

# 2011

# FISCAL LAW

# DESKBOOK



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The Judge Advocate General's Legal Center and School  
United States Army  
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



**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, Imports, and Excises, to pay the Debts and provide for the common Defense 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 an Appropriation 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. 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 obligation thereafter. DoD Financial Management Regulation 7000.14-R, Glossary, p. xviii [hereinafter DoD FMR].
- 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. DoD FMR, Glossary, p. xvii.
- D. Budget Authority. Budget authority means “the authority provided by Federal law to incur financial obligations . . .” 2 U.S.C. § 622(2). *See also*, DoD FMR, Glossary, p. v.
1. Examples of budget authority include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Cir. A-11, Preparation, Submission and Execution of the Budget (June 2002), § 20.4 [hereinafter OMB Cir. A-11], available at <http://www.whitehouse.gov/omb/circulars/a11/02toc.html>.
  2. “Contract Authority,” as noted above, is a limited form of budget authority. Contract 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. viii. *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.

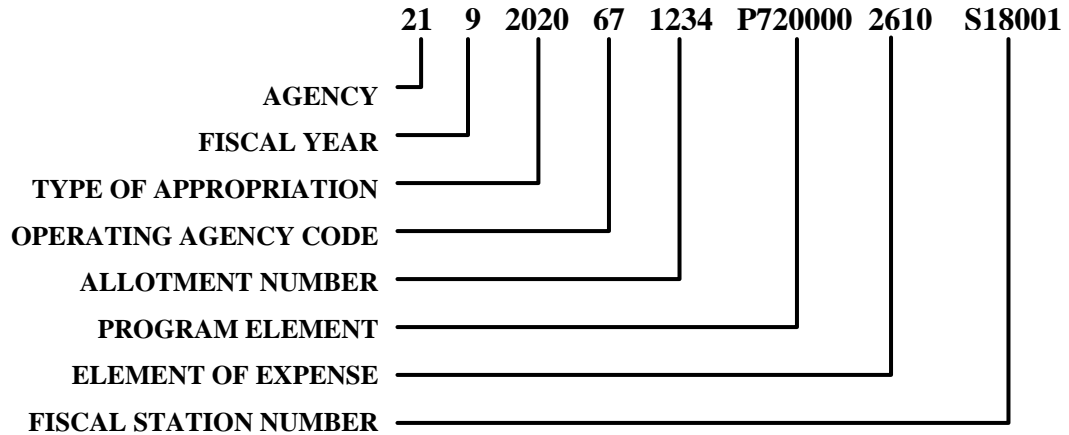
F. Appropriations Act.

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. DFAS-IN Reg. 37-1, ch. 3, para. 030701.
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.
2. Established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.
3. Issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.

H. 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-XX, *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:

<b>Appropriation Type</b>	<b>Army</b>	<b>Navy</b>	<b>Marine Corps</b>	<b>Air Force</b>	<b>OSD</b>
<b>Military Personnel</b>	<b>21*2010</b>	<b>17*1453</b>	<b>17*1105</b>	<b>57*3500</b>	<b>N/A</b>
<b>Reserve Personnel</b>	<b>21*2070</b>	<b>17*1405</b>	<b>17*1108</b>	<b>57*3700</b>	<b>N/A</b>
<b>National Guard Personnel</b>	<b>21*2060</b>	<b>N/A</b>	<b>N/A</b>	<b>57*3850</b>	<b>N/A</b>
<b>Operations &amp; Maintenance</b>	<b>21*2020</b>	<b>17*1804</b>	<b>17*1106</b>	<b>57*3400</b>	<b>97*0100</b>
<b>Operations &amp; Maintenance, Reserve</b>	<b>21*2080</b>	<b>17*1806</b>	<b>17*1107</b>	<b>57*3740</b>	<b>N/A</b>
<b>Operations &amp; Maintenance, National Guard</b>	<b>21*2065</b>	<b>N/A</b>	<b>N/A</b>	<b>57*3840</b>	<b>N/A</b>
<b>Procurement, Aircraft</b>	<b>21*2031</b>	<b>17*1506</b>		<b>57*3010</b>	<b>N/A</b>
<b>Procurement, Missiles</b>	<b>21*2032</b>	<b>17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)</b>	<b>17*1109</b>	<b>57*3020</b>	<b>N/A</b>
<b>Procurement, Weapons &amp; Tracked Vehicles</b>	<b>21*2033</b>			<b>N/A</b>	<b>N/A</b>
<b>Procurement, Other</b>	<b>21*2035</b>			<b>17*1810</b>	<b>57*3080</b>
<b>Procurement, Ammunition</b>	<b>21*2034</b>	<b>17*1508</b>		<b>57*3011</b>	<b>N/A</b>
<b>Shipbuilding &amp; Conversion</b>	<b>N/A</b>	<b>17*1611</b>		<b>N/A</b>	<b>N/A</b>
<b>Res., Develop., Test, &amp; Eval.7</b>	<b>21*2040</b>	<b>17*1319</b>		<b>57*3600</b>	<b>97*0400</b>
<b>Military Construction</b>	<b>21*2050</b>	<b>17*1205</b>		<b>57*3300</b>	<b>97*0500</b>
<b>Family Housing Construction</b>	<b>21*0702</b>	<b>17*0703</b>		<b>57*0704</b>	<b>97*0706</b>
<b>Reserve Construction</b>	<b>21*2086</b>	<b>17*1235</b>		<b>57*3730</b>	<b>N/A</b>
<b>National Guard Construction</b>	<b>21*2085</b>	<b>N/A</b>	<b>N/A</b>	<b>57*3830</b>	<b>N/A</b>

\* 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. 020103.D.
  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 carry 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.B.
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. 020103.E.

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 in excess 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. 020103.A.1.

- b. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B). *See also*, DoD FMR, vol. 14, ch. 2, para. 020103.A.2.
- c. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342. *See also*, DoD FMR, vol. 14, ch. 2, para. 020103.B.

- 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 **not** 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.

#### **IV. CONCLUSION.**

# **CHAPTER 2:**



## **AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE**

**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/>).
- 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](#) (3 March 2005) , 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://www.gao.gov/legal.htm>.
- G. [A Glossary of Terms Used in the Federal Budget Process](#), GAO/AFMD-2.1.1 (Jan. 1993) (found at: <http://archive.gao.gov/t2pbat6/148403.pdf>).
- H. OMB Cir. A-11, [Preparing, Submitting, and Executing the Budget](#) (July 2010), § 51 available at: [http://www.whitehouse.gov/omb/circulars\\_a11\\_current\\_year\\_a11\\_toc](http://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc)

#### II. CONSTITUTIONAL, STATUTORY AND OTHER BACKGROUND.

- A. [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.” As a result, Congress must annually pass and the President must sign Appropriations Acts before agencies can expend any money.

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). 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. 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.*

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. An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.” See A Glossary of Terms Used in the Federal Budget Process, p.13-14, GAO/AFMD-2.1.1 (September 2005). 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.<sup>1</sup>
  
- B. In recent years Congress has, on an annual basis, passed thirteen appropriations acts. 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.

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<sup>1</sup> See A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, p.70, GAO/AFMD-2.1.1 (September 2005), available at: <http://www.gao.gov/new.items/d05734sp.pdf> (last accessed March 17, 2010); see also 2010 Fiscal Law Deskbook, Chapter 5: Obligations.

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.
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 the President has not enacted an appropriation act for DOD, then DOD may have to stop (or “shut down”) its operations because there is a “funding gap,” or a period of time when 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.<sup>2</sup>

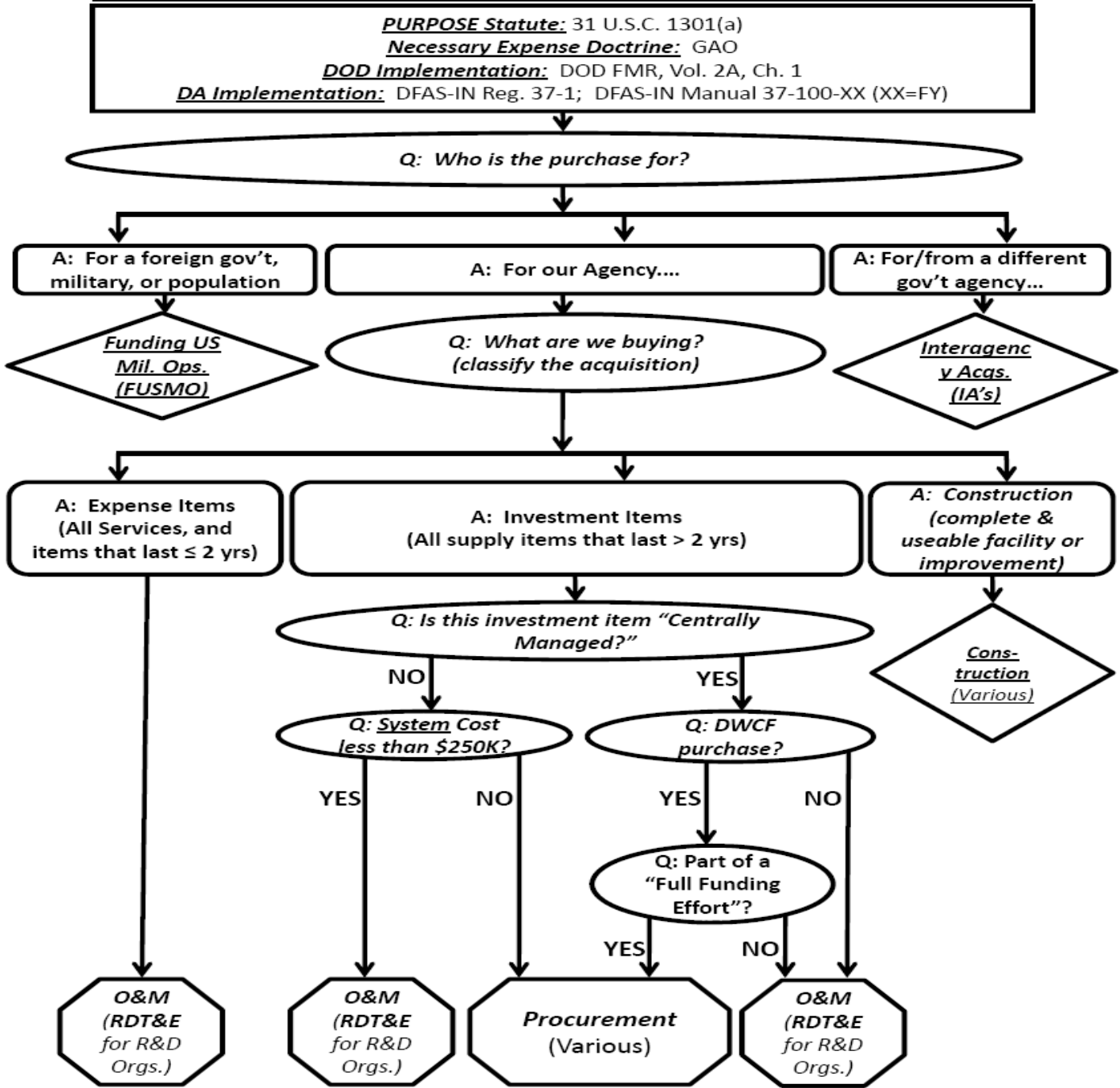
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<sup>2</sup> See 2010 Fiscal Law Deskbook, Chapter 9: Continuing Resolution Authority (CRA).

- D. Researching Appropriation Acts. In addition to LEXIS<sup>TM</sup>- and Westlaw<sup>TM</sup>-based research, Judge Advocates (JA's) can use the Thomas website (<http://www.thomas.gov/>) of the Library of Congress to conduct research on legislation enacted since 1973. This website also contains a consolidated listing of appropriation legislation enacted since 1999, and a list of pending appropriation bills for the current and upcoming fiscal years.

**IV. EXPRESS STATUTORY PURPOSE: THE DEPARTMENT OF DEFENSE APPROPRIATIONS**

# Purpose Analysis Flowchart



- A. The Purpose Analysis Flowchart above 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., Department of Defense Appropriation Act, 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (providing 61 separate appropriations to DOD and 2 other appropriations to non-DOD entities); Military Quality of Life and Veterans Affairs Appropriations Act, 2006, Pub. L. No. 109-114, 119 Stat. 2372 (2005) (providing an additional 20 appropriations to DOD).
- C. Who is the purchase for?<sup>3</sup> Congress appropriates funds for DOD in the annual DOD Appropriations Act (DODAA). Congress intends that DOD use their appropriated funds by DOD for the primary benefit of DOD. As a result, to understand whether a unit may obligate appropriated funds for a purchase, Judge Advocates (JAs) must first determine who is the primary beneficiary of the purchase is.<sup>4</sup> 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.<sup>5</sup>

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<sup>3</sup> See *infra*, Appendix B: Purpose Analysis Flowchart.

<sup>4</sup> 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.

<sup>5</sup> See 2011 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.<sup>6</sup>
  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 first 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.<sup>7</sup>
1. Expenses are “the costs of resources consumed in operating and maintaining [DOD],” such as services, supplies, and utilities. ***Expenses are normally financed with O&M 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;<sup>8</sup>
    - c. Civilian employee labor;
    - d. Rental charges for equipment and facilities;

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<sup>6</sup> See 2011 Fiscal Law Deskbook, Chapter 10: Operational funding.

<sup>7</sup> 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 2011 Fiscal Law Deskbook, Chapter 3: Time.

<sup>8</sup> Prior to a recent Vol 2A Chapter 1 revision, the FMR defined the “current period” as 2 years or less. Although this is no longer the rule, it may be useful for JA’s 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.

- e. Fuel;
  - f. Maintenance, repair, overhaul, and rework of equipment; and
  - g. Utilities.
2. Investments are the 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...equipment,” [DOD FMR, vol. 2A, ch. 1, para. 010201.D.2.](#), or assets which will benefit both current and future periods and generally have a long life span. ***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.<sup>9</sup> 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.<sup>10</sup>

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 . . . .” 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 equipment that the Armed Services need to operate the force, including base maintenance services, vehicle maintenance services, civilian salaries, and all expenses<sup>11</sup> 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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<sup>9</sup> United States Code, Title 10 [hereinafter 10 U.S.C.], §2801; *see also* 2011 Fiscal Law Deskbook, Chapter 8: Construction Funding.

<sup>10</sup> *See* 2011 Fiscal Law Deskbook, Chapter 8: Construction Funding.

<sup>11</sup> *See infra*, Purpose Outline,



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 . . .*” Congress provides DOD Research and Development (R&D) organizations (e.g., Defense Advanced Research Projects Agency – DARPA)<sup>12</sup> with its own appropriation to fund the scientific research and development of new technologies that have military applications. Of note is that Congress provides these R&D organizations the RDT&E 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 (DODAA) 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. 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 equipment layaway; and other expenses necessary for the foregoing purposes . . . .”

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<sup>12</sup> See Defense Advanced Research Projects Agency (DARPA), available at: <http://www.darpa.mil> (last accessed March 17, 2010) (DARPA is one of the major DOD R&D organizations. It 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).

- 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...*”
    - (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 . . . .”
5. Military Construction (MILCON). Used for “acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property . . . .”

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 provides a Family Housing appropriation annually. The Family housing appropriation is used for “expenses of family housing for the [Service] for construction, including acquisition, replacement, addition, expansion, extension and alteration, as authorized by law . . . .” 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) DOD to purchase investment items up to a certain cost threshold with Operations and Maintenance funds.

1. The current threshold is \$250,000. (Department of Defense and Full Year Appropriation Act, 2011, Pub. L. No. 112-10, Div. A., tit. 8, §9010 (Apr. 15, 2011.) 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).<sup>13</sup>
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),<sup>14</sup> but with distinctions depending on the type of investment item. The chart below summarizes DOD’s election:<sup>15</sup>

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<sup>13</sup>The DoD Defense Supplemental Appropriations Act allowed for an increase to \$500,000 for Combatant Commanders engaged in contingency operations overseas upon SECDEF approval. Department of Defense Supplemental Appropriations Act, 2008, Pub. L. No. 110-252, § 9311, 122 Stat. 2323 (Jun. 30, 2008). On 5 February 2009, CENTCOM received approval to use \$500,000 as the threshold in support of Operation Iraqi Freedom and Operation Enduring Freedom with respect to funds appropriated for 2009.

<sup>14</sup>Department of Defense Financial Management Regulation [hereinafter DOD FMR], vol. 2A, ch. 1, paras. 010201.C.3 and D.1. (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,”

Expense/Investment Cost Determination						
Is the item a	If	Then	If	Then	If	Then
Centrally Managed/Asset Controlled Item?	Yes	Is the item purchased from DWCF?	Yes	Is the item part of a full funding effort? *	Yes	Classify as Investment
			No	Classify as Investment	No	Classify as Expense
	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.						

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.<sup>16</sup> 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.<sup>17</sup> 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.

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and directs the use of O&M funds. For fiscal purposes, however, this re-definition has no practical effect on the fiscal analysis); *see also* DFAS-IN Manual 37-100-XX (“XX” stands for the last two digits of the fiscal year).

<sup>15</sup> DOD FMR, vol. 2A, ch. 1, para. 010201. F., *available at*: [http://comptroller.defense.gov/fmr/02a/02a\\_01.pdf](http://comptroller.defense.gov/fmr/02a/02a_01.pdf); *see also* DFAS-IN Manual 37-100.

<sup>16</sup> 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 approved stockage 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.

<sup>17</sup> DOD FMR, vol. 2A, ch. 1, para. 010107.B.54.; *see also* 2011 Fiscal Law Deskbook, Chapter 7: Revolving Funds.

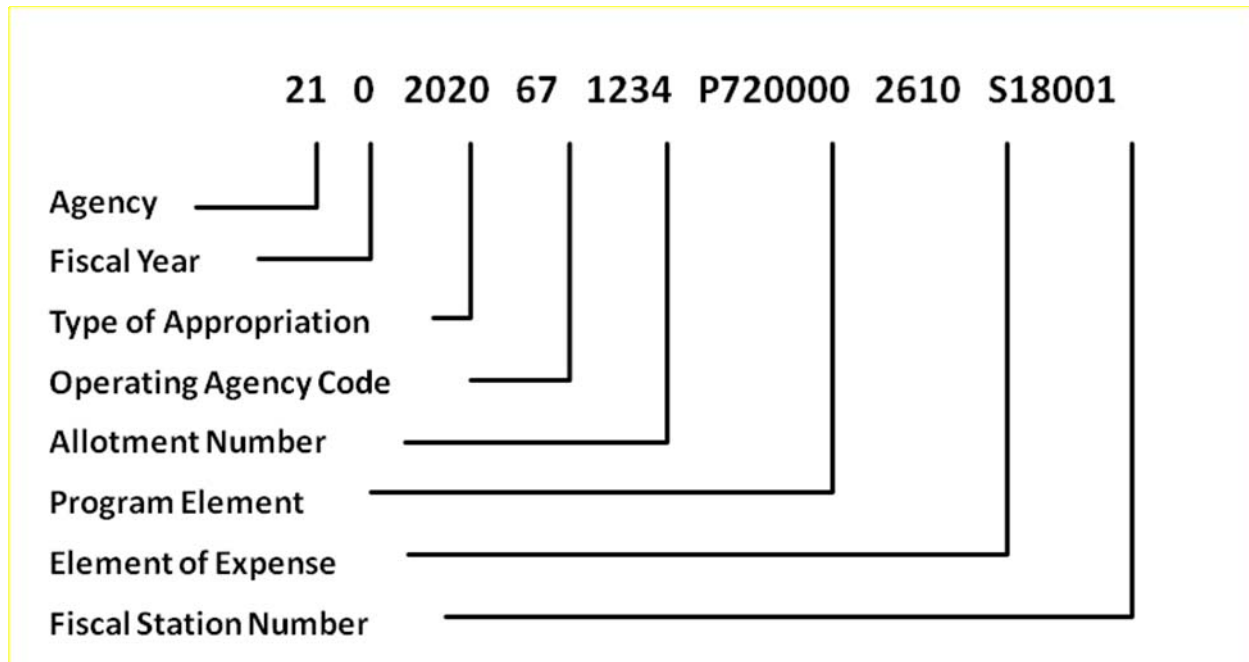
- G. Systems and the Expense/Investment Threshold. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.
1. Agencies must consider the “system” concept when evaluating the procurement of items. 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.
  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 end items of equipment (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.

<b>Appropriation Type</b>	<b>Army</b>	<b>Navy</b>	<b>Marine Corps</b>	<b>Air Force</b>	<b>OSD</b>
<b>Military Personnel</b>	<b>21*2010</b>	<b>17*1453</b>	<b>17*1105</b>	<b>57*3500</b>	<b>N/A</b>
<b>Reserve Personnel</b>	<b>21*2070</b>	<b>17*1405</b>	<b>17*1108</b>	<b>57*3700</b>	<b>N/A</b>
<b>National Guard Personnel</b>	<b>21*2060</b>	<b>N/A</b>	<b>N/A</b>	<b>57*3850</b>	<b>N/A</b>
<b>Operations &amp; Maintenance</b>	<b>21*2020</b>	<b>17*1804</b>	<b>17*1106</b>	<b>57*3400</b>	<b>97*0100</b>
<b>Operations &amp; Maintenance, Reserve</b>	<b>21*2080</b>	<b>17*1806</b>	<b>17*1107</b>	<b>57*3740</b>	<b>N/A</b>
<b>Operations &amp; Maintenance, National Guard</b>	<b>21*2065</b>	<b>N/A</b>	<b>N/A</b>	<b>57*3840</b>	<b>N/A</b>
<b>Procurement, Aircraft</b>	<b>21*2031</b>	<b>17*1506</b>		<b>57*3010</b>	<b>N/A</b>
<b>Procurement, Missiles</b>	<b>21*2032</b>	<b>17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)</b>	<b>17*1109</b>	<b>57*3020</b>	<b>N/A</b>
<b>Procurement, Weapons &amp; Tracked Vehicles</b>	<b>21*2033</b>			<b>N/A</b>	<b>N/A</b>
<b>Procurement, Other</b>	<b>21*2035</b>			<b>17*1810</b>	<b>57*3080</b>
<b>Procurement, Ammunition</b>	<b>21*2034</b>	<b>17*1508</b>		<b>57*3011</b>	<b>N/A</b>
<b>Shipbuilding &amp; Conversion</b>	<b>N/A</b>	<b>17*1611</b>		<b>N/A</b>	<b>N/A</b>
<b>Research, Development, Test, &amp; Evaluation</b>	<b>21*2040</b>	<b>17*1319</b>		<b>57*3600</b>	<b>97*0400</b>
<b>Military Construction</b>	<b>21*2050</b>	<b>17*1205</b>		<b>57*3300</b>	<b>97*0500</b>
<b>Family Housing Construction</b>	<b>21*0702</b>	<b>17*0703</b>		<b>57*0704</b>	<b>97*0706</b>
<b>Reserve Construction</b>	<b>21*2086</b>	<b>17*1235</b>		<b>57*3730</b>	<b>N/A</b>
<b>National Guard Construction</b>	<b>21*2085</b>	<b>N/A</b>	<b>N/A</b>	<b>57*3830</b>	<b>N/A</b>

\* 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 2010 would be depicted as 2102020).

\*\* Source for the codes found in Table 2-1: [DOD FMR, vol. 6B, App. A \(Nov. 2001\)](#).



- I. 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 [GAO, A Glossary of Terms Used in the Federal Budget Process](#), p.46, GAO/AFMD-2.1.1 (Sep. 2005).
  1. ‘Ceiling Earmarks’: In the FY 2008 O&M, Defense-Wide appropriation, Congress gave the DOD \$22,693,617,000 for non-department O&M activities. It also told the DOD that out of that amount, “not to exceed \$36,000,000 can be used for emergencies and extraordinary expenses”
  2. ‘Floor Earmarks’: “not less than \$27,380,000 shall be made available for the Procurement Technical Assistance Cooperative Agreement Program.”
  3. Both of these provisions are examples of earmarks. The first is a “ceiling” earmark, meaning the DOD may not spend more than \$36,000,000 for the designated purpose (emergencies and extraordinary expenses) 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. [The Honorable Lane Evans, 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 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](#).
3. Limitation applies even if 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-242266, 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. Agency discretion is not questioned generally. Secretary of Agric., A-96689, 18 Comp. Gen. 285, 292 (1938).
2. **BUT**, once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other, during the current fiscal year. See [Funding for Army Repair Projects](#), B-272191, Nov. 4, 1997. 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. (See caution noted on p 2-5.) 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, quoted at the top of this page, 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”).

C. **Authorization Act.**

1. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities.
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 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 2002, Congress authorized the appropriation of \$1,187,233,000 to the Army for the procurement of ammunition, but later actually appropriated \$1,200,465,000 to the Army. The Army may spend the entire \$1,200,465,000 for ammunition procurement.

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. § 520b](#) permits DOD to use its appropriated funds “for the issue of authorized articles to applicants for enlistment.”

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 LEXIS<sup>TM</sup> or Westlaw<sup>TM</sup>, 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, legislative history absent any enacted legislation has no force. See Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7<sup>th</sup> cir. 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. A-11, [Preparing, Submitting, and Executing the Budget](#) (Jul. 2010).
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 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. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited.
  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://www.defenselink.mil/comptroller/defbudget/fy2008/>.
    - c. The Army’s budget materials can be found at:  
<http://www.asafm.army.mil/budget/fybm/fybm.asp>.
    - 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/09PRES/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/office\\_org/headquarters\\_offices/aba/budgets\\_brief](http://www.faa.gov/about/office_org/headquarters_offices/aba/budgets_brief).
- 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, (May 18, 2011); [AFI 65-601, vol. 1, para. 4.36](#) (Mar. 3, 2005, including changes through Nov. 6, 2009); and Department of the Navy (Financial Management and Comptroller) Financial Policy Manual, NAVSO P-1000, Rev through Change 6, 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-XXXX, The Army Management Structure \(July XXXX\)](#). The manual is reissued every FY. (XXXX= 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: <https://www.doctrine.quantico.usmc.mil/>.

