



**Legal Opinion L-2006-06**  
**March 15, 2006**

U.S. Railroad Retirement Board Phone: (312) 751-7139  
844 North Rush Street TTY: (312) 751-4701  
Chicago Illinois, 60611-2092 Web: <http://www.rrb.gov>

**TO:** John M. Walter  
Chief of Accounting, Treasury,  
and Financial Systems  
Bureau of Fiscal Operations

**FROM:** Steven A. Bartholow  
General Counsel

**SUBJECT:** Interest Due under the Prompt Payment Act for Payment to  
Vendors During and After Continuing Resolution Periods

This is in reply to your request for my opinion regarding whether penalty interest accrues to a vendor under the Prompt Payment Act (31 U.S.C. §§ 3901-3907) when full payment is not made because agency operations are temporarily funded through a continuing resolution. You ask first whether the unavailability of full year funds in a new fiscal year may itself excuse interest penalties. If interest obligations may occur, you then ask my opinion as to when liability for interest would begin under the Prompt Payment Act in an example case.

I. Temporary Unavailability of Funds.

As you know, the Prompt Payment Act requires an agency to pay a vendor for property or service received by the agency no later than the "required payment date". See 31 U.S.C. §3902(a). Failure to make timely payment triggers an interest penalty payment to the vendor. *Id.* Section 3902(d) further states that:

(d) The temporary unavailability of funds to make a timely payment due for property or services does not relieve the head of an agency from the obligation to pay interest penalties under this section.

This provision was added to the original Prompt Payment Act by the Prompt Payment Act Amendments of 1988 (P.L. 100-496, 102 Stat. 245). The legislative history of this amendment (See House Report No. 784, 100<sup>th</sup> Cong., 2d Sess. at 20, reprinted in 1988 U.S. Code Cong. and Admin. News, 3036,3048) states that this section incorporates the result in Comptroller General decision B-223857, 1987 U.S. Comp. Gen. LEXIS 1531 (Feb. 27, 1987). The Commodity Credit Corporation (CCC) entered into contracts to purchase meat, but exhausted the funds available to make payments. The Comptroller General decision required the CCC to pay interest to vendors when payment was made more than 10 days after delivery, even though CCC was unable to pay timely because CCC had reached its borrowing ceiling for that purpose, and supplemental funding authority was pending approval in Congress when payment fell due. The Comptroller General found no support for CCC's argument that "compliance with the mandatory requirements of the Prompt Payment Act is not necessary if it is difficult or impossible for an agency to comply." *Id.* at 11-12.

Under section 3902(d), an agency that has created a valid obligation cannot avoid payment of interest if it fails to liquidate that obligation within the time limits set forth in the Prompt Payment Act. However, our review of the example you gave in your memorandum suggests that no interest is payable in that case because payments were made timely based on the dates of obligation for the period October 1 through November 30, 2004 and December 1, 2004 through September 30, 2005.

II. Payment of Interest in the Example.



## Legal Opinion L-2006-06 March 15, 2006

U.S. Railroad Retirement Board  
844 North Rush Street  
Chicago Illinois, 60611-2092

Phone: (312) 751-7139  
TTY: (312) 751-4701  
Web: <http://www.rrb.gov>

### A. Summary of Example Transaction.

The documents you have provided as an example may be summarized as follows. A computer software vendor issued an invoice dated by the vendor September 2, 2004 in the amount of \$4,032, for renewal of an annual software license fee for the fiscal year to begin October 1, 2004. The software program had previously been purchased and used under license during fiscal year 2004. The same vendor sent a second invoice dated September 9, 2004 in the amount of \$468 to license use of a modification to update and improve the original software. The vendor sent the invoices to an employee in the Board's Bureau of Information Services (BIS), who evidently received them sometime in September.

