual 6-3100, § 3125.

2. Prescribed forms. *See* TFM 6-3100, § 3125. Unless made through the Judgment Fund Internet Claims System (JFICS), all payment requests require submission of FMS Form 194, *Judgment Fund Transmittal*, FMS Form 196, *Judgment Fund Award Data Sheet*, and FMS Form 197, *Judgment Fund Voucher for Payment*. These required forms are available on the Financial Management Service's Judgment Fund website, http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm .

3. Detailed guidance on the procedures for submitting requests for payment is located at http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm ; the Treasury's regulations at 31 C.F.R. Part 256, *Obtaining Payments from the Judgment Fund and Under Private Relief Bills* (see the website at http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/regulations.htm); and at Treasury Financial Manual 6-3100.

IX. FUNDS RECEIVED FROM THE CONTRACTOR.

A. General Rule. Funds received from an outside source (e.g. other than through the appropriations process) must be deposited in the General Fund of the United States Treasury, as required by the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). *See supra* Chapter 2, *Availability of Appropriations as to Purpose*, Section IX (Augmentation of Appropriations & Miscellaneous Receipts).

B. Exceptions. Congress has given federal agencies several exceptions to the Miscellaneous Receipts Statute, but unfortunately these exceptions are scattered throughout the United States Code and public law. In addition, GAO has recognized a limited number of non-statutory exceptions. For a comprehensive overview of the Miscellaneous Receipts Statute and its exceptions, *see* Major Timothy D. Matheny, *Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW., Sep. 1997, at 31. The exceptions include some situations in which funds may be received from contractors and retained and used by the agency:

1. Replacement Contracts. One of the GAO recognized exceptions to the Miscellaneous Receipts Statute allows an agency "to retain recovered excess reprocurement costs to fund replacement contracts." *See Bureau of Prisons -- Dispositions of Funds Paid in Settlement of Breach of Contract Action*, B-210160, 62 Comp. Gen. 678 (1983). Thus, if an agency obtains funds from an original contractor through a judgment, award, or settlement based upon defective workmanship or due to a default termination, the agency may "retain the amount of funds necessary to reprocure the goods or services that would have been provided under the original contract" but any "excess money will be considered miscellaneous receipts and must be deposited into the Treasury." *Id.*

2. Refunds. If an agency is entitled to a refund from a contractor due to a payment made in error, an overpayment, or an adjustment for previous amounts disbursed, the general rule is that agency must credit such refund to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired. *See Secretary of War,* B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944).

3. False Claims Act (FCA) Recoveries. If an agency obtains a damage award or settlement pursuant to the FCA, it may "retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses." *See Federal Emergency Management Agency -- Disposition of Monetary Award Under False Claims Act*, B-230250, 69 Comp. Gen. 260, 264 (1990). If "treble damages and penalties are collected pursuant to the statute, those funds must be deposited as miscellaneous receipts." *Id.*

X. CONCLUSION.

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Chapter 12:

Reprogramming and Transfer Authority

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CHAPTER 12

REPROGRAMMING AND TRANSFER

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CHAPTER 12

REPROGRAMMING AND TRANSFER

I. INTRODUCTION. Upon completing this instruction, the student will understand:

A. The difference between reprogramming and transferring funds.

B. The procedural rules involved in reprogramming funds.

C. The special rules involved in reprogramming for military construction purposes.

II. REFERENCES.

A. Annual Department of Defense Appropriations Act and Conference Report (or equivalent).

B. 31 U.S.C. § 1532 (Transfer Statute) "An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount. A withdrawal and credit is made by check and without a warrant."

C. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 3, ch. 3 (Jan. 2011), 6 (Mar. 2011), and 7 (Mar. 2011) [hereinafter DOD FMR] available at: http://comptroller.defense.gov/FMR.aspx

D. Defense Financial and Accounting Service - Indianapolis 37-1, Finance and Accounting Policy and Implementation, ch. 3, para. 0306 (Sep. 2014) available at: http://asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200.

E. Air Force Instruction 65-601, Volume I, ch. 2, para. 2.3, Budget Guidance and Procedures (16 August 2012) available at: http://www.e-publishing.af.mil.

F. Department of Navy, NAVSO P-1000, Financial Management Policy Manual, ch. 1, pt. D (12 December 2002) available at: http://www.finance.hq.navy.mil/fmc/

G. U.S. Government Accountability Office, Principles of Federal Appropriations Law, 2-24 to 2-33 (3d ed., vol. I, Jan. 1, 2004) [hereinafter GAO Principles of Fed. Appropriations Law] available at: http://www.gao.gov/legal/redbook/redbook.html

H. Office of Management and Budget, Circular No. A-11, Preparation, Submission, and Execution of the Budget (July 2013) available at http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html.

III. DEFINITIONS.

A. Reprogramming. Reprogramming is the use of "funds in an appropriation account for purposes other than those contemplated at the time of appropriation." DOD FMR, vol. 2A, ch. 1, para. 010107.B.51 (Oct. 2008). Specifically, when an agency reprograms funds, it is moving funds within an appropriation (i.e. from one "budget activity" to another "budget activity"). Frequently—although not always—reprogramming is accomplished by notice to, or approval by, the appropriate Congressional committees.

B. Transfer Authorities. "Annual authorities provided by the Congress via annual appropriations and authorization acts to transfer budget authority from one appropriation or fund account to another." DOD FMR, vol. 2A, ch. 1, para. 010107.B.58 (Oct. 2008). Transfer authority exists in the annual appropriation/authorization acts as well as in permanent legislation. In contrast to reprogramming (which moves funds within a single appropriation), when an agency transfers funds, it is moving funds from one appropriation to another appropriation. Transfers often require notice to the appropriate Congressional committees. Some transfers even require the approval of OMB or the President. DOD FMR, vol. 3, ch. 3, para. 030202 (Jan. 2011). OMB Circular No. A-11, p. 49, Sec. 20.4 (2013).

IV. TRANSFERS DISTINGUISHED FROM REPROGRAMMING

A. **Transfers**. GAO, Principles of Fed. Appropriations Law, p. 2-24.

1. Transfers shift money between appropriations.

2. There are generally three types of transfers:

a. Transfers between accounts within the same agency, e.g., Operation and Maintenance account to Military Personnel account;

b. Transfers between agencies, e.g., Department of Defense to Department of State; and

c. Transfers to/from fixed "earmarks," e.g., where Congress includes an "earmark" for a specific purpose within a general appropriation. Matter of John D. Webster, B-278121, 98-1 CPD ¶ 19.

3. Transfers require statutory authority. 31 U.S.C. § 1532; The Honorable Peter Hoekstra, B-279886, 1998 WL 229292 (C.G.).

a. 31 U.S.C. § 1532 prohibits transfers without statutory authority. This statute provides:

> An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn is available for the same purpose and subject to the same limitations provided by the law appropriating the amount.[1]

b. Generally speaking, there are two types of transfer authority: general and specific.

(1) General Transfer Authority. General Transfer Authority is provided in either appropriations acts or in permanent legislation.

[1] Several GAO decisions have interpreted 31 U.S.C. § 1532 to mean that unless a particular statute authorizing the transfer provides otherwise, transferred funds are subject to the same purpose and time limitations applicable to the donor appropriation—the appropriation from which the transferred funds originated. GAO, Principles of Fed. Appropriations Law, p. 2-28. So, if funds from a one-year appropriation were transferred into a five-year appropriation, the transferred funds would be available only for one year. Nevertheless, the annual DOD appropriation acts typically provide a number of exceptions to this rule, thereby authorizing the donor appropriation to assume the "fiscal identity" of the appropriation into which it is transferred.

(a) Typically, Congress provides general transfer authority to DOD in its annual appropriations acts. Often, transfer authority is found in authorization acts as well. See, e.g., Department of Defense Appropriations Act FY 2014, Pub. L. No. 113-76, § 8005 (2014) [hereinafter FY 14 DOD Appropriations Act].

(b) Some transfer authority is contained in permanent legislation. See, e.g., 7 U.S.C. § 2257 (authorizing transfers between Department of Agriculture appropriations in an amount not to exceed seven percent of the "donor" appropriation).

(c) DOD must notify Congress promptly of all transfers made pursuant to the General Transfer Authority. DOD FMR, vol. 3, ch. 3, para. 030202 (Jan. 2011); FY 14 DOD Appropriations Act, § 8005.

(2) Specific Transfer Authority. Congress can authorize or direct the movement of funds to support specific programs. See, e.g., FY 14 DOD Appropriations Act, Title VI, Defense Drug Interdiction and Counter-Drug Activities. This provision allows the transfer of more than $1B to appropriations for military personnel of the reserve components to carry out counter-drug activities.

c. The prohibition against transferring funds without statutory authority applies even though the transfer is intended as a temporary expedient and the agency contemplates reimbursement. To the Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

d. An unauthorized transfer also violates the purpose statute, 31 U.S.C. § 1301(a), and constitutes an unauthorized augmentation of the receiving appropriation.

(1) Exception. 31 U.S.C. § 1534 authorizes an agency to charge one appropriation for expenditure benefiting another appropriation of the same agency. See Use of Agencies' Appropriations to Purchase Computer Hardware for Department of Labor's Executive Computer Network, 70 Comp. Gen. 592 (1991). Amounts must be available in both the benefitting and benefited appropriations, and reconciliation must take place within the fiscal year.

e. Examples of transfers

(1) **General Transfer Authorities**

(a) Transfers from Working Capital Funds. Normally, in the annual DOD Appropriation Act, there is broad authority to transfer a specified amount of funds from the DOD working capital funds to any DOD Appropriation (except to the military construction appropriation).[2]

(b) Transfers from the Army Operation and Maintenance Appropriation. A recurring provision in the annual DOD Appropriation Acts gives the Secretary of Defense the authority to transfer funds from the Army's operations and maintenance appropriation.[3]

[2] For example, section 8005 of the FY 14 DOD Appropriations Act permits DOD to transfer up to $5B from DOD's working capital funds to any DOD appropriation (except the military construction appropriation) "for military functions" so long as the Secretary of Defense notifies Congress. See also Consolidated Appropriations Act for FY 2013, Pub. L. No. 113-6, § 8005 (2013); Consolidated Appropriations Act for FY 2012, Pub.L. No. 112-74, § 8005 (2012).

[3] For example, section 8066 of the FY 14 DOD Appropriations Act permits the Secretary of Defense to transfer up to $108.7M from the Army's operation and maintenance appropriation to any other DOD appropriation for "other activities of the Federal Government." See also Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 8069 (2011).

(2) **Specific Transfers Authorities**

(a) Military Pay. There is a recurring provision in the DOD Appropriations Acts concerning transferring funds from DOD-wide O&M to appropriations for military pay.[4]

(b) RDT&E and Procurement. There is a recurring provision in the DOD Appropriation Acts concerning transferring funds from an RDT&E appropriation to a procurement appropriation.[5]

(c) DOD Pilot Mentor Protégé Program. There is a recurring provision in the DOD Appropriation Acts concerning the transfer of funds appropriated to the DOD for the Pilot Mentor Protégé Program.[6]

4. Generally, proposals to exercise transfer authority should be submitted formally to the DOD Comptroller for processing. DOD FMR, vol. 3, ch. 3, para. 0304.

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[4] Section 8051 authorizes the transfer of up to $30,000,000 from the DOD-wide operations and maintenance appropriation to any other DOD appropriation which is made available for the pay of military personnel. FY 14 DOD Appropriations Act; see also Consolidated Appropriations Act for FY 2013, Pub. L. No. 113-6, § 8051 (2013). The purpose of this authorization to transfer funds is to reimburse other DOD appropriations for the costs of supporting non-DOD programs pursuant to 10 U.S.C. § 2012.

[5] Section 8070 of the FY 14 DOD Appropriations Act authorizes the transfer up to $504M from the RDT&E-Defense-wide appropriation (originally designated for the Israeli Cooperative Programs) to any of the DOD appropriations "available for the procurement of weapons and equipment." See also Consolidated Appropriations Act for FY 2013, Pub. L. No. 113-6, § 8070 (2013).

[6] Section 8015 authorizes the transfer of funds appropriated for the Pilot Mentor Protégé Program to any other DOD appropriation for the specific purpose of implementing "the Mentor-Protégé Program developmental assistance agreement" under this authority. FY 14 DOD Appropriations Act; see also Consolidated Appropriations Act for FY 2013, Pub.L. No. 113-6, § 8015 (2013). The purpose of this program is to assistance small businesses by providing incentives to large businesses to partner with small businesses in performing government contracts. See Section 831 of the National Defense Authorization Act for Fiscal Year 1991, Pub.L. No 101-510).

B. **Reprogramming**. See generally, GAO, Principles of Fed. Appropriations Law, p. 2-29.

1. There are a variety of reasons that agencies move funds within an appropriation. Former Deputy Secretary of Defense William H. Taft IV stated:

> The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements.[7]

2. In contrast to transfers, "reprogramming" shifts money within an appropriations account. (For more detailed information about reprogramming actions, see Section V. of this outline.)

   a. There is no change in the total amount available in the appropriations account.

   b. Reprogramming is not a request for additional funds, but rather, it is a reapplication of funds.

3. When Congress appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions on the expenditure of the funds. LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.

[7] Reprogramming Action Within the Department of Defense: Hearing Before the House Armed Services Committee (Sept 30, 1985) (remarks prepared for delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, unprinted).

4. Subdivisions of an appropriation contained in the agency's budget request or in conference or committee reports are not legally binding upon the department or agency concerned, unless they are specified in the appropriations act itself. Newport News Shipbldg. and Dry Dock Co., B-184830, 55 Comp. Gen. 812 (1976).[8]

5. Reprogramming is based on minimal congressional and legislative guidance. There "is no general statutory provision either authorizing or prohibiting it and it has evolved largely in the form of informal (i.e. non-statutory) agreements between various agencies and their congressional oversight committees."[9] There are some general limitations to reprogramming:

   a. Agencies must comply with the requirements of 31 U.S.C. § 1301;

   b. Agencies must check appropriations acts for statutory prohibitions to proposed reprogramming; the DOD Appropriations Act usually sets out broad guidelines; and

   c. Agencies must follow their internal policies and procedures. For DOD, there are detailed procedures located in the DOD FMR, vol. 3, ch. 3 and 6.

6. Items eligible for reprogramming. Congress, in the annual appropriation act, typically states that DOD may submit actions only for higher priority items, based on unforeseen military requirements, than those for which the funds were originally appropriated. See FY 14 DOD Appropriations Act, § 8005.

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[8] Since the 2009 NDAA, Congress has added funding tables to the authorization act, so that the conference reports have the legal force of law. See e.g., NDAA 2009, P.L. 110-417, Section 1005 (14 Oct. 2008) (the first joint explanatory statement). Each year since that time, the NDAA has included funding tables, usually at Division D.

[9] GAO, Principles of Fed. Appropriations Law, p. 2-30 to 2-31.

7. Items ineligible for reprogramming. Annually, Congress prohibits DOD from submitting reprogramming actions for items for which funds have previously been requested from, but denied by, Congress. See e.g., FY 14 DOD Appropriations Act, § 8005. GAO has stated that in the absence of a similar statutory provision, a reprogramming that has the effect of restoring funds deleted in the legislative process is okay. See Propriety of LEAA Funding of Urban Crime Prevention Program, B-195269, Oct. 15, 1979.

8. **All DOD reprogramming actions must be approved by the DOD Comptroller**. Additionally, some reprogramming actions require notice to or approval by the appropriate congressional subcommittees. DOD FMR, vol. 3, ch. 6 and 7. Regarding the routing of requests, "Military Departments must submit proposed DD 1415 [reprogramming] actions formally by memorandum addressed to the USD(C) from the Assistant Secretary (Financial Management and Comptroller) of the Military Department." DOD FMR, vol. 3, ch. 6, para. 060407.

V. REPROGRAMMING TYPES

A. **Reprogramming Actions Requiring Prior Approval of Congressional Committees**. DOD FMR vol. 3, ch. 6, para. 060401, A-F. See also Conference Report accompanying annual DOD appropriations acts.

1. If a DOD Component (i.e., Army, Air Force, Navy, or Marines) wants to reprogram funds (requiring Congressional approval), then the Component Comptroller will forward a formal request to the DOD Comptroller explaining the details of the reprogramming request. The DOD Comptroller will forward the request to Congress for consideration (the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee). The DOD Comptroller will receive letters from each of these committees and will notify the Component Comptroller if its request has been approved or disapproved. If the request is denied, then the Component Comptroller will not reprogram the funds.

2. The following types of reprogramming requests require Congressional approval:

a. Any reprogramming that involves an item designated as a Congressional special interest item;

b. Any increase in the procurement quantity of a major end item, such as an individual aircraft, missile, naval vessel, tracked combat vehicle, and other weapon or torpedo and related support equipment;

c. Any reprogramming action that involves the application of funds which exceed thresholds agreed upon by the congressional committees and DOD:

(1) Military Personnel: cumulative increases in a budget activity[10] of $10 million or more.

(2) Operation and Maintenance: net changes in a budget activity of $15 million or more.

(3) Procurement: cumulative increases for any program year of $20 million or more (or 20 percent of the appropriated amount, whichever is less); cumulative decreases for any program year of $20 million or more (or 20 percent of the appropriated amount, whichever is less).

(4) Research, Development, Test, and Evaluation (RDT&E): cumulative increases for any program year of $10 million or more in an existing program element (or 20 percent of the appropriated amount, whichever is less); cumulative decreases for any program year of $10 million or more (or 20 percent of the appropriated amount, whichever is less).

(5) Additional sub-activity thresholds as specified by Congress.[11]

[10] "Budget activities" are defined as categories within each appropriation and fund accounts that identify the purposes, projects, or types of activities financed by the appropriation or fund. DOD FMR, vol. 3, ch. 6. For an example of budget activities, see the Joint Explanatory Statement of The Committee of Conference for the FY 2014 Consolidated Appropriations Act, which breaks down the budget activities in some detail. For example, prior appropriations acts required approval if the Air Force wanted to perform a reprogramming action in its Military Personnel, Air Force appropriation by moving $15 million from one budget activity to another budget activity (because it exceeded the $10 million threshold for the military personnel appropriation).

d. New Starts: a program, subprogram, modification, project or subproject not previously justified by DOD and funded by Congress is considered a "new start." Congressional committees discourage the use of reprogramming to initiate new starts. Congress normally states in the annual DOD Appropriations Acts that before funding any new start, the requester must first notify the Secretary of Defense and Congress.[12] For specific notification and approval procedures, see DOD FMR, vol. 3, ch. 6, para. 060401.E;

e. Termination of programs that result in elimination of certain procurement programs and subprograms and RDT&E elements, projects, and subprojects. DOD FMR, vol. 3, ch. 6, para. 060401.E; and

f. Most fund shifting/movements that make use of general transfer authority.[13] But see DOD FMR, vol. 3, ch. 6, para. 060401.C, for exceptions.