- b. JAGCNET. Those individuals with a JAGCNET password may conduct a search of the text of all publications contained within the JAGCNET library of publications (found at: <https://www.jagcnet.army.mil/LaawsXXI/cds.nsf>).
  - c. There is also a very user-friendly, key word-searchable website dedicated to the DOD Financial Management Regulation, DOD 7000.14-R (found at: <http://www.dod.mil/comptroller/fmr/>).
- 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.

## VIII. NECESSARY EXPENSE.

- A. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriations act. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. 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 carry 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.

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).

- D. 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, and determinations are fact/agency/purpose/appropriation specific. 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. Agencies may have specific guidance about “questionable” expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1, ch. 4, §§ K-O (3 March 2005 incorporating change 3, 6 Nov. 2009).
- B. 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 (unpub.); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng’s, B-289683, Oct. 7, 2002 (unpub.) (both providing an excellent overview of each of these 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).
- C. 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 comparably 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. Through 27 January 2003, federal agencies commonly paid for “light refreshments” at government-sponsored conferences under a regulatory exception found in the travel regulations where a majority of the attendees were from a different permanent duty station than the sponsoring activity. See Federal Travel Regulation, Part 301-74. See also Joint Federal Travel Regulation (JFTR), Appendix R, Part II, Section I; Joint Travel Regulation (JTR), Appendix R, Part II, Section I. The JFTR / JTR may be found at: <http://perdiem.hqda.pentagon.mil/perdiem/trvlregs.html>. That exception was overturned with respect to paying for the 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).

- (1) In National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 03, 2005) (“NIH opinion”), the GAO authorized the use of appropriated funds for light refreshments, even for individuals not in travel status, under certain criteria.<sup>18</sup>
- (2) 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.<sup>19</sup> Therefore, attendees from the PDS area are not authorized the use of the “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.
  - (a) Meeting: meetings, conferences and other gatherings.
  - (b) Subsistence: any food or drink.

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.

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<sup>18</sup> 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).

<sup>19</sup> Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 32 Op. Off. Legal Counsel 1, 5 (2007).

b. Meetings and Conferences. Under the Government Employees Training Act, [5 U.S.C. § 4110](#), the government may 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.” Meals for attendees 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).

- (1) 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-21570, 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
- (2) 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 limits of the PDS.



- (3) 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). As part of the decision, the GAO applied the same [5 U.S.C. § 4110](#) criteria<sup>20</sup> 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 involve **topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants.**
- (4) On 20 April 2011, the Secretary of the Army issued a memorandum mandating that all Army conferences, symposia, seminars and similar meetings be approved at his level.<sup>21</sup>
- c. Training. Under [5 U.S.C. § 4109](#) (applicable to civilian employees) and [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 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 (Includes discussion of providing food, in general, where it furthers the needs of the training program.).

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<sup>20</sup> See Section IX.C.3.b.

<sup>21</sup> Memorandum from Secretary of the Army, to Principal Officials of Headquarters, Department of the Army et al., subject: Army Directive 2011-05 (Department of the Army Conferences, Symposia, Seminars and Meetings) (20 Apr. 2011).

- (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) 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").
  
- (3) 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); [AFI 65-601, vol. 1, para. 4.26.1.2](#).

- d. Award Ceremonies (for Civilian Incentive Awards). Under [5 U.S.C. §§ 4503-4504](#) (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 [DoD 1400.25-M, subchapter 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 \(29 January 1999\)](#) and [DA Pam 672-20, Incentive Awards Handbook \(1 July 1993\)](#). For Air Force civilians, the award must also be made in accordance with [AF Pam 36-2861, Civilian Recognition Guide \(1 June 2000\)](#). See also [AFI 65-601, vol. 1, para. 4.31](#).
  - (3) **NOTE:** 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 a separate statute (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.
- D. 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.
  3. 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. 4.45* (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).

4. 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 arguably only under severely 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.

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

1. In the past, the Comptroller General opined that buying food storage and/or preparation equipment generally did not materially contribute to an agency’s mission performance. As a result, these items were generally considered to be a personal expense. As an exception, the GAO sanctioned the use of appropriated funds to buy food storage and preparation equipment when the purchase was “reasonably related to the efficient performance of agency activities, and not just for the personal convenience of individual employees.” This situation generally arose only when there were no commercial eating facilities available for the employees. 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. In June, 2004 the GAO revisited the issue and determined that regardless of the availability of commercial eating facilities, food storage and/or preparation equipment did reasonably relate to the efficient performance of agency activities, and thus appropriated funds could be spent for these items. See Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). The Comptroller General observed that these items reasonably related to workplace safety in that employees were not allowed to have personal coffee makers in their workspaces due to fire safety concerns. However, the opinion also noted that such equipment results in other benefits for the agency, “including 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.”
  
3. Bottom line: Food preparation and storage equipment may now 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.)

F. 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).

- G. 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 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).



- H. 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. 4.26.2. Note: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, etc.).
- I. 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. More Restrictive Agency Level Regulations. The military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially prepared business cards. All others are permitted to use appropriated funds to purchase card stock and printer ink and then use in-house computing resources to print their own business cards. See AR 25-30, The Army Publishing and Printing Program, para. 7-11 (March 2006); DOD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); DOD Instruction 5330.03, Defense Logistics Agency (DLA) Document Services, (May 18, 2011); AFI 65-601, vol. 1, para. 4.36; Department of the Navy (Financial Management and Comptroller Financial Policy Management Manual, NAVSO P-1000, Rev Through Change 6, Dec. 12, 2002; but see Department of Defense memorandum, dated 15 July 1999 and Department of the Army memorandum, dated 2 August 1999 (indicating agencies may procure commercially prepared business cards from the Lighthouse for the Blind if the cost of procuring the cards is equivalent to or less than the cost of producing the cards on a personal computer).
- J. 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, para 4.24.6](#), and AFI 33-111, para. 16.2.
- K. 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 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).

- L. 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 state physician’s license, DEA certifications not payable, even where advantageous for the Government). *But see AFI 65-601, vol. 1, para. 4.47* (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) (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) (license 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 (Costs associated with service-member renouncing foreign citizenship in order to obtain security clearance payable).
  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, 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. 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).

M. 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 (Purchase of baseball caps not allowed, 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 \(11 Dec. 2006\)](#). 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 other 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. 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, \(1 Aug. 1997\); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments \(28 Jan. 1975\).](#) [See also AFI 65-601, vol. 1, para. 4.29; OpJAGAF 1999/23, 1 Apr. 1999.](#)
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, para. 0311 \(Aug. 1999\).](#) 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 \(1 July 1993\).](#) For Air Force civilians, the award must also be made in accordance with [AF Pam 36-2861, Civilian Recognition Guide \(1 June 2000\).](#)

- 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. The agency regulations each expressly permit non-cash awards, however. Curiously, 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) (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 (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 it deems could be necessary to honor the awardees accomplishments. In such circumstances, the award is not the food; the food is just 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.
- N. Use of Office Equipment. 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 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. An electronic copy of this memorandum may be found at: [http://www.defenselink.mil/dodgc/defense\\_ethics/ethics\\_regulation/OPMReserve\\_s.htm](http://www.defenselink.mil/dodgc/defense_ethics/ethics_regulation/OPMReserve_s.htm). 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).



O. 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).

**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. § 23](#) (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 that 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. Congress recently (in section 1051 of the FY 2007 Defense Authorization Act) authorized the Department of Defense 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.<sup>22</sup>
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 CERCLA 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.

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<sup>22</sup>This new statutory authority has been implemented in DoD FMR vol. 12 ch. 32 (change 2009).

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 procurement 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 for damages due to defective workmanship.
  - b. The replacement contract must be coextensive with the original contract, i.e., the agency may procure 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 account charged with 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).
  
  - 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 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 (nonreimbursable 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 2008, 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 \$11,478,000 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**, \$27,361,574,000 . . . ." (emphasis added)

- 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 Directive 7250.13, Use of Appropriated Funds for Official Representation Purposes (30 Jun. 2009); [DOD FMR, vol. 10, ch. 12, para. 120222.B.](#)
    - b. Army Regulation: [AR 37-47, Representation Funds of the Secretary of the Army](#) (12 March 2004).
    - c. Air Force Regulation: [AFI 65-603, Official Representation Funds: Guidance and Procedures](#) (17 Feb. 2004).
    - d. Navy Regulation: [SECNAV 7042.7, Guidelines for Use of Official Representation Funds](#) (14 March 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](#) (15 Apr. 1983).
    - b. Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations, para. 1.18 (8 Apr. 2011) (governing counterintelligence and investigative emergency and extraordinary expense funds, also known as E-funds).

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 (30 July 1990).
  - b. Air Force Regulation: AFI 71-101, Criminal Investigations, para. 1.18 (8 Apr. 2011) (governing counterintelligence and investigative emergency and extraordinary expense funds, also known as E-funds).
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](#). Other examples include:
  - a. Acquisition of weapons from Panamanian civilians. (currently considered to be a proper expenditure of operation and maintenance funds);
  - b. Reward for search teams at the Gander air crash; and
  - c. Mitigation of erroneous tax withholding of soldiers' pay.
5. Procedures for Use of Official Representation Funds.
  - a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. [DOD Directive 7250.13, para. 3.1](#); [AR 37-47, para. 2-1](#); [AFI 65-603, para. 1](#); [SECNAVINST 7042.7K, para. 6](#). See also DOD FMR, Vol. 10, Ch. 12, para. 120322.B. Official courtesies are subject to required ratios of authorized guests to DOD personnel. See, e.g., DOD Directive 7250.13, para. E2.4.3; [AR 37-47, paras. 2-1b and 2-5](#). 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 [DOD Directive 7250.13, para. E.2.4.1.8](#) (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 once every three years to take inflation into account and was most recently raised to \$305) See also [AR 37-47, para. 2-4c](#); [AFI 65-603, para. 6.2](#); [SECNAVINST 7042.7K, para. 8a\(6\)](#).
  - (2) If the guest is from within DOD and is one of the specified individuals listed in [Enclosure 1 to DOD Directive 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, para. E2.4.2.10.

(3) **NOTE:** While the DoD Directive cited above permits the command to give specified DOD distinguished guests mementos costing less than \$40.00, Army Regulation, in quite clear language, precludes giving any gift or memento to DOD personnel: “ORFs will not be used to purchase gifts or mementos of any kind for presentation to, or acceptance by, DOD personnel. Under no circumstances may gifts or mementos for DOD personnel be purchased with ORFs.” AR 37-47, para. 2-9d.

c. Levels of expenditures. Levels of expenditures are to be “modest.” [DOD Directive 7250.13, para. E2.2.1.2.4.2](#); [AR 37-47, para. 2-4a](#); [AFI 65-603, para. 2.1](#). 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. [DOD Directive 7250.13, para. E2.4.2](#); [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 an exception to policy (or for Air Force, advance approval of the Secretary of the Air Force). [AR 37-47, para. 2-10](#); [AFI 65-603, para. 12](#).

(2) Exceptions will not be granted for the following:

(a) Classified projects and intelligence projects;

(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.](#)

- (3) Use for retirements and change of command ceremonies is generally prohibited, but can be permitted as an exception if approved in advance by the Service Secretary. [DOD Directive 7250.13, para. E2.4.2.5](#); [AR 37-47, para. 2-3c](#); [SECNAVINST 7042.7K, paras. 5e and 9a\(4\)](#); [United States Army School of the Americas – Use of Official Representation Funds, B-236816, 69 Comp. Gen. 242 \(1990\)](#) (new commander reception distinguished from change of command ceremony).
- 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 LEXIS™ or 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. § 2246. 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, Chaplain Activities in the United States Army (12 Mar. 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 Lexis-Nexis™ or 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. If the opinion was issued after October 1, 1995, it may also be found at the Government Printing Office (GPO) *GPO Access* website found at: <http://www.gpoaccess.gov/gaodecisions/index.html>.
- 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.
- g. Administrative Law Topic/Reference Index. OTJAG Admin Law Division has developed a quick cross-reference guide to many of the more routine issues you may run across. The index cross-references statutes and DOD and Army regulations associated with a given topic. The most recent guide can be found on the Administrative Law Publications Site, by clicking on the “Administrative Law” link under “JAGC Publications,” at: <https://www.jagcnet2.army.mil/jagcintranet/applications/ejaws/ejaws.nsf>.

3. Locating Legislation/Uncodified Authority.
  - a. Appropriation Acts. Congress typically passes thirteen (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 Lexis-Nexis<sup>TM</sup> and Westlaw<sup>TM</sup> -based research, one can utilize the [Thomas website](http://thomas.loc.gov/) within the Library of Congress (<http://thomas.loc.gov/>) to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriation legislation enacted since 1999 and a list of pending appropriation bills for the current or upcoming fiscal year.
  - 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 Lexis-Nexis<sup>TM</sup>, Westlaw<sup>TM</sup>, and/or the [Thomas website](#) 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 XI.C. *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 XI.C. *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 (Note: § 8116 only contained authority to use FY2003 appropriations to carry out such programs so we are also once again without express authority). 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 (albeit temporary) 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 XI.C. immediately *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 as well as many of the civilian agencies has a website 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.usapa.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 (<https://doctrine.quantico.usmc.mil/>).
  - f. Joint Publications (<http://www.dtic.mil/doctrine/>).
2. Use **JAGCNET** (<https://www.jagcnet2.army.mil/applications/ejaws/ejaws.nsf>) to Search for Publications. Those individuals with a JAGCNET password 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://www.dod.mil/comptroller/fmr/>). 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.** 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. You can conduct a search of the overall DFAS library (<http://www.dod.mil/dfas/search.htm>) only.

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.

# **CHAPTER 3:**



## **AVAILABILITY OF APPROPRIATIONS AS TO TIME**

**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.

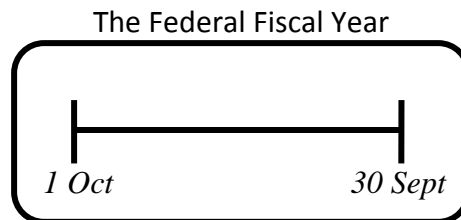
- A. **Appropriation or Appropriations Act.** An appropriations act is the most common form of budget authority. It is a statutory authorization to incur obligations and make payments out of the U.S. Treasury for specified purposes. An appropriations act fulfills the requirement of Article I, Section 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.” GAO Glossary, at 13. 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 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. **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: Funds are presumed to be available for obligation 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 Department of Defense Appropriations Act, 2011, Pub. L. No. 112-10, § 8003, 125 Stat. 38, 55 (2011).
3. Periods of Availability for Various Appropriations.
  - a. Operations & Maintenance (O&M) - 1 year
  - b. Personnel – 1 year
  - c. Research, Development Test & Evaluation (RDT&E) Appropriations - 2 years;
  - d. Procurement Appropriations - 3 years;
  - e. Shipbuilding and Conversion, Navy - 5 years, except that the Navy may incur certain obligations over longer periods;
  - f. Military Construction Appropriations - 5 years;
  - g. Chemical Agents and Munitions Destruction, Defense - various periods.



- h. Multiple Year - Varies up to five years depending on the program. DOD receives a variety of special purpose appropriations, some of which are available for more than one year. For example, DOD has a two-year appropriation for overseas humanitarian, disaster, and civic aid.
  - i. Stock and Industrial Funds (Working Capital Funds) - indefinite (No Year). The language typically used by the Congress is "[T]o remain available for obligation until September 30, XXXX." Defense Technical Information Center--Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989).
4. 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).
  5. 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 (June 2006). See Section VII, infra.
  6. 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).
- D. **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.”)

**E. Commitment.**

1. Definition. An administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. Government Accountability Office (GAO), A Glossary of Terms Used in the Budget Process, GAO-05-734SP, 32 (Fifth Edition, September 2005) [hereinafter GAO Glossary]. 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.C and D.
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.<sup>1</sup> 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, paras. 0703, 030209.
  - 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, 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. DFAS-IN 37-1, para. 070501; DOD FMR, vol. 3, ch. 8, para. 080201. In general, agencies record as a commitment the cost estimate set forth in the commitment document. 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

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<sup>1</sup> 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) 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. See Appendices C and D to view these forms.

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-DE 7000-4, para. 3; 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, GSBICA 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

G. **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.

- 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. **Definition:** The balance of an appropriation is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made during the period of availability. 31 U.S.C. § 1502(a). An appropriation is generally available for obligation for a definite period of time. Agencies must obligate such limited appropriations during this period of availability, or the authority to obligate expires. 31 U.S.C. § 1552.

- 1. Essentially, the bona fide needs rule is a timing rule. **It looks to see if the timing of the obligation and the current agency need are both within the fund’s period of availability.** 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. DoD FMR, Vol. 3, Ch. 8, para. 080303.A; DFAS-IN Reg. 37-1, para. 070501.

2. **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.
  3. The Bona Fide Needs Rule applies only to appropriations with limited periods of availability for obligation.
  4. 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); Magnavox—Use of Contract Underrun Funds, B-207453, 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. 020103.E; DFAS-IN 37-1, para. 080302.
- B. **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 reappropriated 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).**Practical Considerations.**

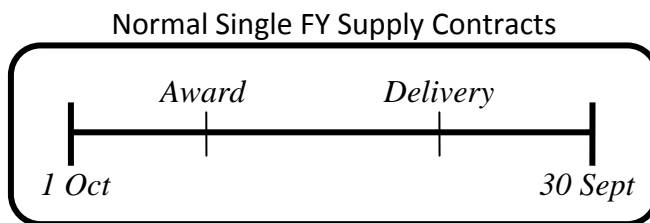
1. Government agencies may not obligate funds prior to signature of the appropriations act **and** receipt of the funds from the Office of Management and Budget through higher headquarters. DoD FMR, Vol. 3, Ch. 8, para. 080301. But see Cessna Aircraft, Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997) aff'g 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. Project Stormfury - Australia - Indemnification of Damages, B-198206, 59 Comp. Gen. 369 (1980). 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.
  
3. 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.
  
4. Absent express statutory authority in the appropriations act itself, 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.
  
5. The government must intend that the contractor start work promptly and perform in accordance with the contract terms. DOD FMR, Vol. 3, Ch. 8, para. 080303.B.

C. **Bona Fide Needs Methodology.** Determining the bona fide needs 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.

1. Classify the acquisition by what is being acquired (e.g., supply, service, construction). Application of the Bona Fide Needs Rule differs depending on the acquisition.
2. Identify the Rule. Each type of acquisition has a general rule for determining when the Bona Fide Need arises. 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 Time rules are satisfied.
3. Identify applicable exceptions. Congress and the GAO have, for different types of acquisitions, provided various exceptions which may allow the agency to treat the acquisition as a bona fide need of the current year.

**D. Bona Fide Needs Rule Applied to Supply Contracts.**

1. Generally, bona fide needs are determined by when the government actually requires (will be able to use or consume to fulfill a requirement) the supplies being acquired.



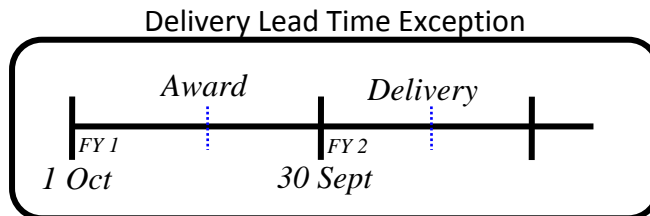
2. Accordingly, agencies generally must obligate funds from the fiscal year in which the supplies will be used. Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Admin., B-155876, 44 Comp. Gen. 399 (1965); Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen. 155 (1957).
3. Supply needs of a future fiscal year are the bona fide need of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the lead-time exception and the stock-level exception. DOD FMR, Vol. 3, Ch.8, para. 080303.



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

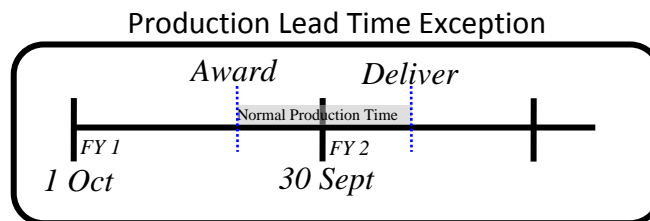
a. Delivery Time. This aspect of the exception recognizes that the agency has a need for, but cannot obtain the item, in the current FY. If the agency could get the item in the current fiscal year, the agency would use the item in the current fiscal year. If an agency cannot obtain materials in the same FY in which they are needed 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) The time between contracting and delivery must not be excessive.
- (2) 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.
- (3) 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.



b. Production Lead-Time. This aspect of the exception permits the agency to consider the normal production lead-time in determining the bona fide needs for an acquisition. Here, the agency has a need for the item in FY2 because that is when it will use the item. However, in order to get the item delivered at the proper time in FY2, the contractor must have the order in FY1. Thus, an agency may contract in one FY for delivery in the second FY if the material contracted for cannot 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).

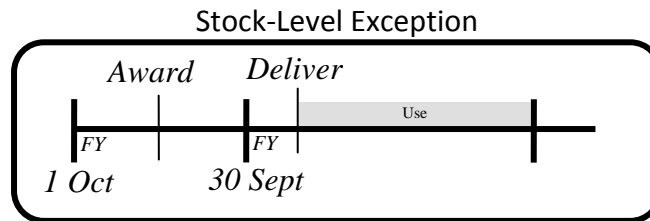
- (1) For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation of FY 2010 funds is appropriate for a delivery on or before a required delivery date of 14 November 2011. (Remember 1 October 2010 is the beginning of FY 2011). This represents the bona fide need of FY 2010. However, if the government directs the contractor to withhold delivery until after 14 November 2008, there is not a bona fide need for the item in FY 2010 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2011.
- (2) If the government establishes a delivery date for an item that is beyond the normal lead-time and in the next fiscal year, then the government must use funds for the next fiscal year. In the example above, if the government does not require the item until after 14 November 2008, then the government must use FY 2009 funds.



c. The above descriptions of the Lead-Time exception 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 needed

in-hand 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.

- d. *Stock-Level Exception to the Bona Fide Needs Rule.* 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.



**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 and annual FY01 funds were obligated. GPO could not deliver and Commerce could not use the aids before the end of FY01. Is the bona fide needs rule violated?

**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 delivered or 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.

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

(1) 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 (unpub.)

(2) 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.

f. CREATION OF STOCK. An agency may not obligate funds when it is apparent from the outset that there will be no requirement until the following fiscal year. An order or contract for the replacement of stock is viewed as meeting a bona fide need of the year in which the contract is made as long as it is intended to replace stock used in that year, even though the replacement items will not be used until the following year. The concept is to prevent interruption of on-going operations between the fiscal years.

**Example:** The Army is creating a new specialized ID that requires special plastic cards with an embedded chip. The program will be implement 1 Nov 02. The Army currently has no stock level of this card. Can the Army use the stock level exception to justify

obligating FY 01 O&M to purchase enough stock for to cover making cards from 1 Nov 02 thru 2 Feb 03?

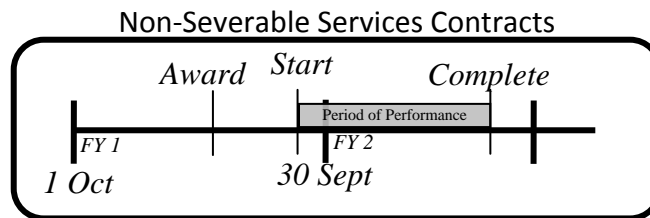
**Answer:** No. The general rule states that a supply is not a need until it is used. Here the cards will not be imprinted until 1 Nov 02. Viewed narrowly, this is a FY02 need that should be funded with FY02 funds. The stock level exception can not be used to justify spending FY01 O&M to create “stock” that will sit in a supply room. 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, there may be good reason to consider the cards a FY01 need that can be funded with FY01 O&M. Additionally, if the cards are a BFN of FY 02, the production lead time exception may allow the Army to order the cards in FY01 if the contractor needs the intervening time for production of the cards.

E. Bona Fide Needs Rule Applied to Service Contracts.

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. Categories: There are two categories of service contracts. The bona fide needs rule is applied differently depending on the category. The nature of the work determines whether a service is severable or non-severable. For purposes of the Bona Fide Needs Rule, services fall into two broad categories:
  - a. Non-severable service contracts; and
  - b. 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. A non-severable

contract is essentially a single undertaking that cannot feasibly be subdivided. 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. For non-severable services contracts, the government must fund the entire effort with dollars available for obligation at the time the contract is executed, 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) (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).

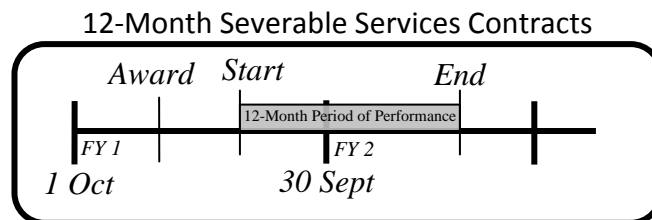


- c. **Case Study:** The Fish & Wildlife Service issues a research work order for a 4 year research study on the effects of harvesting frogs. The study is to produce a publishable report. The work order is non-severable because it contemplates a defined end-product that cannot feasibly be subdivided 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).
- d. **Case Study:** 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. The estimated cost was \$8.9 million but instead of obligating the entire \$8.9 million at contract award, FINCEN incrementally funded the contract. **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. Current Year funds for FY1 from date of award to 30 Sept; 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. § 253l.

(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.

5. 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 (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).



**Case Study:** 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. CSB would be charged the current GSA price list fee each month and the agreement would be perpetual. The IA included the following paragraph, “The existence of a defined requirement (bona fide need) at the time the IA is executed forms the basis for the incurring and recording of a financial obligation on the part of the client. This obligation likely remains in force across fiscal year boundaries until the specified services are delivered.”