However, when fiscal year 2005 began on October 1, 2004, Congress had not yet approved the Board's annual budget, approving instead a resolution to continue funding temporarily. In the absence of a budget for the full year, BIS on November 9, 2004, notated the September 2 invoice that it was "approved for payment of \$750.00 for 10/1/04 – 11/30/04". No notation was made to the September 9 invoice. On November 18, 2004, the Board's Office of Administration, Division of Acquisition Management, issued an initial purchase order which notified the vendor that "This order is partially funded through 11/30/04. This order will be modified for the remainder of FY 2005 when funds become available."<sup>1</sup> The purchase order did not distinguish between the original software and the software update. The reverse side of the purchase order contained form language requiring that invoices be mailed to the Bureau of Fiscal Operations. The same day (November 18), your office annotated the vendor's September 2 invoice as received. The Board issued \$750 payment to the vendor December 2, 2004.

Six days later, on December 8, 2004, Congress approved a final budget for the Board for the 2005 fiscal year. See P.L. 108-447, Division F, Title IV, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005, (118 Stat. 3112, at 3159-3160). The Division of Acquisition Management executed and forwarded to the vendor an "Amendment of Solicitation/Modification of Contract" (GSA Standard Form 30) on January 21, 2005. The modification form notified the vendor "This modification in the amount of \$3,749 (sic) is issued to fully fund the annual maintenance renewal of the software through September 30, 2005." Below the foregoing sentence, the form shows "From: \$751 To: \$4,500", constituting the total of the September 2 and September 9 invoices (\$4,032 + \$468). Though the vendor acknowledged receipt January 31, a signed copy of the modification form was not returned by the vendor until May 13, 2005. The vendor's cover letter for the modification form was addressed to a BIS employee, rather than to BFO. BIS on May 18 forwarded a photocopy of the original September 2004 invoice to Fiscal Operations with the annotation "approved for payment of \$3,282." The photocopy was notated as received by BFO May 18, 2005, and payment was issued June 9, 2005. BIS notated the September 9 invoice as "approved for payment" on May 24, 2005. BFO notated the invoice as received on June 1, 2005, and issued payment to the vendor June 10.

### B. Formation of Contract for Purchase.

The Office of Management and Budget regulations implementing the Prompt Payment Act provide that the Prompt Payment Act applies to government contracts, which are specifically defined at 5 CFR 1315.2(g) as "any enforceable agreement, including rental and lease agreements, purchase orders, delivery orders \* \* \*, requirements-type (open-ended) service

---

<sup>1</sup> It does not appear from the documents submitted that the purchase order contract included the paragraphs required when contracting before funds are provided. See Federal Acquisition Regulations at 48 CFR 32.703-2.



Legal Opinion L-2006-06  
March 15, 2006

U.S. Railroad Retirement Board  
844 North Rush Street  
Chicago Illinois, 60611-2092

Phone: (312) 751-7139  
TTY: (312) 751-4701  
Web: <http://www.rrb.gov>

contracts, and blanket purchases agreements between an agency and a vendor for the acquisition of goods or services \* \* \* .” The Government may enter into contracts only through its duly authorized contracting officers. See: Federal Acquisition Regulations at 48 CFR 1.601. Agencies have no obligation to pay interest under the Prompt Payment Act where no legally binding contract exists. See: Matter of: Maintenance Service & Sales Corp., B-242019, 70 Comp. Gen. 664 (Aug. 5, 1991)(No contract existed upon which interest was due where delivery orders were issued by contracting officer after his warrant expired).

Special rules apply to formation of contracts which span the end of one fiscal year and the beginning of the next, because the current appropriation is not available for future needs, and funds for the future needs have not yet been appropriated. As a general matter, the Antideficiency Act prohibits contracts purporting to bind the Government beyond the duration of the appropriation.<sup>2</sup> See 31 U.S.C. §1341(a)(1). The guiding principles for this situation were stated by the Supreme Court in the leading case of Leiter v. United States, 271 U.S. 204 (1925). The Court held in that case that a purported multi-year lease was binding for only one fiscal year, and ceased to exist afterward until “the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year.” 271 U.S. at 206-207.