B. **"Internal" Reprogramming**. DOD FMR, vol. 3, ch. 6, para. 060402.

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[11] See e.g. Explanatory Statement for the FY 2009 DOD Appropriations Act, listing multiple sub-activities (such as Army Land Forces Depot Maintenance), for which transfers out of the sub-activity in excess of $15M require Prior Approval Reprogramming; DOD FMR vol. 3, ch. 6, para. 060401.D.2.

[12] See e.g., FY 14 DOD Appropriations Act, § 8074 ("None of the funds provided in this Act shall be available for obligation or expenditure through a reprogramming of funds that creates or initiates a new program, project, or activity unless such program, project, or activity must be undertaken immediately in the interest of national security and only after written prior notification to the congressional defense committees.").

[13] Note that DOD uses a "Reprogramming Action" (DD 1415-1) to accomplish both reprogrammings and transfers. There are different forms for internal (DD 1415-3) reprogramming actions (again, a term which includes those actions 'using transfer authority'), versus those that require prior approval (1415-2). Thus, the wording of the FMR can be confusing in that it uses the terms "reprogramming" and "transfer" in the same section when referring to this process. For example, the FMR's reprogramming chapter states that reprogramming actions that "use general transfer authority" require Congressional approval. Bottom line, beware the distinction between "reprogramming" as defined in this outline, and a "reprogramming action" as used in the FMR. *See e.g.* DOD FMR, vol 3, ch. 6, para. 060401C (March 2011).

1. "Internal" reprogramming actions are not, technically, formal reprogramming actions (as the name would suggest). Internal reprogramming actions, instead, are "audit-trail type actions processed within the Department to serve various needs." DOD FMR, vol. 3, ch. 6, para. 060402.

2. Internal reprogrammings fall into three general categories:

   a. Reclassification Actions. Actions involving a reclassification or realignment of funds within budget activities or within budget line items/program elements. These reclassifications do not involve any change in the substance of the program and the funds will be used to for the same purposes originally contemplated when submitted to Congress;

   b. Transfer Appropriations.[14] "Transfer accounts" are appropriations with funding that will be transferred to other appropriations for execution. Reprogramming to or from transfer accounts is generally permissible without relying upon statutory authority such as the general transfer authority. Examples of transfer accounts include: Overseas Contingency Operations Transfer Fund and Foreign Currency Fluctuations, Defense; and

   c. Procurement Quantities. Approval to increase quantities of major end items where Congress has specified that approval is not required.

3. Technically, funding changes within program elements are not regarded as "reprogramming." The Honorable Roy Dyson, House of Representatives, B-220113, 65 Comp. Gen. 360 (1986).

4. Internal reprogrammings are not subject to dollar thresholds.

5. Internal reprogrammings do not require prior congressional approval or notification. Such actions are audit-trail type actions processed within DOD Secretary of Defense, Comptroller.

[14] The language of the DOD FMR refers to "transfer appropriations" in the chapter on reprogramming, which it then describes as reprogramming actions related to transfer accounts. *See* DOD FMR, vol 3, ch. 6, para. 060402.B.

C. **Below Threshold Reprogrammings**. DOD FMR, vol. 3, ch. 6, para. 0608.

1. Below threshold reprogrammings are those reprogramming actions that do not exceed the thresholds, identified above in this outline at paragraph V.A.2.c, individually, or when combined with other below-threshold reprogramming actions.

2. Below-threshold reprogramming actions "provide DOD Components with the discretionary flexibility to realign, within prescribed limits, congressionally approved funding to satisfy unforeseen, higher priority requirements." DOD FMR, vol. 3, ch. 6, para. 060801. Additionally, such reprogramming actions are minor actions that do not require congressional approval. When the DOD Components accomplish these reprogramming actions, they measure these actions "cumulatively" over the course of the appropriation's period of obligation.

3. For example, the Army could accomplish a below-threshold reprogramming of funds in its Military Personnel, Army appropriation by moving funds from one budget activity (i.e. Pay and Allowances, Officer) to another (i.e. Pay and Allowances, Enlisted), so long as the total amount was less than $10 million.

4. Congress performs oversight through the DOD's semi-annual submission of its DD 1416, Report of Programs.

D. **Letter Notifications**. DOD FMR, vol. 3, ch. 6, para. 060403.

1. Letter notifications apply to the initiation and termination of certain projects, including some below-threshold procurements.

2. Notification to the appropriate committees requires a 30-day automatic hold on funds. The reprogramming action may be implemented 30-days after notification if no objection is received.

E. **Intelligence Related Reprogrammings**. DOD FMR, vol. 3, ch. 6, para. 0606.

1. Generally, the same rules apply to reprogramming intelligence resources as provided for other reprogramming actions under DOD FMR, vol. 3, ch. 6, para. 060602.

2. Some special rules do apply:

a. Actions reprogramming DOD appropriations that impact the National Foreign Intelligence Program are subject to additional guidelines.

b. The Office of the Director of National Intelligence issues specific guidance on processing certain intelligence reprogramming actions and on below-threshold determinations. DOD FMR, vol. 3, ch. 6, para. 0606.

VI. MILITARY CONSTRUCTION REPROGRAMMING. DOD FMR, vol. 3, ch. 7.

A. **General.** The congressional subcommittees concerned with the appropriation and authorization of military construction and family housing funds have agreed that, in executing approved programs, some flexibility is required in adjusting approved funding levels to comply with new conditions and to effectively plan programs to support assigned missions. Departmental adjustments or reprogrammings may be required for a number of reasons including but not limited to:

1. Responding to emergencies;

2. Restoring or replacing damaged or destroyed facilities;

3. Accommodating unexpected price increases; and

4. Implementing specific program provisions provided for by Congressional committees.

B. **Procedures.** DOD FMR, vol. 3, ch. 7.

1. Proposed military construction action must be approved by the DOD comptroller before submission to the appropriate congressional committees. In many cases, the DOD comptroller is simply required to notify Congress (vice obtain approval) and then wait a certain period of time; if Congress does not act upon the notification, then DOD may proceed with the reprogramming action.

2. While most military construction reprogramming actions must be submitted to Congress, there are some "below threshold" actions that may be approved at the DOD comptroller level.

C. Authority

1. *Approval* by Congress Required Prior to Reprogramming (partial list):

   a. Any increase exceeding 25% of the reprogramming base (originally approved, or subsequently approved project value) or $2M—whichever is less—to MILCON projects and family housing new construction projects, or family housing improvement projects (exceeding $2M base value), or for which the base has been increased or decreased by a previously approved action.

   b. For any increase, regardless of amount, to a MILCON project that has been previously reduced in scope by Congress in acting on the appropriation.

   c. To increase the amount appropriated for UMMC.

   d. To increase the amount appropriated for architectural and engineering service and contraction design.

   e. For any Base Realignment and Closure (BRAC) projects.

   f. For any family housing project relocation project to be accomplished by 10 U.S.C. 2827.

2. *Notice* to Congress is Required[15] Prior to Reprogramming (partial list):

a. 10 U.S.C. § 2803. Provides permanent authority to obligate and reprogram up to $50 million annually for emergency construction if a project is:

(1) Not otherwise authorized by law;

(2) Vital to national security or to the protection of health, safety, or the quality of the environment; and

(3) So urgent that waiting until the next budget submission would be inconsistent with national security, or the protection of health, safety or environmental quality.[16]

b. 10 U.S.C. § 2854. Provides permanent authorization for the repair, restoration or replacement of facilities (including a family housing unit) damaged/destroyed due to natural disasters. If the estimated cost of the project exceeds the UMMC threshold (i.e., $2 million), the Secretary concerned must notify the appropriate committees of Congress.[17]

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[15] DOD FMR, vol 3, ch. 7, para. 070302 includes these statutory provisions in the list of actions requiring "Prior Approval Reprogramming". These statutes only require notice to (vice "approval" by) the appropriate congressional subcommittees. The FMR requires the use of "Prior Approval Reprogramming" for both notification and approval actions.

[16] The Secretary of Defense must submit a written report ("*notify*" only) to the appropriate committees of Congress on this decision. This report must include (1) the justification for the project and the cost estimate, (2) the justification for carrying out the project using this section, and (3) a statement of the source of the funds to be used to carry out the project. The project may then be carried out only after the end of the 21-day waiting period beginning on the date that the notification is received by the congressional committees, or if earlier, the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium.

[17] The Secretary of Defense must *notify* the appropriate committees of Congress in writing of this decision. This notice must include (1) the justification for the project and the cost estimate, (2) the justification for carrying out the project using this section, and (3) a statement of the source of the funds to be used to carry out the project. The project may then be carried out only after the end of the 21-day waiting period beginning on the date that the notification is received by the congressional committees, or if earlier, the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium.

3. Approval by (or Notice to) Congress is *NOT Required* Prior to Reprogramming.

a. When none of the criteria listed in the DOD FMR, Vol 3, ch 7 apply (to require Congressional approval).

b. Some specific examples when Congressional approval not required:

(1) For projects utilizing Environmental Restoration, Defense funds authorized under 10 U.S.C. § 2810;

(2) When a DOD Component takes action to reprogram funds between or among family housing operations and maintenance account;

(3) For any project being completed with expired funds for valid upward adjustments of pre-existing commitments;

(4) When none of the criteria listed in DOD FMR, vol, 3, ch 7, para. 070302 apply.

D. **Restrictions on Reprogrammings.** DOD FMR, vol. 3, ch. 7.

1. DOD will not submit a request for reprogramming:

a. For any project or effort that has not been authorized, unless permitted under 10 U.S.C. §§ 2803, 2854 or 2853;

b. For any project or effort that has been denied specifically by Congress; or

c. To initiate programs of major scope or base realignment actions, where Congress has not authorized such efforts.

2. DOD Comptroller sends MILCON reprogrammings (which require congressional notification or approval) to the House and Senate Armed Services Committees and the House and Senate Appropriations Committees.

   a. Generally, committee review process is non-statutory.

   b. An agency generally will observe committee review and approval procedures as part of its informal arrangements with the various committees, although they are not legally binding. GAO, Principles of Fed. Appropriations Law, p. 2-25.

VII. CONCLUSION

A. Note the differences between reprogramming and transferring funds.

B. There are special rules involved in reprogramming for military construction purposes.

Chapter 13:

Non-Appropriated Funds

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CHAPTER 13

NONAPPROPRIATED FUNDS

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CHAPTER 13

NONAPPROPRIATED FUNDS

I. INTRODUCTION.

"What we have today is a $10 billion governmental entity which employs almost a quarter of a million people in 12,000 activities worldwide . . . without legislative authority."

- Congressman Dan Daniel,
Chairman, MWR Panel of the House Armed Services Committee, 1982

II. REFERENCES

A. 10 U.S.C. § 2783, Nonappropriated Fund Instrumentalities: Financial Management and Use of Nonappropriated Funds.

B. DOD 7000.14-R, DOD Financial Management Regulation, Volume 13, Nonappropriated Funds Policy and Procedures (July 2013).

C. DOD Instruction (DODI) 1000.15, Procedures and Support for Non-Federal Entities Authorized to Operate on DOD Installations (October 24, 2008).

D. DODI 1015.10, Military Morale, Welfare and Recreation (MWR) Programs (Change 1, May 6, 2011).

E. DODI 1015.11, Lodging Policy (Change 1, November 15, 2011).

F. DODI 1015.12, Lodging Program Resource Management (October 30, 1996).

G. DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare and Recreation (MWR), and Armed Services Exchange Category C Revenue-Generating Activities (March 11, 2004).

H. DODI 1015.15, Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources, October 31, 2007 (Change 1, March 20, 2008).

I. DODI 1330.21, Armed Services Exchange Regulations, July 14, 2005.

J. Army Regulation (AR) 165-1, Army Chaplain Corps Activities, December 3, 2009.

K. AR 215-1, Morale, Welfare and Recreation Programs and Nonappropriated Fund Instrumentalities, 24 September 2010.

L. AR 215-4, Nonappropriated Fund Contracting, 29 July 2008.

M. AR 215-7, Civilian Nonappropriated Funds and Morale, Welfare and Recreation Activities, 26 January 2001.

N. AR 215-8 / Air Force Instruction (AFI) 34-211(I), Army and Air Force Exchange Service Operations, 5 October 2012.

O. Air Force Instruction (AFI) 34-201, Use of Nonappropriated Funds, 28 March, 2013.

P. AFI 34-262, Services Programs and Use Eligibility, 27 June 2002.

Q. AFI 64-301, NAF Contracting Policy, 12 February 2002.

R. AFI 65-106, Appropriated Fund Support of MWR and Nonappropriated Fund Instrumentalities, 6 May 2009.

S. SECNAVINST 1700.12A, Operation of Morale, Welfare and Recreation Activities, 15 July 2005.

T. SECNAVINST 5401.2A, Establishment, Management, and Control of NAFIs and Financial Management of Supporting Resources, 21 January 2004.

U. BUPERSINST 1710.11C, Operation of MWR Programs, 25 July 2001 (with Change 1, dated 31 March 2003).

III. DEFINITIONS

A. Nonappropriated Funds (NAFs).

1. What are NAFs?

a. NAFs are monies which are not appropriated by the Congress of the United States. These funds are separate and apart from funds that are recorded in the books of the U.S. Treasury (i.e., appropriated funds or APFs). NAFs shall be administered only through the auspices of a nonappropriated fund instrumentality (NAFI).

b. Within the Department of Defense (DOD), NAFs come primarily from the sale of goods and services to military and civilian personnel and their family members, and are used to support Morale, Welfare, and Recreation (MWR), lodging, and certain religious and educational programs.

c. NAFs are government funds used for the collective benefit of military personnel, their family members, and authorized civilians. DOD 7000.14-R, Financial Management Regulation, Volume 13, Chapter 1, para. 010213; see also DODI 1015.15, para. 4.

2. NAFs are Government funds subject to controlled use. All DOD personnel have a fiduciary responsibility to use NAFs properly and prevent waste, loss, mismanagement, or unauthorized use. Violators are subject to administrative and criminal sanctions. See 10 U.S.C. § 2783 (Appendix A to this outline); see also DODI 1015.15, para. 4.7.

3. NAFs are audited.

a. Comptroller General. The Comptroller General has statutory authority to audit the operations and accounts of each nonappropriated fund and related activities authorized or operated by the head of an executive agency to sell goods or services to United States government personnel and their dependents. 31 U.S.C. § 3525; see, e.g., Nonappropriated Funds, Opportunities to Improve DoD's Concessions Committee, GAO/NSIADF/AIMD-98-119, April 30, 1998.

b. Agency and Inspector General Audits. The Services must audit NAFs. See DODI 1015.15, paras. 5.7.6, 6.18; DOD 7000.14-R, Financial Management Regulation, Volume 13, Chapter 1, para. 010501; AR 215-1, Chapter 18.

B. Nonappropriated Fund Instrumentalities (NAFIs).

1. NAFIs are DOD organizational and fiscal entities supported in whole or in part by NAFs. They act in their own name to provide or assist the Secretaries of the Military Departments in providing MWR programs for military personnel, their families, and authorized civilians. DODI 1015.15, paras. 4.2, E2.13.

2. NAFIs are established and maintained individually or jointly by two or more DOD components. As a fiscal entity, it maintains custody and control over its NAFs, equipment, facilities, land, and other assets. It enjoys the legal status of an instrumentality of the United States. It is not incorporated under state laws. DODD 1015.15, para. 4 and Enclosure E2.13; AR 215-1, Glossary.

3. The DOD classifies NAFIs into one of six program groups to assure uniformity in the establishment, management, allocation and control of resource support. DODI 1015.15, para. 6.1.1.1. These program groups include Military MWR programs, Armed Service Exchange programs, Civilian MWR programs, Lodging Program Supplemental Mission Funds, Supplemental Mission Funds, and Special Purpose Central Funds. DODI 1015.15, paras. 6.1.1.1.1 to 6.1.1.1.6.

4. Within each Program Group, NAFI activities are further classified into one of three funding categories: Category A—Mission Sustaining Activities, Category B—Basic Community Support Activities, and Category C—Revenue-Generating Activities. These funding categories are the basis of APF and NAF funding authorizations for a particular NAFI activity. DODI 1015.15, para. 6.2.1.

5. In Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942), the Supreme Court concluded that post exchanges were an integral part of the War Department and enjoyed whatever immunities the Constitution and federal statutes provided the Federal Government. Accordingly, a California law that levied taxes on fuel sold to a Post Exchange was found inapplicable to those sales.

C. MWR programs (formerly MWR activities).

1. Programs (exclusive of private organizations) on military installations or on property controlled (by lease or other means) by a military department or furnished by a DOD contractor that provide for esprit de corps, comfort, pleasure, contentment, as well as mental and physical productivity of authorized DOD personnel. AR 215-1, Glossary.

2. They include recreational and leisure-time programs, self-development programs, resale merchandise and services, or general welfare programs outlined in AR 215-1. AR 215-1, Glossary.

3. The Army Morale, Welfare, and Recreation (MWR) Program is a quality-of-life program that directly supports readiness by providing a variety of community, Soldier, and Family support programs, activities, and services. Included are social, fitness, recreational, educational, and other programs and activities that enhance community life, foster Soldier and unit readiness, promote mental and physical fitness, and generally provide a working and living environment that attracts and retains quality Soldiers. AR 215-1, para. 1-8.

4. The range of MWR programs offered at Army garrisons is based on the needs of authorized patrons who work and reside there. Programs are managed by garrison commanders within the framework of authorized and available APFs and NAFs. AR 215-1, para. 1-8.

D. MWR Unit Funds.

1. Separate Unit Funds. Generally, separate unit MWR funds are not authorized for installation units. Separate funds may be established, managed, and administered at the unit level for isolated active duty units or reserve component units or personnel performing annual training. One coordinating garrison provides NAF support to surrounding units. AR 215-1, Chapter 6.

2. Unit Activities Funds. Upon IMCOM region direction, units attached to an installation may nonetheless receive direct monetary NAF support through the garrison MWR operating entity. Garrison commanders may determine the amount of NAF support. Such support will be applied equitably to all units or personnel within the installation. NAF support provided to installation units is referred to as "unit activities" and will be accounted for within the garrison MWR operating entity. AR 215-1, para. 6-1.

3. The Air Force has Special Morale and Welfare (SM&W) authority which allows use of NAFs to fund expenditures considered necessary to contribute to the overall morale and welfare of the military community. AFI 34-201, Chapter 12.

4. The Navy has unit recreation funds which are available to tenant commanders for financing special expenditures in order to enhance unit identity and promote retention. The funds should not be used solely for parties and picnics, although the purchase of alcoholic beverages is authorized but discouraged. Funds can also be used for emblematic, recognition and reception related items for advancement, award and reenlistment ceremonies. With approval of the host installation CO, occasional fund-raising, e.g., hot dog sales and chili cook-offs, can be conducted to supplement unit recreation funds. BUPERSINT 1710.11C, para. 406.

IV. MANAGEMENT OF MWR PROGRAMS.

A. Army. AR 215-1, Chapter 1-8: "The Army MWR program is a quality-of-life program that directly supports readiness by providing a variety of community, Soldier, and Family support programs, activities, and services."