**Issue:** GSA argued that the “lifecycle management” aspect of the IA created a non-severable service because none of the tasks have value alone. CSB was concerned the ID card management was a severable service and proposed 1) a one-year agreement with option, or 2) an MOU with a annual task order contract. GSA refused. CSB requested a GAO opinion on the severability of the services.

**Result:** GAO opined that the lifecycle management portion consisted of repetitive recurring tasks such that the IA was for a severable service. As a severable service, the recurring need for ID card management is a bona fide need at the time the service is rendered and should be charged to the appropriations current at that time. Further, the IA did not specify a period of performance. Without statutory authority, CSB may not enter into such an open-ended obligation, whether resulting from an IA or a contract because it exposes the government to unknown and unlimited liability. Chem. Safety & Hazard Investig. Bd – Interagency agreement with GSA, B-318425, 2009 WL 5184705 (Dec 8, 2009).

F. Bona Fide Needs Rule Applied to Training Contracts.

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.

3. Training courses that begin on or after 1 October may constitute a bona fide need of the prior year if:
  - a. The agency has an immediate need for the training in the prior year,
  - b. Scheduling is beyond the agency's control, and
  - c. The time between award of the contract and performance is not excessive.

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).

4. Some multiple course training may be considered a severable service. For example, an advanced degree from an accredited university. 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).

G. Bona Fide Needs Rule Applied to Construction Contracts.

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 need 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. Associate General Counsel Keplinger, B-235086, Apr. 24, 1991 (unpub). 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. For example, suppose a barracks will not be available for renovation until 27 December 2011 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 2012 and the contract should be awarded in FY 2012 using FY2012 funds. Accordingly, use of FY 2011 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.C.
  - 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. Bona Fide Needs Rule applied to 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.

#### IV. MULTIPLE YEAR APPROPRIATIONS

- A. Introduction.

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 used.

- B. 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 (June 2006). See also DOD FMR, Vol. 3, Ch. 13, para. 130202.A.1.b.

- C. 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.

- D. Program managers using procurement appropriations usually want to have all the necessary funding in hand before they obligate funds on a procurement contract. Having all of the funds helps to ensure stable production runs and lower costs. This policy is referred to as "full funding." DOD FMR, vol. 2A, para. 010202.

1. 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).
  2. A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 2007 RDT&E Army Appropriation, which is available for obligation until 30 September 2008, may be obligated for the needs of FY 2007 and 2008; it is not available for the needs of FY 2009.
  3. The statutory severable services exception, 10 U.S.C. 2410a, does NOT apply to multiple year appropriations. Severable Services Contracts, Comp. Gen. B-317636, 2009 CPD ¶ 89, 2009 WL 1140240, Apr. 21, 2009.
- E. 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; AR 70-6.

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

- A. As a general rule, revolving funds are “no-year” funds that do not depend on annual appropriations. 10 U.S.C. § 2210(b) (2006). The GAO has ruled that the bona fide needs rule does not apply to “no-year” funds. 43 Comp. Gen. 657, 661 (1964); B-279886 (1998).
- B. 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 based on 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.

1. 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).
  
2. 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).
  - a. 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. The report also found that \$8.5 million of the funds were obligated within the last three days of the applicable FY.
  
  - b. 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.<sup>2 3</sup>

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<sup>2</sup> 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.

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

**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 4<sup>th</sup> 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).

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

**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 4<sup>th</sup> 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.

**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 4<sup>th</sup> 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.**

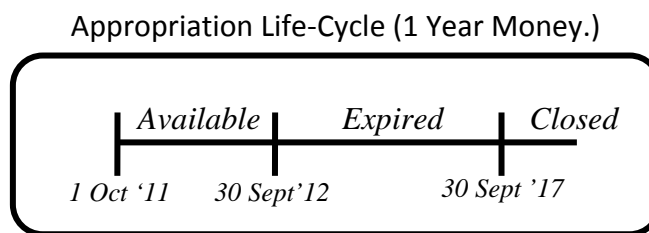
- A. See the Chapter on Interagency Acquisitions for a more complete fiscal analysis.
- B. The Economy Act (31 U.S.C. § 1535) provides general authority for one agency (requesting agency) to transfer funds to another agency (servicing agency) to enter into a contract under certain conditions. The DOD 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 deobligated 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 deobligation 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). Expired Appropriations.
  
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.

1. Some adjustments are possible after the end of the period of availability, but before an account closes. 31 U.S.C. § 1553(a); AFI 65-601, vol. 1, para. 6.4.
  - a. Appropriations retain their complete accounting classification identifiers throughout the entire five-year “expired” period. See DOD FMR, Vol. 3, Ch. 13, para. 130208.B.
  
  - b. 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.
  
2. 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:

- a. 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.
  - b. 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.
3. 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.
  4. 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.
3. 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.
  - a. 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.
4. 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. Recording Obligations Under EPA cost-plus-fixed-fee Contract, B-195732, 59 Comp. Gen. 518 (1980); 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-325678, 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); EPA Level of Effort Contracts, B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216.
  - c. **Case Study.** When the end of FY1 approaches and an agency’s term level of effort contract is about to expire, can the contract be modified into a non-severable completion contract – such that FY1 funds can be used to continue the contract into FY2?

**Result.** No. This modification is substantially outside the scope of the contract for purposes of competition. As such, it is not an ancillary liability. This is so because the change alters the essential characteristics of the contract type originally solicited. A

level of effort contract contemplates a stated level of work for a definite time without a required end product. On the other hand, a completion contract contemplates performance of a specific end product. From the fiscal perspective, such a modification does not relate back to any authorized contract change clause in the contract. Annual funds placed on the original term level of effort contract could not be used to fund such a contract modification. Such a modification should be competed as a new requirement. 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. 55 Comp. Gen. 1351, 1353 (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; Funding of Replacement Contracts, B-198074, July 15, 1981, 81-2 CPD ¶33; 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 reprocurement 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.

**Case Study:** In FY1, the EPA awarded an \$18,000 contract to Company A for an electric fork lift truck. Later, when Company A did not deliver the truck, the agency terminated the contract for default. It was now FY2, and the FY1 funds obligated on contract A had expired. The agency still had a bona fide need for the truck so it immediately reprocured on the same basis and for a substantially similar truck. In FY2, the agency awarded a \$20,000 contract for the truck to Company B.

Q: What appropriation should be obligated – FY2 funds or the expired FY1 funds?

A: The expired FY1 funds. “Since the ‘bona fide’ need is viewed as continuing, the entire cost of the replacement contract must be charged to the appropriation current at the time the need arose. Legally, the defaulting contractor is liable to the government for the additional cost of the replacement contract. However, the recovery of such funds by the government may be subject to a great deal of uncertainty and delay...Hence, the agency may utilize unobligated funds, if any, from its prior years’ appropriations to increase the amount of obligations chargeable in that year for the original contract in order to pay the replacement contractor the full amount owed, (while continuing to attempt collection from the defaulting contractor). Funding of Replacement Contracts, B-198074, 60 Comp. Gen. 591 (July 15, 1981).

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, 100206 (June 2009).
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, 100206 (June 2009).
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, at 162. DOD FMR, Vol. 3, Ch. 10, para. 100206; DFAS-IN 37-1, tbl. 8-7.

- e. If all of the conditions above can not 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 217.173.

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 217.173.
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 217.174.

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. AR 70-6, para. 2-2c.(4).

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; Holly Corp., ASBCA No. 24795, 83-1 BCA ¶ 16,327.
2. There are restrictions on the use and exercise of options. FAR Subpart 17.2.

- a. The government must have synopsised 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.

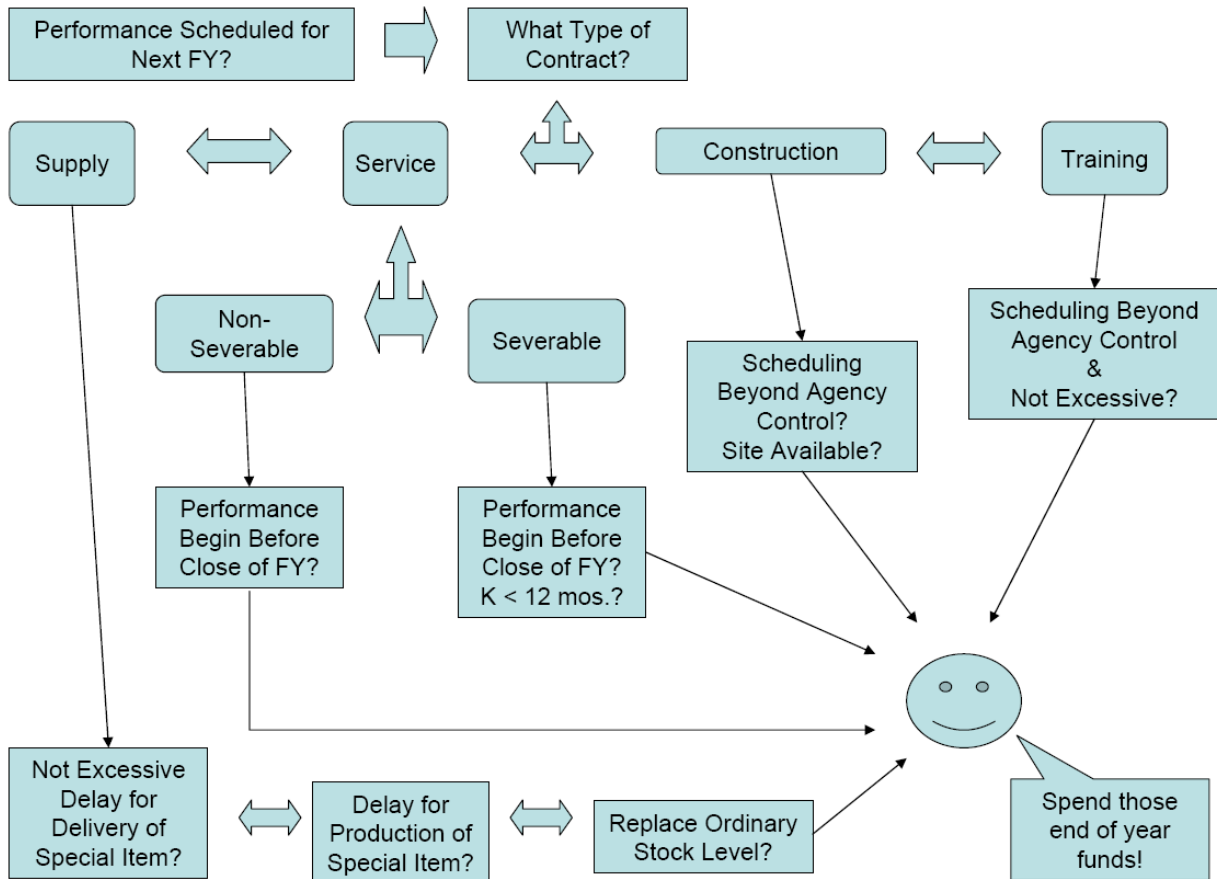
B. Requirements or Indefinite Quantity Contracts.

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**

Simplified Time Analysis Flowchart:



# CHAPTER 4:



# THE ANTIDEFICIENCY ACT

**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 (July 2010) [hereinafter OMB Cir. A-11], available at [http://www.whitehouse.gov/omb/assets/a11\\_current\\_year/a\\_11\\_2010.pdf](http://www.whitehouse.gov/omb/assets/a11_current_year/a_11_2010.pdf).
- F. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 14 [hereinafter DOD FMR] available at <http://comptroller.defense.gov/fmr/>.
- G. Defense Finance and Accounting Service - Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000 w/ changes through May 2011) [hereinafter DFAS-IN 37-1], available at <http://asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200>.
- H. Air Force Instruction 65-608, Antideficiency Act Violations (18 Mar 2005) [hereinafter AFI 65-608] available at <http://www.e-publishing.af.mil>.
- I. Defense Finance and Accounting Service - Denver, Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter AF Procedures for Administrative Control of Appropriations] available at <https://dfas4dod.dfas.mil/library/pubs/7200-1.pdf>.
- J. Department of Navy, NAVSO P-1000, Financial Management Policy Manual (Dec. 2002) [hereinafter DON FMPM], available at <http://www.fmo.navy.mil/policies/regulations.htm>.



- K. Principles of Federal Appropriations Law, U.S. Government Accountability Office, Volume II, Third Edition, Chapter 6, (March 2009) [hereinafter Red Book], available at <http://www.gao.gov/legal/redbook.html>.
- L. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

### 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 (for executive branch apportionments). *See* Red Book, 6-35. *See* E.O. 6166 (June 10, 1933).
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 any contract or other 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. “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); or
  - d. “Accept 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 (emphasis added). *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*, 6-38.
  - 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. 050301.

#### IV. THE ANTIDEFICIENCY ACT’S FISCAL CONTROLS

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

1. The ADA imposes two 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 ADA violation has been called the “granddaddy of all violations.” *See Red Book, 6-43.* Thus, this is an example of how the Navy violated the ADA by obligating an appropriation *in excess* of the amount available in that appropriation.

(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.<sup>1</sup> To the Chairman,

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<sup>1</sup> 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*

- (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 available at the time of obligation, resulting in an ADA violation.<sup>2</sup>

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).<sup>3</sup>

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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.*

<sup>2</sup> 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.*

<sup>3</sup> 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).

- (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.<sup>4</sup>

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.<sup>5</sup>
- (2) Thus, if the DOD Appropriations Act provides \$31B in the Army O&M appropriation, then the “amount available” for obligation is \$31B.<sup>6</sup> As obligations are made against this appropriation, the amount available for new obligations declines.

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<sup>4</sup> 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.*

<sup>5</sup> See Red Book, 6-84.

<sup>6</sup> For example, the FY 2011 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, **\$30,934,550,000**. (emphasis added)

(3) Earmarks<sup>7</sup> may also limit the “amount available” in a particular appropriation. Thus, if an earmark establishes a maximum amount that may be obligated, then 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 and obligations that violate specific statutory restrictions on obligations or spending.

(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).

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<sup>7</sup> 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.*

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

(a) “None of the funds appropriated or otherwise made available in this Act may be obligated or expended for assistance to the Democratic People’s Republic of North Korea unless specifically appropriated for that purpose.”<sup>8</sup>

(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 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.”<sup>9</sup>

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).

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<sup>8</sup> FY 2010 DOD Appropriations Act, Div. A, Title VIII, Sec. 8044.

<sup>9</sup> *Id.* at Sec. 8061.



- a. So, for example, if on 15 September 2010 (FY 2010), an Army contracting officer awarded a contract obligating FY 2011 Army O&M funds for an FY 2011 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.<sup>10</sup>
  - (1) So, if Congress passes the FY 2011 DOD Appropriations Act on 29 September 2010, then as of 30 September 2010 the funds contained in this appropriation are still not available because it is not yet 1 October 2011 (and the President has not yet signed the act). If an Air Force contracting officer awarded a contract on 30 September 2010 obligating FY 2011 Air Force O&M funds for a FY 2011 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.
  
  - (2) Likewise, if Congress passes the FY 2011 DOD Appropriations Act on 1 October 2010 (FY 2011) 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 2010 obligating FY 2011 Army O&M funds, then the contracting officer would have violated the ADA by obligating funds “before the appropriation was made.”

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<sup>10</sup> See Red Book, Vol I, 5-9. See generally Red Book 6-146.

- 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 if authorized by law.
  - a. The statute must specifically authorize entering into a contract *in excess of* or *in advance of* an appropriation. The Army Corps of Eng’rs’ Continuing Contracts, B-187278, 56 Comp. Gen. 437 (1977); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

- (1) The Feed and Forage Act (aka The Adequacy of Appropriations Act) (41 U.S.C. § 11) (*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).<sup>11</sup> 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 (Jan. 2001); 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.

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<sup>11</sup> 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 (emphasis added).

*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.<sup>12</sup> 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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<sup>12</sup> 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”) until the contracting officer has given written notice to the contractor that funds are available. See, FAR 32.703-2.
  - 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).<sup>13</sup>
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.

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<sup>13</sup> 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).<sup>14</sup>
- 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, then 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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<sup>14</sup> 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).

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).<sup>15</sup>
  
- b. So, if a Navy contracting officer awarded a contract obligating FY 2011 O&M Navy funds which exceeds a formal subdivision (of FY 2011 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.

**Discussion Problem:** On 30 August, the Directorate of Public Works at Fort Tiefert had \$170,000 remaining in its O&M allowance. On 2 September, the contracting officer awarded a contract for \$170,000 using these funds, but the Defense Accounting Office erroneously recorded this obligation as \$120,000. As a result, the Directorate of Resource Management believed that the Directorate of Public Works still had \$50,000 left in their O&M allowance. To avoid losing this money, the contracting officer awarded a contract on 20 September obligating \$50,000 in O&M. Is there an ADA violation?

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<sup>15</sup> 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).<sup>16</sup> 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.
2. Common “Purpose Statute” Violations - Operation and Maintenance (O&M) Funds.

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<sup>16</sup> 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 \$750,000 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. 020201.D.
  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<sup>17</sup> 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

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<sup>17</sup> 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.
- b. For example, if the Air Force obligated Air Force, O&M funds for a construction project with a funded cost of \$1 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. 0504.

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 (thereby avoiding an ADA violation) 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 inappropriately 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).

**Discussion Problem:** The Chief of Staff at Fort Tiefert has decided that the post needs a memento for presentation to all of the local officials, foreign dignitaries, and senior US Government personnel that routinely visit the Fort. Determined to make sure that the memento is as unique as Fort Tiefert, the Chief commissions a world-renowned military artist to create a painting that captures the spirit of Fort Tiefert and the highlights of its service to the nation. The artist charges \$50,000 for the painting, which will be hung in the main corridor of the headquarters building. The post also purchases 500 prints of the painting (the Chief wants to make sure they don't run out) to use as mementos for presentation for the visitors. Each print costs \$200. Fort Tiefert uses its O&M allowance of funds to cover the entire \$150,000 cost of this venture. Any fiscal problems here?

**Discussion Problem:** On 1 July 2010, the Fort Tiefert contracting officer awarded a \$690,000 contract for the construction of a storage facility. The contract was funded with FY 2010 O&M funds. Things went smoothly until 8 October 2010 (FY 2011) when the contracting officer

issued what she thought was an *in-scope contract modification* increasing the contract price by \$50,000. The general rule for in-scope modifications is that they are funded from the same source as the original project was funded from, so the contracting officer cited FY 2010 O&M funds on the modification. On 28 October 2010, the Army Audit Agency (AAA) conducted a random audit of Fort Tiefert's contracting process and determined that the 8 October modification was *outside the scope of the original contract*. Any fiscal issues here?

**Discussion Problem:** On 3 August 2011, the Fort Tiefert contracting officer awarded a contract for 100 off-the-shelf computers for a total of \$260,000 obligating FY 2011 O&M funds. The computers were to be used in a warehouse complex that would be completed (i.e., ready for installation of the computers) sometime in November 2011 (FY 2012). Any fiscal issues here?

#### 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. See DFAS-IN 37-1, ch. 9, para. 090211; Air Force Procedures for Administrative Control of Appropriations, § 10, para. E; see also FAR 1.602-3(a).

**Discussion Problem:** SGT Jones, who has no authority to make purchases on behalf of the government, goes to the local parts store and charges a new diesel engine to the government. Is this a problem?

**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](http://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, 93-1 BCA ¶ 25,241.
  4. The voluntary services prohibition dates back to 1884.<sup>18</sup>
  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).

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<sup>18</sup> *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.*

- b. 5 U.S.C. § 3111 (student intern programs).
  - 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 free services from a person who agrees, in writing, to waive entitlement to compensation; in this instance, the “free services” constitute “gratuitous services.” 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).

**Discussion Problem:** For the last year, Ft. Tiefert's Army Command has been pushing subordinate commands to implement the command's Voluntary Services Program (VSP). Authority for the VSP flows from 10 U.S.C. § 1588, which permits the Secretary of the Army to accept voluntary services for programs that support members of the armed forces and their families (such as family support, child development and youth services, and employment assistance for spouses). The VSP has worked so well at Ft. Tiefert that the CG there decided to expand the program. Under Ft. Tiefert's Improved VSP (IVSP), volunteers have painted offices, straightened out the post HQ's filing system, and refurbished a dilapidated old building completely (to include putting on a new roof) using materials donated by local merchants. Any ADA issues?

## 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 (Jan. 1998) 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.<sup>19</sup>
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.<sup>20</sup>
3. Information that must be reported:
  - a. Accounting classification of funds involved;

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<sup>19</sup> 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.

<sup>20</sup> *See* DEFENSE FINANCE AND ACCOUNTING SERVICE, INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION para. 040204 (01 May 2008). 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 or by the applicable Major Army Command (MACOM) 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 suspected violation and not on corrective actions. *See*, 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*, 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 of 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. 4, para. 0401.
  
- 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.

- 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. OSD Comptroller will consider the report and if it agrees, then it will prepare notification letters to the President, Congress, the GAO. OMB Cir. A-11, para. 145.7; DOD FMR, vol. 14, Ch. 7, para. 0705. 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](http://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.

**Final Discussion Problem:** For years, the Army owned an administrative office building adjacent to Fort Mojave. Several months ago, the Army Command (formerly known as “Major Command”) Facilities Inspection Team directed the Commander of Fort Mojave to make several upgrades to the building. Fort Mojave’s Engineer obtained funds for the project and forwarded a purchase request to the contracting officer. This document certified that \$70,000 O&M was available for the project. Two months later, the contracting officer awarded an \$82,000 contract to Constructors, Limited. To date, the contractor has received \$40,000 in progress payments. Yesterday, the Engineer learned that the Corps of Engineers had conveyed the building to the State one month before the award of the renovation contract. Any fiscal problems here?

## **XII. CONCLUSION**

# CHAPTER 5:



## OBLIGATING APPROPRIATED FUNDS



## CHAPTER 5

### **OBLIGATING APPROPRIATED FUNDS**

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## **CHAPTER 5**

### **OBLIGATING APPROPRIATED FUNDS**

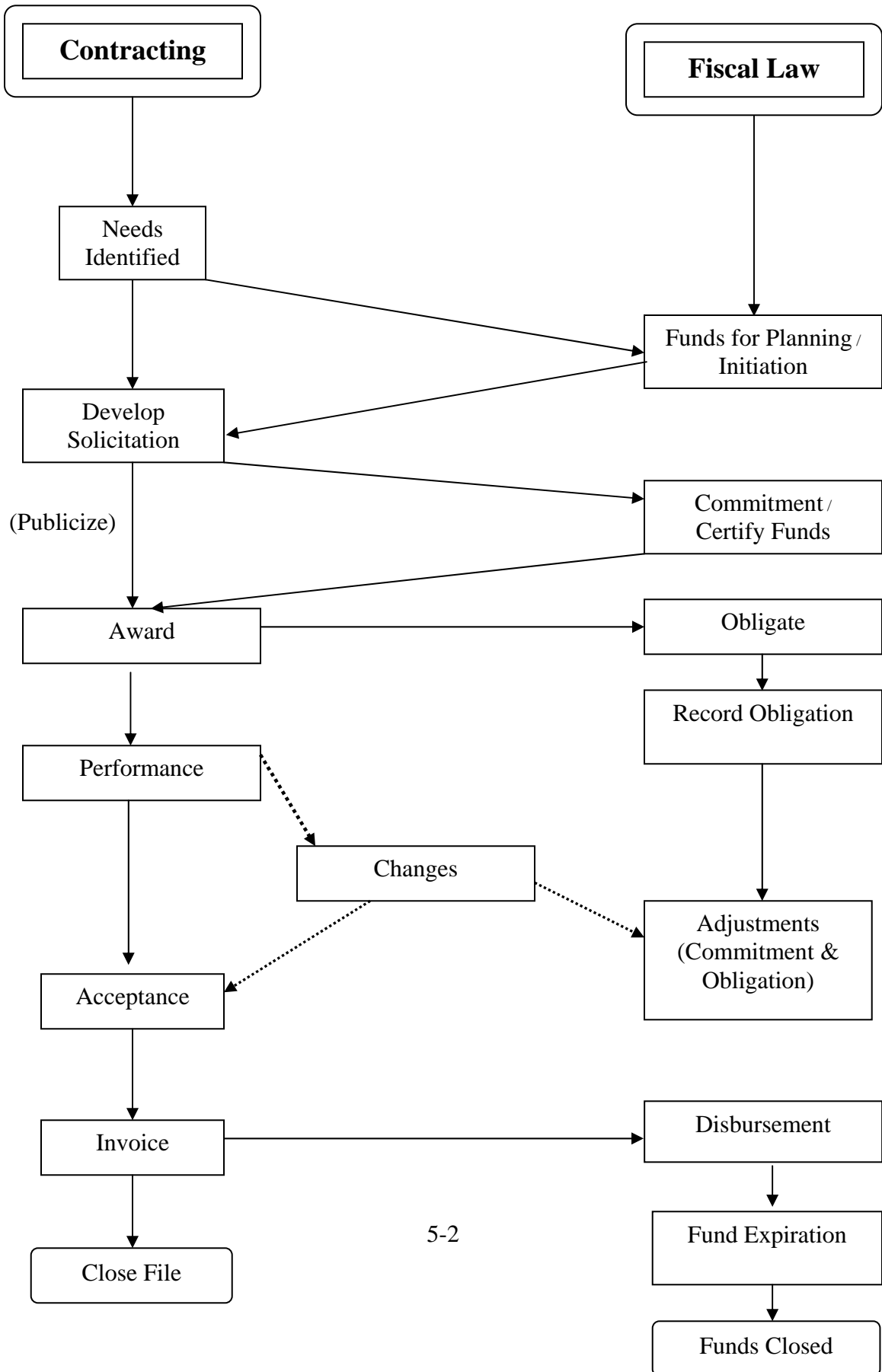
#### **I. INTRODUCTION.** Following this block of instruction, students will understand:

- 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, (2002) [hereinafter OMB Cir. A-11].
- C. Government Accountability Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 7, Obligation of Appropriations (3<sup>d</sup> 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) (Oct. 2001) & ch. 8 (Obligation Management) (Jun. 2006) [hereinafter DFAS-IN 37-1] (*available at <https://dfas4dod.dfas.mil/library>*).