In the example you submitted, the licenses for use of the computer software end with the close of the fiscal year 2004. Under Leiter, no contract for use of the software for new fiscal year 2005 may arise until an authorized Board officer affirmatively agrees to a contract for purchase of a new license. In my opinion, based on the evidence submitted, no contract existed until the Board’s authorized contract officer signed a purchase order for the software for the new fiscal year on November 18, 2004. That contract authorized purchase of the software for 2005 in installments, with the first installment paid December 2, 2004. The contract order modification form sent January 21, 2005, revised the contract to provide for purchase of the software license for the balance of the fiscal year at the stated price. The vendor assented to the modification May 13, 2005, creating a new contract on that date.

C. Prompt Payment Act Interest.

Whether interest payments are due to the vendor in your example depends upon when the “required payment date” as defined by section 3903(a) occurred. Section 3903(a)(1) requires the Office of Management and Budget (OMB) to prescribe regulations which implement section 3902 to define the “required payment date” as (A) “the date payment is due under the contract for the item of property or service provided; or (B) 30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract.” See also, OMB regulations at 5 CFR 1315.4(f).

Section 3901(a)(4) sets forth conditions under which the agency is “deemed” to “receive an invoice”:

- (A) on the later of—
  - (i) the date on which the place or person designated by the agency to first receive such invoice actually receives a proper invoice; or

---

<sup>2</sup> Exceptions to this rule which allow contracted performance to extend into a subsequent fiscal year, and a contract properly obligated against funds for the year it is made to be actually paid in a subsequent year, are not applicable to the example considered.



Legal Opinion L-2006-06  
March 15, 2006

U.S. Railroad Retirement Board  
844 North Rush Street  
Chicago Illinois, 60611-2092

Phone: (312) 751-7139  
TTY: (312) 751-4701  
Web: <http://www.rrb.gov>

- (ii) on the 7<sup>th</sup> day after the date on which, in accordance with the terms of the contract, the property is actually delivered or performance of the services is actually completed, as the case may be, unless—
- (I) the agency has actually accepted such property or services before such 7<sup>th</sup> day; or
  - (II) the contract (except in the case of a contract for the procurement of a brand-name commercial item for authorized resale) specifies longer acceptance period, as determined by the contracting officer to be required to afford the agency a practicable opportunity to inspect and test the property furnished or evaluate the services performed; or
- (B) on the date of the invoice, if the agency has failed to annotate the invoice with the date of receipt at the time of actual receipt by the place or person designated by the agency to first receive such invoice.

(Emphasis supplied).

Paragraphs (A)(i) and (B) above both use the invoice to “deem” a receipt date, while paragraph (A)(ii) “deems” receipt based on delivery and acceptance of the property or services, rather than the invoice itself. See also, OMB regulations at 5 CFR 1315.4(b).

In my opinion, the Board’s payments for the purchase of the software licenses under the November contract or the January modification were timely as defined by the foregoing provisions. The payment date cannot be established by the September invoices because no contract existed when they were submitted. Delivery and acceptance constructively occurred on November 18, the date the authorized contract officer issued a purchase order for the software. Considering the software to have been both “delivered” and “accepted” as of the date of the purchase order, by operation of paragraph 3901(a)(4)(A)(ii)(I) above, the Board is “deemed” for purposes of the Prompt Payment Act to have received an invoice on that date. Under section 3903(a)(1)(B), the “required payment date” became 30 days from November 18. Because the Board made payment on December 2, in my opinion no interest is due under the Prompt Payment Act with respect to the December 2 payment.

Interest is also not due to the vendor with respect to the January 21 modification order because the evidence again is that the Board made timely payment. The January 21 modification order did not become an agreement between the vendor and the Board until the vendor assented on May 13. Once again, the software may be considered to have been both “delivered” and “accepted” as of the date the amended contract is formed for purposes of paragraph 3901(a)(4)(A)(ii)(I). By making payment June 10, the agency consequently met the requirement that payment be made within 30 days.

In closing, I may note that though it is difficult to generalize from the result in the example you provided to other circumstances, the sequence for analysis would remain the same: Does a contract exist? When was a contract formed? Is the start of the 30 day period based on an invoice, or on the delivery or acceptance of the product or services? A final question, not considered here, would be whether the 30 day period has been reduced, e.g., as in a case where the agency failed to notify a vendor of a defective invoice within 7 days of receipt (31 U.S.C. § 3903(a)(7)).