1. The Army MWR program is executed through the auspices of Non-Appropriated Fund Instrumentalities (NAFIs). Each one is established by the Secretary of the Army, often in coordination with other branches. An example of this coordination is the joint Army and Air Force Exchange Service (AAFES) (see AR 215-8 / AFI 34-211(I)).

2. The Commander, Installation Management Command (IMCOM) and the Assistant Chief of Staff for Installation Management (ACSIM) manage the Army-wide MWR program as specified in AR 215-1.

3. The Commander, Family Morale, Welfare and Recreation Command (FMWRC) develops the overall guidance, standards, and procedures to implement specifically approved MWR programs. Additionally, FMWRC is responsible for the administration and use of all nonappropriated funds used to fund MWR programs and activities, to include NAF-funded construction and procurement.

4. Garrison Commanders implement the local programs with guidance from IMCOM and FMWRC, to include planning, managing, and funding MWR programs at their respective installations. They ensure local programs adhere to DOD/HQDA policies and regulations and develop annual budgets for the use of their local NAF resources.

5. A number of forums exist for the management and oversight of MWR programs. They include:

   a. The Soldier and Family Readiness Board of Directors (SFR BOD), a strategic forum combining the former Installation Management Board of Directors and the Morale Welfare and Recreation Board of Directors. Co-Chaired by the Secretary of the Army and the Chief of Staff of the Army, the SFR BOD provides the Army's senior executive leadership with a strategic forum in which to guide the fulfillment of the Army Family Covenant and to maintain Soldier and Family readiness in a time of persistent conflict. Various committees provide input to the SFR BOD as outlined in AR 215-1, Appendix B, to include review and approval of NAF construction projects.

b. The Soldier Family Readiness Executive Committee (EXCOM) is a 3-star working group designed to review issues and proposals for presentation to the SFR BOD.

c. The Soldier Family Readiness Working Group (SFRWG) is a Colonel-level forum that develops and reviews issues and proposals for presentation to the EXCOM and SFR BOD.

d. The Capital Investment Review Board (CIRB) reviews and prioritizes construction projects funded with NAF on behalf of the EXCOM.

6. NAFI Councils.

a. A governing body of active duty Soldiers or civilian employees appointed or elected to assist in the management of each NAFI and represent MWR activity patron interests. The governing council is a decision-making body that exercises general supervision for the commander and directs specific actions in the management of the NAFI. The non-governing council is a review body that recommends and reports to the commander on general or specific matters concerning the management of the NAFI.[1] AR 215-1, Glossary.

b. Councils are required for separate garrison NAFIs and garrison MWR operating entities. AR 215-1, para. 3-17.

B. Air Force. AFI 34-201, Chapter 2.

1. The Secretary of the Air Force gives the authority to administer NAFs and NAFIs to the Chief of Staff of the Air Force (CSAF). The Air Force MWR Advisory Board provides recommendations to the CSAF on broad issues affecting policy, management, and oversight of NAFs, NAFIs, and MWR programs.

2. Major Commander (MAJCOM):

[1] Non-governing councils may also include military retirees and family members.

a. Approves the establishment of base and isolated unit NAFIs;

b. Supervises all NAFIs within the command and administers command-level NAFIs; and

c. Appoints a NAF council and finance and audit committee to help administer and supervise command-level NAFs.

3. Installation Commander (wing commander or equivalent):

a. Requests MAJCOM approval to establish base-level NAFIs; and

b. Appoints a custodian for each NAFI and appoints a NAF council.

4. At base level, the resource management flight chief (RMFC) acts as single custodian of all NAFIs serviced by the NAF accounting office with the exception of base restaurant and civilian welfare fund NAFIs, and in some instances, NAFIs at remote and isolated locations.

C. Navy.

1. The Navy has a Morale, Welfare and Recreation Division (PERS-65), composed of nine branches, located in Millington, TN.

2. Chaired by the Vice Chief of Naval Operations, a MWR/Navy Exchange (NEX) Board of Directors (BOD) makes major policy and business decisions for both programs.

3. COMNAVPERSCOM is the immediate superior in command of the MWR program manager.

4. The Navy MWR NAF activities are regionalized.

D. Marine Corps.

1. The Personal and Family Readiness Division, under the staff cognizance of the Deputy Chief of Staff for Manpower and Reserve Affairs, is responsible for providing Service policy and resources to support commanders in executing quality Personal and Family programs.

2. The MWR Policy Review Board makes recommendations on major MWR policy matters to the Assistant Commandant of the Marine Corps. Marine Corps Order 1700.26C.

3. Category E, Personal Services. MCO P1700.27A, Appendix B.

   a. Created in 1999 as part of transformation from MWR to Marine Corp Community Services (MCCS); Funded entirely with APFs.

   b. Examples:

      (1) Preventive Services: Exceptional Family Member; Life Skills Management; New Parent Support; Personal Financial Management; Suicide Prevention.

      (2) Counseling Services: Clinical Counseling; Marriage and Family Counseling; Family Advocacy.

      (3) Mobility Support: Family Member Employment Assistance; Personal Sponsorship; Relocation & Transition Assistance.

V. CASH MANAGEMENT, BUDGETING, SOURCES OF NAFI REVENUE, AND RESOURCE MANAGEMENT.

A. NAFI Cash Management. AR 215-1, para. 16-5.

1. All NAFIs are required to generate sufficient cash and a positive net income before depreciation which, when coupled with existing funds, will permit the NAFI to fund all of its operating and capital requirements, with the exception of major construction, which is funded by the Army MWR Fund (AMWRF).

2. Each NAFI must produce adequate revenues to cover operating and capital requirements while maintaining a cash to debt ratio between 1:1 and 2:1 (total cash divided by current liabilities).

B. NAFI Budgeting.

1. The basis for garrison MWR planning is the MWR 5-year plan. Updated annually, the 5-year plan is the management tool for justifying program elements and using resources. AR 215-1, para. 15-1. Each annual budget is submitted with the 5-year MWR plan to the applicable IMCOM Region. Annual budgets must comply with specific instructions and procedures issued annually by FMWRC. AR 215-1, para. 16-13. Budgets must contain a garrison commander's narrative that includes, at a minimum:

   a. A description of current operations, including goals and objectives reflected in the budget; and

   b. Significant changes from previous years approved budget and actual operations. AR 215-1, para. 16-13.

2. IMCOM Regions will review and approve installation and community budgets and forward consolidated budgets to FMWRC. AR 215-1, para. 16-14.

C. Revenue Sources and Resource Management Structure.

1. Garrison MWR Operating Entity. AR 215-1, para. 5-9.

   a. Group of MWR programs offered at an installation that fall within the garrison commander's responsibility (previously referred to as the "installation MWR fund).

b. Garrison-level NAFs are primarily generated by local sales of goods and services and user fees and charges.

c. Forms an integral part of the IMCOM Region single MWR fund. NAFs generated by each garrison level MWR program are pooled into the IMCOM region single MWR fund and allocated to MWR programs based on garrison priorities.

2. Region Single MWR Funds. AR 215-1, para. 5-8.

a. Separate region NAFI that consolidates all garrison funds within the region, as well as centralized functions for the garrisons within the region, such as procurement, financial management, civilian personnel, and marketing.

b. The region single-fund management will provide oversight of garrison MWR operating entities. When necessary, region single-fund management may subsidize unprofitable garrison MWR operating entities, to include cross-leveling funds of MWR fund NAFIs within or among the regions.

3. The Army MWR Fund (AMWRF)

a. The AMWRF is the Army central NAF managed by the U.S. Army Family and Morale Welfare Recreation Command (FMWRC) that provides up to 90% of funds for approved NAF major construction and supports other Army-wide MWR programs.

b. AMWRF acts as the successor-in-interest to all IMCOM Regional Single MWR Funds. AR 215-1, para. 16-3.

c. Resources for the AMWRF are primarily derived from dividends paid from the AAFES and from interest earned from the temporary investment of funds that have been programmed but not yet spent. AR 215-1, para. 16-8.

d. AMWRF resources are devoted primarily to funding NAF major construction (NAFMC) and other program investments. Any garrison entity or IMCOM region contribution to a NAF construction project will be withdrawn from the garrison entity or IMCOM region bank account as bills on the project are paid. AR 215-1, para. 16-11.

e. All capital purchases and minor construction (CPMC) will be financed from local installation and/or IMCOM Region resources. AR 215-1, para. 16-12.

4. Supplemental Mission Funds. AR 215-1, para. 5-10.

a. Supplemental mission funds/NAFIs are quality of life adjuncts to APF mission programs other than those recognized as MWR programs.

b. The generation and expenditure of supplement mission NAFs is restricted to the purposes of the supplemental mission fund/NAFI. Supplemental mission NAFs will not be used to subsidize MWR programs, nor will NAFs generated by MWR programs be used to subsidize supplemental mission funds/NAFIs.

c. Some supplemental mission funds/NAFIs are consolidated within the IMCOM region single MWR fund and some are established as separate NAFIs.

(1) Examples of supplemental mission funds accounted for within the IMCOM region single MWR fund:

(a) Army Community Services (see AR 608-1).

(b) Fees paid by customers for veterinary services (see AR 40-905).

(2) Examples of supplemental mission NAFIs excluded from consolidation into the IMCOM region single MWR fund:

(a) Army Lodging Funds

(b) Fisher House Funds

(c) Overseas vehicle registration funds

VI. FUNDING SUPPORT OF MWR PROGRAMS.

A. DOD NAFIs are classified into one of six program groups to assure uniformity in the establishment, management, allocation and control of resource support. DODI 1015.15, para. 6.1.1.1; AR 215-1, paras. 3-1 to 3-6. The program groups are:

1. Program Group I—Military MWR Programs, to include child development and recreational lodging programs.

2. Program Group II—Armed Services Exchange Programs.

3. Program Group III—Civilian MWR programs. DODD 1015.8.

4. Program Group IV—Lodging Program Supplemental Mission Funds.

5. Program Group V—Supplemental Mission Funds.

6. Program Group VI—Special Purpose Central Funds, such as NAF employee life and health insurance, and NAF risk management.

B. Funding Standards. MWR programs are dual funded and rely on a mix of appropriated (APF) and nonappropriated (NAF) funds. The DOD basic standard, regardless of category, is to use APFs to fund 100 percent of costs for which MWR programs are authorized. AR 215-1, para. 5-1. NAFs are used to supplement APF shortfalls or fund activities not authorized APF support. See generally AR 215-1, Chapter 5, Section III.

1. NAFs are generated primarily by sales, fees, and charges to authorized patrons.

2. APFs are provided primarily through operations and maintenance and military construction appropriations.

C. APF Support of MWR. Appendix D to AR 215-1 contains the specific areas of support that Army commanders may fund with APFs. Attachment 2 to AFI 65-106 contains similar guidance for Air Force Management and Funding.

1. APF support can be direct, indirect, or common. AR 215-1, para. 5-1.

a. *Direct APF Support.* Generally limited to Category A and B MWR programs. Includes support or expenses incurred in the management, administration, and operation of MWR programs or common support functions. It includes those costs that directly relate to, or are incurred by, the operation of the MWR facilities.

b. *Indirect APF Support.* All MWR programs receive and are authorized indirect APF support which is historically provided to all installation facilities and functions. Such support mutually benefits MWR and non-MWR. E.g., health, safety (police and fire), security, grounds and facility maintenance and repair.

c. *Common MWR Support.* APF support to fund the management, administration, and operation of more than one MWR program or category, where such support is not easily or readily identifiable to a specific MWR program or to solely Category C MWR programs. E.g., central accounting office, civilian personnel office, central procurement.

d. *Support Agreements.* NAFIs and installation support elements will enter into agreements on the type of support required and resources to be expended. When the service is not authorized APFs, but the support element provides the service, the NAFI reimburses the Government for the service based upon the support agreement. AR 215-1, para. 5-1f.

2. MWR Categories. AR 215-1, para. 3-7; DODI 1015.10, Encl. 5. These Fund support for MWR programs depends on the **funding category** of the activity, which is based on the relationship of the activity to readiness factors and the ability of the activity to generate revenue. There are **three primary funding categories** of MWR programs. They are:

a. *Category A - Mission Sustaining Activities.* activities are deemed essential to meeting the organizational objectives of the Military Services. Commanders must fund these activities almost entirely with APFs. Exceptions include instances where appropriated fund support is prohibited by law, or when the use of NAF is essential for the operation of a facility or program.

(1) Examples of Category A activities:

(a) Libraries and Information Services;

(b) Recreation Centers;

(c) Movies (free admission: overseas and isolated/remote locations);

(d) Parks, picnic areas, barbecue pits, pavilions, game fields, playgrounds;

(e) Sports (individual, intramural, unit);

(f) Gymnasiums, field houses, pools for aquatic training, and other physical fitness facilities;

(g) Armed Forces Professional Entertainment Program Overseas; and

(h) Better Opportunities for Single Soldiers.

b. *Category B - Community Support Activities.* These activities provide community support systems that help to make military bases temporary hometowns for a mobile military population. They receive a substantial amount of APF support, but can generate NAF revenue. The DOD goal is to fund these programs with a minimum of 65% APFs.

(1) Examples:

(a) Arts and Crafts;

(b) Bowling centers (12 lanes or less);

(c) Child, Youth, and School services;

(d) Information, ticketing, and registration services; and

(e) Outdoor recreation programs, such as archery ranges, beach facilities, garden plots, hunting/fishing areas, marinas without retail sales or private boat berthing, outdoor recreation checkout centers.

c. *Category C - Revenue-Generating Activities.* These activities have less impact on readiness, and are capable of generating enough income to cover most of their operating expenses. They receive very limited APF support.

(1) Remote or isolated sites approved by Congress.

(a) Category C MWR programs at sites designated as remote or isolated receive APFs on the same basis as Category B MWR programs.

(b) AF regulations generally authorize Category B-level APF support for Category C activities at approved remote and isolated locations, except for AAFES equipment and supplies, or equipment used for generating revenue, or for providing a paid service (such as point of sales systems, bowling center pinsetters, golf carts, slot machines). AFI 65-106, para. 3.1.

(2) Examples of Category C Revenue-Generating Activities:

(a) Armed Forces Recreation Centers;

(b) Bingo;

(c) Bowling centers (over 12 lanes);

(d) Golf courses and associated operations;

(e) Outdoor recreation, including cabin/cottage operations, rod and gun activities, skiing operations, stables, flying activities; and

(f) Military clubs.

d. *Supplemental Mission NAF Accounts* do not support and are not part of the MWR program, but are established to provide a NAF adjunct to APF mission activities. AR 215-1, para. 5-10; AFI 65-106, para. 2.2. Examples include:

(1) Army Community Services (ACS);

(2) Veterinary services;

(3) Fisher House funds;

(4) Vehicle registration funds;

(5) Fort Leavenworth U.S. Disciplinary Barracks funds; and

(6) USMA funds.

VII. USE OF NONAPPROPRIATED FUNDS.

A. The use of NAFs is limited. AR 215-1, para. 5-13.

1. In all cases, NAFs are used judiciously and not as a matter of convenience.

2. NAFs are not to be commingled with APFs and are managed separately, even when supporting a common program. AR 215-1, para. 4-1 (a).

3. NAFs are returned to authorized patrons by providing needed MWR services and capital improvements. AR 215-1, para. 13, discusses authorized uses of NAFs. AR 215-1, Appendix D, lists expenses that should be funded with NAFs and APFs.

4. Prices, user fees, and charges are structured to meet cash management goals for sustainment of a NAFI and its operations, to cover capital requirements and overhead expenses, and to satisfy budget requirements for support of other MWR programs dependent upon the NAFI. AR 215-1, para. 12-8.

5. Funds from supplemental mission NAFIs support only the requirements for which they were established. AR 215-1, paras. 5-10, 5-13; see also Aaron v. United States, 27 Fed. Cl. 295 (1992) (class action suit challenging excess vehicle registration fees used to fund MWR programs); GAO Report to the Chairman, Subcommittee on Defense, Committee on Appropriations, House of Representatives, B-238071, Army Housing Overcharges and Inefficient Use of On-Base Lodging Divert Training Funds, Sep. 1990 (finding improper the Army's use of profits from housing TDY soldiers for the benefit of MWR programs).

B. In the Navy, nonappropriated MWR funds will be expended on official MWR programs and facilities on a equitable basis to achieve a balanced, adequate MWR program. BUPERSINT 1710.11C, para. 416.

1. The emphasis should be placed on MWR programs that benefit the greatest number of eligible patrons. BUPERSINT 1710.11C, para. 416.

2. MWR NAF funds are authorized only for those purposes related to the official MWR program. BUPERSINT 1710.11C, para. 420.

C. NAFs may NOT be used to:

1. Accomplish any purpose that cannot withstand the test of public scrutiny or which could be considered a waste of Soldiers' dollars, AR 215-1, para. 4-13a, or unauthorized activities, AFI 34-201, para. 4.2.27 (cross referencing AFI 34-101).

2. Accomplish any prohibited purpose listed in AR 215-1, para. 5-14, which contains a detailed listing of NAF prohibitions. See also AFI 34-201, para. 4.2 (listing prohibited expenditures for Air Force NAFs); BUPERSINST 1710.11C, para. 420 (listing prohibited expenditures for Navy MWR funds).

3. Pay costs of items or services authorized to be paid from APFs when APFs are available. AR 215-1, para. 4-13b; AFI 34-201, para. 4.2.1. Exceptions to this policy in the Army include:

a. When the appropriate official certifies in writing that APFs cannot satisfy the requirement (AR 215-1, para. 5-14*b*);

b. When functions, programs, and activities to be funded with NAFs are integral to the functions for which the NAFI was established (AR 215-1, para. 5-14*b*); and

c. When the DOD MWR Utilization, Support and Accountability (USA) policy applies.

4. Support private organizations. AR 215-1, para. 4-13c; AFI 34-201, para. 4.2.22.

5. Contract with Government personnel, military or civilian, except as authorized in AR 215-4. (Para. 1-21 of that regulation provides that contracts are authorized with government employees and military personnel so long as such contracts are non-personal services contracts funded entirely with NAFs. Examples include contracts for sports officials and instructors and arts and crafts). AR 215-1, para. 5-14n.

6. Support non-MWR functions. Army regulations specifically prohibit use of NAFs for any expense for a retirement ceremony, command representation, or other specific benefit for select individuals or groups. AR 215-1, para. 5-14i. However, the Air Force allows the use of NAFs to fund change of command ceremonies on a "modest" basis, as established by MAJCOM commanders. AFI 34-201, para. 12.4.8.

7. Purchase personal items such as memo pads or greeting cards, including personalized memo pads to be used at work. In the Air Force, this extends to business cards. AR 215-1, para. 5-14k; AFI 34-201, para. 4.2.17.

D. In the Air Force, NAFs may NOT be used for the following activities (see AFI 34-201 for other restrictions):

1. Supporting programs or personnel attending functional or professional courses. AFI 34-201, para. 4.2.2.

2. Offices, work areas, waiting areas, or special interest groups that are not primarily concerned with MWR programs, e.g., legal offices. AFI 34-201, para. 4.2.3.