# CONTRACTING PROCESS AND FISCAL PROCESS



- 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--Denver/Air Force Interim Guidance, Accounting For Obligations (Nov. 2004) [hereinafter DFAS-DE, Obligations]. All three can be accessed at <https://dfas4dod.dfas.mil/library>.

### 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. DFAS-DE, Procedures for Administrative Control, Definitions, p. X.
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.C and D.

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 precommitment 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 activities must 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. DOD FMR, vol. 3, ch. 15, para. 150202A.
  - a. Army. The Army requires certification of fund availability for unexpired and expired appropriations. DFAS-IN 37-1, 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. DFAS-DE, Accounting for Commitments, 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.<sup>1</sup> DOD FMR, vol. 3, ch. 15, para. 150202A.

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<sup>1</sup> 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) or similar documents having the effect of a firm order or authorization to enter into an obligation. DFAS-IN 37-1, ch.

- 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, paras. 0703, 030209.
  - 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, 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. 150202.A. Issuing a commitment authorizing obligations in excess of an appropriation or formal subdivision of funds could result in an antideficiency 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. DFAS-IN 37-1, para. 070501; DOD FMR, vol. 3, ch. 8, para. 080201
  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

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7, para. 070601. The Air Force uses AF Form 9 as a fund cite authorization document. See Appendices C and D to view these forms.

FMR, vol. 1, Definitions. 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.
  - 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. DFAS-DE Accounting for Commitments, 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. DFAS-DE Accounting for Commitments, 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.<sup>2</sup> 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.
- 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.

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<sup>2</sup> 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. 0209 and DFAR 213.305(d).

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 7010.2-R, para. 9-18e.
  
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 1.602-2.

**DISCUSSION PROBLEM NO. 1**

You are the contracts attorney at Fort Spackler, which is conducting a procurement for the maintenance of government vehicles. The contract will require the contractor to service and maintain approximately 250 government sedans, vans, and pickup trucks for one base year with four option years (estimated cost = \$600,000). Because of the volatility of oil and lubricant prices, the contracting officer plans to use a fixed price contract with economic price adjustment (EPA) clause. The EPA clause will cover increases (or decreases) in the cost of these items up to 10% of the contract price. The budget analyst in the Directorate of Resource Management, or DRM (the person responsible for certifying fund availability) calls you with the following questions:

1. What type of funds should be used for this procurement?
2. How much money should be committed for the base year for this procurement? Specifically, what kind of liability does the EPA clause represent? How much money should be committed to cover this liability?
3. What about the option periods?

#### **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.
  - a. 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 31 U.S.C. § 1501. OMB Cir. No. A-11, para. 20.5. All obligations require a standard document number (SDN). DFAS-IN 37-1, para. 080102. SDN formats are in DFAS Manual 37-100-FY.

b. 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.

2. Current Appropriation. An appropriation whose availability for new obligations has not expired under the terms of the applicable appropriations act.
3. 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).
4. 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. 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, GSBICA 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. 080301.A.

### B. Contract Types.

#### 1. Firm-Fixed Price Contracts. FAR 16.202.

- a. Description. Provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract.
- 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. DOD FMR, vol. 3, ch.8, para. 080502.

- a. Fixed-Price Contract with Economic Price Adjustment (FP w/EPA). FAR 16.203.
  - (1) The EPA clause, FAR 52.216-2, provides that the government assumes a portion of the cost risk of certain unforeseeable price fluctuations, such as material or wage increases. The EPA provision permits contractors to eliminate contingencies for these potential costs.
  - (2) The contract price will be adjusted later if the contingencies occur.
  
- b. Fixed-Price Contracts with Price Redetermination (FP-R). FAR 16.205 and 16.206.
  - (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) A 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.
- (4) Funding Limitations: On 17 October 2006, the President enacted the 2007 National Defense Authorization Act (NDAA); Section 814 of the 2007 NDAA required the Secretary of Defense to issue guidance for the appropriate use of award fees in all DoD acquisitions.<sup>3</sup>
  - (a) On 24 April 2007, the Director, Defense Procurement and Acquisition Policy issued the required guidance on the proper use of award fees and the DoD award fee criteria.<sup>4</sup>

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<sup>3</sup> John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083, Sec. 814 (Oct. 17, 2006).

<sup>4</sup> See Appendix F: DPAP Memo on Proper Use of Award Fee Contracts and Award Fee Provisions.

The required DoD award fee criteria is reflected in the chart below:

<b><u>Rating</u></b>	<b><u>Definition of Rating</u></b>	<b><u>Award Fee</u></b>
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.	50% - 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.	75% - 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.	90% - 100%

(b) Section 8117 of the 2008 DoD Appropriations Act, enacted by the President on 13 November 2007, contained the funding limitation that “[n]one of the funds appropriated or otherwise made available by this Act may be obligated or expended to provide award fees to any defense contractor contrary to the provisions of section 814 of the National Defense Authorization Act, Fiscal Year 2007 (Public Law 109-364).”



(c) As a result of Sec. 8117, any obligations or expenditures for DoD contract award fees that do not conform with the DoD award fee criteria are not only policy violations, but likely *per se* (uncorrectable) Antideficiency Act violations as well.

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. Fee. 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<sup>5</sup> that is fixed at award; and, possibly, an additional award fee based upon the quality of the contractor's performance.
  - (b) 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: On 17 October 2006, the President enacted the 2007 National Defense

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<sup>5</sup> 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).

Authorization Act (NDAA); Section 814 of the 2007 NDAA required the Secretary of Defense to issue guidance for the appropriate use of award fees in all DoD acquisitions.<sup>6</sup>

(i) On 24 April 2007, the Director, Defense Procurement and Acquisition Policy issued the required guidance on the proper use of award fees and the DoD award fee criteria.<sup>7</sup> The required DoD award fee criteria is reflected in the chart below:

<b><u>Rating</u></b>	<b><u>Definition of Rating</u></b>	<b><u>Award Fee</u></b>
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.	50% - 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.	75% - 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.	90% - 100%

<sup>6</sup> John Warner National Defense Authorization Act, 2007, Pub. L. No. 109-364, 120 Stat. 2083, Sec. 814 (Oct. 17, 2006).

<sup>7</sup> See Appendix F: DPAP Memo on Proper Use of Award Fee Contracts and Award Fee Provisions.

(ii) Section 8117 of the 2008 DoD Appropriations Act, enacted by the President on 13 November 2007, contained the funding limitation that “[n]one of the funds appropriated or otherwise made available by this Act may be obligated or expended to provide award fees to any defense contractor contrary to the provisions of section 814 of the National Defense Authorization Act, Fiscal Year 2007 (Public Law 109-364).”

(iii) As a result of Sec. 8117, any obligations or expenditures for DoD contract award fees that do not conform with the DoD award fee criteria are not only policy violations, but likely *per se* (uncorrectable) Antideficiency Act violations as well.

(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) Statutory Limitation on Awarding Sole-Source ID/IQ's: Section 843 of the 2008 NDAA limited DoD's ability to award large, sole-source ID/IQ contracts. Section 843 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.

(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 when issued in the amount stated, 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 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. § 253l. 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’s attempted 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).

### **DISCUSSION PROBLEM NO. 2**

Having answered the DRM budget analyst’s questions, you next field a call from the contracting officer. She is concerned because the DOL wants the contract to run from August 2009 through July 2010. Because FY 2009 O&M, Army funds will be used to fund the contract, the contracting officer is concerned that the contract will extend through ten months of FY 2010. What do you advise? Is there a Bona Fide Need?

- 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.

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.

- a. 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.
- b. 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.
- c. 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.
- d. 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.
- e. 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 (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.
  - c. 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. 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. 118 Stat. 987 (4 Aug. 2004).
  - e. Orders placed with DOD components under the Project Order Law (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. 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 bonafide 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.

- f. 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. 080704; DFAS-IN 37-1, tbl. 8-2.

- g. 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. 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. 080801.B.

- 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.
- c. When the customer’s financing appropriation expires, an undelivered order for a nonstock-numbered item for which the stock fund has not executed a procurement action (incurred an obligation) also expires. DOD FMR, vol. 3, ch. 8, para. 080803.

## 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):

[A] contract change authorized by and enforceable under the provisions of the original contract, commonly referred to as a within-the-scope change, is considered an antecedent liability. In other words, the original contract makes the government liable for a price increase under specified conditions and the subsequent contract change makes that liability fixed and certain. Therefore, 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.

- b. Increase of ceiling price under Cost-reimbursement contract. For an increase in ceiling price with no antecedent liability (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 4. 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 possible 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 (22 Sept., 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.
    - a. Upward obligation adjustments in excess of \$1 Million. No upward obligation adjustment in excess of \$1 Million that involves any individual action or contract shall be accomplished to expired appropriation accounts without prior submission to, and approval by, the Head of the DoD Component. The prior approval authority may be delegated, but a report must be provided annually to the Component Head. DoD FMR, vol. 3, ch. 8, para. 0813.
    - b. 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. Contract change of \$25 Million or More. 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. 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 DOD 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, para. 080606. If a reprourement 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 reprourement 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

**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, PARA. 080607.**

## **VIII. MISCELLANEOUS RULES OF OBLIGATION.**

A. Bid Protests or other challenge. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080608.

- 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); DFAS-IN Reg. 37-1 para. 080606.

**DISCUSSION PROBLEM NO. 3**

Since you steered everyone in the right direction, efforts to compete and award the vehicle maintenance contract proceeded smoothly. Fort Spackler received four proposals that were evaluated for award, and the contracting officer has decided to eliminate Smails & Son, Inc. from the competitive range of offerors still eligible for contract award. On 15 July, Smails & Son, Inc. filed a protest with the GAO concerning its elimination from the competitive range. The GAO has 100 days to issue a decision. It is now 20 September and the contracting officer and budget analyst ask you whether they should de-commit the funds and use them elsewhere before they expire. What do you advise?

- 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. 12; 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).
- 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.
- 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. 081203..
  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.**

### **DISCUSSION PROBLEM NO. 4**

Fort Spackler won the protest, and completed the evaluation and selection of a contractor for award. You now have the contract file for review prior to issuing notice of award. The file contains a PR&C citing \$600,000 of FY 2008 O&M, Army funds. However, the proposed awardee's price is \$650,000. What do you advise?



## APPENDIX A

### TITLE 31 - MONEY AND FINANCE SUBTITLE II - THE BUDGET PROCESS

#### CHAPTER 15 - APPROPRIATION ACCOUNTING SUBCHAPTER I - GENERAL

##### Sec. 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.

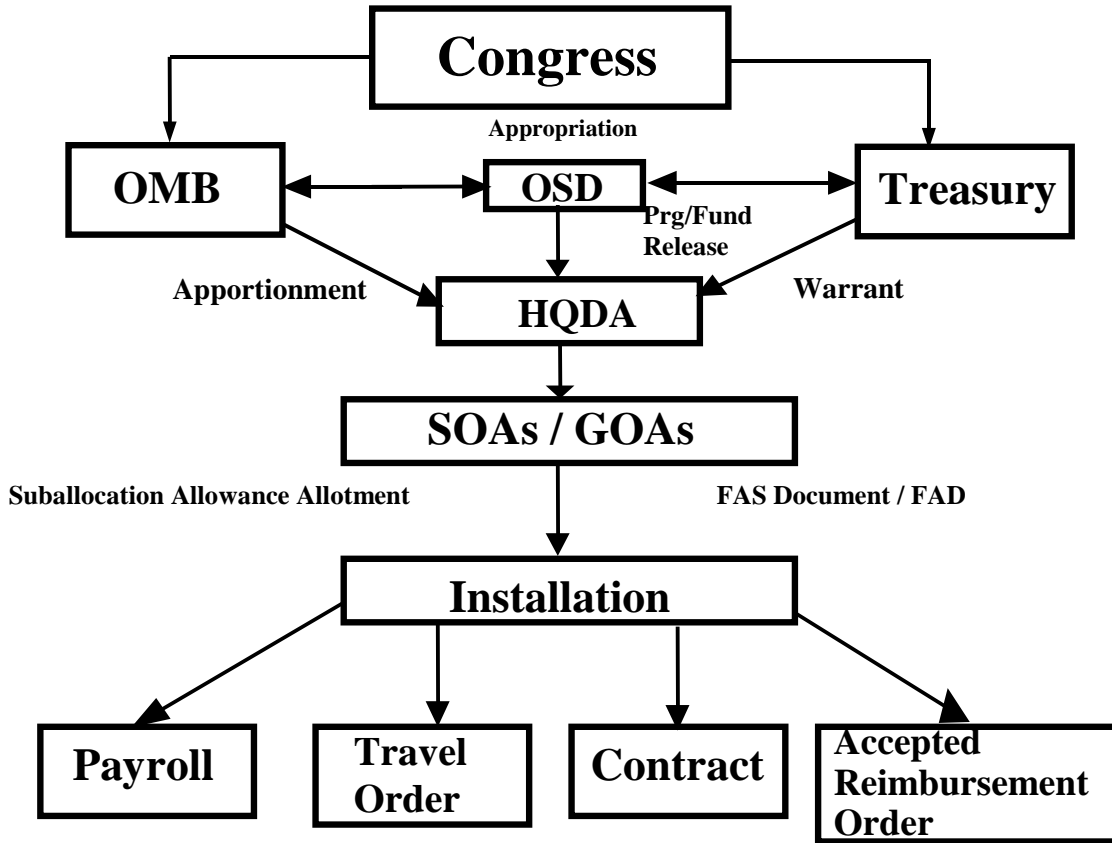
(b) A statement of obligations provided to Congress or a committee of Congress by an agency shall include only those amounts that are obligations consistent with subsection (a) of this section.

-SOURCE- (Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 927.)



APPENDIX B

**FUND DISTRIBUTION PROCESS**





**APPENDIX C**

<b>Commitment / Certification</b>	<b>Obligation</b>
<b>Internal to Agency</b>	<b>Promise to External Agency</b>
<b>Subjective: Conservative Estimate</b>	<b>Objective: Amount Promised</b>
<b>Conservative Estimate of Contingent Liability</b>	<b>No Obligation while Liability Contingent</b>
<b>Certify Before Award</b>	<b>Occurs upon Award; Record After Obligation</b>
<b>Specific Act of Certifying Officer</b>	<b>Occurs when Promise is Made</b>



**APPENDIX D**

**PURCHASE REQUEST AND COMMITMENT (PR&C)**

**DA FORM 3953**

**ELECTRONIC VERSION AVAILABLE AT: [WWW.USAPA.ARMY.MIL](http://WWW.USAPA.ARMY.MIL)**



**APPENDIX E**

**AIR FORCE REQUEST FOR PURCHASE (RFP)**

**AF IMT 9**

**ELECTRONIC VERSION AVAILABLE AT:**

**<https://acc.dau.mil/CommunityBrowser.aspx?id=55112>**





**APPENDIX F:**

**DPAP MEMO, SUBJECT: PROPER USE OF AWARD FEE CONTRACTS AND  
AWARD FEE PROVISIONS, DTD 24 APRIL 2007**





ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

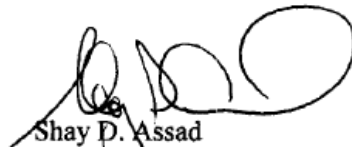
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MAY 15 2007

MEMORANDUM FOR DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Proper Use of Award Fee Contracts and Award Fee Provisions

The Head of Contracting Activity (HCA) for each Other Defense Agency shall retain the determination and finding (D&F) required by the attached April 24, 2007 memorandum for (a) all ACAT programs, and (b) all non-ACAT contracts with an estimated value of \$50 million or more. The D&Fs for ACAT 1 programs shall be forwarded by the HCA to DPAP, as required by the DPAP memo. Copies of D&Fs on all contracts shall also be included in the contract file.



Shay D. Assad  
Director, Defense Procurement  
And Acquisition Policy

Attachment:  
As stated







ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

APR 24 2007

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:

<u>Rating</u>	<u>Award Fee Pool Earned</u>
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

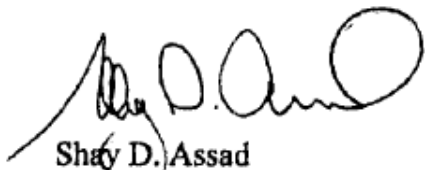
Contractor has met the basic (minimum essential) contract requirements and has met at least 90% of the award fee criteria established in the award fee plan.

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](mailto:bill.sain@osd.mil).



Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy

# CHAPTER 6:



# INTERAGENCY ACQUISITIONS



## CHAPTER 06

### INTERAGENCY ACQUISITIONS

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## CHAPTER 06

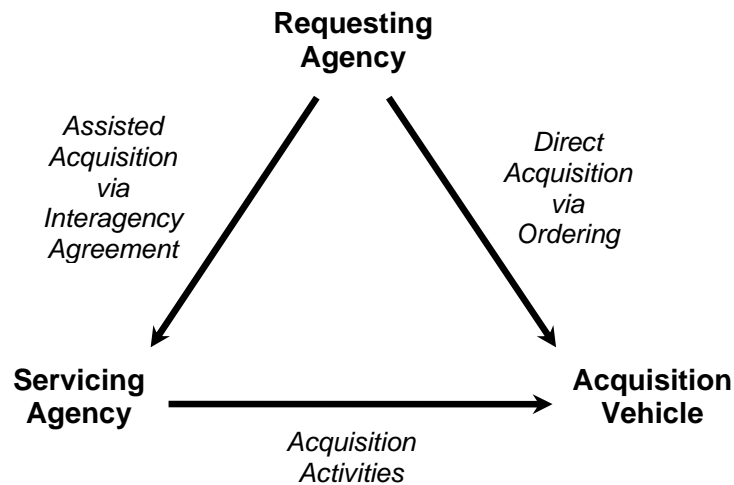
### INTERAGENCY ACQUISITIONS

#### 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.



- B. Common Use: indefinite delivery 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 (GWACs), and multi-agency contracts (MACs).
- 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 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.
    - 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 17.500(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:<sup>1</sup>
1. Funds are available;
  2. The head of the ordering agency or unit decides the order is in the best interests of the 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.<sup>2</sup>
- B. Authorized Uses.
1. Interservice Support: orders placed between DoD activities, including those (1) between military departments or (2) between military departments and other defense.<sup>3</sup>
  2. Intragovernmental Support: orders placed with non-DoD federal agencies. Also referred to as Interagency.
  3. The Economy Act applies only in the absence of a more specific interagency acquisition authority. (FAR 17.500(b))<sup>4</sup>
- C. Determinations and Findings (D&F) Requirements (FAR Subpart 17.503).
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; **and**
    - b. The supplies or services cannot be obtained as conveniently or

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<sup>1</sup> 31 U.S.C. §1535(a). ; DoD FMR, vol. 11A, ch. 3, para. 030103. The Economy Act was passed in 1932 as an effort to obtain economies of scale and eliminate overlapping activities within the federal government.

<sup>2</sup> See *Dictaphone Corp.*, B-244691.2, 92-2 Comp. Gen. Proc. Dec. ¶ 380 (Nov. 25, 1992).

<sup>3</sup> 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. 030102.

<sup>4</sup> *An Interagency Agreement—Admin. Office of the U.S. Courts*, B-186535, 55 Comp. Gen. 1497 (1976).

economically by contracting directly with a private source. (FAR 17.503(a). DoD FMR, vol. 11A, ch. 3, para. 030202.A).

- c. NOTE: In Economy Act transactions between DoD activities with a DD Form 1144 support agreement signed by the head of the requiring activity (O6 or GS-15), no further written determinations are required. (DoDI 4000.19; DoD FMR, vol. 11A, ch. 3, para. 030203). If there is no support agreement, the D&F is required.

2. Additional Determination. Orders requiring contract action (to include placing an order against an existing ID/IQ contract) by the servicing agency also must include in the D&F that at least one of the three following circumstances apply:

- a. 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 the servicing agency for the same or similar supplies or services;
- b. The servicing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or
- c. The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. FAR 17.503(b). *See also*, DoD FMR, vol. 11A, ch. 3, para. 030202.A.

3. D&F Approval Authority. (FAR 17.503(c)).

- a. Requesting Agency's Contracting Officer (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. (DoDI 4000.19, para. 4.4; DoD FMR, vol. 11A, ch. 3, para. 030204; DFAS-IN Reg. 37-1, ch. 12, para. 120702).
  - (1) The D&F for an order with a non-DoD servicing agency shall be approved at a level no lower than Senior Executive Service (SES)/flag/general officer.

- (2) 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.

D. Additional Determinations by DoD Policy.<sup>5</sup> (See section V.B., *infra*).

1. Use of a non-DoD contract to procure goods or services in excess of the simplified acquisition threshold requires determinations in addition to the D&F. (DFARS 217.7802).<sup>6</sup>
  - a. With some slight differences between the military departments (see your individual service policy in the Appendix), these policies generally require 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.
  - b. 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 on either a reimbursable basis or by a

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<sup>5</sup> All Economy Act orders must comply with FAR Subpart 17.503, DFARS Subpart 217.5, and DoDI 4000.19.

<sup>6</sup> See Appendix A. **Each of these memoranda, which apply to use of non-DoD contracts under both Economy Act and non-Economy Act authorities, as well as policy memoranda dealing specifically with non-Economy Act interagency acquisitions, are included in the Appendix to this chapter.**

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. 030102)<sup>7</sup>

- 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)<sup>8</sup>
  - (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).<sup>9</sup>
  - (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).<sup>10</sup>
- 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 17.505(d); 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

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<sup>7</sup> 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). **Applicable to both Economy Act and non-Economy Act transactions.**

<sup>8</sup> 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).

<sup>9</sup> 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).

<sup>10</sup> DoD Instruction 4000.19, *Interservice and Intragovernmental Support*, para. 4.6 (Aug. 9, 1995). 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.



need in the fiscal year for which the appropriation is available.<sup>11</sup>

2. Obligation and Deobligation of Funds.

a. Obligation.

- (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)).<sup>12</sup>
- (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.<sup>13</sup>

1. An Economy Act order may be placed on any form that is acceptable to both the requesting and servicing agencies. (FAR 17.504(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.

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<sup>11</sup> DoD FMR vol. 11A, ch. 3, para. 030402.

<sup>12</sup> See GAO Redbook, vol III, ch. 12 (3rd Ed.), pp. 12-43 to 12-50.

<sup>13</sup> See FAR 17.504; DoD FMR, vol. 11A, ch. 3. In addition, individual agencies will have their own policies for ordering.

- b. If the MIPR is not used, the terms of the interagency agreement will determine the method of acceptance. (DoD FMR, vol. 11A, ch. 3, para. 030501).
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 17.504(b) 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. When the requesting agency is within DoD, a copy of the executed D&F shall 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 217.504).
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,<sup>14</sup> DoD policy generally prohibits the practice of advance payment unless the DoD components are specifically authorized by law, legislative action, or Presidential authorization.<sup>15</sup>

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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<sup>14</sup> 31 U.S.C. § 1535(d); FAR 17.505; DoD FMR, vol. 11A, ch. 3, para. 030502.

<sup>15</sup> 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, para. 4.5).
- 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. (DoDI 4000.19, para. 4.6).

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.<sup>16</sup>
- 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.<sup>17</sup> 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. Disputes. No formal method for dispute resolution exists for Economy Act transactions. The requesting and servicing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third party forum. FAR 17.504(c).
- 2. 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 ORDERS STATUTE (41 U.S.C. § 23).**

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<sup>16</sup>To avoid a violation of the Purpose Statute and an improper augmentation of the appropriations of the agency making use of the detailed employees.

<sup>17</sup>See *Department of Health & Human Servs. Detail of Office of Community Servs. Employees*, B-211373, 64 Comp. Gen. 370 (1985).

- 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” placed with Government-owned establishments are considered as obligations “in the same manner as provided for similar orders or contracts placed with...private contractors.”
    - 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.<sup>18</sup>
- 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. 020504).
  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

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<sup>18</sup> The Coast Guard has similar project order authority, at 14 U.S.C. § 151.

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, paras. 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 which 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) Services such as education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, utilities, or communications;

- (3) 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).<sup>19</sup>
- 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. § 23).
- b. 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).
- 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 subsequent 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.

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<sup>19</sup> Providing the obligation otherwise meets the criteria for recordation of an obligation contained in 31 U.S.C. § 1501(a) (the "Recording Statute").

- (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 basis. (*Id.*, at para. 020701).
3. The MIPR is normally used for issuance and acceptance of project orders.
  - a. The DoD FMR states that “the use of a specific project order form is not prescribed,” DoD FMR, vol. 11A, ch. 2, para. 020302.
  - b. The Army, however, requires that project orders be issued on a MIPR (DD Form 448), DoD FMR, vol. 11A, ch. 2, Army Annex.
  - c. Use of a MIPR is also required by 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).

**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:<sup>20</sup>
  - 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.<sup>21</sup>
  - d. Executed before the end of the period of availability of the appropriation used;
  - 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.<sup>22</sup>
  - 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 applies a deobligation requirement similar to that of the Economy Act. (DoD FMR, vol. 11A, ch. 18, para. 180302).<sup>23</sup>
    - (1) Expired funds must be returned by the servicing agency and deobligated by the requesting agency to the extent that the servicing agency has not:
      - (a) Provided the goods or services (or incurred actual expenses in providing the goods or services), or

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<sup>20</sup> DoD FMR vol. 11A, ch. 18, para. 180301.

<sup>21</sup> 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).

<sup>22</sup> *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157

<sup>23</sup> Office of the Under Secretary of Defense (Comptroller) memorandum, Subject: Non-Economy Act Orders, dated October 16, 2006. (Appendix C).



- (b) 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).<sup>24</sup>
  - (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 contracting parties at the time of contracting. DoD FMR, vol. 11A, ch. 18, para. 180302.A.
3. Advance Payment.<sup>25</sup>
- 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. 180209.26).
  - 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).

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<sup>24</sup> **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 period not to exceed one year *from the date of obligation and acceptance of this order.*) (emphasis added)

<sup>25</sup> 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).

<sup>26</sup> See also DoD FMR, vol. 4, ch. 5 for the conditions and requirements related to advances and prepayments.

- C. DoD Policy for non-DoD orders.<sup>27</sup> (See section V.B., *infra*).
1. If the non-Economy Act order is over \$100,000, comply with your Military Department's policy requirements for use of non-DoD contracts over \$100,000, in addition to the requirements below.<sup>28</sup> (See *infra* part II.D.)
  2. Non-Economy Act orders may be placed with a non-DoD agency for goods or services if:<sup>29</sup>
    - 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.
  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).
    - b. If the order is in excess of \$100,000, 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;

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<sup>27</sup> See DoD FMR, vol. 11A, ch. 18.

<sup>28</sup> See Appendix A.

<sup>29</sup> DoD FMR, vol. 11A, ch. 18, para. 180202

4. Payment terms and conditions;
  5. The specific non-Economy Act statutory authority used;
  6. 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.”
  7. 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.”
  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 other agency employees if funds are already provided for interagency training in its appropriation.<sup>30</sup>
    - 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.

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<sup>30</sup> OFFICE OF PERSONNEL MANAGEMENT, TRAINING POLICY HANDBOOK: AUTHORITIES AND GUIDELINES 26, May 11, 2007.

- (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.<sup>31</sup>
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.
    - (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. 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 \$100,000).

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<sup>31</sup>*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).

- c. 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) proposed prices for both services and products when awarding combination orders; (3) seek discounts and explain why if not obtained; (4) solicit as many contractors as possible.<sup>32</sup>
  
- 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).
  - c. Ordering Requirements:
    - (1) The JWOD Act requires agencies to purchase supplies or services on the Procurement List maintained by the Committee (this list may be accessed at <http://www.abilityone.gov>), 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).<sup>33</sup>
  - b. Current Requirements:

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<sup>32</sup> 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).

<sup>33</sup> 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).

- (1) The law has changed in recent years, minimizing the “mandatory source” nature of FPI.<sup>34</sup>
- (2) When acquiring an item for which FPI has a significant market share<sup>35</sup> 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.
  - (a) 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 and are not subject to review by FPI). (FAR 8.602)
  - (b) 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.
  - (c) If the FPI item is comparable, then the agencies must obtain a waiver to purchase the item from other sources, except when:
    - (i) Public exigency requires immediate delivery or performance;
    - (ii) Used or excess supplies are available;
    - (iii) The supplies are acquired and used outside the United States;
    - (iv) Acquiring supplies totaling \$2500 or less; or
    - (v) Acquiring services.

5. The Clinger-Cohen Act of 1996. (40 U.S.C. § 11302).

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<sup>34</sup> 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.

<sup>35</sup> 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.

- a. Purpose: requires 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)
  - (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 are provided below.

### Government-wide Acquisition Contracts (GWACs)<sup>36</sup>

Managing Agency	Vehicle	Available Information Technology Products and Services	Agency website address for more information
1. Commerce	Commerce Information Technology Solutions (COMMITTS) NexGen	Wide range of services from small businesses	<a href="http://oam.ocs.doc.gov/commits/index.html">http://oam.ocs.doc.gov/commits/index.html</a>
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	<a href="http://www.epa.gov/oam/read/">http://www.epa.gov/oam/read/</a>
3. GSA	Applications and Support for Widely-diverse End User Requirements (ANSWER)	Full-service support	<a href="http://www.gsa.gov/gwacs">www.gsa.gov/gwacs</a>
4. GSA	HUBZone	Services from historically underutilized business zone (HUBZone) contractors	<a href="http://www.gsa.gov/gwacs">www.gsa.gov/gwacs</a>
6. GSA	Millennia	Services to support large systems integration and software development projects	<a href="http://www.gsa.gov/gwacs">www.gsa.gov/gwacs</a>
7. GSA	Millennia Lite	Planning, studies, and assessment; high end services; mission support; legacy	<a href="http://www.gsa.gov/gwacs">www.gsa.gov/gwacs</a>

<sup>36</sup> [http://www.whitehouse.gov/omb/procurement/interagency\\_acq/gwac\\_list.pdf](http://www.whitehouse.gov/omb/procurement/interagency_acq/gwac_list.pdf)

		systems migration; new enterprise systems development	
8. GSA	STARS	Services from disadvantaged small businesses	<a href="http://www.gsa.gov/gwacs">www.gsa.gov/gwacs</a>
9. GSA	Veterans Technology Services	Information systems engineering and systems operations and maintenance from service-disabled veteran-owned small businesses.	<a href="http://www.gsa.gov/gwacs">www.gsa.gov/gwacs</a>
10. HHS- NIH	Chief Information Officer Solutions & Partners 2 Innovations (CIO-SP2i)	Hardware; software development; systems integration; technical support services	<a href="http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/">http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/</a>
11. HHS- NIH	Electronic Commodities Store (ECS III)	Commercial-off-the-shelf products; software; maintenance; peripherals	<a href="http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/">http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/</a>
12. HHS- NIH	Image World2 <i>New Dimensions</i> (IW2nd)	Imaging and document management services	<a href="http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/">http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/</a>
13. NASA	Scientific Engineering Workstation Procurement (SEWP)	High-end scientific and engineering products	<a href="http://www.sewp.nasa.gov/">http://www.sewp.nasa.gov/</a>

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,<sup>37</sup> 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.

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<sup>37</sup> 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.



- (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. Recent Change: although these pilots were to expire at the end of fiscal year 1999, they have been extended several times.
  - (1) Recently, the termination provision at section 403(f) was amended so as 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.<sup>38</sup>

## V. DOD POLICY ON USE OF NON-DoD CONTRACTS.<sup>39</sup>

- 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.”<sup>40</sup>
- B. Requirements For Use of Non-DoD Contracts Over \$100,000.<sup>41</sup>
  - 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 \$100,000 (under the Economy Act or under any

<sup>38</sup> 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.

<sup>39</sup> Common policy applicable for Economy Act and non-Economy Act transactions.

<sup>40</sup> Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, Subject: Interagency Acquisition, dated January 18, 2008 (Appendix F).

<sup>41</sup> 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.

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)).
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 Appendix to this chapter), these policies generally require statements 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 \$100,000, 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:
  - (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. Under DFARS 217.7802 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)).<sup>42</sup>
- D. DoD agencies are required to use an Interagency Agreement for all 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).<sup>43</sup>

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<sup>42</sup> 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).

<sup>43</sup> 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

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requirements under FAR 17.5 or DFARS 217.78, which take precedence in any conflict with OFPP guidance.  
(Appendix H).

## APPENDIX A



UNDER SECRETARY OF DEFENSE  
1100 DEFENSE PENTAGON  
WASHINGTON DC 20301-1100



SEP 25 2003

COMPTROLLER

MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
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)  
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.

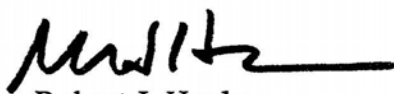


This new policy satisfies the requirements of Section 2330(b)(1)(C)(ii) of Title 10, United States Code as amended by Section 801 of the National Defense Authorization Act for Fiscal Year 2002. Section 801 requires advance approval to buy services via use of a "contract entered into or a task order issued, 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.

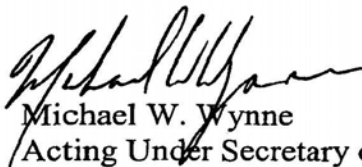
The use of multiple award contracts must be consistent with the requirements of Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Competition Requirements for Purchase of Services Pursuant to Multiple Award Contracts); Federal Acquisition Regulation (FAR) Part 8.002 (Priorities 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.

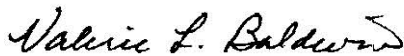
This memorandum applies to both direct acquisitions (i.e., orders placed by an Army contracting or ordering officer against a non-DoD contract) and assisted acquisitions (i.e., contracts awarded or orders placed by non-DoD organizations using Army funds) for supplies and services. Except as expressly 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.

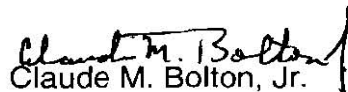


The Office of the Assistant Secretary of the Army (Acquisition, Logistics and Technology) points of contact are Ms. Barbara Binney at (703) 604-7113, and Mr. Ed Cornett at (703) 604-7142, office symbol SAAL-PP. The Office of the Assistant Secretary of the Army (Financial Management and Comptroller) point 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  
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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](mailto:PSStaff@hqda.army.mil) or [PSStaff@saalt.army.mil](mailto: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 (blocks 19-22) 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.

**Army Policy**  
**Proper Use of Non-Department of Defense (Non-DoD) Contracts**

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

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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.

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(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

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**Proper Use of Non-Department of Defense (Non-DoD) Contracts**

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

**Army Policy**  
**Proper Use of Non-Department of Defense (Non-DoD) Contracts**

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,

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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

6 DEC 2004

OFFICE OF THE ASSISTANT SECRETARY

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](mailto:Richard.Unis@pentagon.af.mil) or Ms. Judith Oliva, SAF/FMBMM, DSN 425-8250 or (703) 697-8250, [Judith.Oliva2@pentagon.af.mil](mailto: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 20 2004

MEMORANDUM FOR DISTRIBUTION

Subj: PROPER USE OF NON-DOD CONTRACTS

Ref: (a) Federal Acquisition Regulation (FAR) 2.101

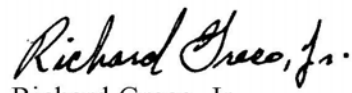
Encl: (1) National Defense Authorization Act for FY 2005, Section 854  
(2) OSD memorandum of October 29, 2004  
(3) DoN Guidelines for Proper Use of Non-DoD Contracts of December 14, 2004

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](mailto: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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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 (COMNAVSEASYSYSCOM)  
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 C4I

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.



## APPENDIX B



COMPTROLLER

**UNDER SECRETARY OF DEFENSE**  
**1100 DEFENSE PENTAGON**  
**WASHINGTON, DC 20301-1100**

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](mailto:kathryn.gillis@osd.mil).



Tina W. Jonas

## APPENDIX C



COMPTROLLER

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
1100 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1100

MAR 24 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--
  - o the order was made during the period of availability of the funds;
  - o the order was specific, definite and certain, with specificity similar to that found in contractual orders; **and**

- o 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:
  - o made during the period of availability of the funds; **and**
  - o 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.
  - o 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.
  - o 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 6804, "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

SEP 20 2005

ACQUISITION  
TECHNOLOGY  
AND LOGISTICS

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](mailto:michael.canales@osd.mil).

Domenic C. Cipicchio  
Acting Director, Defense Procurement  
and Acquisition Policy





COMPTROLLER

UNDER SECRETARY OF DEFENSE  
1100 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1100

MAR 27 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 policies 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, whichever 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](mailto:jack.patterson@osd.mil).



Tina W. Jonas

Attachment:  
As stated



COMPTROLLER

UNDER SECRETARY OF DEFENSE  
1100 DEFENSE PENTAGON  
WASHINGTON DC 20301-1100



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 DEPARTMENT 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 statutes, 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



## 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.

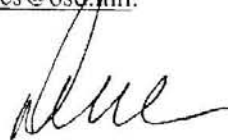


- Contracting Officers are encouraged to solicit as many contractors as practicable when using Federal Supply Schedules. On those occasions where this is not possible, explain why in the contract file.

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](mailto:Michael.Canales@osd.mil).



Deidre A. Lee  
Director, Defense Procurement  
and Acquisition Policy

Attachment:  
As stated



# APPENDIX E



ACQUISITION  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MAR 28 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:

<u>FSC</u>	<u>FSC Description</u>
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



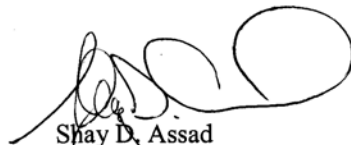
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Products for which FPI has a significant market share (FSCs listed above) must be procured using competitive (or fair opportunity) procedures. In conducting such a competition, contracting officers shall consider a timely offer from FPI in accordance 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](mailto:susan.pollack@osd.mil).



Shay D. Assad  
Director, Defense Procurement,  
Acquisition Policy, and  
Strategic Sourcing



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

## APPENDIX F

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

JAN 18 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](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](mailto:michael.canales@osd.mil) or at 703-695-8571.

A handwritten signature in black ink, appearing to read 'Shay D. Assad', with a large circular flourish at the end.

Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy

## APPENDIX G



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE  
3010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3010

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.

A handwritten signature in black ink, appearing to read "Ashton B. Carter".

Ashton B. Carter



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

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.

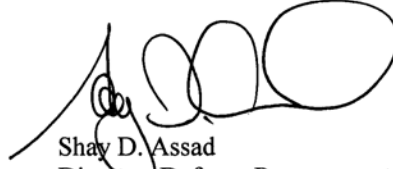
To ensure minimal impact to current operations and to comply with Section 801(b), the following procedures are established to request the Director, Defense Procurement and Acquisition Policy approval of a Section 801(b) "waiver". DoD Components are requested to establish a single focal point within your 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](mailto: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



## APPENDIX H



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

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](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](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).



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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](mailto:michael.canales@osd.mil).



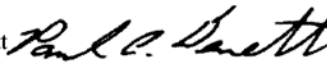
Shay D. Assad  
Director, Defense Procurement,  
Acquisition Policy, and  
Strategic Sourcing



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D. C. 20503

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](mailto: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

# CHAPTER 7:



# REVOLVING FUNDS

## CHAPTER 7

### REVOLVING FUNDS

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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].

##### **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. “An account or fund in which all income is derived from its operations and is available to finance the fund’s continuing operations without fiscal year limitations.” Congressional Research Service, Library of Congress.

##### **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.
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, there were 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.<sup>1</sup>

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<sup>1</sup> 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.

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).

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 cyclic 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 customer.
  - 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 the Secretary of the Treasury to 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, para. 090102.B.
    - 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 DOD 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;<sup>2</sup> 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
    - (c) Applicable administrative expenses.
  - (3) Customers then reimburse working-capital funds from:

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<sup>2</sup> The DOD Comptroller's goal is to align resources with requirements.

- (a) Available appropriations; or
  - (b) Funds otherwise credited for those costs.<sup>3</sup>
  
- b. Cash Management. DoD FMR, vol. 2B, ch. 9, para. 090103.A. *See Memorandum, DoD Comptroller, subject: Working Capital Funds Cash Management Responsibility (5 Jan. 95).*
  - (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 in advance of the availability of funds for:
  - (1) Unspecified minor military construction projects costing more than \$100,000;
  - (2) Automatic data processing equipment or software costing more than \$100,000;
  - (3) Other equipment costing more than \$100,000; and

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<sup>3</sup> 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).

- (4) Other capital improvements costing more than \$100,000.
- 
- d. Advance Billing. 10 U.S.C. § 2208(1). The Secretary of a military department may bill a customer before it delivers the goods or services.<sup>4</sup>
    - (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.<sup>5</sup>
    - (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.
  - e. Limits on Advance Billings. 10 U.S.C. § 2208(1). Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, §§ 1007-1008, 112 Stat. 1921, 2114 (1998).
    - (1) The DOD may not impose advance billings totaling more than \$1 billion per year.
    - (2) The Secretary of Defense must account for, report, and audit the funds and activities managed through working-capital funds separately.
    - (3) Charges for the goods and services provided through a working-capital fund must include amounts necessary to recover:

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<sup>4</sup> *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).

<sup>5</sup> The Secretary of Defense may waive the notification requirement during a war, national emergency, or contingency operation. 10 U.S.C. 2208(1)(2).

- (a) The full costs of the goods and services provided; and
  - (b) The depreciation of the fund's capital assets.
- (4) 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)(1);
  - (b) The costs incurred to close or realign military installations; or
  - (c) The costs associated with mission critical functions.
- (5) The Secretary of Defense 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.
- f. Capital Budget. DoD FMR, vol. 2B, ch. 9, para. 090103.C.
- (1) Working capital funds must finance the acquisition of most of their capital assets through the fund.<sup>6</sup>
  - (2) Capital assets include depreciable property, plant, equipment, and software that:
    - (a) Has a unit cost that is not more than \$250,000 (except for Minor Construction, which has a capitalization threshold of \$100,000); and

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<sup>6</sup> This requirement does not apply to construction or the capital assets listed in DoD FMR, vol. 2B, ch. 9, para. 090103D (e.g., major Range and Test Facility Activities items). DoD FMR, vol. 2B, ch9, para 090103C.



- (b) Has a useful life of 2 years or more.
  
- g. Minor Construction. DoD FMR, vol. 2B, ch. 9, para. 090103.C.16.
  - (1) Working-capital funds must finance minor construction projects costing more than \$750,000 through the annual Military Construction Appropriations Act.<sup>7</sup>
  - (2) Working-capital funds may finance project planning and design costs through the fund.
  
- h. The Full Recovery of Costs and Setting of Prices. DoD FMR, vol. 2B, ch. 9, paras. 090103 and 090104.
  - (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.
    - (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.).

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<sup>7</sup> Projects costing more than \$500,000 (not \$750,000) must be approved by the DOD Comptroller and identified on the annual operating budget (AOB) prior to execution to avoid an Antideficiency Act violation. DoD FMR, vol. 2B, ch. 9, para. 090103E.

- (2) Prices normally remain fixed during the budget year.<sup>8</sup> This is known as the stabilized rate policy.<sup>9</sup> This policy protects customers from unforeseen inflationary increases and other cost uncertainties.
- i. 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.
  - (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.
- j. Apportionments and Budgetary Resources.<sup>10</sup> DoD FMR, vol. 3, ch. 19, paras. 1902 and 1903.
  - (1) The Office of Management and Budget (OMB) apportions appropriations and contract authority to working-capital funds by means of an SF 132.

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<sup>8</sup> This provision does not apply to depot maintenance activity groups. DoD FMR, vol. 2B, ch. 9, para. 090103H.2. A depot maintenance activity group must recoup operating losses or return operating gains of \$10 million or more in the current fiscal year (or the 1st quarter of the next fiscal year in the case of 4th quarter gains or losses). DoD FMR, vol. 2B, ch. 9, para. 090103H.4.

<sup>9</sup> The “stabilized rate” is defined as “the cost per direct labor hour (or other output measure) customers are charged for the products and services provided by the depot or activity group . . . [It] is determined by taking the approved Direct Labor Hour rate (or other cost per output measure) for the budget year and adjusting it for both inter-Fund transactions (adjustments to reflect changes in the costs of purchases between activity groups within the Fund), and for the impact of prior year gains or losses as reflected by the [Accumulating Operating Result].” DoD FMR, vol. 2B, ch. 9, para. 090104B.

<sup>10</sup> 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. DoD FMR, vol. 3, ch. 19, paras. 190203 and 190205.

- (2) Working-capital funds 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.
- (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.<sup>11</sup>**

- 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.
  - (2) Examples of the types of materials and supplies that supply management activity groups typically acquire include:
    - (a) Nonstandard end items of equipment that are not centrally managed and have a standard unit price of less than \$25,000;

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<sup>11</sup> These types of funds were previously known as Supply Management Business Areas or Stock Funds.

- (b) Assemblies, spares, and repair parts that are reparable at the depot level or below;
    - (c) Spares and repair parts which are not reparable; and
    - (d) Food, clothing, and petroleum products.
  - 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.<sup>12</sup>
  - 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. 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.
    - (1) There is an Army Management Fund, a Navy Management Fund, and an Air Force Management Fund.

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<sup>12</sup> These types of funds were previously known as Depot Maintenance Business Areas or Industrial Funds.

- (2) Each fund consists of a corpus of \$1 million, and any additional funds appropriated to the fund.
  
- b. 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. 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. 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 essentially the same as for Economy Act orders. DoD FMR, vol. 11A, ch. 18, para. 180302. See Chapter 6, *Interagency Acquisitions*, section V 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.access.gpo.gov/su\\_docs/aces/aces170.shtml](http://www.access.gpo.gov/su_docs/aces/aces170.shtml).
  
- 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").

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. no. 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. **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. See Chapter 6, *Interagency Acquisitions*, section V 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 27283 (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. 010101.J.
  - 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. 010101.J.
  - 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.

## **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).
  - 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. 090103.C.16. 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).<sup>13</sup>

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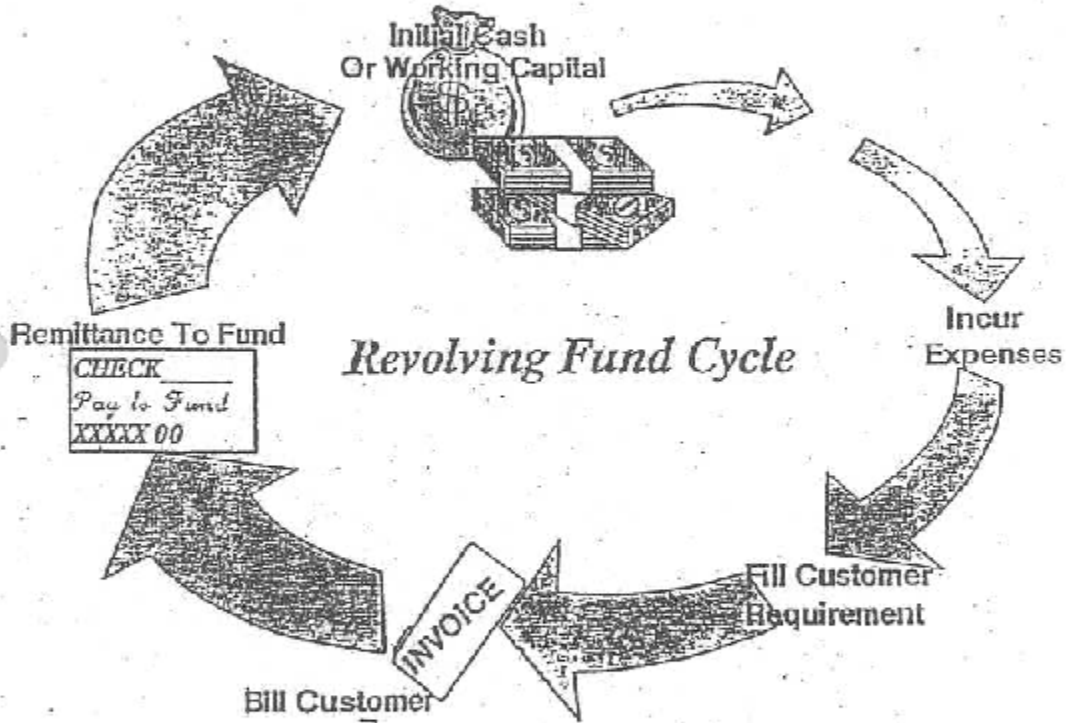
<sup>13</sup> This is merely an illustrative example. This limitation no longer applies. *See, e.g.*, Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, 112 Stat. 1920 (1998). Practitioners dealing with working capital funds should review the yearly DoD authorization and appropriation acts to determine whether Congress has imposed any such limitations.

## **VII. CONCLUSION.**

APPENDIX A

APPENDIX A

REVOLVING FUND CYCLE



## **APPENDIX B**

### **WORKING CAPITAL FUNDS - Statutes**

10 USCS § 2208

§ 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; 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 \[10 USCS § 4543\]](#).

(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 \[10 USCS § 2474\(b\)\(2\)\]](#) 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 \$ 100,000:

(A) An unspecified minor military construction project under section 2805(c)(1) of this [title \[10 USCS § 2805\(c\)\(1\)\]](#).

(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 \[10 USCS § 2801\(b\)\]](#)), other than a minor construction project financed by the fund pursuant to section 2805(c)(1) of this [title \[10 USCS § 2805\(c\)\(1\)\]](#).

(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.

**APPENDIX C**  
P.L. 110-116

TITLE V

REVOLVING AND MANAGEMENT FUNDS

Defense Working Capital Funds

For the Defense Working Capital Funds, \$1,352,746,000.

National Defense Sealift Fund

For National Defense Sealift Fund programs, projects, and activities, and for expenses of the National Defense Reserve Fleet, as established by section 11 of the Merchant Ship Sales Act of 1946 (50 U.S.C. App. 1744), and for the necessary expenses to maintain and preserve a U.S.-flag merchant fleet to serve the national security needs of the United States, \$1,349,094,000, to remain available until expended: Provided, That none of the funds provided in this paragraph shall be used to award a new contract that provides for the acquisition of any of the following major components unless such components are manufactured in the United States: auxiliary equipment, including pumps, for all shipboard services; propulsion system components (that is; engines, reduction gears, and propellers); shipboard cranes; and spreaders for shipboard cranes: Provided further, That the exercise of an option in a contract awarded through the obligation of previously appropriated funds shall not be considered to be the award of a new contract: Provided further, That the Secretary of the military department responsible for such procurement may waive the restrictions in the first proviso on a case-by-case basis by certifying in writing to the Committees on Appropriations of the House of Representatives and the Senate that adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis and that such an acquisition must be made in order to acquire capability for national security purposes.

# CHAPTER 8:



# CONSTRUCTION FUNDING

**CHAPTER 8**

**CONSTRUCTION FUNDING**

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## **CHAPTER 8**

### **CONSTRUCTION FUNDING**

#### **I. INTRODUCTION.**

##### **A. Objectives.**

Following this block of instruction, students will:

1. Understand the statutes and regulations governing funding and authorization of military construction, including the statutes authorizing military construction projects and the acts appropriating funds for military construction.
2. Understand how to apply construction funding rules to routine problems.

##### **B. New Developments.**

Practitioners must stay current since new developments frequently occur in this area of the law.

#### **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. § 12.
- C. Annual Military Construction Authorization and Appropriation Acts and their accompanying Conference Reports.
- D. DOD Dir. [4270.5](#), Military Construction (12 February 2005) [hereinafter DOD Dir. 4270.5].
- E. DOD Reg. [7000.14-R](#), DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 6, Military Construction/Family Housing Appropriations (July 2008) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 6].