3. Loans to individuals, AFI 34-201, para. 4.2.7.

4. Purchasing land, AFI 34-201, para.4.2.20.

5. Buying portraits of senior Air Force leaders, AFI 34-201, para.4.2.21.

E. In the Navy, NAFs may not be used for the following activities (see BUPERSINST 1710.11C for other restrictions):

1. Command receptions or for expenses of similar functions incident to the official activation, deactivation or realignment of a command, para. 420l;

2. For support of aero or sky diving clubs, para. 420o;

3. To subsidize recycling programs, para. 420q;

4. For support of religious programs, para. 420s;

5. For recognition awards, incentive awards, rating badges, wing insignias, and similar items not related to MWR program (except for unit funds), para. 420u; and

6. For support of activities, and programs unrelated to MWR purposes (crash kits, "welcome aboard" gifts, and retirement/farewell gifts), para. 420v.

VIII. FUNDING PROGRAMS FOR CONSTRUCTION.

A. APF support for construction of MWR facilities is generally determined by the category of the MWR activity.

B. Construction to support MWR programs are funded either from APF or NAF construction programs as specified in AR 215-1, Appendix E. Requirements associated with category A programs will be funded from APF construction programs; generally, those for category B and C programs will be funded from NAF construction programs unless other specified in AR 215-1, Appendix E. AR 215-1, para. 15-4*b*.

C. For a discussion of the NAF construction program and APF v. NAF funding, see AR 215-1, Section II (Construction Planning).

IX. NAF FISCAL ISSUES.

A. Contingency Operations.

1. MWR programs are mission essential to combat readiness. They contribute to successful military operations by promoting individual physical and mental fitness, morale, unit cohesion, and esprit de corps, and by alleviating mission-related stress. Joint Pub 1-0, Personnel Support to Joint Operations, 24 OCT 2011, Chapter 2, para 3b(10) (discussing planning and execution of MWR in a contingency setting).

2. MWR support for contingency operations will be funded by Service component commands through appropriated funds. AR 215-1, para. 9-1*b*.

B. DOD MWR Funding Policy. DOD has several funding policies designed to give MWR managers funding flexibility.

1. MWR Utilization, Support, and Accountability **(**USA) Program—AR 215-1, para. 5-2.

a. Applicable to MWR entities not participating in the Uniform Funding and Management Program.

b. Allows garrison commanders and APF and NAF resource managers to execute a memorandum of agreement to use NAFs to provide APF-authorized services in support of MWR programs, with subsequent payment to the NAFI/entity for these services from APFs.

c. May be used to finance personnel services, supplies, furniture, fixtures and equipment, routine maintenance, and other operating expenses of MWR programs (Program Group I), the exchange service (Program Group II), Stars and Stripes (Program Group V), and the U.S. Military Academy mixed-funded athletic or recreational extracurricular programs (Program Group V). MWR USA may not be used for construction.

d. NAFIs must keep an accounting of the funds. The MWR USA program will not be used to extend the availability of APFs. If the NAFI will not obligate the funds before they expire, the NAFI must return the funds for obligation elsewhere.

2. Uniform Funding and Management (UFM) Program, AR 215-1, para. 5-3.

a. UFM is the merging of APFs and NAFs for the purpose of providing MWR support services under a single set of rules and procedures in order to reduce duplication of cost and provide better visibility on MWR program costs.

b. Under the program, APFs are expended using NAF rules for MWR programs authorized APF support to promote efficiencies. The purpose is to facilitate procurement of property and services for MWR, management of employees used to carry out the programs, and financial reporting and management.

c. The practice of UFM results in no increase or decrease to the funding of MWR. It is an alternate means of execution.

d. UFM Involves:-

(1) Preparation of a MOA between the APF resource manager and MWR manager outlining the APF authorized MWR service to be performed by the NAFI location, the APF funding, and the up-front payment schedule.

(2) The MOA serves as the basis for creating the APF obligation and forwarding the money to the NAFI.

(3) MWR management employs NAF rules and procedures in execution of the services authorized APF and funded via the MOA.

(4) Expenditures authorized APF and paid in accordance with the UFM process are recorded in a specially coded department on the NAF financial statement.

(5) At year-end, the MWR expenses authorized APF must equal or exceed the UFM income. Any recorded expenses excess to the amount of APF provided as a result of the MOA are termed APF shortfall.

C. Use of NAF employees to perform APF functions.

1. An example is using a NAF contracting officer to perform APF contract actions.[2]

2. This constitutes augmentation of appropriations and violates the Antideficiency Act.

3. Use of APF employees to perform NAF functions beyond those which are authorized violates the Purpose Statute and the Antideficiency Act.

D. Golf Courses.

1. Unless the DOD golf course is located outside the United States or designated as a remote and isolated location, APFs may not be used to equip, operate, or maintain it. 10 U.S.C. § 2491a; see also Prohibition on Use of APF for Defense Golf Courses, B-277905, Mar. 17, 1998 (APFs cannot be used to install or maintain "greywater" pipelines on an Army golf course).

E. MWR patronage eligibility.

[2] Note that this does not include acquisitions accomplished through UFM or MWR USA. Congress statutorily authorized both of these funding mechanisms.

1. See DODI 1015.10, Encl. 4, table 1. Programs are established primarily for military personnel, but 28 categories of authorized patrons are listed in Table 6-1 of AR 215-1, Chapter 6. Before expanding the patron base for MWR usage, consider such things as congressional and regulatory requirements, and affect on customer service. MWR programs may be opened up to additional guests under limited circumstances. See AR 215-1, para. 7-2.

F. Public Private Ventures (PPV).

1. Private sector built, operated, and maintained facilities or services on installations in exchange for discounted fees and/or an equitable return to the garrison MWR operating entity. FMWRC is the sole Army agency authorized to award MWR PPV contracts. See DODI 1015.13; AR 215-1, para. 15-12.

2. In order to meet MWR requirements, installations may identify activities that are unavailable through normal funding sources and that may be met by the private sector. The FMWRC negotiates and executes all Army PPV contracts, and coordinates with the Corps of Engineers who leases the land under the authority of 10 U.S.C. § 2667. The contractor builds and operates the facility at its expense, and the garrison MWR operating entity receives a percentage of gross revenue.

3. PPVs require approval/coordination with Service MWR headquarters and an extensive local survey prior to approval. Congress notified by DOD.

G. Advertising.

1. MWR programs communicate their presence and availability of goods and services they offer to as many potential patrons as they can. The advertising will not reflect adversely on the DOD, the Army, other DOD components, or the Federal Government. DODI 1015.10, Encl. 12, para. 1; AR 215-1, para. 11-1.

2. MWR programs and other NAFIs may sell space for commercial advertising in any NAFI/entity media. DODI 1015.10, Encl. 12, para. 1; AR 215-1, para. 11-2.

a. Advertising will be rejected if it undermines or appears to undermine an environment conducive to successful mission performance and preservation of loyalty, moral, and discipline. AR 215-1, para. 11-2(b)(1).

b. Advertising will not contain anything in it that might be illegal or contrary to DOD or Army Regulations. AR 215-1, para. 11-2(b)(2).

(1) Discrimination;

(2) Prohibition against soliciting membership in private groups;

(3) Endorsement of political positions; partisan political items, or political advertisements;

(4) Favoring one group over another; or

(5) Games of chance, including casinos and Indian tribe gaming.

H. Commercial Sponsorship.

1. Commercial sponsorship is a contractual agreement between the military and the sponsor. The military provides access to its advertising market, and the sponsor provides support to an event. DODI 1015.10, Encl. 11; AR 215-1, para. 11-6.

2. Commercial Sponsorship is either solicited or unsolicited and is only authorized for support of DOD MWR programs listed at Enclosure 11 of DODI 1015.10. Commercial sponsorship is not authorized for military open house programs. AR 215-1, para. 11-7.

3. All commercial sponsorship agreements must be in writing and **MUST** receive legal review prior to entering the agreement and prior to signature of the parties. AR 215-1, para. 11-9.

   a. Provisions for termination of agreements, force majeure (e.g. acts of God), and assignment will be included in the agreement.

   b. The commercial sponsorship will certify in writing that sponsorship costs will not be chargeable in any way to any part of the Federal Government.

4. The Army will not solicit commercial sponsorship from companies in the tobacco, beer, or alcoholic industries. AR 215-1, para.11-11b.

   a. Unsolicited sponsorship may be accepted.

   b. A responsible use campaign (beer, alcohol) and the Surgeon General's warning (tobacco) will be incorporated in any print media.

5. Officials responsible for procurement or contracting will not be directly or indirectly involved with the solicitation of commercial sponsors. AR 215-1, para. 11-13.

10 U.S.C. §2783: Nonappropriated Fund Instrumentalities: Financial Management and Use of Nonappropriated Funds.

(a) Regulation of management and use of nonappropriated funds. The Secretary of Defense shall prescribe regulations governing--

(1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and

(2) the financial management of such funds to prevent waste, loss, or unauthorized use.

(b) Penalties for violations.

(1) A civilian employee of the Department of Defense who is paid from nonappropriated funds and who commits a substantial violation of the regulations prescribed under subsection (a) shall be subject to the same penalties as are provided by law for misuse of appropriations by a civilian employee of the Department of Defense paid from appropriated funds. The Secretary of Defense shall prescribe regulations to carry out this paragraph.

(2) The Secretary shall provide in regulations that a violation of the regulations prescribed under subsection (a) by a person subject to chapter 47 of this title (the Uniform Code of Military Justice) is punishable as a violation of section 892 of this title (article 92 of the Uniform Code of Military Justice).

(c) Notification of violations.

(1) A civilian employee of the Department of Defense (whether paid from nonappropriated funds or from appropriated funds), and a member of the armed forces, whose duties include the obligation of nonappropriated funds, shall notify the Secretary of Defense of information which the person reasonably believes evidences--

(A) a violation by another person of any law, rule, or regulation regarding the management of such funds; or

(B) other mismanagement or gross waste of such funds.

(2) The Secretary of Defense shall designate civilian employees of the Department of Defense or members of the armed forces to receive a notification described in paragraph (1) and ensure the prompt investigation of the validity of information provided in the notification.

(3) The Secretary shall prescribe regulations to protect the confidentiality of a person making a notification under paragraph (1).

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Chapter 14:

Liability of Accountable Officers

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CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

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CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES.

A. 10 U.S.C. § 2773a (authorizing DOD to hold accountable officials liable).

B. 31 U.S.C. § 3325 (requiring certifying officers within DOD).

C. 31 U.S.C. § 3527 (specifying when the Comptroller General may relieve other accountable officers from liability).

D. 31 U.S.C. § 3528 (specifying when the Comptroller General may relieve certifying officers from liability).

E. Dep't of Defense Reg. 7000.14-R, Financial Management Regulation, Volume 5, Disbursing Policies and Procedures [hereinafter DOD FMR, Vol. 5], *available at* http://comptroller.defense.gov/fmr.

F. Principles of Federal Appropriations Law [hereinafter "GAO Redbook"], Third Edition, Volume II, Chapter 9 (Liability and Relief of Accountable Officers).

G. DFAS-IN (Defense Finance and Accounting Service-Indianapolis) Reg. 37-1, Finance and Accounting Policy Implementation, *available at* http://www.asafm.army.mil/secretariat/document/37-1reg/37-1reg.asp.

II. TYPES OF ACCOUNTABLE OFFICERS.

A. Definitions.

1. An accountable officer is any government officer or employee who by reason of his or her employment is responsible for or has custody of government funds. See Relief from Liab. for Erroneous Payments from U.S. Bankr. Court's Registry Fund, B-288163, June 4, 2002; Lieutenant Commander Michael S. Schwartz, USN, B-245773, May 14, 1992 (unpub.); Mr. Charles L. Hartgraves, B-234242, Feb. 6, 1990 (unpub.).

2. The DOD refers to this broad universe of persons as "accountable officials." The DOD definition includes military members or civilian employees "to whom public funds are entrusted, or who participate in the process of certifying vouchers for payment, in the connection with the performance of government business." DOD FMR, Vol. 5, Glossary. Examples of "accountable officials" include: Agents of Disbursing Officers; Cashiers; Certifying Officers; Change Fund Custodians; Departmental Accountable Officials (DAO); Deputy Disbursing Officers; Disbursing Officers; Imprest Fund Cashiers; and Paying Agents.

3. "Pecuniary Liability" is "personal financial liability for fiscal irregularities of disbursing and certifying officers, and DAOs. It acts as an incentive to guard against errors and theft by others, and also to protect the government against errors and dishonesty by the officers themselves." DOD FMR, Vol. 5, Glossary.

4. Any government officer or employee, military or civilian, who handles government funds physically, even if only once or occasionally, is "accountable" for those funds while they are in his or her **custody**. Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (1992); Finality of Immigration & Naturalization Serv. Decision on Responsibility of Accountable Officer for Physical Losses of Funds, B-195227, 59 Comp. Gen. 113 (1979).

5. Absent statutory authority, agency officials who are not designated as accountable officers are not personally liable for **illegal, improper, or incorrect payments**. Veteran Affairs – Liab. of Alexander Tripp, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005) (concluding that certain acts of an "approving official" did not carry financial responsibility); Dep't of Def. – Auth. to Impose Pecuniary Liab. by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

B. Certifying Officers, Disbursing Officers and Other Accountable Officers, and Departmental Accountable Officials. In general terms, accountable officers fall into several broad categories. First, certifying officers are typically responsible for authorizing payments; yet, they do not have custody of public funds. Second, disbursing officers, their agents, and other accountable officers such as collections agents, are responsible for making payments and collecting funds. These accountable positions are typically authorized to have custody of funds. Additionally, government employees may become accountable officers by virtue of the fact that they (even occasionally) become custodians of federal funds. Last, within DOD, certain individuals comprise a third category of accountable officials. Departmental Accountable Officials (DAO) are those officials that provide information or data that is subsequently relied upon by a certifying officer. See GAO Redbook, Vol. II, 9-11; DOD FMR, Vol.5, Ch. 2 and Glossary.

1. Certifying Officer. A "certifying officer is a government officer or employee whose job is or includes certifying vouchers for payment." GAO Redbook, Vol. II, 9-13. A certifying officer differs from other accountable officers in that the certifying officer does not have physical custody of government funds. Certifying Officer liability is established by 31 U.S.C. § 3528.

   a. Within DOD, a certifying officer is defined as a an "individual appointed in writing to attest to the correctness of statements, facts, accounts, and amounts appearing on a voucher, and certifying that voucher for payment." DOD FMR, Vol. 5, Glossary. DOD Certifying Officers must be appointed in writing on a DD Form 577. DOD FMR, Vol. 5, Ch. 33, para. 330401.

   b. Certification is "the act of attesting to the legality, propriety and accuracy of an item or action, e.g. a voucher for payment" as provided for in 31 U.S.C. §3528. DOD FMR, Vol. 5, Glossary.

   c. Certifying officers perform inherently governmental functions and therefore must be Federal Government employees. DOD FMR, Vol. 5, Ch. 33, para. 330202.

2. Disbursing Officers and Agents. Generally, a disbursing officer "is an officer or employee of a federal department or agency, civilian or military, designated to disburse moneys and render accounts in accordance with laws and regulations governing the disbursement of public funds." GAO Redbook, Vol. II, 9-14. The DOD FMR lists various additional positions as "agents of disbursing officers" including collections officers and other agents who are specifically appointed and who are authorized to have custody of government funds. DOD FMR, Vol. 5, Ch. 2 and Glossary.

a. Disbursing Officer (DO). "An individual appointed to perform any and all acts relating to the receipt, disbursement, custody, and accounting for public funds." DOD FMR, Vol. 5, Glossary. A "Deputy DO" (DDO) may be appointed to act in the name of the DO. All DO and DDO appointees a must be U. S. citizens. See generally 31 U.S.C. § 3321; DOD FMR, Vol. 5, Ch. 2.

b. Disbursing Agents. A disbursing agent is an agent of the DO who is NOT a DDO. Disbursing agents typically operate disbursing offices that are geographically separated from the DO's office. Unlike DO's and DDO's, disbursing agents cannot sign or issue US Treasury checks. DOD FMR, Vol. 5, Ch. 2, para. 020205.B and Glossary.

c. Cashier. Appointed to perform limited cash-disbursing functions or other cash-handling operations to assist a finance officer or other subordinate/assistant of the finance officer. Cashiers disburse, collect, and account for cash, and perform other duties as required concerning the receipt, custody, safeguarding and preparation of checks. DOD FMR, Vol. 5, Ch. 2, para. 020205.C; Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997) (disbursing officer and his subordinate cashiers are jointly and severally liable for loss of funds and must separately petition for relief).

d. Paying Agents. Paying agents are appointed only when adequate payment, currency conversion, or check cashing services cannot otherwise be provided. Paying agents cannot act as purchasing officers or certifying officers. DOD FMR, Vol. 5, Ch.2, para. 020205.D.

e. Collection Agents. Collection agents receive funds generated from activities such as hospitalization fees and other medical facility charges, rentals, and other charges associated with housing, reproduction fees, and other similar functions. DOD FMR, Vol. 5, Ch. 2, para. 020205.E.

f. Change Fund Custodians. A change fund custodian receives a change fund from the parent disbursing office and uses it to make change for sales transactions. DOD FMR, Vol. 5, Ch. 2, para. 020205.F.

g. Imprest Fund Cashiers. Imprest fund cashiers make authorized cash payments for purchases of materials and non-personal services, maintain custody of funds, and account for and replenish the imprest fund as necessary. DOD FMR, Vol. 5, Ch. 2, para. 020205.G. Imprest Funds are generally not authorized for DOD activities, but there are exceptions for contingency and classified operations. In most cases, the government purchase card is the vehicle used to make micro-purchases. DOD FMR, Vo. 5, Ch. 2, para. 0204; FAR 13.305.

3. Departmental Accountable Officials (DAO). A DAO is an "individual who provides certifying officers information, data, or services that the certifying officers rely upon directly in certifying vouchers for payment." DOD FMR, Vol. 5, Glossary. See also, 10 U.S.C. § 2773A (Departmental Accountable Officials); DOD FMR, Vol. 5, Ch. 33, para. 33030305. DAOs must also be appointed in writing on a DD Form 577. DOD FMR, Vol. 5, Ch. 33, para. 330401. Pecuniary liability for DAOs is established by 10 U.S.C. § 2773A.

III. LIABILITY OF ACCOUNTABLE OFFICERS.

A. Certifying Officers.

1. A certifying officer:

a. Is responsible for the correctness of the facts recited in the certificate, or otherwise stated on the voucher or supporting papers;

b. Is responsible for the correctness of computations on the voucher;

c. Is responsible for the legality of the proposed payment under the appropriation or fund cited on the voucher;

d. Is to ensure there is a legal obligation to pay (e.g., a contract);

e. Is to ensure the payee has fulfilled the prerequisites to payment (e.g., an invoice, receiving report);

f. Is accountable for any payment:

(1) Determined to be prohibited by law,

(2) Determined to be illegal, improper, or incorrect because of an inaccurate or misleading certificate, or

(3) Determined to not represent a legal obligation under the appropriation or fund involved. 31 U.S.C. § 3528; DOD FMR, Vol. 5, Ch. 33, para. 330304.

g. Certifying officers are accountable for illegal, improper, or incorrect payments made as a result of their certifications *even though they may have relied on information, data, or services of other departmental accountable officials.* "A critical tool that certifying officers have to carry out this responsibility is the power to question, and refuse certification of, payments that may be improper." Mr. Jeffery Elmore-Request for Relief of Financial Liability, B-307693 (Apr. 12, 2007); but see, National Institute of Food and Agriculture – Biotechnology Risk Assessment Grant Payment, B-322898 (May 24, 2012) (stating that "[i]ncluded in the certifying officer's burden is questioning items on the face of vouchers or supporting documents that simply do not look right" but then concluding that a "certifying officer's statutory liability does not extend to the exercise of discretion and judgment [] resid[ing] with agency program officials.").

h. If more than one certifying officer is involved in a given payment, the officer who certified the original payment is still responsible for the correctness of the voucher. Subsequent certifying officers are responsible for additional related vouchers or for changes to the original voucher that they have certified. DOD FMR, Vol. 5, Ch. 33, para. 330504.

i. The certifying officer may rely on data received from reliable automated systems that have been certified as compliant with the Federal Financial Management Improvement Act (FFMIA) (see Volume 1, Chapter 3), 31 U.S.C. § 3512; DOD FMR, Vol. 5, Ch. 33, para. 330304.B.

2. Liability attaches when an official makes an erroneous payment based on an improperly certified voucher. "A certifying officer's legal liability is strict and arises automatically at the time of an illegal or improper payment." Transp. Sec. Admin. Proposed Time & Attendance Sys., B-291001, 2002 U.S. Comp. Gen. LEXIS 275 (Dec. 23, 2002); Responsibilities and Liabs. of Certifying Officers, B-184145, 55 Comp. Gen. 297 (Sept. 30, 1975).

B. Disbursing Officers.

1. Disbursing officers are:

a. Responsible for examining vouchers as necessary to ensure that they are in the proper form, duly certified and approved, and computed correctly on the basis of the facts certified.

b. Responsible for disbursing funds only upon, and in strict accordance with, duly certified vouchers. 31 U.S.C. § 3325; DOD FMR, Vol. 5, Ch. 2.

2. Disbursing Officers are pecuniarily liable for payments made that are not in accordance with certified vouchers, and for errors in their accounts. DOD FMR, Vol. 5, Ch. 2 and 33; 31 U.S.C. § 3325.

3. Disbursing officers are accountable for illegal, improper, or incorrect payments and for errors in their accounts even though they may have relied on deputies, agents, or cashiers who caused the errors. DOD FMR, Vol. 5, Ch. 2, para. 020201.A.

4. However, generally if a DO makes a payment in accordance with a certification provided by a properly appointed certifying officer, then the certifying officer, and not the DO, is pecuniarily liable for the payment. DOD FMR, Vol. 5, Ch. 33, para. 330701.

C. DoD Departmental Accountable Officials.

1. Previously, DOD FMR, Vol. 5, Ch. 33 purported to impose pecuniary liability on "accountable officials" as a matter of policy. "Accountable officials" were defined as personnel "who are designated in writing and are not otherwise accountable under applicable law, who provide source information, data or service (such as a receiving official, a cardholder, and an automated information system administrator) to a certifying or disbursing officer in support of the payment process." The rationale was (and is) that it is extremely difficult for any single official to ensure the accuracy, propriety, and legality of every payment, and that therefore certifying officers and disbursing officers, as a practical matter, must rely upon information provided by others in performing this difficult task.

2. The GAO held, however, that this regulatory imposition of financial liability against such persons was improper because, unlike certifying officers and disbursing officers, there was no statutory basis for imposing liability against "accountable officials," and agencies may impose pecuniary liability against someone only if there is a statutory basis for doing so. Dep't of Def. – Auth. to Impose Pecuniary Liab. by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

3. The 2003 Defense Authorization Act, codified at 10 U.S.C. § 2773a, has since provided that statutory authority. Section 2773a states that departmental accountable officers may be held financially liable for illegal or erroneous payments resulting from their negligence. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §1005, 116 STAT 2458, 2631-32 (2002).

4. The DOD FMR now provides that DAOs "may be pecuniarily liable under 10 U.S.C. 2773a(c) for an illegal, improper or incorrect payment resulting from information, data, or services they negligently provide to a certifying officer, and upon which that certifying officer directly relies in certifying the voucher supporting that payment." Any liability is joint and several with that of any other officer or employee of the United States or member of the uniformed services who is also pecuniarily liable for such loss. 10 USC § 2773a(c) (3); DOD FMR, Vol. 5, Ch. 33, para. 330701.C.

5. DAOs are designated by DD Form 577 and are notified in writing of the designation and of their pecuniary liability for all illegal, improper or incorrect payments that result from negligent performance of their duties. DOD FMR, Vol. 5, Ch. 33, para. 330401.

6. The GAO looked at the DOD practice of hiring foreign local nationals as DAOs and found no specific authority that restricted DOD from appointing such employees who were paid from appropriated funds. The GAO, however, questioned the wisdom of appointing DAOs who potentially could be shielded from liability by host nation law. Dep't of Def. Accountable Officials – Local Nat'ls Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006).

D. "Possessory" Accountable Officers.

1. Someone who has custody of funds is an accountable officer even though he or she is not a certifying or disbursing officer. Those entrusted with funds are liable for **any and all** losses. This liability is based on the broad responsibilities imposed by 31 U.S.C. § 3302, which requires government officials or agents in custody of government funds to keep the funds safe. See, e.g., B-220492 (holding that an ATF special agent in possession of a "flash roll" used in undercover activities, was an accountable officer and was strictly liable for the funds in his custody even though the funds were stolen from the glove compartment of his car, which he parked in a high-crime area).

2. DOD does not use the term "Possessory" Accountable Officers, but defines Accountable Officials to include deputy disbursing officers, agents, cashiers and other employees who by virtue of their employment are responsible for or have custody of government funds. DOD FMR, Vol. 5, Glossary.

3. There is no liability limitation for these accountable officers, though they may be granted relief if warranted by the facts. Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990) (holding that although Secret Service agent was an accountable officer by virtue of his employment and custody of government funds, the facts regarding his hotel room break-in and burglary supported granting relief).

E. The Nature of Accountable Officer Liability.

1. Accountable officers (with the exception of departmental accountable officials – see paragraph 5 below) are strictly liable for losses or erroneous payments of public funds. A series of very old cases recognized two exceptions to the strict liability rule: 1) overruling necessity (e.g. acts of God); and 2) public enemy, however subsequent cases rendered these exceptions extremely limited. United States v. Prescott, 44 U.S. (3 How.) 578 (1845); United States v. Thomas, 82 U.S. (15 Wall.) 337 (1872); Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969); GAO Redbook, Vol. II, Ch. 9, para. B.1a.

2. Accountable officers are in effect, "insurers" of public funds in their custody or for which they are otherwise responsible. Ms. Bonnie Luckman, B-258357 (Jan. 3, 1996) (refusing to grant relief to an imprest fund cashier who arguably did not lose any funds, but could not account for a number of purchases due to lost supporting documentation).

3. Liability arises by operation of law at the moment a physical loss occurs or an erroneous payment is made. Fault or negligence on the part of the accountable official does not excuse this legal liability. However, the lack of fault or negligence may provide a basis for relief from the obligation to repay the loss. Relief does not excuse the legal liability, but rather is a separate process that may take fault or negligence into consideration to the extent authorized by the governing statute. If relief is granted, the duty to repay is excused. 31 U.S.C. §§ 3527, 3528; Mr. David J. Bechtol, B-271608, 1996 U.S. Comp. Gen. LEXIS 333 (June 21, 1996); Captain John J. Geer, Jr., B-238123, 70 Comp. Gen. 298 (Feb. 27, 1991); Mr. Anthony Dudley, B-238898, 70 Comp. Gen. 389 (Apr. 1, 1991); Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974); DOD FMR, Vol. 5, Ch. 6, para. 0604.

4. Certifying officers and disbursing officers are automatically liable when a "fiscal irregularity," i.e., physical loss or erroneous payment, occurs. A fiscal irregularity creates the "presumption of negligence" on the part of the certifying or disbursing officer. This presumption shifts the burden to the accountable official to prove, during the relief process, that he or she was either not negligent or not the proximate cause of the irregularity. DOD FMR, Vol. 5, Ch. 6, para. 060206.B.

5. DAOs are not subject to the presumption of negligence, but may be held liable for an illegal, improper, or incorrect payment that results from their fault or negligence and may be either individual or joint and severally liable with that of other officers or employees of the U.S. or members of the uniformed services who are also pecuniarily liable for those losses. 10 U.S.C. § 2773a(c); Dep't of Def. Accountable Officials – Local Nat'ls Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006); DOD FMR, Vol. 5, Ch. 33, para. 330701.C.

IV. PROTECTION AND RELIEF FROM LIABILITY.

A. Advance Decisions from the Comptroller General.

1. A certifying officer, disbursing officer, or head of an agency may request an opinion concerning the propriety of a certification or disbursement. 31 U.S.C. § 3529; DOD FMR, Vol. 5, Ch. 25, para. 250302.A.

2. Upon request, the Comptroller General will decide any question involving:

a. A payment the disbursing official or the head of the agency proposes to make; or

b. A voucher presented to a certifying official for certification.

3. As of April 2005, DOD does not recognize the statutory authority of the Comptroller General to shield DOD personnel from financial liability by issuing advance decisions on the use of appropriated funds. DOD FMR, Vol. 5, Ch. 1, para. 010801 (April 2005 version).

a. An old version of DOD FMR, Vol. 5, Ch. 1, para. 010802.E explained:

> While an opinion of the CG [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official . . . . The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the CG to relieve Executive Branch Officials from liability (*i.e.*, 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the CG, as an agent of Congress, may not exercise Executive power, and does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.
>
> DOD FMR, Vol. 5, Ch. 1, para. 010801 (April 2005 version); Memorandum, Department of Justice, to Department Employees, subject: Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (DOJ Order 2110.39A) (15 Nov. 1995).

b. The 1995 DOJ memorandum was based on a 1991 DOJ Office of Legal Counsel opinion which concluded that the statutes were unconstitutional insofar as they purport to empower the Comptroller General to relieve Executive Branch officials from liability. Memorandum for Janis A. Sposato, General Counsel, Justice Management Division, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Comptroller General's Authority To Relieve Disbursing and Certifying Officials From Liability (Aug. 5, 1991).

c. The April 2005 DOD action in changing DOD FMR consistent with the DOJ opinion followed similar action initiated by the Department of Treasury in 2004. Memorandum, U.S. Department of Justice, Office of the Assistant Attorney General, to U.S. Department of Treasury General Counsel, subject: Response to Department of Treasury (28 Jan. 2004).

d. The current version of the DOD FMR deleted this explanation and history. It provides a means to request advance decisions, but those decisions do not go beyond DOD. See section IV.B. below. DOD FMR, Vol. 5, Ch. 25, para. 2503 and Appendix E.

B. Advance Agency Decisions.

1. DoD FMR, Vol. 5, Ch. 25, para. 2503, and Appendix E (updated Jan. 2011) .

2. Historically, per the General Accounting Office Act of 1996, Pub. L. 104-316, § 204, 110 Stat. 3826, 3845-46, the following were authorized to issue advance decisions for designated claims categories.

   a. DOD (DOD General Counsel): military member pay, allowances, travel, transportation costs; survivor benefits; and retired pay.

   b. Office of Personnel Management (OPM): civilian compensation and leave.

   c. General Services Administration Board of Contract Appeals (GSBCA): civilian employee travel, transportation, and relocation allowances.

3. **For DOD,** a disbursing officer, certifying officer, or head of an agency, may seek an advance decision on the propriety of any prospective payment from an authorized official enumerated in the current version of Appendix E to DOD FMR, Vol. 5. DOD FMR, Vol. 5, Ch. 25, para. 250302.A.

   a. Such advance decisions will effectively "shield" the employee from liability in that DOD will not seek to recover a payment from the employee if the appropriate authorized official issued an opinion advising that the payment could legally be made.

   b. The DOD FMR cautions however, that these advance decisions are not applicable to payments already made, or to hypothetical cases. Further, advance decisions are conclusive only regarding the particular payment involved. Accountable officials are encouraged, however, to use the principles cited in advance decisions in making other entitlement decisions. DOD FMR, Vol. 5, Ch. 25, para. 250302 and 250304.

   c. As of January 2011, DOD FMR, Vol. 5, Appendix E, directs employees to the following responsible offices for advance decisions:

      (1) Use of appropriated funds: Office of the Secretary of Defense, Office of the Deputy General Counsel (Fiscal).

(2) Military members' pay, allowances, travel, transportation, retired pay, and survivor benefits: Office of the Secretary of Defense, Office of the Deputy General Counsel (P&HP).

(3) Federal civilian employees' compensation and leave: Office of Personnel Management (Office of Merit Systems Oversight and Effectiveness).

(4) Federal Civilian employees' travel, transportation and relocation expenses and allowances: Civilian Board of Contract Appeals.

d. Requests for advance decisions are submitted through the General Counsel of the DOD component or of DFAS, to the Deputy General Counsel (Fiscal) (DOD (DCG(F)) for determination. The DOD FMR provides that an "appropriate General Counsel may return cases involving entitlement questions[, which] have been clearly decided authoritatively, with a determination that no advance decision is necessary." DOD FMR, Vol. 5, Ch. 25, para. 250303.

C. Relief of Non-DOD Certifying Officers. 31 U.S.C. § 3528(b).

1. The Comptroller General may relieve a certifying officer from liability if:

a. The officer based the improper certification on official records <u>and</u> the officer did not know, or reasonably could not have known, that the information was incorrect. 31 U.S.C. § 3528(b)(1)(A); Relief of Accountable Officer Sally V. Slocum – Am. Embassy, Brazzaville, Rep. of the Congo, B-288284.2, 2003 U.S. Comp. Gen. LEXIS 223 (Mar. 7, 2003); <u>or</u>

b. The obligation was in good faith, no law specifically <u>prohibited</u> the payment, <u>and</u> the government received some benefit. 31 U.S.C. § 3528(b)(1)(B); Envtl. Prot. Agency, B-262110, 97-1 CPD ¶ 131 (Mar. 19, 1997) (certifying officials not required to second-guess discretionary decisions of senior agency officials); Ms. Trudy Huskamp Peterson, B-257893, 1995 U.S. Comp. Gen. LEXIS 337 (June 1, 1995).

2. The Comptroller General will deny relief if the agency did not attempt diligently to collect an erroneous payment.

D. Relief of Non-DOD Disbursing Officers for Illegal, Improper, or Incorrect Payments.

1. The Comptroller General may, on his own initiative, or on the written recommendation of the head of an agency, relieve a disbursing official responsible for a deficiency in an account because of an illegal, improper, or incorrect payment when the Comptroller General decides that the payment was not made as a result of bad faith or lack of reasonable care by the official. 31 U.S.C. § 3527(c).

2. The Comptroller General may deny relief if the agency did not pursue collection action diligently. 31 U.S.C. § 3527(c).

E. Relief of Other Non-DOD Accountable Officers.

1. Applicability. The Comptroller General may relieve an accountable official or an agent from liability for the physical loss or deficiency of public money, vouchers, checks, securities, or records when:

a. The agency head finds that:

(1) The officer or agent was carrying out official duties when the loss or deficiency occurred or the loss or deficiency occurred because of an act or failure to act by a subordinate of the officer or agent; *and*

(2) The loss or deficiency was not the result of fault or negligence of the officer or agent. Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992).

b. The loss or deficiency was not the result of an illegal or incorrect payment; *and*

c. The Comptroller General agrees with the decision of the head of the agency. 31 U.S.C. § 3527(a).

2. The Comptroller General has delegated to agency heads the authority to resolve physical losses or deficiencies when a loss is less than $3,000. U.S. Gov't Accountability Office, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.9.C, *available at* http://www.gao.gov/assets/80/76194.pdf; Mr. Frank Palmer, B-252809, 1993 U.S. Comp. Gen. LEXIS 485 (Apr. 7, 1993); Mr. Thomas M. Vapniarek, B-249796, 1993 U.S. Comp. Gen. LEXIS 248 (Feb. 9, 1993); Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992). This delegation is limited, however, with respect to improper payments. GAO Redbook, Vol. II, p. 9-40.

3. Alternatively, the Comptroller General may authorize reimbursement of amounts paid by the responsible official as restitution.

F. Relief of **DOD** Certifying Officers for Illegal, Incorrect, or Improper Payments.

1. The DOD FMR, Vol. 5, Ch. 6, para. 060301, defines illegal, incorrect, or improper payments as "erroneous" payments, which include:

   a. Any payment that should not have been made or that is an incorrect overpayment under statutory, contractual, administrative, or other legally applicable requirement; and

   b. Any payment to an ineligible recipient, any payment for an ineligible service, any duplicate payment, payment for services not received, and any payment that does not account for credit for applicable discounts.

2. The DOD FMR does not make such a distinction and under its broad language, appears to require all relief requests to be determined by DOD. DOD FMR, Vol. 5, Ch. 6, para. 0604 ("The determination of the Secretary of Defense that relief should be granted is binding.").

3. The Secretary of Defense has delegated authority to the Director, DFAS or his designee, to make the required determinations and to grant or deny relief. DOD FMR, Vol. 5, Ch. 6, sec. 060401. Currently, that authority has been re-delegated to the Director of DFAS-NP.

4. The standard for relief of certifying officers under 31 U.S.C. § 3528 (and also DOD FMR, Vol. 5, Ch. 6, para. 060305.B):

   a. The certification was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or

   b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment.

5. 31 U.S.C. § 3527(b)(1)(B) provides that the Comptroller General shall relieve a certifying officer of the "armed forces" for an illegal, improper, or incorrect payment resulting from an inaccurate or misleading certificate, provided the Secretary of Defense, after taking a diligent collection action, finds that the criteria of 31 U.S.C. § 3528(b)(1) are satisfied (see section IV.C. above). The Comptroller General determined that "armed forces" under the statute refers to the Army, Navy, Air Force, and Marines but not to defense agencies. Mr. Jeffrey Elmore, B-307693, 2007 U.S. Comp. Gen. LEXIS 70 (Apr. 12, 2007) (concluding that GAO had authority to consider a request for relief submitted under 3527(b) from an employee of the Defense Logistics Agency (DLA)).

6. The statute also says that the Comptroller General may deny relief when the Comptroller General decides that the head of the agency did not diligently carry out efforts to recover the payment. 31 U.S.C. § 3528(b)(2). DoD FMR, Vol. 5, Ch. 6, para. 060305.B, echoes the statute by requiring a determination that "diligent collection efforts were made to recover the payment." 31 U.S.C. § 3527(b)(1)(B) incorporates these determinations within the Secretary of Defense's findings. It further provides that the "finding of the Secretary involved is conclusive on the Comptroller General." 31 U.S.C. § 3527(b)(2). This language would appear to preclude the Comptroller General from denying relief based on failure to diligently pursue a collection action if there is an appropriate DOD finding to the contrary. In light, however, of GAO's decision described above (that "armed forces" under 31 U.S.C. § 3527 do not include defense agencies (see Mr. Jeffrey Elmore, B-307693)), it is unclear if the Comptroller General can deny relief to DOD certifying officers outside the Army, Navy, Air Force, and Marines.