- F. DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, [ch. 8](#), Facilities Sustainment and Restoration/Modernization (June 2007) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 8].
- G. DOD Reg. 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 (Dec 1996) [hereinafter DOD Reg. 7000.14-R, vol. 3, ch. 17].
- H. DFAS-IN Reg. 37-1, Finance and Accounting Policy Implementation (Jan 2000 w/ changes through Jan. 2009) [hereinafter DFAS-IN 37-1].
- I. [AR 415-32](#), Engineer Troop Unit Construction in Connection with Training Activities (15 Apr 1998) [hereinafter AR 415-32].
- J. AR 420-1, Army Facilities Management (12 Feb 2008) [hereinafter AR 420-1].<sup>1</sup>
- K. [DA Pam 420-1-2](#), Army Military Construction and Non-Appropriated Funded Construction Program Development and Execution (2 April 2009) [hereinafter DA Pam 420-1-2].
- L. [DA Pam 420-11](#), Project Definition and Work Classification (7 October 1994) [hereinafter DA Pam 420-11].
- M. Memorandum, Office of the Assistant Secretary of the Army Installations and Environment (8 Feb 2008) Delegation of Authority – Relocatable Buildings [hereinafter ASA(I&E) RLB memo, (8 Feb 2008)]. (Provided at Appendix A)
- N. Memorandum, Assistant Chief of Staff for Installation Management (10 Feb 2008) Interim Policy Change on Relocatable Buildings for Paragraphs 6-13 through 6-17 in AR 420-1, Army Facilities Management (10 February 2008) [hereinafter DAIM-ZA RLB memo, (10 Feb 2008)]. (Provided at Appendix B)
- O. Memorandum, Office of the Assistant Secretary of the Army Installations and Environment (13 May 2009) Additional Guidance to the Deputy Assistant Secretary of the Army (Installations and Housing), 8 February 2008 Memorandum, Delegation of Authority - Relocatable Buildings [hereinafter ASA(I&E) RLB memo, (13 May 2009)]. (Provided at Appendix C)

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<sup>1</sup> 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).

- P. AFI 32-1021, Planning and Programming of Facility Military Construction (MILCON) Projects (24 Jan 2003) [hereinafter AFI 32-1021].
- Q. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (15 Oct 2003) [hereinafter AFI 32-1032].
- R. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch. 9, Military Construction Appropriations (3 Mar 2005) [hereinafter AFI 65-601, vol. 1, ch. 9].
- S. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch 21, Military Family Housing (MFH) Appropriations (3 Mar 2005) [hereinafter AFI 65-601, vol. 1, ch. 21].
- T. OPNAVINST 11010.20G, Facilities Projects Manual (14 Oct. 2005) [hereinafter OPNAVINST 11010.20G].
- U. OPNAVINST 11010.33C, Procurement, Lease and Use of Relocatable Buildings (7 Mar. 2006) [hereinafter OPNAVINST 11010.33C].
- V. OPNAVINST 11011.10F, Utilization of Navy Real Property (24 Oct. 1989) [hereinafter OPNAVINST 11011.10F].
- W. Major Brian A. Hughes, *Uses and Abuses of O&M Funded Construction: Never Build on a Foundation of Sand*, ARMY LAW., Aug. 2005, at 1.

### **III. BACKGROUND.**

- A. Congressional Oversight of the Military Construction Program.
  - 1. Congressional oversight of the military construction program is pervasive and extensive.
  - 2. There are very few military construction projects that do not require advance approval by Congress. Of those that do not require advance approval by Congress, most require notifying Congress before executing the project.
- B. The Military Construction Codification Act (MCCA).

The purpose of the MCCA was to revise and codify recurring provisions of annual legislation relating to military construction and family housing. H.R. REP. NO. 97-612 (1982).

#### IV. DEFINITIONS.

##### A. 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.*”
2. Regulatory Definitions.
  - (1) FAR 2.101. The term “construction” refers to the construction, alteration, or repair of buildings, structures, or other real property.
    - (a) Construction includes dredging, excavating, and painting.
    - (b) Construction does not include work performed on vessels, aircraft, or other items of personal property.
  - (2) Service Regulations. 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:**
    - (a) The erection, installation, or assembly of a new facility;
    - (b) The addition, expansion, extension, alteration, functional conversion, or replacement of an existing facility;

- (c) The relocation of a facility from one site to another;
- (d) 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
- (e) Related real property requirements, including land acquisitions, site preparation, excavation, filling, landscaping, and other land improvements.

B. 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....”

C. Facility.

10 U.S.C. § 2801(c)(1). 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.”

D. Military Installation.

10 U.S.C. § 2801(c)(2). 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.*”

E. Appropriate Committees of Congress.

10 U.S.C. § 2801(c)(4) defines the “appropriate committees of Congress” as “the congressional defense committees” (e.g., the House and Senate Armed Services Committees).

F. Relocatable Building.

ASA(I&E) RLB memo, (8 Feb. 2008); DAIM-ZA RLB memo, (10 Feb 2008); ASA(I&E) RLB memo, (13 May 2009). **AR 420-1 relocatable building provisions that conflict with the aforelisted ASA(I&E) memoranda are invalid.**

1. An arrangement of components and systems designed to be transported over public roads with a minimum of assembly upon arrival and a minimum of disassembly for relocation. A relocatable building is designed to be moved and reassembled without major damage to floor, roof, walls, or other significant structural modification. ASA(I&E) RLB memo, (8 Feb. 2008).
2. The costs for disassembly, repackaging, any exterior refinishing (e.g. brick façade etc ...) and any interior work (e.g. electrical systems, fire suppression systems, walls or ceiling, etc.) including labor applied to the building after site delivery to make the relocatable building useable, and non-recoverable building components, including foundations, may not exceed 20 percent of the purchase price of the relocatable building. ASA(I&E) RLB memo, (8 Feb. 2008). When force protection requirements warrant that concrete slabs are used as foundations for relocatable buildings, the cost of the concrete slab shall be excluded from the determination of the 20% calculation of the relocatable building. ASA(I&E) RLB memo, (13 May 2009).
3. Relocatable buildings classified as personal property will either be funded with operations and maintenance or procurement appropriations depending upon the Expense-Investment Threshold contained in law for capital equipment purchase. Whether the relocatable are procured to be stacked or installed individually, all the modules the comprise the entire relocatable building are a system. This includes the normal amenities or components one finds in buildings: plumbing, electrical systems, and heating ventilation and air conditioning, etc. It does not include furnishings or other attachments. ASA(I&E) RLB memo, (13 May 2009).
4. May only be used for more than 6 years with the approval of ASA(I&E). ASA(I&E) RLB memo, (8 Feb. 2008).

## V. 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.

## VI. DEFINING THE SCOPE OF THE PROJECT.

- A. Military Construction Project.

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).

- 1. Project splitting and/or incrementation<sup>2</sup> is prohibited!!

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<sup>2</sup> AR 415-32, Glossary, sec. II, defines “incrementation” as: “The splitting of a project into separate parts where-

- a. It is done solely to reduce costs below an approved threshold or minor construction ceiling, or
- b. Each part is in itself complete and usable, or

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.

2. 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. 2.6; 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).
3. An agency may not treat “clearly interrelated”<sup>3</sup> 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.

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- c. The total project is not complete until all parts are complete.”

See DA Pam 420-11, Glossary, sec. II; see also AR 420-1, Glossary, sec. II (distinguishing between the phasing of construction and incremental construction).

<sup>3</sup> AR 415-32, Glossary, sec. II, 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*, 87<sup>th</sup> Cong. (1962); Hon. Sam Rayburn, Comp. Gen., B-133316 (Jan. 24, 1961); and Hon. Sam Rayburn, Comp. Gen., B-133316 (Mar. 12, 1962).



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
      - (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.<sup>4</sup>
    - (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.

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<sup>4</sup> The conference report indicated that a military department should rarely use these exceptions. H.R. REP. NO. 97-612 (1982).

- (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:
    - (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, 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:<sup>5</sup>
  - (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.

## VII. CLASSIFYING THE WORK.

### A. Construction.

- 1. 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.
- 2. 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, attach 1; OPNAVINST 11010.20G, para. 4.1.1. Construction includes:
  - a. The erection, installation, or assembly of a new facility.

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<sup>5</sup> Cf. OPNAVINST 11010.20G, para. 4.2.1.a (imposing similar requirements for construction work involving multiple facilities).

- b. The addition, expansion, extension, alteration, conversion, or replacement of an existing facility.
- (1) An addition, expansion, or extension is a change that increases the overall physical dimensions of the facility.
  - (2) 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.
  - (3) A conversion is a change to the interior or exterior arrangements of a facility that permits its use for a new purpose.
  - (4) A replacement is the complete reconstruction of a facility that has been damaged or destroyed beyond economical repair.
- c. The relocation of a facility from one site to another.<sup>6</sup>
- (1) A facility may be moved intact, or disassembled and later reassembled.
  - (2) Work includes the connection of new utility lines, but excludes the relocation of roads, pavements, or airstrips.
  - (3) Relocation of two or more facilities into a single facility is a single project.
- d. 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.

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<sup>6</sup> 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).

- e. Related site preparation, excavation, filling, landscaping, or other land improvements.<sup>7</sup>
  
- f. Construction may include relocatable buildings 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).
  - (1) Relocatable buildings.
    - (a) References:
      - (i) 10 U.S.C. 2801.
      - (ii) DoDI 4165.56 dtd Apr '88.
      - (iii) IMAA-PWD Memo, Subject: Funding Clarification Guidance for Acquisitions of and Site Preparation for Relocatable Buildings in Support of Transformation dtd 27 Feb '06.
      - (iv) ASA(I&E) RLB memo, (8 Feb. 2008).
      - (v) DAIM-ZA RLB memo, (10 Feb 2008).
      - (vi) ASA(I&E) RLB memo, (13 May 2009).

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<sup>7</sup> This includes the foundation, site work, and utility work associated with the setup of a relocatable building. AR 420-1.



- (vii) AR 420-1 dtd 12 Feb 2008 (Rapid Action Revision dated 28 Mar 2009) **AR 420-1 relocatable building provisions that conflict with the aforesited ASA (I&E) memoranda are invalid.**
- (b) General Rule: A “relocatable building” must be funded as a construction project if the estimated funded and unfunded costs for average building disassembly, repackaging (including normal repair and refurbishment of components, but not transportation), and nonrecoverable building components, including typical foundations, **exceed 20%** of the acquisition cost of the relocatable building itself. DoDI 4165.56 dtd Apr '88, para. 3.2.1. The DoDI also includes a partial list of the nonrecoverables. That list includes fasteners, skirting, ancors, and seals. It did not include additional interior and exterior construction. See interim policy, Table 5-4.
- (c) The Army clarified the 20 percent rule in its Interim Policy published in February 2008. The policy states “[t]he costs for disassembly, repackaging, any exterior refinishing (e.g. brick façade, etc ...) and any interior work (e.g. electrical systems, fire suppression systems, walls, or ceilings, etc.) including labor applied to the building after site delivery to make the relocatable building usable, and non-recoverable building components, including foundations, may not **exceed 20 percent** of the purchase price of the relocatable building. (Foundations include blocking, footing, bearing plates, ring walls, and concrete slabs. When concrete slabs are used as relocatable building foundations or floors the entire cost of the slab will be included in the foundation cost).” ASA(I&E) RLB memo, (8 Feb. 2008). In 2009, ASA(I&E) modified the policy by excluding the cost of concrete foundation slabs from the determination of the 20% calculation when such slabs are justified by force protection requirements. ASA(I&E) RLB memo, (13 May 2009).

- (d) Under the interim policy relocatable buildings may be used for no more than 6 years unless approved by ASA (I&E).<sup>8</sup>
  - (e) If the costs above exceed 20% of the acquisition cost of the relocatable building, the building will be considered real property and will be approved, funded, and provided as a construction project (with either O&M or MILCON funds, as appropriate), in accordance with AR 420-1.
  - (f) If the costs do not exceed 20%, account for the buildings as personal property (use either O&M or Procurement funds, as appropriate).
  - (g) 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 aircondition, etc. It does not include furnishings or other attachments.” ASA(I&E) RLB memo, (13 May 2009).
- (2) Legal review required prior to approval of relocatable building purchase or lease. AR 420-1, para. 6-14l(2).
  - (3) Approval Authorities. Generally, DASA (I&H) for all purchases and leases exceeding 1 year or costing more than \$100,000. Director, IMCOM, for short term leases or leases costing less than \$100,000. AR 420-1, Table 6-1.

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<sup>8</sup> 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).

B. Maintenance and Repair.

1. **Maintenance and repair projects are not construction.** 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 \$750,000 O&M limitation on construction.<sup>9</sup> 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”).
  
2. Definitions.
  - a. Maintenance.
    - (1) 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.
    - (2) 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, atch 1.
    - (3) 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.”

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<sup>9</sup> 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).

- (a) 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).
- (b) 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:
  - (i) Minimize or correct wear; and
  - (ii) Ensure the maximum reliability and useful life of the facility or component.

b. Repair.

- (1) 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.
- (2) “New” DOD Definition. DOD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. See Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/Budget), subject: Definition for Maintenance and Repair (2 July 1997) [hereinafter DOD Repair Memorandum]. The term “repair” means 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.
  - (a) When repairing a facility, the military department or agency may:
    - (i) Repair components of the facility by replacement; and

- (ii) Use replacements that meet current building standards or code requirements.<sup>10</sup>
  - (b) The term “repair” includes:
    - (i) Interior rearrangements that do not affect load-bearing walls; and
    - (ii) The restoration of an existing 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, or environmental).
  - (c) The term “repair” does not include additions, new facilities, and functional conversions. See 10 U.S.C. § 2811(c).
- (3) Army Definition. AR 420-1, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 1-7. See Memorandum, Assistant Chief of Staff for Installation Management, subject: New Definition of “Repair” (4 Aug. 1997) [hereinafter DA Repair Memorandum]. The term “repair” means to restore a facility or a facility component to such a condition that the Army may use it effectively for its designated functional purpose.

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<sup>10</sup> AR 420-1, para. 4-17b, states that “heating, ventilation, and air conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and can provide for more capacity than the original unit due to increased demands and standards.” See DA Pam 420-11, para. 1-7h (stating that the Army should use energy and water saving materials whenever feasible).

- (a) The DA Repair Memorandum states that: “The new definition is more liberal and expands [the Army’s] ability to provide adequate facilities for [its] soldiers and civilians;” however, the DA Repair Memorandum also states that: “**A facility must exist and be in a failed or failing condition in order to be considered for a repair project.**” See DA Pam 420-11, para. 1-7e (stating that “[r]epair means that the facility or facility component has failed, or is in the incipient stages of failing, or is no longer performing the functions for which it was designated”).
  
- (b) The term “**repair**” includes:
  - (i) Overhauling, reprocessing, or replacing deteriorated components, parts, or materials;
  
  - (ii) Correcting deficiencies in failed or failing components to meet current building standards or code requirements if the Army can perform the work more economically by performing it concurrently with the restoration of other failed or failing components;<sup>11</sup>
  
  - (iii) Relocating or reconfiguring components (e.g., partitions, windows, and doors) during a major repair project if they are replacements for existing components;<sup>12</sup>
  
  - (iv) Relocating or reconfiguring utility systems during a major repair project to meet current building standards or code requirements if the total area or population served by the utility system remains the same; and

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<sup>11</sup> The DA Repair Memorandum indicates that the Army can add a sprinkler system or air conditioning to bring a facility up to applicable standards or codes, provided the facility is in a failed or failing condition.

<sup>12</sup> A major repair project would include gutting the interior of a building.

(v) Incorporating additional components during a major repair project if: (a) the system is in a failed or failing condition;<sup>13</sup> and (b) incorporating the additional components makes the replacement system safer and more efficient.

(c) The term “**repair**” does **not** include:

(i) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;

(ii) Increasing the quantities of components for functional reasons;

(iii) Extending utilities or protective systems to areas not previously served;

(iv) Increasing exterior building dimensions; or

(v) 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, atch 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:

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<sup>13</sup> Under certain circumstances, the Army may classify a utility system or component as “failing” if it is energy inefficient or technologically obsolete. See AR 420-1, Glossary, sec. II.

- (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);<sup>14</sup>
  - (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 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;

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<sup>14</sup> Moving load-bearing walls is construction. AFI 32-1032, para. 4.1.2.1.2.



- (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;<sup>15</sup> or
- (xiii) Repairing a facility if the repair work exceeds 70% of the facility’s replacement cost.<sup>16</sup>

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<sup>15</sup> Repair work required regardless of a functional conversion may still be repair work. AFI 32-1032, para. 5.1.2.3.2.

c. Navy Definition. OPNAVINST 11010.20G, para. 3.1.1.<sup>17</sup> 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.”

(1) The term “repair” includes:<sup>18</sup>

- (a) 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);
- (b) 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);
- (c) 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 state of operating efficiency without adding increased capability for the facility;
- (d) The replacement of energy consuming equipment with more efficient equipment if:

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<sup>16</sup> 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.

<sup>17</sup> This regulatory provision pre-dates the DOD’s new definition of repair. See DOD Repair Memorandum.

<sup>18</sup> OPNAVINST 11010.20G, para. 3.1.3, contains several additional examples of repair projects.

- (i) The shore activity can recover the additional cost through cost savings within 10 years;
    - (ii) The replacement does not substantially increase the capacity of the equipment; and
    - (iii) The new equipment provides the same end product (e.g., heating, cooling, lighting, etc.).
  - (e) 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.)
  - (2) 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. 4-17c; 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.

## VIII. DETERMINING 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;<sup>19</sup>
  - b. Installed capital equipment;<sup>20</sup>
  - c. Transportation costs for materials, supplies, and unit equipment;<sup>21</sup>

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<sup>19</sup> 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).

<sup>20</sup> 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 funded from O&M, RDT&E, or procurement appropriations. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170304 and 170305.

- 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;<sup>22</sup>
- 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, atch 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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<sup>21</sup> 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).

<sup>22</sup> 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;*<sup>23</sup>
  - c. Materials, supplies, and equipment obtained for the project on a non-reimbursable basis as *excess distributions* from *another* military department or federal agency.<sup>24</sup>
  - 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;<sup>25</sup>

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<sup>23</sup> Equipment maintenance and operation costs are funded costs.

<sup>24</sup> 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 420-8, para. 9-2q. Transportation costs for such items are funded costs.

<sup>25</sup> See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.I.4 (stating that planning and design costs are excluded from the cost determination for purposes of determining compliance with 10 U.S.C. §

- g. Gifts from private parties;<sup>26</sup> and
  - h. Donated labor and material.<sup>27</sup>
3. Report unfunded costs to higher headquarters even though they do not apply toward the military construction appropriation limitations.

## IX. SELECTING THE PROPER APPROPRIATION.

### A. Sources of Military Construction Funding.

1. **Military Construction Appropriations Acts (MILCON Appropriations Act).** See, e.g., Military Quality of Life and Veterans Affairs Appropriations Act, 2006 [note: includes Military Construction Appropriations], Pub. L. No. 109-114, 119 STAT. 2372; and Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004).
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.

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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).

<sup>26</sup> 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 date, the Fishers have completed, or are in the process of completing 32 Fisher Houses. See, <http://www.fisherhouse.org/>.

<sup>27</sup> The acceptance of donated labor may violate the prohibition against accepting voluntary services. 31 U.S.C. § 1342.

See, e.g., Department of Defense Appropriations Act for Fiscal Year 2006, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

1. Provides some miscellaneous “pots” 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 annual Military Construction Authorization Act. An example is provided at Appendix D. The conference report accompanying the Military Construction Authorization Act breaks down project authorizations by project. An example of this breakdown is provided at Appendix E.
    - (1) Congress typically specifically authorizes only those military construction projects expected to exceed \$2 million.<sup>28</sup>
    - (2) A military department may not carry out a military construction project expected to exceed \$2 million without specific Congressional authorization and approval.

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<sup>28</sup> Congress may also specify projects under \$2 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).



- b. Proper Appropriation. Congress provides funding for specified military construction projects in the annual Military Construction Appropriations Act. An example is provided at Appendix F. 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.<sup>29</sup>
- 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.
- b. An UMMC project is defined as a military construction project having an *approved cost* of \$2 million or less.<sup>30</sup>
- c. An UMMC project can have an approved cost up to \$3 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."

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<sup>29</sup> The statutory provisions governing military family housing are at 10 U.S.C. §§ 2821-2837.

<sup>30</sup> 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. Congress did not, however, increase the amount allowed if the military construction addresses 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:<sup>31</sup>

- (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 provides funding for UMMC projects in the Military Construction Appropriations Act. An example is provided at Appendix F.

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 conference report accompanying the Military Construction Appropriations Act identifies the amount available for unspecified minor construction.<sup>32</sup> An example is provided at Appendix G.

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<sup>31</sup> This justification requirement applies to all UMMC projects having an approved cost over \$2M and all OMA-funded military construction projects costing more than \$750,000.

<sup>32</sup> For FY2006, for example, Congress appropriated UMC funds in the amounts of \$24.1M for the Army; \$14M for the Navy, and \$15.9M for the Air Force. *See Military Construction Appropriations Act, 2006, Pub. L. No. 109-114, H.R. CONF. REP. NO. 109-305 (2005), 119 STAT 2372.*

- f. The Army refers to its “unspecified” military construction appropriations as “Unspecified Minor Military Construction, Army” (UMMCA). AR 420-1, Appendix D.<sup>33</sup>
  
  - g. Requirements for Use. 10 U.S.C. § 2805(b).
    - (1) Before beginning an UMMC project with an approved cost greater than \$750,000, the Secretary concerned must approve the project.
  
    - (2) In addition, the Secretary concerned must:
      - (a) Notify the appropriate committees of Congress;<sup>34</sup> and
  
      - (b) Wait 21 days.<sup>35</sup>
3. UMMC Projects Financed by Operation & Maintenance (O&M) Funds.

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<sup>33</sup> 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.

<sup>34</sup> 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).

<sup>35</sup> 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.

- a. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See AR 420-1, para. 2-14; AFI 32-1021, para. 4.2; OPNAVINST 11010.20G, para. 6.1.1.f. The Secretary of a military department may use O&M funds to execute UMMC projects not otherwise authorized by law and *costing not more than*.<sup>36</sup>
  - (1) \$1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.<sup>37</sup>
  - (2) \$750,000 if the project is intended for any other purpose.<sup>38</sup>
  
- 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:

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<sup>36</sup> The thresholds for O&M funded projects were raised from \$500,000 to \$750,000, and from \$1 million to \$1.5 million under the expanded life health and safety authority by the DOD Authorization Act for FY 2002. See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012, Section 2801. The statutory change was effective on 28 December 2001. To the extent that regulatory cites in this outline specify a \$500,000 threshold, those cites pre-date the increase in the statutory threshold and may or may not be controlling at the time you review your project.

<sup>37</sup> The Air Force requires prior approval of SAF/MII and Congressional notification for projects solely to correct a life, health, or safety deficiency that exceed \$750,000 (but not more than \$1,500,000). AFI 32-1032, para 5.1.2.1 and AFI 65-601, Vol. 1., para. 9-10.

<sup>38</sup> AR 420-1, para. 2-12d, requires Army activities to use O&M funds for construction projects that cost less than the statutory thresholds. Army activities must obtain prior approval from HQDA to use military construction funds for construction projects costing \$750,000 or less.

- (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 Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); see also AR 415-32, para. 3-11d. For procedural guidance for executing ERC, see JOINT CHIEFS OF STAFF, INSTR. 4600.01, EXERCISE-RELATED CONSTRUCTION STANDARD OPERATING PROCEDURES (20 Jun. 2001).

- (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. Pursuant to Section 2808 of the Military Construction Authorization Act for Fiscal Year 2009, Division B of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law Number 111-383, 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 Task Force-Horn of Africa** that the Secretary determines meets each of the following conditions:

- (1) 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.
- (2) 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.
- (3) The United States has no intention of using the construction after the operational requirements have been satisfied.
- (4) The level of construction is the minimum necessary to meet the temporary operational requirements.

b. **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:**

- (1) the 10-day period beginning on the date the notice is received by the committees or, if earlier,
- (2) 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:

- (a) Certification that the conditions specified in subsection (a) are satisfied with regard to the construction project.
- (b) A description of the purpose for which appropriated funds available for operation and maintenance are being obligated.
- (c) All relevant documentation detailing the construction project.
- (d) An estimate of the total amount obligated for the construction.

c. Annual Limitation on Use of Authority.—

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.

- (1) If the Secretary of Defense certifies to the congressional defense committees that additional construction in Afghanistan is required to meet urgent military requirements in Afghanistan, up to an additional \$100,000,000 in funds available for operation and maintenance for fiscal year 2011 may be used in Afghanistan subject to the notification requirements under subsection (b). Under no circumstances shall the total appropriated funds available from operation and maintenance for that fiscal year exceed \$300,000,000.
- (2) 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).

d. QUARTERLY REPORT.—

- (1) Not later than 45 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.
- (2) 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.

e. **RELATION TO OTHER AUTHORITIES.—The temporary authority provided by this section, and the limited authority provided by section 2805(c) of title 10, United States Code, to use appropriated funds available for operation and maintenance to carry out a construction project are the only authorities available to the Secretary of Defense and the Secretaries of the military departments to use appropriated funds available for operation and maintenance to carry out construction projects.**

f. **CONGRESSIONAL COMMITTEES.—The congressional committees referred to in this section are the following:**

- (1) The Committee on Armed Services and the Subcommittee on Defense and the Subcommittee on Military Construction, Veterans Affairs, and Related Agencies of the Committee on Appropriations of the Senate.



- (2) The Committee on Armed Services and the Subcommittee on Defense and the Subcommittee on Military Construction, Veterans Affairs, and Related Agencies of the Committee on Appropriations of the House of Representatives.
  
- g. Effect of Failure to Submit Quarterly Reports or Project Notifications.--If the report for a fiscal-year quarter under subsection (d) or the advance notice of the proposed obligation of the funds for a construction project required by subsection (b) is not submitted to the congressional committees specified in subsection (f) by the required date, appropriated funds available for operation and maintenance may not be obligated or expended after that date under the authority of this section to carry out construction projects outside the United States until the date on which the report or notice is finally submitted.
  
- h. EXPIRATION OF AUTHORITY.—The authority to obligate funds under this section expires on the later of—September 30, 2011; or the date of the enactment of an Act authorizing funds for military construction for fiscal year 2012.
  
- i. (i) DEFINITIONS.—In this section:
  - (1) The term ‘area of responsibility’, with respect to the Combined Task Force-Horn of Africa, is Kenya, Somalia, Ethiopia, Sudan, Eritrea, Djibouti, and Seychelles.
  
  - (2) 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.

j. Implementing Guidance. On 1 April 2004, the Deputy Secretary of Defense issued implementing guidance for Section 2808 of the FY 2004 Defense Authorization Act. See Memorandum, Deputy Secretary of Defense, Subject: Use of Operation and Maintenance Appropriations for Construction during Fiscal Year 2004 (1 April 2004).

- (1) Pursuant to this guidance, Military Departments or Defense Agencies are to submit candidate construction projects exceeding \$750,000 to the Under Secretary of Defense (Comptroller).
- (2) The request will include a description and the estimated cost of the project, and include a certification by the Secretary of the Military Department or Director of the Defense Agency that the project meets the conditions stated in Section 2808 of the FY 04 Defense Authorization Act.

The Under Secretary of Defense (Comptroller) will review the candidate projects in coordination with the Under Secretary of Defense (Acquisition, Technology, and Logistics), and the Under Secretary of Defense (Comptroller) will notify the Military Department or Defense Agency when to proceed with the construction project.

5. Contingency Construction Projects. 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.<sup>39</sup>

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<sup>39</sup> 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.

- b. Proper Appropriation. Funds are specifically appropriated for construction under 10 U.S.C. § 2804.<sup>40</sup>
- c. Requirements for Use.
  - (1) 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:
  - (1) Notify the appropriate committees of Congress;<sup>41</sup> and
  - (2) Wait 21 days.<sup>42</sup>

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<sup>40</sup> 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 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).

<sup>41</sup> 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).

<sup>42</sup> 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.

e. 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 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.

(2) 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].”

(3) 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.

- (4) 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.
  
- 6. 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.<sup>43</sup>
    - (1) Congress must normally approve a reprogramming request for the project.<sup>44</sup>
    - (2) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

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<sup>43</sup> 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).

<sup>44</sup> 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).

- (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;<sup>45</sup> and
  - (b) Wait 21 days.

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<sup>45</sup> 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).

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.<sup>46</sup>

(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.

7. 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 facilities as necessary to meet the missions of the reserve components.

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<sup>46</sup> 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).

- (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.
- 8. 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.<sup>47</sup>
  - b. Proper Appropriation. The SECDEF must use unobligated military construction funds, including funds appropriated for family housing, to finance these projects.

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<sup>47</sup> 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;<sup>48</sup> 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).<sup>49</sup>
9. 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.<sup>50</sup>

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<sup>48</sup> 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).

<sup>49</sup> **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."

<sup>50</sup> 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

c. Requirements for Use.

(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;<sup>51</sup> and

(b) Wait 21 days.<sup>52</sup>

10. 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.<sup>53</sup>

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see DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.G.2 (detailing the requirements for reprogramming requests).

<sup>51</sup> 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).

<sup>52</sup> 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.

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.

(a) The Secretary concerned may use O&M funds under 10 U.S.C. § 2805(c) if the cost of the project is \$750,000 or less.<sup>54</sup>

(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.<sup>55</sup> See H.R. REP. NO. 97-612 (1982).

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<sup>53</sup> 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.

<sup>54</sup> The expanded thresholds for Life, Health, and Safety threatening situation should be considered for use in these situations.

<sup>55</sup> MILCON funds are the funds Congress appropriates under the Military Construction Appropriations Act. They include both “specified” funds and UMMC funds.

- (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.<sup>56</sup>
  - (i) Congress must normally approve a reprogramming request for the project.<sup>57</sup>
  - (ii) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.
- (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 (i.e., \$1.5 million), the Secretary concerned must:
  - (i) Notify the appropriate committees of Congress;<sup>58</sup> and
  - (ii) Wait 21 days.

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<sup>56</sup> 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).

<sup>57</sup> 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).

<sup>58</sup> 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).

(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 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”).<sup>59</sup>

D. Statutory Thresholds.

1. If the approved cost of the project is \$750,000 or less (\$1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety), use O&M funds.
2. If the approved cost of the project is between \$750,000 and \$2 million (\$3 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.
3. If the approved cost of the project is greater than \$2 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.

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<sup>59</sup> OPNAVINST 11010.20G, para. 4.4.3, defines “major restoration” as “restoration costing in excess of 50 percent of the plant replacement value (PRV).”

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.<sup>60</sup>
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;
  - b. When the violation was discovered and corrected; and
  - c. Continuously between the date of the violation and the date of correction.<sup>61</sup>

F. Authorized Variations.<sup>62</sup>

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<sup>60</sup> 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).

<sup>61</sup> Obtaining the proper funds (i.e., funds that meet the 3-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.

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 \$750K (or \$1.5M) 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 \$1.5 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:

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<sup>62</sup> 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.



- (1) The increase or decrease is required solely to meet unusual variations in cost; and
    - (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)).

## **X. VERIFYING THE IDENTITY OF 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 \$750,000 or less (\$1.5 million in the case of a life, health, or safety project). 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 \$750,000 and \$1.5 million.<sup>63</sup> AR 420-1, app. D.
2. Air Force. AFI 32-1032, 5.1.<sup>64</sup>
  - 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).<sup>65</sup>
  - 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.

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<sup>63</sup> Regulation was published prior to the increase in UMMC under the 2008 NDAA. JAs should verify whether the amount has increased to \$2 million.

<sup>64</sup> This regulation predates the legislation that increased the statutory threshold for O&M projects to \$750,000.

<sup>65</sup> The AF/ILE may further delegate this authority. AFI 32-1032, para. 1.4.

- c. The Assistant Secretary of the Navy (Installations & Environment) (ASN(I&E)) approves projects costing between \$500,000 and \$1.5 million (\$3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety).
- 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 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).

## **XI. CONCLUSION.**

- A. Use a Structured Methodology to Analyze Construction Funding Issues.
- B. Document Rationale for Funding Decisions.
- C. Additional Rules May Apply During Overseas Exercises and Contingency Operations.

## **XII. NOTES**

# Army Facilities Management

Headquarters  
Department of the Army  
Washington, DC  
12 February 2008

**Rapid Action Revision (RAR) Issue Date: 28 March 2009**

## UNCLASSIFIED

passengers or tonnage carried, or hours use) should be established. In all cases a document shall be retained on file to reflect the specific utilization goals that have been established for each vehicle. For example, the DPW has 10 pick-up trucks assigned to trades (electrical, plumbing, carpentry, land management). The trucks drive to work site and spend majority of time at the work site. Nine of the trucks are active at jobs sites on an average of at least 6.5 hours per day. One truck has low mileage and is assigned against a job only one hour per day. Is that 10th truck needed? Does the supervisor use the truck to visit job sites to check on work? Can the supervisor use his own car and get reimbursed or borrow another lightly used work vehicle? Do the job sites have POV restrictions? The local management must make a decision on whether the extra truck is necessary. Documentation, which should be robust enough to withstand an external audit, should be retained in the project data. The documentation should be reviewed and updated on an annual basis.

(2) All public works equipment end items will be documented as per AR 710-2.

(3) The IMCOM will—

(a) Appoint individuals responsible for management of the public works equipment program.

(b) Conduct agencywide surveillance of their equipment program. This is accomplished by monitoring reports and other equipment actions and by making staff visits.

(c) Visit each garrison on an established schedule by individuals having a general knowledge of the public works mission and a thorough knowledge of the management of the public works equipment program.

1. The purposes of these visits are to assess conformance with guidance and directives, to ensure the use of internal management control review checklists, to evaluate systemic problems, and to provide assistance.

2. A written report will document this visit with a copy provided to the visited activity and maintained for review.

(4) When appropriate, payment in the form of rental rates (for all operating, maintaining, and expenses of managing) and depreciation costs will be obtained for those equipment items used to accomplish public works maintenance, repair, and minor construction projects and other reimbursable services. Equipment rental for troop labor projects shall be considered a funded cost.

(a) Rental rates and depreciation costs should be locally determined or obtained from commercial sources. Payment should be to an established local account or an identifiable functional cost account code.

(b) Documentation of procedures used to establish rental rates and changes to rental rates, and a record of rents received will be maintained for at least 2 years.

(c) Documentation of the procedures used to establish depreciation rates and changes to these rates, and a record of payments received, will be maintained for 2 years after the item is no longer considered in service.

*b. Safety considerations.*

(1) Public works equipment acquired, loaned, or leased will be operated and maintained in compliance with AR 385-10.

(2) The operation of an item of equipment that is in an unsafe mechanical condition or in an unsafe manner is prohibited (see AR 385-10).

(3) Accidents involving public works equipment will be reported per AR 385-10.

(4) The provisions of the Operational Safety and Health Act (OSHA) (<http://www.hqda.army.mil/acsimweb/>

homepage.shtml) are applicable as are shop safety precautions such as those found in 29 CFR 1910.

- (5) Supervisors will ensure that personnel are provided with and required to use safety equipment, personal protection equipment, and those devices necessary to protect themselves and other individuals.
- (6) All personnel will be given an initial indoctrination that will include instructions in—
- (a) Safe practices and working in a safe manner.
  - (b) Accident prevention and recognizing hazardous conditions.
  - (c) Accident and hazardous condition reporting.
  - (d) The proper use and maintenance of equipment and tools.
- (7) The above safety considerations apply to users of public works activity equipment issued or loaned as part of the self-help program.

## **Section IV**

### **Personal Property Relocatable Buildings**

#### **6–13. Overview**

- a. This guidance establishes Army policy and procedures for the authorization, acquisition, use, sustainment, and disposition of relocatable buildings acquired as personal property. It applies to relocatable buildings on Army controlled property, purchased or leased as personal property, regardless of the source of funds.
- b. This guidance does not apply to personal property items that are accountable in organic troop unit allowance lists such as table of allowances (TOAs) and tables of equipment (TOEs), tents, portable chemical toilets, and Family housing.
- c. This guidance does not apply to building types and forms that are provided as an integral part of a mobile equipment item and that are incidental portions of such equipment components, such as medical mobile units, communications vans or communications trailers.
- d. This guidance does not apply to tactical use relocatable buildings that are centrally managed.
- e. This guidance does not apply to structures that are 120 sq ft or smaller in combined floor size that are not connected to Real Property utilities. These structures will be approved, accounted for, and controlled by IMCOM. Each structure will have a sign with unit, POC, phone number and any other information IMCOM requires.
- f. This guidance does not apply to Relocatable Buildings provided and approved as swing space or support as part of an MCA/Medical MILCON project and the relocatable buildings must be removed immediately upon completion of the MCA/Medical MILCON contract. Siting and utility support for contractor-provided relocatable buildings must be locally approved by the Garrison.
- g. This guidance does not apply to Relocatable Buildings provided and approved as swing space or support as part of an operation and maintenance construction or repair project and the relocatable buildings must be removed immediately upon completion of the contract. Those Relocatable Buildings must not be the major part or main use of the project and are to be used only to support the work of the project. Siting and utility support for contractor-provided relocatable buildings must be locally approved by the Garrison.
- h. Contractor-owned relocatable buildings provided for contract administration do not require approval under this policy and must be removed upon completion of the contract. Siting and utility support for contractor-provided relocatable buildings must be locally approved by the Garrison.
- i. This guidance does not apply to tents that are purchased or leased, are not part of a TDA or TOE, and are not connected to real property utilities. Sprung type shelters and similarly constructed structures are not considered tents.

#### **6–14. General policy**

- a. *Interim requirement.* A short-term, urgent requirement due to transitory peak military missions, deployments, military contingency operations, disaster relief requirements, or pending approval and construction of real property facilities via normal military construction programs. The short term requirement must have an approved exit plan to dispose of the building(s).
- b. *Relocatable building.* Personal property used as a structure, that would have a building category code if it was real property, designed to be readily moved, erected, disassembled, stored, reused, and meets the 20 percent rule. Personal property is managed as equipment.
- (1) The sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20 percent of the purchase cost of the relocatable building. If the percentage is greater than 20 percent, then the facility must be acquired as real property and follows real property project approval authorities. Typical foundations include blocking, footings, bearing plates, ring walls, and slabs that are an integral part of the relocatable building. 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). Slabs that are Real Property and not part of the actual building are not counted in the 20 percent.

(2) Tents that use real property utilities will be considered relocatable buildings.

*c. Site preparation project approval.*

(1) Site preparation costs are classified as construction because the items installed are permanent in nature and become Real Property-foundations, utilities, parking, and so forth. Projects for Site Preparation are subject to the statutory approval limitations for new construction. A construction project must result in a complete and usable facility. In the case of site preparation projects, the “complete and usable facility” is the prepared site. Accordingly, for project approval purposes, the work to prepare each distinct site is a project. Generally, in order to be “distinct,” a site is characterized by the following:

(a) Independent of work at any other site to be “complete and usable.”

(b) Independent of mission function at any other site to be “complete and usable.”

(c) Site preparation work on no other site is dependant on it.

(2) Site preparation costs must be combined into one project for approval purposes for sites that are interdependent, but may be separately approved for sites that are inter-related. Inter-related contiguous sites are considered distinct and separate as long as each site is prepared as a complete and useable independent project.

*d. Expense/investment threshold.* The expense/investment threshold applies to the purchase and assembly and does not include delivery and set-up.

*e. Delivery and set-up.* The process of bringing the relocatable components from the point of origin to the point of destination and includes all work necessary to unload and stage the components. Delivery and set-up will be locally approved.

*f. Purchase and assembly.* Procurement of the relocatable components and work necessary to have a complete building or system, excluding delivery and set-up. Assembly includes connection to existing utility systems. Purchase and assembly are included in the approval request.

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*g. Personal property.* Relocatable buildings will be accounted for as personal property.

*h. Services contracts.* Services contracts will not be used to acquire relocatable buildings.

*i. Approval.* Approval of relocatable buildings as swing space in support of maintenance, repair, or construction contracts, must comply with authorities shown in table 6–1.

**Table 6–1**

**Army relocatable building approval and redelegation authorities**

Action Commander, IMCOM

and

Army Command, Army Service Component Command,

and Direct Reporting Unit Commanders

DASA(I&H)

Lease (Non-BRAC) Time: Known requirement 1 year or less and

Cost: Total lease \$100,000 or less.

Time: Known requirement exceeds 1 year or

Cost: Greater than \$100,000.

Purchase No Authority Unrestricted

*j.* Approval authorities for leased relocatable buildings are based on the total estimated leased cost. Setup, sustainment, and removal costs are normally contained within the lease.

*k.* Approval authorities for purchased relocatable buildings are based on the total estimated cost (total actual purchase plus assembly).

*l.* IMCOM will validate and submit requests for relocatable buildings on IMCOM controlled installations. For contingency areas and installations not funded by and under command and control of IMCOM, ACOM, ASCC, and DRUs will validate and submit requests for relocatable buildings directly to the ACSIM with a copy of the request provided to IMCOM. The project approval documentation will consist of:

(1) A request memorandum from the Region or HQ.

(2) Legal review.

(3) Completed relocatable building approval worksheet (IMCOM developed, ACSIM approved format).

(4) Validated economic analysis.

(5) Approved site plan.

(6) Justification for relocatable requirement.

*m.* IMCOM will maintain a comprehensive list of all Army relocatable buildings, including those located at non-

IMCOM controlled installations. IMCOM will cross-level all Army owned relocatable buildings at the end of the approved period of use.

n. The approved period of use begins with beneficial occupancy date of a relocatable building.

o. IMCOM will ensure that relocatable buildings, including those from non-Army tenants, meet all current Army standards for relocatable buildings or have obtained a waiver from HQDA (DAIM-OD).

p. Real Property conversion and diversion rules do not apply to personal property relocatable buildings.

#### **6-15. Procedures**

a. *Economic analysis.* A life cycle economic analysis will be performed to determine the economic preference of lease versus purchase for all relocatable buildings. This analysis provides the basis to determine the most cost effective or viable option, and will consider all feasible alternatives (for example, lease, purchase, construction of permanent facility, use of commercial space, or use or conversion of existing facilities). Net present value measure will be used for lease versus purchase analysis. Director, IMCOM and ACOM, ASCC, and DRU commanders will validate economic analyses. An economic analysis is not required if the lease requirement is less than 12 months and the lease cost is less than \$100,000.

b. *Purchase of relocatable buildings as personal property.*

(1) Approval authority for purchase of relocatable buildings is based on per-building cost (table 6-1).

(2) Construction projects for site preparation for relocatable buildings will be approved in accordance with military construction authorities based on the total estimated funded project cost. The validated requirement for site preparation may not be fragmented or met in a piecemeal fashion in order to circumvent statutory Military Construction funding or construction approval limitations. The acquisition cost of relocatable buildings is an unfunded construction project cost. The appropriate fund source for purchase of relocatable building is determined on a per building basis and is approved separately from construction project approvals.

(3) Funds made available for operation and maintenance (for example, Operation and Maintenance, Army (OMA)) will be used for acquisition by purchase of relocatable buildings that are equal or cost less than the expense / investment limit of \$250,000 per building (\$100,000 for Army Working Capital Fund (AWCF)).

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(4) Funds made available for procurement of equipment (for example, Other Procurement, Army (OPA)) will be used for acquisition by purchase of relocatable buildings that cost more than the investment/expense limit of \$250,000 per building (\$100,000 for AWCF).

(5) Site preparation (foundations, exterior utilities, and other supporting construction) is a funded real property construction project cost and will be approved and funded using construction funds following construction approval authorities.

(6) Costs for packaging and transporting relocatable buildings are unfunded construction project costs and are paid using the same funds that acquired the relocatable buildings.

(7) Costs of erection and assembly of relocatable buildings are unfunded costs and are paid using the same funds that acquired the relocatable buildings.

c. *Lease of relocatable buildings as personal property.*

(1) Approval authority for lease of relocatable buildings is based on the total lease cost and known or estimated duration of the lease requirement. The term of the lease will not be split to justify lease vs. purchase. Renewal and extension of relocatable building leases will be considered on the individual merits of the requirement and will be based on an economic analysis that justifies continued lease versus purchase of the relocatable buildings.

(2) The appropriate fund source for lease of relocatable buildings is determined on a per lease basis. Leases of relocatable buildings are either operating leases or capital leases.

(3) All the criteria listed below must be met for the lease to be considered an operating lease.

(a) Ownership of the relocatable building remains with the lessor during the term of the lease and is not transferred to the Government at or shortly after the end of the lease term.

(b) The lease does not contain a bargain-price purchase option.

(c) The lease term does not exceed 75 percent of the estimated economic life of the relocatable building.

(d) The present value of the minimum lease payments (Per Building Lease Cost less delivery, sustainment, and removal) over the lease does not exceed 90 percent of the Fair Market Value of the relocatable building at the beginning of the lease term (Per Building Purchase Cost less delivery).

(e) The relocatable building is general-purpose rather than being for a special purpose of the government and is not built to the unique specification of the government as lessee.

(f) There is a private sector market for the relocatable building.

(4) If any one or more of the criteria listed above in paragraphs (3)(a) through (3)(f) are not met, then the lease is a capital lease.

(5) Construction projects for site preparation for relocatable buildings will be approved in accordance with military construction authorities based on the total estimated funded project cost. The validated requirement may not be fragmented or acquired in a piecemeal fashion in order to circumvent funding or approval limitations. Funded and unfunded construction project costs and the source of funds will be determined according to the following guidance:

(a) Site preparation (foundations, exterior utilities, and other supporting construction) is a funded project cost.

(b) Costs for packaging and transporting relocatable buildings used for interim-requirements are unfunded project costs and are paid using the same funds that acquired the relocatable buildings.

(c) Costs of erection and assembly of relocatable buildings are unfunded project costs and are paid using the same funds that acquired the relocatable buildings.

(d) Costs of removal/demolition of relocatable buildings are unfunded project costs.

(6) Sustainment of relocatable buildings will be paid from the same funding account that paid for the lease or purchase, if allowable within the appropriation guidelines, or from the appropriation supporting installation real property facilities.

(7) All utilities services (for example, electricity, water, and gas) for relocatable buildings will be separately metered. Operating costs for Base Operations Support services (for example, utilities, refuse collection, and custodial services) will be paid according to existing installation support agreements.

#### **6-16. Management of relocatable buildings**

*a. General.* Relocatable buildings can be purchased or leased and are to be used for pre-defined, short term periods of time. Relocatable buildings are designed to be readily moved, erected, disassembled, stored, and reused. The normal life expectancy of a relocatable building is 15 years. A useful life expectancy greater than 15 years must be documented with manufacturer certificates, warranties, or memorandum.

*b. Modular and pre-engineered buildings.* Modular and pre-engineered buildings, as opposed to relocatable buildings, are designed to be used as permanent buildings and would usually incur excessive costs and possible damage if relocated. These buildings would normally be acquired following Real Property rules.

*c. Approved period of use.* All relocatable buildings have a specified approved period of use. The lease contract term will not exceed the approved period of use. The approved period of use for a relocatable building will begin upon beneficial occupancy of the building.

*d. Accountability/property book records.* All relocatable buildings (both owned and leased) will be accounted for on AR 420-1 • 12 February 2008 263

garrison property book records as equipment to comply with personal property and Chief Financial Officer's Act data reporting requirements. In addition to recording relocatable buildings in the personal property records, relocatable buildings should be recorded in the real property database of record with an "R" code in order to be used for future requirements forecasting.

*e. Cross-leveling or disposal.* The IMCOM will maintain and review biannually the relocatable building disposal plan.

(1) Once the interim requirement has been met (that is, either the surge diminishes or the permanent construction is finished), the relocatable building needs to be either removed by the contractor (if leased), cross-leveled by IMCOM to a new location, or disposed of in accordance with standard property procedures (AR 735-5).

(2) DASA (I&H) approval is required prior to an Army-owned relocatable building being cross-leveled to a different use, regardless of whether the relocatable buildings remain on the original installation or are cross-leveled to a new location.

(3) If the relocatable building has met or exceeded its estimated economic life (15 years under normal circumstances), the building should be removed from the installation property books and turned in to DRMO for sale or disposal.

#### **6-17. Relocatable buildings used as temporary real property in lieu of permanent, real property**

Only the DASA(I&H) may approve use of Relocatable Buildings as substitutes for permanent or conventional buildings when the duration of the requirement is greater than 6 years. The Relocatable Building must be acceptable concerning life, safety, Real Property, and engineering requirements. In such cases, the relocatable buildings and will be converted to and accounted for as real property, the original building purchase cost, transportation, erection costs, site preparation, and related supporting costs will be approved and funded according to AR 405-45 and AR 405-70. The costs will be summarized on DD Form 1354 to become part of the Real Property facility file.

### **Chapter 7**

## **Transportation Infrastructure and Dams**

### **Section I**

#### **Introduction**

##### **7-1. Overview**

*a.* This chapter provides basic policies, specific responsibilities and procedures to plan, program, and perform maintenance, repair, minor construction, quality assurance, and control of the following:

- (1) Paved roads.
- (2) Airfields.
- (3) Other surfaced areas.
- (4) Culverts and other appurtenances.
- (5) Railroad tracks.
- (6) Bridges.
- (7) Dams.

*b.* This chapter includes guidance for establishing facilities maintenance and repair standards and policies for planning and executing pavement, railroad track, bridge, dam, and airfield projects

##### **7-2. Applicability**

For applicability, see title page.

##### **7-3. Chapter exponent**

The exponent (see glossary) for this chapter is the ACSIM (DAIM-ODF).

##### **7-4. Chapter responsibilities**

The following responsibilities are in addition to the general responsibilities identified in paragraph 1-4.

*a.* The ACSIM has ARSTAF responsibility for development, integration, and interpretation of standards, policies, and doctrine for planning, execution, and administration of maintenance, repair, and minor construction associated with pavements, railroad track, bridges, dams, and airfields. The ACSIM, in addition to those responsibilities identified in paragraph 1-4*b*, will develop and direct policy, planning, programming, and budgeting involving management and resourcing of Army garrisons for maintenance, repair and minor construction of pavement, railroad track, bridges, dams, and airfields.

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DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY  
INSTALLATIONS, ENERGY AND ENVIRONMENT  
110 ARMY PENTAGON  
WASHINGTON, DC 20310-0110

JAN 11 2011

MEMORANDUM FOR

HEADQUARTERS, DEPARTMENT OF THE ARMY, ASSISTANT CHIEF OF STAFF  
FOR INSTALLATION MANAGEMENT, (DAIM-ZA), 600 ARMY PENTAGON,  
WASHINGTON, DC 20310-0600  
CHIEF, ARMY RESERVE (DAAR-ZA), 2400 ARMY PENTAGON,  
WASHINGTON, DC 20310-2400  
DIRECTOR, ARMY NATIONAL GUARD, 111 SOUTH GEORGE MASON DRIVE,  
ARLINGTON, VA 22204

SUBJECT: Delegation of Authority - Relocatable Buildings

1. References:

- a. Memorandum, DASA(I&H), 8 February 2008, subject: Delegation of Authority – Relocatable Buildings.
- b. Memorandum, DASA(I&H), 13 May 2009, subject: Additional Guidance to the Deputy Assistant Secretary of the Army (Installations and Housing), 8 February 2008 Memorandum, Delegation of Authority – Relocatable Buildings.
- c. Memorandum, DASA(I&H), 18 June 2010, subject: Temporary Waiver for Delegation of Authority – Relocatable Buildings.
- d. Army Regulation 420-1, 12 Feb 2008, Army Facilities Management

2. This delegation supersedes authorities and information contained in References 1.a, 1.b, 1.c and reference 1.d, paragraphs 6-13 through 6-17.