G. Relief of **DOD** Disbursing Officers for Illegal, Incorrect, or Improper Payments.

1. The statute provides that the Comptroller General shall relieve an accountable officer of the armed forces who makes an improper, illegal, or incorrect payment, if, after taking diligent collection action, the Secretary of Defense finds that:

   a. The payment was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or

   b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment. 31 U.S.C. § 3527(b)(1)(B); 31 U.S.C. § 3528(b)(1). See generally Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997).

2. DOD FMR, Vol. 5, Ch. 6, para. 060305.A provides only this simplified two-prong standard for relief of a disbursing official in a case of erroneous payment:

   a. The payment was not the result of bad faith or lack of reasonable care; and

   b. Diligent collection efforts by the disbursing officials and the agency were made.

3. Apparently, the reason DOD FMR does not include the first prong of the statutory standard (that the payment was based on official records and the official did not know, and by reasonable diligence/inquiry, could not have discovered, the correct information) is because the DOD FMR specifically states that disbursing officers are not liable for payments that are properly certified by certifying officers even if the payments turn out to be illegal, improper, or incorrect. DoD FMR, Vol. 5, Ch. 33, para. 330701.

4. The Secretary of Defense has delegated authority to the Director, DFAS or designee, to make the required determinations and grant or deny relief. DOD FMR, Vol. 5, Ch. 6, sec. 060401.

H. Relief of **DOD** Disbursing Officers and Accountable Individuals for Physical Losses.

1. The statute provides that the Comptroller General shall relieve a disbursing official of the armed forces who is responsible for the physical loss or deficiency of public money, vouchers, or records when:

   a. The Secretary of Defense determines that the officer was carrying out official duties when the loss or deficiency occurred;

   b. The loss or deficiency was not the result of fault or negligence by the official; and

   c. The loss or deficiency was not the result of an illegal or incorrect payment. 31 U.S.C. § 3527(b)(1)(A).

2. The DOD FMR, Vol. 5, Ch. 6, para. 060207, contains the identical standard and applies it to disbursing officials as well as other accountable individuals in cases of physical losses. Accordingly, this standard would also apply to other accountable officials such as DOD departmental accountable officials, deputy disbursing officers, agents, cashiers, and other employees who by virtue of their employment are responsible for and have custody of government funds.

3. Under the statute (31 U.S.C. § 3527(b)), the SECDEF finding binds the Comptroller General. For this reason, the Comptroller General does not require military departments to forward these relief determinations for approval. U.S. Gov't Accountability Office, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.10; Mr. William Duff, B-271859, 1996 U.S. Comp. Gen. 490 (Sep. 26, 1996).

I. Relief of **DOD** Departmental Accountable Officials for Illegal, Incorrect, or Improper Payments.

1. DOD FMR, Vol. 5 does not state any standards for relief of departmental accountable officials (DAOs).

2. However, because 10 U.S.C. § 2773a requires fault or negligence on the part of a departmental accountable official in order to subject that person to financial liability to begin with, it follows that a lack of negligence, at a minimum, will result in relief of liability.

3. Further, as stated above and in the DOD FMR, the presumption of negligence does not apply to DAOs.

J. Judicial Relief – U.S. Court of Federal Claims.

1. Disbursing officers. Under 28 U.S.C. § 1496, the court has jurisdiction to review disbursing officer cases.

2. Any individual. If an agency withholds the pay of any individual, that person may request that the employing agency report the balance due to the Attorney General, who shall then initiate a suit against the individual. 5 U.S.C. § 5512(b). By doing this, the individual can get his matter heard in federal court.

3. See GAO Redbook, Vol. II, Ch. 9, sec. E., for a description of other potential relief statutes.

K. Legislative Relief. Private and collective relief legislation. Historically, this means of relief is what gave rise to the current regime of relief statutes (e.g. 31 U.S.C. § 3527) and is rarely used today.

V. ESTABLISHING LIABILITY.

A. DOD Required Action.

1. Before initiating collection for a loss, the appropriate agency must establish the accountable officer's liability "permanently." Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616, 622 (July 8, 1991). Liability is "permanently" established when the officer has agreed to repay the loss or the appropriate authority has denied relief.

2. The DOD FMR requires a formal investigation for all physical losses of funds or for erroneous payments induced by fraud. The commander may investigate other losses formally as well. DoD FMR, Vol. 5, Ch. 6. The dollar value of the loss will typically affect the level of formality of the investigation required. Chapter 6 provides detailed guidance on when investigations must be conducted as well as the procedures that must be followed during the investigation.

B. Statute of Limitations. 31 U.S.C. § 3526(c)(1).

1. The statute of limitations for settling accounts of an accountable officer is three years after agency accounts are substantially complete. Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616 (July 8, 1991); Lieutenant Colonel S.C. Shoemake, Jr., B-239483, 70 Comp. Gen. 420 (Apr. 15, 1991). After this period, the account is settled by operation of law, and an accountable officer has no personal financial liability for the loss in question. Mr. John S. Nabil, B-258735, 1994 U.S. Comp. Gen. LEXIS 950 (Dec. 15, 1994); Mr. Clarence Maddox, B-303920, 2006 U.S. Comp. Gen. LEXIS 54 (Mar. 21, 2006) (statute of limitations reduced potential liability of $1,443.22 to $485.60).

2. "Substantially complete" means the time when, absent fraud by the officer, the agency can audit the paperwork upon which the officer based his action. Relief of Anna L. Pescod, B-251994, 1993 U.S. Comp. Gen. LEXIS 991 (Sept. 24, 1993).

3. If the loss is due to embezzlement, fraud, or other criminal activity, the three-year statute of limitations is not triggered until the loss has been discovered and reported. Steve E. Turner, B-270442.2, 1996 U.S. Comp. Gen. LEXIS 75 (Feb. 12, 1996).

4. The statute of limitations does not apply if a loss is due to fraud or other criminal acts of an accountable officer. 31 U.S.C. § 3526(c)(2).

VI. MATTERS OF PROOF.

A. Evidentiary Showing.

1. To qualify for relief from liability for a loss or deficiency under the applicable relief statutes, an accountable officer generally must prove that he was:

   a. Acting in an official capacity; and

   b. was either not negligent or that his negligence did not cause the loss. 31 U.S.C. § 3527; Mr. S.M. Helmrich, B-265856, 1995 U.S. Comp. Gen. LEXIS 717 (Nov. 9, 1995).

B. The "Reasonable Care" Standard.

1. In determining whether an officer was negligent, the Comptroller General applies a "reasonable care" standard. Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974).

   a. Liability results when an accountable officer's conduct constitutes simple or ordinary negligence. Gross negligence is not required.

   b. The standard is whether the accountable officer did what a reasonably prudent and careful person would have done to safeguard his/her own property under similar circumstances.

   c. This is an "objective" standard. It does not vary with such factors as the level of experience or the age of the particular accountable officer concerned.

   d. Failure to follow laws/regulations is negligent. Hence, accountable officers must familiarize themselves with applicable laws/regulations. DOD FMR, Vol. 5, ch.1, para. 010302.

2. That a loss or deficiency has occurred creates a rebuttable presumption of negligence on the part of the accountable officer. This presumption arises from the accountable officer's strict liability for any loss or deficiency. The accountable officer can rebut this presumption of negligence by presenting affirmative evidence that he exercised due care. Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Melvin L. Hines, B-243685, 1991 U.S. Comp. Gen. LEXIS 985 (July 1, 1991); Mr. Frank D. Derville, B-241478, 1991 U.S. Comp. Gen. LEXIS 1488 (Apr. 5, 1991); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969). The burden is on the accountable officer seeking relief to present evidence that he or she exercised the requisite degree of care.

3. As noted previously, the DOD FMR indicates that the presumption of negligence does not apply to acts of Departmental Accountable Officials.

C. Proximate Cause.

1. If the accountable officer was negligent, the Comptroller General will consider whether the negligence was the proximate cause of the loss or deficiency. Again, however, it is the burden of the individual seeking relief to "show that some other factor or combination of factors was the proximate cause of the loss, or at least that the totality of evidence makes it impossible to fix responsibility." GAO Redbook, Vol. II, p. 9-52. The government need not prove proximate cause.

2. If negligence occurred and it was the proximate cause of the loss or deficiency, the Comptroller General may <u>not</u> grant relief from liability. 31 U.S.C. § 3527(a).

3. If an accountable officer was negligent, but the negligence was not the proximate cause of the loss or deficiency, the Comptroller General may grant relief under the statute. See B-201173 (Aug. 18, 1981) (granting relief to an accountable officer who negligently failed to lock a safe, but whose negligence was not the proximate cause of the loss because the safe containing the funds was in the process of being physically carried away by armed burglars when the door of the unlocked safe swung open).

VII. DEBT COLLECTION.

A. Collection is pursuant to 31 U.S.C. §§ 3701- 3720E (Debt Collection Act) and 5 U.S.C. § 5512(a) (allowing offset against government employee or retiree pay). See 5 U.S.C. § 5514 (allowing payment by installment and limiting amount per period to 15%); 37 U.S.C. § 1007(a) (governing withholding of military officer pay); 10 U.S.C. § 9837(d) (remission of indebtedness); 10 U.S.C. § 1552 (correction of records).

B. DOD has published detailed collection procedures. DoD FMR, Vol. 5.

VIII. CONCLUSION.

Chapter 15:

Fiscal Law Research

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CHAPTER 15

FISCAL LAW RESEARCH

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CHAPTER 15

FISCAL LAW RESEARCH

I. LEGISLATION & STATUTES.

A. Appropriation Acts.

1. On an annual basis, Congress ordinarily passes thirteen (13) regular appropriations acts plus one or more supplemental appropriation acts. 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 1, 1-26, GAO-04-261SP (3d ed. 2004). http://www.gao.gov/legal/redbook/redbook.html

2. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 1, 1-26 to 1-27, GAO-04-261SP (3d ed. 2004).

3. In recent years, including FY 2015, Congress has combined some or all of the appropriations into a consolidated appropriations act. *See, e.g.*, Consolidated Appropriations Act, 2015, Pub. L. No. 113-234. The 2015 Consolidated Appropriation Act is an omnibus appropriation act in which Congress consolidated twelve (12) appropriations acts. Consolidated Appropriations Act, 2015, Pub. L. No. 113-235 (2015).

4. Congress occasionally funds some agencies' requirements through a series of continuing resolutions without ever passing an annual appropriation act. *See, e.g.*, Continuing Appropriations Resolution, 2014, Pub. L. No. 113-46 (funding several agencies through the 15 January 2014). A continuing resolution occurs when action on regular appropriation bills is not completed before the beginning of a fiscal year. To fill the funding void, a continuing resolution may be enacted in a bill or a joint resolution to provide funding for the affected agencies for the full year, up to a specified date, or until their regular appropriations are enacted. U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 13-14, GAO-05-734SP (Sept. 2005).

5. In addition to LEXIS™- and Westlaw ™ -based research, one can use the Library of Congress' website, either Congress.gov or Thomas (http://www.thomas.gov) to conduct research on legislation enacted since 1973. The Pentagon Library, available at http://www.whs.mil/library/ also contains a list of and links to Department of Defense appropriation and authorizations acts.

B. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. This organic legislation provides the agency with authority to conduct the program, function, or mission and to utilize appropriated funds to do so. With relatively rare exceptions, organic legislation does not provide any money. 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-40, GAO-04-261SP (2004).

C. Authorization Act. An authorization act is substantive legislation, passed annually by Congress that authorizes the appropriation of funds for programs and activities. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 17, GAO-05-734SP (Sept. 2005).

1. Although there is no general statutory requirement to have an authorization in order for an appropriation to occur, Congress statutorily created certain situations in which it must authorize an appropriation. 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-41, GAO-04-261SP (2004). For example, 10 U.S.C. § 114(a) states that "[n]o funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and/or research, development, test and evaluation "unless funds therefore have been specifically authorized by law."

2. Under congressional rules, an authorization of an appropriation is a prerequisite to the appropriation. A point of order may be raised in either house objecting to an appropriation in an appropriation act that is not previously authorized by law. U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 15, GAO-05-734SP (Sept. 2005); 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-41, GAO-04-261SP (2004). However, if a point of order is not raised, or is raised and not sustained, the provision, if enacted, is no less valid. 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 1, 1-30, GAO-04-261SP (2004). As a general rule, an authorization act does not provide budget authority. That authority stems from the appropriations act. Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide, however.

D. Locating Pertinent Statutes.

1. The U.S. Code is broken down into titles which typically cover a given subject matter area.

a. Example #1: Codified statutes pertaining to the Department of Defense (DoD) are typically found in Title 10. When searching to find a codified statute dealing only with restrictions on DOD's use of its appropriations, the statute will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5. When searching to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, with the most logical starting point would be to search Title 5.

b. Example #2: Statutes pertaining to the Department of State (DoS) are typically found in Title 22. Research into the field of Foreign Assistance will normally entail research into Title 22.

2. Searches can be run on either a specialized legal database, such as LEXIS™ or Westlaw™, or on the Government Printing Office (GPO) website, *available at* http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE.

II. THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO) AND ADVANCE AGENCY DECISIONS.

A. The Budget and Accounting Act of 1921 established the Government Accounting Office (now the Government Accountability Office) as an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. *See* 31 U.S.C. §§ 701-720. The Comptroller General heads the GAO and issues legal opinions and reports to agencies concerning the availability and use of appropriated funds.

B. In most cases, disbursing officials, certifying officials, and agency heads are entitled to advance decisions from the Comptroller General. 31 U.S.C. § 3529 (certain requests concerning functions transferred to or vested in the Director of the Office of Management and Budget must be directed to and answered by OMB or by another agency as delegated by the Director). GAO also has discretionary authority to render opinions to other individuals or organizations. *See* 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 1, 1-39 to 1-45, GAO-04-261SP (2004) (discussing GAO's rendering of advanced decisions).

C. As of April 2005, DOD does not recognize the statutory authority of the Comptroller General to shield DOD personnel from financial liability by issuing advance decisions on the use of appropriated funds. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, Vol. 5, Ch. 1, para. 010802.E explained:

> While an opinion of the CG [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official . . . . The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the CG to relieve Executive Branch Officials from liability (*i.e.*, 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the CG, as an agent of Congress, may not exercise Executive power, and does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.

As a result of the Department of Justice's determination, requests for advance decisions must be obtained from an authorized executive branch official. The current version of the DOD FMR deleted this explanation and history. It provides a means to request advance decisions, but those decisions do not go beyond DOD. See DOD FMR, Vol. 5, Ch. 25, para. 2503 and Appendix E. For a description of the process to obtain advanced decisions within DOD, see Chapter 14, Liability of Accountable Officers, The Judge Advocate General's Legal Center & School's Fiscal Law Deskbook.

D. Authority of Comptroller General Decisions

1. The Comptroller General is an officer of the Legislative Branch. See Bowsher v. Synar, 478 U.S. 714, 727-32 (1986) (holding Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power).

2. The Attorney General has found that because GAO is part of the legislative branch, executive branch agencies are not bound by GAO legal advice and that Office of Legal Counsel (OLC) provides the authoritative interpretations of the law for the Executive Branch. Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether Appropriations May be Used for Informational Video News Releases* at 1 (Mar. 11, 2005)("Bradbury Memo")(citing Bowsher, 478 U.S. at 727-32).

   a. Memorandum for Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division and for John D. Leshy, Solicitor, Department of the Interior, from Todd David Peterson, Deputy Assistant Attorney General, Re: Administrative Settlement of Royalty Determinations at n.7 (July 28, 1998)("Although the opinions and legal interpretations of the GAO and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies or officers of the executive branch.")

   b. Authority of GAO Reports. *Statutory Authority to Contract with the Private Sector for Secure Facilities*, 16 Op. O.L.C. 65, 68 n.8 (1992) ("We note that while GAO reports are often persuasive in resolving legal issues, they, like opinions of the Comptroller General, are not binding on the Executive branch.");

   c. Memorandum for Donald B. Ayer, Deputy Attorney General, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation* at 8 (Dec. 18, 1989) ("This Office has never regarded the legal opinions of the Comptroller General as binding upon the Executive.");

   d. Conflicts. Memorandum for Joe D. Whitley, Acting Associate Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Detail of Judge Advocate General Corps Personnel to the United States Attorney's Office for the District of Columbia and the Requirements of the Economy Act (31 U.S.C. §§ 1301, 1535)* at 2 n.2 (June 27, 1989) ("The Comptroller General is an officer of the legislative branch, and historically, the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the opinions of the Attorney General and the Office of Legal Counsel.")

E. Decisions of the Comptroller General of the United States (Comp. Gen.).

1. The Government Printing Office (GPO) prints decisions of the Comptroller General. Prior to September 30, 1994, the GPO distributed written copies of selected decisions.

   a. Hardbound volumes 1-73; volume No. 73 covers 1993-1994.

      (1) Separate topical indices & digests from 1894 to the present.

      (2) Contains only about 10% of total decisions issued each year.

      (3) No legal distinction between published and unpublished decisions.

   b. Example of citation:

      Department of the Army - - Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 48 (1983).

2. The GPO Access website, http://www.gpoaccess.gov/gaodecisions/index.html, contains electronic copies of decisions from October 1995 thru September 19, 2008. Documents are available as ASCII text and Adobe Acrobat Portable Document Format (PDF) files. On 19 September 2008, GPO signed a partnership agreement with GAO to provide permanent public access to the GAO Comptroller General Decisions database on the GAO website. Comptroller General decisions are now available on the GAO website at http://gao.gov/legal/index.html.

3. The GAO website also contains electronic listings and copies of opinions issued within the past month and six months respectively. Subscriptions are available providing access to a GAO electronic alert that issues daily notifications of the reports, decisions, and opinions that GAO has issued. Registration for this service is avaialable at http://www.gao.gov/subscribe/index.php.

4. Comptroller General's Procurement Decisions (CPD).

a. Published by West Publishing Group.

b. Contains every decision.

c. Loose-leaf reporter updated monthly.

d. A separate index volume with three indices.

(1) B-Number Index.

(2) Government Volume Index.

(3) Subject-Matter Index.

e. Example of citation:

Matter of Prohibition on Use of Appropriated Funds for Defense Golf Courses, B-277905, Mar. 17, 1998, 98-1 CPD ¶ 135.

F. Principles of Federal Appropriations Law (a.k.a. "The Red Book").

1. The third edition was published in 2004 by the Government Accountability Office, Office of General Counsel. In 2012, GAO published an annual update of the Third Edition, Volumes I, II and III. The most current version of The Redbook is available at http://www.gao.gov/legal/redbook.html.

2. The Red Book serves as a detailed fiscal law guide covering those areas of law in which the Comptroller General renders decisions.

3. Example of citation:

1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 1, 1-39 to 1-45, GAO-04-261SP (2004).

G. U.S. GOV'T ACCOUNTABILITY OFFICE, TITLE 7 OF THE GAO POLICY AND PROCEDURES MANUAL FOR GUIDANCE OF FEDERAL AGENCIES (1993). While this manual is no longer available, the GAO website does provide the most current information on the topics formerly covered in the manual as well as the GAO points of contact for those topics at http://www.gao.gov/special.pubs/ppm.html.

1. A substantial portion of the general guidance issued by GAO to executive agencies was first codified in GAO Policy and Procedures Manual for Guidance of Federal Agencies in 1957. The manual had eight major parts called titles. Of these eight titles, only Title 7 remains viable.

2. Title 7 is entitled "Fiscal Procedures" and it contains requirements related to collections, disbursements, appropriations, and accountable officers' accounts. The GAO point of contact for Title 7 is Mr. Tom Armstrong, (202) 512-8257. http://www.gao.gov/assets/80/76194.pdf

H. U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 15, GAO-05-734SP (Sept. 2005).

1. The Glossary fulfills part of GAO's statutory responsibility to publish standard terminology, definitions, classifications, and codes for federal fiscal, budgetary, and program-related information. 31 U.S.C. § 1112. The Glossary is available at http://www.gao.gov/new.items/d05734sp.pdf.

2. It is a basic reference document for the Congress, federal agencies, and others interested in the federal budget-making process.

III. BUDGET REQUESTS.

A. Agencies are required to justify their budget requests. *See* FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (July 2014), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2014.pdf.

B. Within DOD, Volumes 2A and 2B of the DOD Financial Management Regulation (DOD FMR) provide guidance on the documentation that must be generated to support defense budget requests. *See* U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, Vols. 2A (Oct. 2008), 2B (Sep. 2010), *available at* http://comptroller.defense.gov/fmr/change.aspx. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volumes 2A and 2B:

1. Chapter 2 deals with justification documents supporting the Military Personnel Appropriations (also known as "M documents").

2. Chapter 3 deals with justification documents supporting the Operations and Maintenance Appropriations (also known as "O documents").

3. Chapter 4 deals with justification documents supporting the Procurement Appropriations (also known as "P documents").

4. Chapter 5 deals with justification documents supporting the Research, Development, Test and Evaluation Appropriations (also known as "R documents").

5. Chapter 6 deals with justification documents supporting the Military Construction Appropriations (also known as "C documents").

C. The budget request is originated by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government's overall budget request.

D. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited.

E. Agencies generally place their past and current year budget submissions onto the web.

1. The President's overall budget materials can be found at: http://www.gpoaccess.gov/usbudget/ as well as at: http://www.whitehouse.gov/omb/budget/.

2. The Defense-wide budget materials can be found at: http://comptroller.defense.gov/.

3. The Army's budget materials can be found at: http://asafm.army.mil/offices/BU/BudgetMat.aspx?OfficeCode=1200.

4. The Air Force's budget materials can be found at: http://www.saffm.hq.af.mil/budget/.

5. The Navy's budget materials can be found at: http://www.finance.hq.navy.mil/fmb/14pres/BOOKS.htm.

6. The National Aeronautic and Space Administration's budget materials can be found at: http://www.nasa.gov/about/budget/index.html.

7. The Federal Aviation Administration's budget can be found at: http://www.faa.gov/about/budget/.

8. The Environmental Protection Agency's budget materials can be found at: http://www.epa.gov/ocfo/budget/index.htm.

9. The Department of the Interior's budget materials can be found at: http://www.doi.gov/budget/.

10. The Department of Homeland Security's budget materials can be found at: http://www.dhs.gov/dhs-budget.

11. The Department of State's budget materials can be found at: http://www.state.gov/s/d/rm/c6113.htm.

IV. AGENCY REGULATIONS.

A. Background. *See generally* 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 3, GAO-04-261SP (2004). When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily delegated authority in agency-level regulations.

B. Deference. An agency will receive a great deal of deference when it promulgates rules and regulations interpreting statutes. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous.

C. Additional Restrictions. Agency-level regulations may also place restrictions on the use of appropriated funds.

Example: The GAO has determined that all federal agencies may purchase commercially prepared business cards using appropriated funds. Each of the defense services has determined it will only buy commercially prepared business cards for a very limited category of personnel. Everyone else within DOD generally must buy card stock and prepare their cards in-house. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 25-30, THE ARMY PUBLISHING PROGRAM para. 7-11 (27 Mar. 2006); U.S. DEP'T OF THE AIR FORCE, INSTR. 65-601, VOL. 1, BUDGET GUIDANCE AND PROCEDURES para. 4.44 (Aug. 16, 2012); Department of the Navy (Financial Management and Comptroller) Financial Policy Manual, NAVSO P-1000, Rev. through Change 67 (Dec. 12, 2002).

D. Researching Regulations.

1. Agency Publication Websites. The DOD and many of the civilian agencies have websites containing electronic copies of most of their regulations. Unfortunately, not all agency publication websites support Boolean searches of the text of the regulations. For example, the Army website below only permits a search of the titles (not the text) of the regulations.

a. DOD Regulations. The Defense Technical Information Center (DTIC) provides electronic access to all DoD Regulations, Directives, and Instructions at: http://www.dtic.mil/whs/directives/.

b. Army Regulations. The U.S. Army Publishing Directorate (APD) provides electronic access to all Army Regulations, Directives, and Pamphlets at: http://www.apd.army.mil/.

c. Air Force Regulations. The U.S. Air Force E-Publishing site provides electronic access to all Air Force Instructions, Regulations, Directives, and Pamphlets at: www.e-publishing.af.mil/.

d. Navy Regulations. The Department of the Navy Issuances Website provides electronic access to all Navy Instructions, Publications, and Manuals at: http://doni.daps.dla.mil/default.aspx.

e. Marine Corps Regulations. The Marine Corps Combat Development Command provides electronic access to all Marine Publications at: http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx.

f. Joint Publications. The Defense Technical Information Center (DTIC) provides electronic access to all Joint Publications at: http://www.dtic.mil/doctrine/s_index.html.

g. Coast Guard Regulations. The U.S. Coast Guard Directives and Publications Division provides electronic access to all Coast Guard Directives, Instructions, and Notices at: www.uscg.mil/directives/default.asp.

h. JAGCNET. Those individuals with a DOD approved CAC may conduct a search of the text of all publications contained within the JAGCNET library of publications (most DOD regulations and TJAGLCS deskbooks) at www.jagcnet.army.mil.

2. Specialized Websites. In addition to the above websites that compile all agency regulations in one location, there are other websites that contain regulations specific to the fiscal law. These include:

a. Department of Defense Financial Management Regulation. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, *available at,* http://comptroller.defense.gov/fmr/change.aspx, establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the Department of Defense. This 15-volume set of regulations contains a very user-friendly, key word-searchable function. Much of this regulation deals with accounting practices, but there are also some fiscal policies embedded within it as well, including:

(1) Volume 2A, Budget Formulation and Presentation. For example, Chapter 1, General Information, provides funding policies for determining investment and expense costs.

(2) Volume 3, Budget Execution—Availability and Use of Budgetary Resources. For example, Chapter 8, Standards for Recording and Reviewing Commitments and Obligations, provides guidance on the proper year fund to charge for increased costs resulting from contract claims and modifications, among many other matters.

(3) Volume 10, Contract Payment Policy and Procedures.

(4) Volume 11B, Reimbursable Operations, Policies and Procedures—Working Capital Funds.

(5) Volume 13, Nonappropriated Funds Policy and Procedures.

(6) Volume 14, Administrative Control of Funds and Anti-deficiency Act Violations.

(7) Volume 15, Security Assistance Policy and Procedures.

b. Defense Finance and Accounting Service (DFAS) Regulations. DFAS handles the finance and accounting services for DOD. It is organized into geographic regions that are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army). Examples of specific DFAS regulations:

(1) DFAS-IN MANUAL 37-100-20XX, THE ARMY MANAGEMENT STRUCTURE (20XX). This regulation assigns most types of expenditures to a specific appropriation. The manual is reissued every FY (XX in the title = the appropriate FY) and is available at: http://www.asafm.army.mil/offices/BU/Dfas37100.aspx?OfficeCode=1200.

(2) DFAS-IN REGULATION 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION, *available at* http://www.asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200.

c. Defense Financial Management and Comptroller Websites. The DOD and each of the Services have a website which provide a wealth of information related to fiscal and other financial issues:

(1) DOD Comptroller at: http://www.defenselink.mil/comptroller/.

(2) Army Financial Management and Comptroller at: http://www.asafm.army.mil/.

(3) Air Force Financial Management and Comptroller at: http://www.saffm.hq.af.mil/.

(4) Navy Financial Management and Comptroller at: http://www.finance.hq.navy.mil/FMC/.

APPENDIX A

GOVERNMENT CONTRACT AND FISCAL LAW WEBSITES AND ELECTRONIC NEWSLETTERS

The table below contains hypertext links to websites that practitioners in the government contract and fiscal law fields use most often. If you are viewing this document in an electronic format, you should be able to just click on the web address in the second column resulting in your computer's web browser automatically opening and taking you to the requested website.

Website Name	Web Address
A	
ABA Lawlink Legal Research Jumpstation:	http://www.abanet.org/tech/ltrc/lawlink/home.html
ABA Network	http://www.abanet.org/
ABA Public Contract Law Journal (PCLJ)	http://www.abanet.org/contract/operations/lawjournal/journal.html
ABA Public Contract Law Section	http://www.abanet.org/contract/admin/home.html
Ability One	http://www.abilityone.gov/index.html
Acquisition Review Journal	http://www.dau.mil/pubscats/Pages/ARJ.aspx
Defense Acquisition Portal	https://dap.dau.mil/Pages/Default.aspx
ACQ Web- Office of the Undersecretary Of Defense for Acquisition & Tech	http://www.acq.osd.mil/
Air Force Acquisition	http://ww3.safaq.hq.af.mil/
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mill
Air Force Audit Agency	http://www.afaa.af.mil/
Air Force FAR Supplement	http://farsite.hill.af.mil/vfaffara.htm
Air Force Contracting Home Page	http://ww3.safaq.hq.af.mil/contracting/
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Site, FAR, DFARS, Fed Reg	http://farsite.hill.af.mil/
Air Force Home Page	http://www.af.mil/

Website Name	Web Address
A	
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/archive/AFMCFARS/02-01/afmc1toc.htm
Air Force Publications	http://www.e-publishing.af.mil/
Acquisition Central	http://www.acquisition.gov/
Anti-Deficiency Act violation database - GAO	http://gao.gov/legal/lawresources/antideficiencyrpts.html
Anti-Deficiency Act Investigation Manual	http://asafm.army.mil/offices/fo/ada.aspx?OfficeCode=1500
Armed Services Board of Contract Appeals	http://www.asbca.mil/
Armed Services Board of Contract Appeals Rules, EAJA and ADR procedures	http://www.asbca.mil/Rules/rules.html
Army Acquisition (ASA(ALT))	http://www.army.mil/asaalt
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.usace.army.mil/CECC/Pages/Home.aspx
AFARS – Army Federal Acquisition Regulation Supplement	http://farsite.hill.af.mil/vfafara.htm
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	http://ogc.hqda.pentagon.mil/
Army General Counsel Ethics Page	http://ogc.hqda.pentagon.mil//Practice_Groups/Ethics_Fiscal.aspx
Army Home Page	http://www.army.mil/
Army Materiel Command Web Page	http://www.army.mil/info/organization/unitsandcommands/commandstructure/amc/
Army Materiel Command Command Counsel	http://www.amc.army.mil/amc/commandcounsel.html
Army Publications	http://www.apd.army.mil/
Army Program Executive Office for Simulation, Training & Instrumentation (PEO STRI)	www.peostri.army.mil

Website Name	Web Address
B	
Bid Protest, GAO Material	http://gao.gov/legal/bids/bidprotest.html
Bid Protests Webpage from the American Bar Association (ABA) Public Contract Law Section	http://apps.americanbar.org/dch/committee.cfm?com=PC402000
Budget of the United States	http://www.whitehouse.gov/omb/budget
C	
CASCOM Home Page	http://www.cascom.army.mil/index.htm
CECOM	http://cecom.army.mil/
CENTCOM Contracting	http://www2.centcom.mil/sites/contracts/Pages/Default.aspx
Center for Law and Military Operations (CLAMO)	https://www.jagcnet.army.mil/CLAMO
Central Contractor Registration (CCR)	http://www.sam.gov/
Civilian Board of Contract Appeals	http://www.cbca.gsa.gov/
Coast Guard Home Page	http://www.uscg.mil
Code of Federal Regulations	http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR
Commission on Wartime Contracting	http://www.wartimecontracting.gov/
Comptroller General Decisions	http://gao.gov/legal/index.html
Comptroller General Bid Protest Decisions	http://gao.gov/legal/bids/bidprotest.html
Comptroller General Legal Products	http://www.gao.gov/legal.htm
Congressional Documents	https://www.congress.gov/
Congressional Record	http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CREC
Contract Pricing References Guides	http://www.acq.osd.mil/dpap/cpic/cp/contract_pricing_reference_guides.html
Contractor on the Battlefield Resource Library	http://www.aschq.army.mil/home/BattlefieldResourceLibrary.html
Cornell University Law School (extensive list of links to legal research sites)	www.law.cornell.edu
Cost Accounting Standards Board (CASB)	http://www.whitehouse.gov/omb/procurement_casb
Court of Appeals for the Federal Circuit (CAFC)	http://www.cafc.uscourts.gov/
Court of Federal Claims	www.uscfc.uscourts.gov

Website Name	Web Address
D	
Davis Bacon Wage Determinations	http://www.wdol.gov/
DCAA – FOIA Reading Room	http://www.dcaa.mil/FOIA/FOIA_Reading_Room.html
Defense Contract Audit Agency (DCAA)	Defense Contract Audit Agency (DCAA)
DCAA Contract Audit Manual (CAM)	www.dcaa.mil/cam.htm
Defense Acquisition University Publications & Periodicals	http://www.dau.mil/pubscats/default.aspx
Defense Acquisition Regulations Directorate (the DAR Council)	http://www.acq.osd.mil/dpap/dars/index.htm
Defense Acquisition University (DAU)	http://www.dau.mil/
Defense Competitive Sourcing & Privatization	http://www.acq.osd.mil/ie/housing.shtml
Defense Comptroller	http://comptroller.defense.gov/
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Finance and Accounting Service (DFAS)	http://www.dfas.mil/
Defense Finance and Accounting Service (DFAS) IN Manual 37-100	http://www.asafm.army.mil/secretariat/document/dfas37-100/dfas37-100.asp
Defense Logistics Agency (DLA)	http://www.dla.mil/default.aspx
DPAP: Contingency Contracting	http://www.acq.osd.mil/dpap/pacc/cc/index.html
Defense Standardization Program	http://www.dsp.dla.mil/APP_UIL/displayPage.aspx?action=content&contentid=66
Defense Tech Info. Ctr home page	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	http://www.commerce.gov/os/ogc/contract-law-division
Department of Energy Acquisition Guide	http://energy.gov/management/downloads/acquisition-guide-0
Department of the Interior Acquisition Regulation	http://www.doi.gov/pam/programs/acquisition/pamareg.cfm
Department of Justice	http://www.usdoj.gov
Department of Navy Issuances (DONI)	http://doni.daps.dla.mil/default.aspx
Department of Veterans Affairs	http://www.va.gov
DFARS Web Page (Searchable)	www.acq.osd.mil/dpap/dars/dfars/index.html
DOD Busopps	http://www.dodbusopps.com/
DOD Financial Management Regulations	http://comptroller.defense.gov/fmr.aspx
DOD General Counsel	http://www.defenselink.mil/dodgc/
DOD Home Page	http://www.defenselink.mil
DOD Inspector General (Audit Reports)	http://www.dodig.mil/pubs/index.cfm?office=Audit
DOD Instructions and Directives	http://www.dtic.mil/whs/directives/
DOD Pubs & Regs	http://www.dtic.mil/whs/directives/corres/pub1.html
DOD Purchase Card Program	http://dodgpc.us.army.mil/
DOD Standards of Conduct Office (SOCO)	http://www.dod.mil/dodgc/defense_ethics/

Website Name	Web Address
E	
Excluded Parties Listing System	http://www.sam.gov
Executive Orders	http://www.gpoaccess.gov/executive.html#presidential
F	
Federal Acquisition Institute (FAI)	http://www.fai.gov/
Federal Acquisition Regulation (FAR)	https://www.acquisition.gov/far/
FAR Site (Air Force) (searchable; other procurement regulations)	http://farsite.hill.af.mil/
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE)	https://aflsa.jag.af.mil/php/dlaw/dlaw.php
Federal Marketplace	http://www.fedmarket.com/
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	https://www.fpds.gov/
Federal Register via GPO Access	http://www.gpo.gov/fdsys/
Financial Operations (Jumpsites)	http://www.asafm.army.mil
Financial Management Regulation (DOD)	http://comptroller.defense.gov/fmr.aspx
FindLaw	http://www.findlaw.com
Fiscal Budget Process Dictionary	http://www.gao.gov/new.items/d05734sp.pdf
G	
Government Accountability Office (GAO) Comptroller General Decisions	http://www.gao.gov/decisions/appro/appro.htm
GAO Comptroller General Bid Protest Decisions	http://www.gao.gov/decisions/bidpro/bidpro.htm
GAO Comptroller General Decisions via GPO Access	http://www.gpoaccess.gov/gaodecisions/index.html
Government Accountability Office (GAO) Comptroller General Legal Products	http://www.gao.gov/legal.htm
GAO Home Page	http://www.gao.gov/
GovCon (Government Contracting Industry)	http://www.govcon.com/
Government Online Knowledge Portal	http://www.golearn.gov/
Government Printing Office (GPO)	http://www.gpo.gov
GSA Advantage	http://www.gsaadvantage.gov
J	
JAGCNET (Army JAG Corps Homepage)	http://www.jagcnet.army.mil/
JAGCNET (The JAG Legal Center & School (TJAGLCS) homepage)	https://www.jagcnet.army.mil/TJAGLCS

Website Name	Web Address
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/s_index.html
L	
Library of Congress	http://www.loc.gov/index.html
M	
Marine Corps Home Page	http://www.usmc.mil
MWR Home Page (Army)	http://www.ArmyMWR.com
N	
NAF Financial (Army)	http://www.armymwr.org/financialmanagement/default.aspx
National Aeronautics and Space Administration (NASA) Acquisition	http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi
National Industries for the Blind	www.nib.org
National Industries for the Severely Handicapped (NISH)	http://www.sourceamerica.org/
Navy Financial Management and Comptroller	http://www.finance.hq.navy.mil/fmc/
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Forms Online	https://navalforms.documentservices.dla.mil/web/public/home
N	
Department of Navy Issuances (DONI)	http://doni.daps.dla.mil/default.aspx
North American Industry Classification System	http://www.census.gov/eos/www/naics/;
O	
Occupational Safety & Health Administration	https://www.osha.gov/pls/imis/sicsearch.html
Office of Federal Procurement Policy (OFPP) Guides	http://www.whitehouse.gov/omb/procurement_index_guides/
Office of Government Ethics (OGE)	http://www.oge.gov/
OGE Ethics Advisory Opinions	http://www.oge.gov/OGE-Advisories/OGE-Advisories/
Office of Management and Budget (OMB)	http://www.whitehouse.gov/omb/

Website Name	Web Address
P	
Pentagon Library	http://www.whs.mil/library/
Per Diem Rates Travel and Transportation Allowance Committee	http://www.defensetravel.dod.mil/
Per Diem Rates (OCONUS)	http://aoprals.state.gov/
Producer Price Index	http://www.bls.gov/ppi/
PubKLaw Website	http://www.pubklaw.com/
Public Contract Law Journal	http://www.pclj.org/
Public Papers of the President of the United States	http://www.gpo.gov/fdsys/search/searchresults.action?st=collection:ppp
Purchase Card Program	http://dodgpc.us.army.mil/;
Policy Documents (DPAP)	http://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html
R	
Rand Reports and Publications	http://www.rand.org/publications/
Regulations / DA PAMs Army Publishing Agency	http://www.apd.army.mil/
GAO Redbook	http://gao.gov/legal/redbook/redbook.html
S	
Service Contract Act Directory of Occupations	http://www.dol.gov/whd/regs/compliance/wage/
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Government Contracting Home Page	http://www.sba.gov/GC/
Small Business Innovative Research (SBIR) & Small Business Technology Transfer (STTR)	http://www.acq.osd.mil/sadbu/sbir/
Special Inspector General for Afghanistan Reconstruction	http://www.sigar.mil/
Steve Schooner, Professor GWU homepage	http://www.law.gwu.edu/Faculty/profile.aspx?id=1740
System for Award Management	http://www.sam.gov
T	
Thomas website	http://thomas.loc.gov/home/thomas.php
U	
UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov
USA.gov	http://www.usa.gov/
U.S. Business.gov (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov
U.S. Code	http://www.gpoaccess.gov/uscode/index.html
U.S. Congress	http://beta.congress.gov/

Website Name	Web Address
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.cafc.uscourts.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/
W	
Where in Federal Contracting?	http://www.wifcon.com/

APPENDIX A

Contract and Fiscal Law Acronyms and Abbreviations

AAA	Army Audit Agency
ACA	Army Contracting Agency
ACAB	Army Contract Adjustment Board
ACAT	Acquisition Category
ACO	Army Contracting Officer
ACSA	Acquisition and Cross Servicing Agreement
ADA	Anti-Deficiency Act
ADPE	Automatic Data Processing Equipment
ADR	Alternative Dispute Resolution
ADRA	Administrative Dispute Resolution Act
AECA	Arms Export Control Act
AFARS	Army Federal Acquisition Regulation Supplement
AFFARS	Air Force Federal Acquisition Regulation Supplement
AFSA	Afghanistan Freedom Support Act
AGBCA	Department of Agriculture Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
AL	Acquisition Letter
AMWRF	Army Morale, Welfare and Recreation Fund
ANA	Afghan National Army
ANSWER	Applications and Support for Widely Diverse End User Requirements
AO	Area of Operations
AOA	Acquisition-only Agreement
AOR	Area of Responsibility
APA	Administrative Procedures Act
APCSS	Asia Pacific Center for Security Studies
APF	Appropriated Funds
AP Plan	Advanced Procurement Plan
AR	Army Regulation
ARB	Combatant Commander‘s Acquisition Review Board
ARC	American Red Cross
ASA (ALT)	Assistant Secretary of the Army (Acquisition, Logistics and Technology)
ASA (FM&C)	Assistant Secretary of the Army (Financial Management and Comptroller)
ASBCA	Armed Services Board of Contract Appeals
ASC	Army Sustainment Command
ASCP	Army Small Computer Program

ASCPA	Army Services Procurement Act
ASPM	Armed Services Pricing Manual
ACSA	Acquisition and Cross-Servicing Agreement
ASFF	Afghanistan Security Forces Fund
ASN (I&E)	Assistant Secretary of the Navy (Installations and Environment)
ASPA	Armed Services Procurement Act
ATO	Agency Tender Official
AWCF	Army Working Capital Fund
BAA	Buy American Act
BAA	Broad Agency Announcement
BAFO	Best and Final Offer (The new term is Final Proposal Revision (FPR))
BCA	Board of Contract Appeals
BCM	Business Clearance Memorandum
BEA	Army Business Enterprise Architecture
BOA	Basic Ordering Agreement
BOD	Beneficial Occupancy Date
BOM	Bill of Materials
BPA	Blanket Purchase Agreement
BPD	Board of Contract Appeals Bid Protest Decisions
CAA	Consolidated Appropriations Act
CAAS	Contracts for Advisory and Assistance Services
C&A	Certified and Accredited
C&S	Commodities and Services
CAF	Army Contractors Accompanying the Force
CAFC	Court of Appeals for Federal Circuit
CAP	Commercial Activities Panel/Program
CAS	Cost Accounting Standards
CASB	Cost Accounting Standards Board
CBA	Collective Bargaining Agreement
CBCA	Civilian Board of Contract Appeals
CBD	Commerce Business Daily
CCA	Contingency Construction Authority
CCH	Commerce Clearing House
CCIF	Combatant Commander Initiative Funds
CCP	Contingency Contracting Personnel
CCR	Central Contractor Registration
CDA	Contract Disputes Act
CDF	Contractors Deploying with the Force
CDRL	Contract Data Requirements List
CERP	Commander’s Emergency Response Program

CFR	Code of Federal Regulations
CICA	Competition in Contracting Act
CIO	Chief Information Officer
CITP	Commercial Items Test Program
CJCS	Chairman of the Joint Chiefs of Staff
CJTF	Combined Joint Task Force
CKO	Contingency Contracting Officer (also CCO)
CLEAs	Civilian Law Enforcement Agency
CLIN	Contract Line item Number
CM/ECF	Case management/Electronic Case Files
CN	Congressional Notification
CNO	Chief of Naval Operations
CO	Contracting Officer
COC	Certificate of Competency
COFC	Court of Federal Claims (also CFC)
COMMITS	Commerce Information Technology Solutions
COR	Contracting Officer Representative
COTR	Contract Officer's Technical Representative
COTS	Commercially Available off the Shelf
CPA	Coalition Provisional Authority
CPAF	Cost plus Award Fee Contract
CPD	Congressional Presentation Document
CPD	Comptroller General's Procurement Decisions
CPFF	Cost plus Fixed Fee Contract
CPIF	Cost plus Incentive Fee Contract
CPPC	Cost-Plus Percentage of Cost
CR	Continuing Resolution
CRA	Continuing Resolution Authority
CRA	Continuing Resolution Act
CRC	CONUS Replacement Center
CSF	Coalition Support Fund
CSO	Competitive Sourcing Official
CSP	Contracting Support Plan
CWAS	Contractor Weighted Average Share
CWAS-NA	Contractor Weighted Average Share- Not Applicable
CWHSSA	Contract Work Hours and Safety Standards Act
DA	Department of the Army
D&F	Determination and Finding
DAC	Defense Acquisition Circular
DA Form	Department of the Army Form

DAMS	Divide-Apply-Make-See (Approach to Pricing Adjustments)
DAPS	Documentation and Production Service
DAR	Defense Acquisition Regulation
DARC	Defense Acquisition Regulatory Council
DASA (I&H)	Deputy Assistant Secretary of the Army for Installations and Housing
DAU	Defense Acquisition University
DBA	Davis-Bacon Act
DBA	Defense Base Act
DBOF	Defense Business Operations Fund
DCA	Defense Communications Agency
DCAA	Defense Contract Audit Agency
DCAAM	Defense Contract Audit Agency Manual
DCCEP	Developing Countries Combined Exercise Program
DCMA	Defense Contract Management Agency
DCMCR	Defense Contract Management Command Region
DCO	Defense Coordinating Officer
DCS	Direct Commercial Sales
DEAR	Department of Energy Acquisition Regulation
DFARS	Defense Federal Acquisition Regulation Supplement
DFAS	Defense Finance and Accounting Service
DLA	Defense Logistics Agency
DLAAR	Defense Logistics Agency Acquisition Regulation
DLARS	Defense Logistics Acquisition Regulation Supplement
DO	Disbursing Officer
DOD	Department of Defense
DODAA	Department of Defense Appropriations Act
DODAAC	Department of Defense Activity Address Code
DOD FMR	DoD Financial Management Regulation
DODIG	Department of Defense Inspector General
DOE	Department of Energy
DOHA	Defense Office of Hearings and Appeals
DOI	Department of the Interior
DOL	Department of Labor
DOMOPS	Domestic Military Operations
DOS	Department of State
DOT	Department of Transportation
DOT CAB	Department of Transportation Contract Appeals Board
DPA	Delegation of Procurement Authority
DPAP	Defense Procurement and Acquisition Policy
DPRO	Defense Plant Representative's Office
DRI	Defense Reform Initiative

DRM	Director of Resource Management
DRMS	Defense Reutilization and Marketing Service
DSC	Differing Site Conditions
DSCA	Defense Security Cooperation Agency
DUNS	Data Universal Numbering System
E&E	Emergency and Extraordinary
EAJA	Equal Access to Justice Act
EBCA	Department of Energy Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
EDA	Excess Defense Articles
EEE	Emergency and Extraordinary Expenses
EEO	Equal Employment Opportunity
EFT	Electronic Funds Transfer
EIT	Electronic and Information Technology
ENG BCAUS	Army Corps of Engineers Board of Contract Appeals
EO	Executive Order
EOQ	Economic order quantity
ESA	Enterprise Software Agreement
ESAA	Emergency Supplemental Appropriations Act for Defense and Reconstruction
ESF	Economic Support Fund
ESF	Emergency Support Functions
EVE	Equal Value Exchange
FAA	Foreign Assistance Act
FAC	Federal Acquisition Circular
FACNET	Federal Acquisition Computer Network
FAR	Federal Acquisition Regulation
FARA	Federal Acquisition Reform Act
FASA	Federal Acquisition Streamlining Act
FCAA	Federal Courts Administration Act
FCCM	Facilities Capital Cost of Money
FCIA	Federal Courts Improvement Act
FCO	Federal Coordinating Officer (DOMOPS)
FedBizOpps	Current Government Wide Point of Entry (Replaced CBD)
FEDCAC	Federal Computer Acquisition Center
FEDSIM	Federal Systems Integration and Management Center
FEPP	Foreign Excess Personal Property
FFP	Firm Fixed Price Contract
FHA	Family Housing, Army

FIPR	Federal Information Processing Resources
FIRMR	Federal Information Resource Management Regulation
FLSA	Fair Labor Standards Act
FMF	Foreign Military Financing
FML	Foreign Military Lease
FMS	Foreign Military Sales
FMS	Financial Management Service
FOAA	Foreign Operations, Export Financing, and Related Programs Appropriations Act
FOO	Field Ordering Officer
FPASA	Federal Property and Administrative Services Act
FPD	Federal Court Procurement Decisions
FPI	Federal Prison Industries AKA UNICOR
FP	Fixed Price
FPI	Fixed Price Incentive Contract
FPR	Final Proposal Revision
FP-R	Fixed Price Contracts with Price Redetermination
FP w/EPA	Fixed Price with Economic Price Adjustment Contract
FRG	Family Readiness Group
FSS	Federal Supply Schedule
FTE	Full-time Equivalent
FUSMO	Funding United States Military Operations
FY	Fiscal Year
G&A	General and Administrative
GAO	Government Accountability Office
GETA	Government Employees Training Act
GFE	Government Furnished Equipment
GFM	Government Furnished Material
GIP	Government Information Practices
GOCO	Government Owned/Contractor Operated
GOGO	Government-owned/Government-operated
GPC	Government Purchase Card
GPE	Government-wide Point of Entry
GPO	Government Printing Office
GSA	General Services Administration
GSAR	General Services Administration Acquisition Regulation
GSBCA	General Services Administration Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
GWAC	Government-Wide Acquisition Contract

HA	Humanitarian Assistance
HCA	Head of Contracting Agency
HCA	Humanitarian and Civic Assistance
HIDTA	High Intensity Drug Trafficking Area
HN	Host Nation
HQDA	Headquarters, Department of the Army
HRA	Human Resource Advisor
HUD BCA	Department of Housing and Urban Development Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
IAW	Inspection, Accordance and Warranty
IBCA	Department of Interior Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
ID/IQ	Indefinite Quantity/Indefinite Delivery Contract
IDS	Individual Replacement Site
IFB	Invitation for Bids
IFF	Iraqi Freedom Fund
IGA	Intra-governmental Acquisition
IGCE	Independent Government Cost Estimate (AKA: IGE)
IGO	International Governmental Organization
IMCOM	Installation Management Command
IMET	International Military Education and Training
INL	Bureau of International Narcotics and Law Enforcement (DOS)
INCLE	International Narcotics and Criminal Law Enforcement
IO	Investigating Officer
IP	Intellectual Property
IRO	Independent Review Officer
IRRF	Iraq Relief and Reconstruction Fund
ISFF	Iraq Security Forces Fund
ITAR	International Traffic in Arms Regulation
ITMRA	The Information Technology Management and Reform Act
ITOP	Information Technology Omnibus Procurement
J&A	Justification and Approval
JCCI/A	Joint Contracting Command Iraq/Afghanistan
JFTR	Joint Federal Travel Regulation
JOC	Job Order Contract
JRC	Joint Reception Center

JTR	Joint Travel Regulation
JWOD	Javits-Wagner-O'Day Act
K	Contract
KO	Contracting Officer
KTR	Contractor
L-H Contract	Labor-Hour Contract
L&S	Lift and Sustain
LATAM COOP	Latin American Cooperation
LBCA	Department of Labor Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
LDs	Liquidated Damages
LHWCA	Longshoreman and Harbor Worker's Compensation Act
LOA	Letter of Agreement
LOA	Letter of Authorization
LOE	Level of Effort
LOGCAP	Logistics Civil Augmentation Program
LOO	Letter of Obligation
LPTA	Lowest Price Technically Acceptable
LSSS	Logistic Support, Supplies, and Services
MAAWS	Money as a Weapon System
MAC	Multi-agency contract/Multiple Award Contract
MACOM	Major Command
MAS	Multiple Award Schedule
MCA	Military Construction, Army
MCCA	Military Construction Codification Act
MEJA	Military Extraterritorial Jurisdiction Act
MEO	Most Efficient Organization
MILCON	Military Construction
MILCONAA	Military Construction Appropriations Act
MILPER	Military Personnel
MIPR	Military Interdepartmental Purchase Request
MMCP	Military to Military Contact Program
MOA	Memorandum of Agreement
MPS	Military Postal System
MRS	Miscellaneous Receipts Statute

NAF	Non-Appropriated Funds
NAFI	Non-Appropriated Fund Instrumentality
NAICS	North American Industry Classification Code
NAPS	Navy Acquisition Procedures Supplement
NCD	Navy Contract Directives
NDAA	National Defense Authorization Act
NDI	Non-developmental Item
NIB	National Industries for the Blind
NMCARS	Navy Marine Corps Acquisition Regulations Supplement
NOA	Notice of Appeal
NOK	Next of Kin
NPR	National Performance Review
NSN	National Stock Number
NTE	Not to Exceed
O&M	Operations and Maintenance
OCI	Organizational Conflicts of Interest
OCO	Overseas Contingency Operations
OFCC	Office of Federal Contract Compliance
OFDA	Office for Foreign Disaster Assistance
OFPP	Office of Federal Procurement Policy
OFPPA	Office of Federal Procurement Policy Act
OHDACA	Overseas Humanitarian, Disaster, and Civic Aid
OMA	Operations and Maintenance, Army
OMB	Office of Management and Budget
OPA	Office of Public Affairs (Embassy)
OPA	Other Procurement, Army
ORF	Official Representation Funds
ORHA	Office of Reconstruction and Humanitarian Assistance
OSD	Office of the Secretary of Defense
PACER	Public Access to Court Electronic Records
PARC	Principal Assistant Responsible for Contracting
PCH&T	Packaging, Crating, Handling, and Transportation
PCO	Procuring Contracting Officer
PDS	Permanent Duty Station
PFA	Procurement Fraud Advisor
PFP	Partnership for Peace
PIA	Procurement Integrity Act
PIK	Payment-in-Kind
PMR	Procurement Management Review

POA	Period of Availability
POLAD DOS	US Department of State Foreign Political Advisors
PPA	Prompt Payment Act
PPV	Public-Private Ventures
PR	Purchase Request
PR&C	Purchase Request and Commitment
PRT QRF	Provincial Reconstruction Team Quick Response Fund
PTO	Patent and Trademark Office
PWD	Procurement Work Directive
PWS	Performance Work Statement
QASP	Quality Assurance Surveillance Plan
QDR	Quadrennial Defense Review
QPL	Qualified Products List
R&D	Research and Development
RCFC	Rules of the Court of Federal Claims
RDD	Required Delivery Date
RDT&E	Research, Development, Test, and Evaluation
READ	Recycling Electronics and Asset Disposition
RFI	Request for Information
RFP	Request for Proposals
RFQ	Request for Quotes
RIK	Replacement- in-Kind
RLB	Relocatable Building
RSA	Randolph Sheppard Act for the Blind
RSS	Required Sources of Supplies or Services
SAA	Supplemental Appropriations Act
SAF	Subject to the Availability of Funds
SAGC	Secretary of the Army General Counsel
SAP	Simplified Acquisition Procedures
SAT	Simplified Acquisition Threshold
SAMM	Security Assistance Management Manual
SABER	Simplified Acquisition of Base Engineer Requirements
SBA	Small Business Administration
SCA	McNamara-O'Hara Service Contract Act
SCO	Servicing Contracting Office
SDN	Standard Document Number
SLA	State Licensing Agency
SLCF	Streamlined Competition Form

SM&W	Special Morale and Welfare
SOF	Special Operations Forces
SOFA	Status of Forces Agreement
SOO	Statement of Objectives
SOW	Statement of Work
SPS	Standard Procurement System
SSA	Source Selection Authority
SSEB	Source Selection Evaluation Board
SSP	Source Selection Plan
STARS GWAC	Multiple Award ID/IQ contract administered by GSA
T4C	Termination for Convenience
T4D	Termination for Default
TAA	Trade Agreements Act
T&E	Train and Equip
T&M	Time and Materials Contract
TCN	Third Country National
TCO	Termination Contracting Officer
TDP	Targeted Development Program
TIN	Taxpayer Identification Number
TINA	Truth in Negotiations Act
TRO	Temporary Restraining Order
UCA	Undefinitized Contract Action
UFM	Uniform Funding and Management
UMC	Unspecified Military Construction
UMMC	Unspecified Minor Military Construction
URD	Uniform Resource Demonstration
USAID	United States Agency for International Development
USARCS	United States Army Claims Service
USD (ATL)	Undersecretary of Defense (Acquisition, Technology, and Logistics)
USD(C)	Undersecretary of Defense (Comptroller)
UTSA	Uniform Trade Secrets Act
WAWF	Wide Area Work Flow
WD	Wage Determination
WDOL	Wage Determinations Online
WHA	Walsh-Healy Public Contracts Act
WHCA	War Hazards Compensation Act

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