3. **Delegation:** Subject to compliance with all applicable laws and regulations, I delegate the authorities contained in this memorandum to you.

- a. These authorities may be re-delegated no lower than a General Officer of organizations having installation or garrison responsibilities. This does not include the SES equivalent.

- b. Purchase or Lease of Relocatable Buildings as Personal Property – Authority to approve the purchase or lease of relocatable buildings for no more than 6 years. The Relocatable Building is to meet short-term requirements, normally 3 years or less but no more than 6 years, for facilities due to transitory peak military missions, deployments, military contingency operations, or disaster relief requirements; or urgent requirements, pending approval, and construction of facilities via normal military construction programs.

- c. The approval must be granted to satisfy the facility needs for

- (1) a specific organization;
- (2) a specific duration (no more than 6 years); and,

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- (3) a specific site on an installation.

A change in any of the three parameters requires a new approval.

- d. The relocatable buildings may not be used for more than 6 years. Requests for an extension beyond 6 years must be approved by DASA(I&H).

- e. Contingency Operations:

- (1) Contingency Operations Relocatable buildings will be purchased and may be used for the duration of the operation.

- (2) In contingency operations, when force protection requirements warrant, the cost of concrete slabs used as foundations for relocatable buildings shall be excluded from the determination of the 20% calculation of the relocatable building.

4. **General Guidance:** Relocatable buildings are a last resort. Real property facilities, including World War II wood, or off post rentals are preferable to the acquisition of a relocatable building. Enclosure 1 to this memorandum contains a list of exceptions where this authority does not apply and where temporarily needed equipment will be controlled by the Garrison Commander.

- a. **Definition:** The following definitions will be placed into applicable Army Regulations. A relocatable building is defined below:

- (1) An arrangement of components and systems designed to be transported over public roads with a minimum of assembly upon arrival and a minimum of disassembly for relocation. A relocatable building is designed to be moved and reassembled without major damage to floor, roof, walls, or other significant structural modification.

- (2) The costs for disassembly, repackaging, any exterior refinishing (e.g. brick façade, etc.) and interior modifications (e.g. electrical systems, fire suppression systems, walls or ceilings, etc.) including labor applied to the building after site delivery to make the relocatable building useable, and non-recoverable building components, including foundations, may not exceed 20 percent of the purchase price of the relocatable building. Non-recoverable building components are components that cannot be used again in the reassembly of the subject building.

- b. **Relocatable Buildings as Construction:**

- (1) If a structure does not meet all of the requisites contained in subparagraphs a above, it shall be authorized and funded as construction in accordance with chapter 4, reference 1.d and accounted for as real property. Enclosure 2 is a table to be used when determining if an acquisition can be consider as relocatable building or real property.

- (2) Relocatable buildings may be used instead of conventional construction when the duration of the requirement is uncertain or when economically desirable. In such cases, the project shall be programmed through proper military construction procedures. The work associated with the erection of the building will be classified

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according to procedures reference 1.d paragraph 2-17, Project Costs and the building will be accounted for as real property.

(3) If the total cost of the relocatable building and the site preparation is less than \$750,000 the acquisition of the relocatable building will follow the procedures in subparagraph (2) above.

c. **Management of Usage:** Relocatable buildings are expensive equipment which needs to be managed and used to the maximum extent possible. The component will manage these existing equipment assets. Relocatable buildings no longer needed at an installation will be moved to an installation with approved requirements. Unneeded relocatable building will be turned in following equipment rules.

d. **Expense/Investment explanation:** Relocatable buildings shall be purchased with either, Operation and Maintenance (O&M) or Other Procurement (OPA) funds depending on the Expense/Investment Threshold contained in law for capital equipment purchase (currently \$250,000 per system for use of O&M). The determination of system cost for this purpose will be based on the cost of the completely assembled building and not on the separate components.

e. **Site Work is Construction:** Site work for relocatable buildings should be planned according to the duration expected for the equipment being supported. Permanent construction will be avoided, if possible. The site preparation will comply with current Army guidance for construction and is funded from the appropriate program: O&M, Unspecified Minor Military Construction (UMMC), or Military Construction (MILCON) depending on cost. Approvals for the construction to support siting of relocatable buildings will include all site work, including but not limited to, walks, porches, decks, and loading docks. Those projects with a funded cost exceeding statutory limit for O&M will be funded and approved within the UMMC or MILCON programs.

5. **Policy and Programs:** The Assistant Chief of Staff for Installation Management is my agent for the relocatable building policy and the program. All reports will be submitted through DAIM-ODF to this office.

a. **Exit Plan:** An exit plan is an integral part of the justification for a Relocatable Building. The exit plan illustrates the limited duration of the equipment requirement. An exit plan containing a construction component must be institutionalized within the Army, championed by the Commanders and given priority over all but the most pressing requirements to ensure that Relocatable Buildings are disposed of in an expedient manner.

b. **Reports:** Within 30 working days after the end of each fiscal year quarter, provide to this office a report concerning the use of this delegation of authority regarding relocatable buildings. The report will include a determination of whether the relocatable building meets the definition of a relocatable building contained in this memorandum. The report is due only if the delegation authority is used. The authority hereby delegated shall expire two years from the date of this memorandum.

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6. **Approval Channels:** Requests from Army Reserve (OCAR) (DAAR-AZ), National Guard Bureau (Army System) (NGB-ZA), and Installation Management Command which exceed the delegated authorities contained in this memorandum will be submitted through Command Channels, to this office. All other requests will be submitted through DAIM-ODF to this office.



Joseph F. Calcara  
Deputy Assistant Secretary of the Army  
(Installations, Housing and Partnerships)

2 Encls

1. List of exemptions.
2. Calculation Table for Relocatable Buildings.



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The approval process contained in this memorandum does not apply to the following special circumstances and conditions:

(1) **Tents.** Tents are not considered relocatable buildings. A tent is a temporary or semi permanent portable shelter consisting of sheets of fabric or other material draped over or attached to a frame of poles. It is easy to assemble and disassemble. Tents may be attached to the ground with stakes lines or ropes and may be connected to real property utilities. A tent is accounted for as unit equipment or as personal property on an equipment property book and not governed by the relocatable building delegation. Tension Fabric type shelters such as clam shells or Sprung Shelters and other similarly constructed structures which are designed with the exterior fabric as a structural element are not considered tents but are relocatable buildings and are governed by the relocatable delegation.

(2) **Swing Space.** Relocatable buildings obtained as swing space for construction or repair projects, funded by the approved real property project, are approved on the DA Form 4283 and the DD Form 1391, and are promptly removed at the conclusion of the project.

(a) Swing space is not to be the major portion of the project scope. Ownership and control of the relocatable buildings remain with the contractor.

(b) When several consecutive repair projects are planned and an economic analysis shows that a substantial saving may be made by using alternate temporary space to support the entire sequence of projects, relocatable buildings may be considered an option in lieu of swing space in the repair projects. These relocatable buildings will be obtained using normal RLB authorities and leasing should be considered as the primary method of acquisition.

(c) The relocatable buildings shall be used only for the duration of the construction or repair projects. They will be promptly removed upon completion of the projects or if any delays are encountered in execution of remaining project.

(3) **U.S. Army Corps of Engineers for support of contracting actions.** Relocatable buildings may be used by the U.S. Army Corps of Engineers to support contracting actions on funded Military Construction projects. The relocatable buildings must be removed immediately upon completion of the contract. The cost of these relocatable building are usually not part of the Military Construction Project and are a Garrison cost. Relocatable buildings are only used when real property facilities are not available. The real property facilities do not need to be located adjacent to the project work sites. The Garrison must locally approve siting and utility support for contractor-provided relocatable buildings, unless prior approval is granted by DAIM-ODC.

(4) **Contractor-owned relocatable buildings.** These type of buildings do not require approval under this policy and must be removed upon completion of the contract. The Garrison must locally approve siting. Utility support for relocatable building will be metered and costs reimbursed by the contractor.

(5) **Small sheds.** Moveable structures that are 360 sq ft or smaller that are not normally connected to real property utilities are obtained as either real property or as

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equipment. These small moveable structures are approved and controlled by the Garrison Commander. Accounting for relocatable buildings is dictated by the manner in which they are acquired. Equipment accountability will be in accordance with AR 735-5, Policies and Procedures for Property Accountability (UIC) and real property is accounted for by AR 405-70, Utilization of Real Property. In addition, each item acquired as equipment will have a sign with unit, POC, phone number and any other information required by the Garrison Commander.

(6) **Training equipment.** This guidance does not apply to equipment used for training such as: Tactical Shelters; Tactical Training Bases (TTB) Structures; Military Operations in Urban Terrain (MOUT) (reconfigurable trailers); or Training Aid Devices Simulators/ Simulations(TADSS) structures. Equipment in these categories will be accounted for as Unit Equipment as per subparagraph 1 above or as real property.

(7) **Unit allowance lists.** This guidance does not apply to property items that are accountable in table of allowances such as Common Table of Allowance (CTA), table of allowances (TOAs), tables of equipment (TOEs) or modified TOEs, and Table of Distributions and Allowance (TDA) tents, portable chemical toilets, and family housing.

(8) **Mobile equipment item.** This guidance does not apply to building types and forms that are provided as an integral part of mobile equipment and that are incidental portions of such equipment components, like medical mobile units, communications vans or communications trailers.

(9) **Tactical use centrally managed items.** This guidance does not apply to tactical use relocatable buildings that are centrally controlled and managed.

(10) **American National Standards Institute (ANSI) and/or International Organization for Standardization (ISO) Shipping Containers.** This regulation does not apply to ANSI and or ISO containers owned by the Army and Managed by U.S. Army Materiel Command, Logistics Support Activity (LOGSA) Packaging Storage and Containerization Center (PSCC) AIMPMO (AR 56-4, Distribution of Materiel and Distribution Platform Management).

(11) **Short term requirements (three months or less).** This guidance apply to requirements which support local events some examples follow: Change of Command ceremonies, Deployment/Re-Deployment events; initial fielding of equipment, training exercises, MWR events which support holiday celebration and civilian community interactions, AAFES or Commissary special sales events, etc. Equipment to support these types of events will be exempt from the normal relocatable building process. They will be approved and controlled by the Garrison Commander. The equipment will be promptly removed at the conclusion of the event.

(12) **RDT&E test events.** RDT&E test events lasting less than one year will be exempt from the normal relocatable building process and will be approved by the first General Officer or SES in the chain of command of the testing agency and the Garrison Commander where the test is being conducted. The equipment will be promptly removed at the conclusion of the event.

<p align="center"><b>Table 1</b>  <b>Relocatable Building Validation</b>            Percentage (g) = (a + b + c + d + e) / (f) * 100</p>								
	(a) (\$)	(b) (\$)	(c) (\$)	(d) <sup>2</sup> (\$)	(e) <sup>1</sup> (\$)	(f) <sup>4</sup> (\$)	(g) (%)	(h) <sup>3</sup>
Facility Type (e.g., barracks, admin, class-room, dayroom, arms room, maintenance, laundry, latrine, storage)	Building Disassembly (disconnect and removal from foundation)	Repackaging (including normal repair, refurbishment of components)	Non-recoverable Building Components (fasteners, seals, skirting, anchors, etc.)	Interior and exterior work added to the structure after it is placed on site. (Electrical wiring, walls, fire suppression systems, exterior finishes, flooring, lighting, wall coverings, etc.)	Foundation	Purchase Cost of Relocatable Building (Including delivery and set up)	%	Is facility relocatable (less than 20%)

**Notes:**

- 1 "Foundation" includes blocking, footings, bearing plates, ring walls, and slabs that are directly under the building. For the purpose of this calculation, "Foundation" does 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). In contingency operations, when force protection requirements warrant, the cost of concrete slabs used as foundations for relocatable buildings shall be excluded from the determination of the 20% calculation of the relocatable building.
2. All exterior refinishing and interior modifications made after site delivery to make the relocatable building useable for its intended occupant. This includes but is not limited to installation of gypsum board and wood paneling for walls, floor coverings (carpet), sprinkler and alarm system installation, and exterior façade improvements
3. If the percentage in column (g) is more than 20%, the structure must be obtained as real property using construction authorities.
4. Set up cost does not include any exterior refinishing or interior modifications made after site delivery covered in note 2.





DEPARTMENT OF THE ARMY  
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT  
600 ARMY PENTAGON  
WASHINGTON, DC 20310-0600

DAIM-ZA

FEB 22 2011

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Relocatable Buildings Delegation of Authority

1. References:

- a. Memorandum HQDA, DAIM-ZA, 19 Feb 08, subject: Interim Policy Change on Relocatable Buildings for Paragraph 6-13 through 6-17 in AR 420-1, Army Facilities Management.
- b. Memorandum HQDA, DASA(IH&P), 11 Jan 11, subject: Delegation of Authority - Relocatable Buildings.
- c. Army Regulation (AR) 420-1, Army Facilities Management, effective 19 Feb 08.

2. This memorandum supersedes reference 1.a. and provides policy changes for reference 1.b. on delegation of approval authorities for relocatable buildings accounted for as personal property, obtained by either lease or purchase regardless of the funding source.

3. Subject to compliance with all applicable laws and regulations, I hereby delegate the relocatable building approval authorities contained in this memorandum and depicted in the table at Enclosure 1.

a. Effective immediately, approval authority is delegated to Commanding Generals of organizations having installation or garrison responsibilities: Commander, Army Materiel Command (AMC); Commander, US Army Corps of Engineers (USACE); Commander, Army Medical Command (MEDCOM); Commander, Army Space and Missile Defense Command (SMDC); Deputy Commander, Installation Management Command (IMCOM) and OCONUS General Officers with installation management responsibilities and Commanders with Contingency Area responsibilities will review and approve requests for relocatable buildings at installations under your command or control. This does not include the SES equivalent.

b. You may re-delegate, in writing, all or part of these approval authorities with re-delegation authority, except:

DAIM-ZA

SUBJECT: Relocatable Buildings Delegation of Authority

(1) This authority may be re-delegated no lower than a General Officer of organizations having installation or garrison responsibilities.

(2) For Contingency Areas, this authority may be delegated no lower than a General Officer of the next lower headquarters with responsibilities in a Contingency Area. Approved relocatable buildings in contingency areas may be used for the duration of the operation.

(3) Requests from IMCOM garrisons which exceed the delegated authorities contained in this memorandum will be submitted through command channels to DASA(IH&P). All other requests will be submitted through DAIM-ODF to DASA(IH&P).

c. If your command wishes to have an SES equivalent perform the duties outlined in this memorandum, a request for waiver may be submitted through DAIM-ODF to DASA(IH&P). Waivers may be granted for a specific duration to a specifically designated SES.

d. Tenant organizations are prohibited from entering into contracts for the purchase or lease of relocatable buildings.

4. If a structure does not meet the requirements of relocatable buildings contained in 4.a. below, it shall be authorized and funded as construction in accordance with chapter 4, of reference 1.c and accounted for as real property.

a. A relocatable building is defined as:

(1) An arrangement of components and systems designed to be transported over public roads with a minimum of assembly upon arrival and a minimum of disassembly for relocation. A relocatable building is designed to be moved and reassembled without major damage to floor, roof, walls, or other significant structural modification.

(2) The costs for disassembly, repackaging, any exterior refinishing (e.g. brick façade, etc.) and interior modifications (e.g. electrical systems, fire suppression systems, walls or ceilings, etc.) including labor applied to the building after site delivery to make the relocatable building useable, and non-recoverable building components, including foundations, may not exceed 20 percent of the purchase price of the relocatable building. Non-recoverable building components are components that cannot be used again in the reassembly of the subject building.

b. A relocatable building approval may be made for no more than 6 years. A change in the location, building use and organization using the relocatable building requires a

DAIM-ZA

SUBJECT: Relocatable Buildings Delegation of Authority

new approval. If the location, building use and organization using the relocatable building does not change and the relocatable building is needed beyond 6 years, IMCOM garrisons may submit requests for extensions through command channels, to DASA(IH&P) with a copy furnished DAIM-ODF. All other requests will be submitted through DAIM-ODF to DASA(IH&P).

5. Relocatable Building authority is delegated as follows, subject to compliance with paragraph 3.

a. Authority to approve the purchase or lease of relocatable buildings to meet short-term requirements, normally 3 years or less but no more than 6 years, for facilities due to transitory peak military missions, deployments, military contingency operations, or disaster relief requirements; or urgent requirements, pending approval, and construction of facilities via normal military construction programs is delegated.

b. The following rules apply to all relocatable buildings obtained under this authority:

(1) Relocatable buildings are accounted for as equipment, personal property.

(2) Purchased relocatable buildings are inventoried, accounted for with Item Unique Identification (IUID) which will be tied to a specific approval document.

(3) Relocatable buildings will be disposed of in accordance with applicable equipment regulations.

(4) The lease for a relocatable building will satisfy a single known requirement.

(5) Use the worksheet at Enclosure 2 when deciding on an appropriate course of action, lease, purchase or construction.

(6) An Option to Purchase clause will not be included in the relocatable building leasing contract. There are only two types of leases that are appropriate for obtaining relocatable space, operating leases and capital leases. Service contracts are not authorized for obtaining space to circumvent these policies.

(7) Purchased relocatable buildings will not be directly converted to real property without approval from Deputy Assistant Secretary of the Army (Installation and Housing) and congressional notification.

(8) Within 30 days of the end of each fiscal year quarter, Commanders will provide to this office a report concerning the use of this delegation of authority on

DAIM-ZA

SUBJECT: Relocatable Buildings Delegation of Authority

relocatable buildings. The content and format of the report is shown in Enclosure 3. The report is due only if the delegation authority was used.

6. Requirements for facilities with a known duration of more than three years, and with a construction cost (relocatable building costs plus site preparation costs) that does not exceed the statutory limit for normal operation and maintenance construction (currently \$750,000) will be met by construction procedures and not by relocatable buildings. This does not apply to contingency areas and operations where ownership of real property may present a hardship during site turnover.

7. Relocatable buildings systems shall be purchased with either Operation and Maintenance (O&M) or Other Procurement, Army (OPA) funds depending on the Expense/Investment Threshold contained in law for capital equipment purchase. Your supporting Staff Judge Advocates office can determine what the current limit Expense/Investment Threshold is governing your action. The determination of system cost for this purpose will be based on the cost of the completely assembled building and not on the separate components. For example, a relocatable building composed of two trailers (double wide) is a single system and stacked relocatable buildings touching one another are a single system. In both cases, the cost would be combined for the entire system.

8. Commanders are cautioned to use the relocatable authority contained herein only as a last resort. Relocatable buildings will be used at about a 50 percent ratio (square feet) to their real property counterparts except for certain types of uses such as barracks and medical facilities. We must use the relocatable authority wisely, to bridge the gap between mission requirements and the availability of real property facilities.

a. Look at alternate options to provide the needed space. The order of precedence is full utilization of available real property, including full utilization of World War II wooden structures where economic considerations and good engineering judgment dictate, construction of temporary facilities when the total funded cost does not exceed the statutory limit for normal operation and maintenance construction (currently \$750,000), and short-term leased space off post.

b. Enclosure 4 contains a list types of equipment and circumstances which are exempt from this delegation and are controlled by the Garrison Commander.

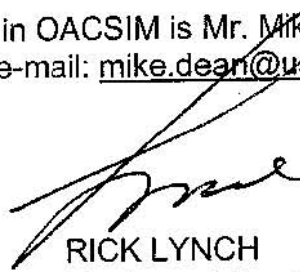
9. Requests that exceed the approval authority delegated in this memorandum will be submitted through command channels to Director, Operations Directorate; DAIM-ODF; Office of the Assistant Chief of Staff for Installation Management; 600 Army Pentagon; Washington, DC 20310-0600.



DAIM-ZA

SUBJECT: Relocatable Buildings Delegation of Authority

10. The Point of Contact for this action in OACSIM is Mr. Mike Dean, DAIM-ODF, telephone (703) 601-0703, (DSN 328), e-mail: [mike.dean@us.army.mil](mailto:mike.dean@us.army.mil).



RICK LYNCH  
Lieutenant General, GS  
Assistant Chief of Staff  
for Installation Management

Encl:

As

DISTRIBUTION:

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US ARMY CORPS OF ENGINEERS, (CELD-ZE/CEMP)  
DEPUTY COMMANDING GENERAL, INSTALLATION MANAGEMENT COMMAND  
US ARMY CENTRAL (USARCENT)

CF:

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US ARMY CRIMINAL INVESTIGATION COMMAND, (CIPL-EN)  
SUPERINTENDENT, US MILITARY ACADEMY, (MACS)  
CONT:

DAIM-ZA

SUBJECT: Relocatable Buildings Delegation of Authority

DISTRIBUTION: CON'T:

DEFENSE LOGISTICS AGENCY, (MMBI)

INSTALLATION MANAGEMENT COMMAND -NORTHEAST REGION, (IMNE)

INSTALLATION MANAGEMENT COMMAND -SOUTHEAST REGION, (IMSE)

INSTALLATION MANAGEMENT COMMAND -WEST REGION, (IMWE)

INSTALLATION MANAGEMENT COMMAND -PACIFIC REGION, (IMPC)

INSTALLATION MANAGEMENT COMMAND -EUROPE REGION, (IMEU)

INSTALLATION MANAGEMENT COMMAND -KOREA REGION, (IMKO)

**Relocatable Building Table of Authorities**

Relocatable Building Action <sup>1</sup>	Deputy Assistant Secretary of the Army (Installations and Housing)	Assistant Chief of Staff For Installation Management <sup>5</sup>	DCO IMCOM and COs of AMC, USACE, MEDCOM, SMDC, USAR, USANG, OCONUS GO w Installations, and CO of Contingency Area responsibility <sup>5</sup>
Lease <sup>4</sup>	6 years, funds unlimited	Not To Exceed (NTE) 6 years, funds unlimited	Not To Exceed (NTE) 6 years, funds unlimited
Existing Lease Extension	6 years, funds unlimited	NTE 6 years, funds unlimited	NTE 6 years, funds unlimited
Transfers to Other Locations	6 years, funds unlimited	NTE 6 years, funds unlimited	NTE 6 years, funds unlimited
Purchase as Personal Property <sup>2</sup>	6 years, funds unlimited	NTE 6 years, funds unlimited	NTE 6 years, funds unlimited
Convert to Real Property <sup>3</sup>	funds unlimited	None	None

1. When the permission to purchase a Relocatable Building is granted, funds available for Operation and Maintenance are used for buildings costing less than \$250,000 and buildings costing more than \$250,000 must be purchased using Other Procurement, Army (OPA) funds.
2. A Relocatable Building with site preparation and building costing less which total than \$750,000 will be locally approved as construction and accounted for as real property, unless it is part of a larger undertaking. This does not apply to Contingency Area Operations.
3. Direct conversion of a Relocatable Building from personal property to real property requires Congressional notification and will not be undertaken without prior approval.
4. Relocatable buildings listed as swing space in approved maintenance and repair or construction projects require no further approval.
5. Re-delegation can be no lower than the Deputy Commanding General of affected units and organizations having installation or garrison responsibilities. For Contingency Areas, this authority may be delegated no lower than the Commanding General, Deputy Commanding General or designated General Officer of the next lower headquarters with responsibilities in a Contingency Area. Approved relocatable buildings in contingency areas may be used for the duration of the operation. Tenant organizations are prohibited from entering into contracts for the purchase or lease of relocatable buildings.
6. IMCOM will submit requests for approvals that exceed 6 years through command channels to DASA(IH&P). All other commands submit requests to DAIM-ODF for approval processing.

**Relocatable Building Request Worksheet**  
**Project Title and Installation Name: \_\_\_\_\_, Date \_\_\_\_\_**

This worksheet must be submitted for each approval request.

This request is to (Check and complete one block below):

1.  Lease relocatable building(s). Relocatable buildings are requested for a period not to exceed \_\_\_ years, at an estimated total funded cost (total actual lease, delivery, setup, and removal costs) of \$\_\_\_ (\$000), at \_\_\_ (Garrison name, State), using \_\_\_ (e.g., OMA, OPA, OMD, RDT&E, AWCF) funds.

2.  Purchase relocatable building(s). Relocatable buildings are requested for a period not to exceed \_\_\_ years, at an estimated total funded cost (total actual purchase, delivery, and setup costs) of \$\_\_\_ (\$000), at \_\_\_ (Garrison name, State), using \_\_\_ (e.g., OMA, OPA, OMD, RDT&E, AWCF) funds.

3. Point of Contact Information. Contact the following POCs regarding this request (Name, Phone Number, Email, and Office):

- a. Garrison. \_\_\_\_\_
- b. IMA Region reviewing official. \_\_\_\_\_
- c. HQIMA reviewing official. \_\_\_\_\_
- d. Agency preparing economic analysis. \_\_\_\_\_
- e. Installation or Command SJA legal review. \_\_\_\_\_

4. Justification. Relocatable building support data, attach as Enclosure 1.

- a. Unit(s) and mission the relocatable building supports.
- b. Facility requirements for the units / mission.
- c. Discussion of all options considered to provide facility space.
- d. Justification of urgent, short-term requirement for the relocatable building(s).
- e. Desired date of occupancy and expected duration of the requirement.
- f. Explain the exit plan that will remove the relocatable building(s) from the installation at the end of the requirement. Describe the plan for the removal, disposal, or sale of the buildings and source of funding.
- g. Required removal date.

5. Replacement Project. Will the requirement for the relocatable building(s) be replaced with real property facilities by MILCON or SRM major repair projects?

6. Yes  No  If yes, attach replacement project data as Enclosure 2.

- a. Project Number(s).
- b. Title(s).
- c. Source(s) of funds.
- d. Cost.
- e. Program Fiscal Year.

f. Copy of associated project document(s) (DD Form 1391 or DA Form 4283).

7. Associated Construction. Construction associated with the relocatable building(s) placement.

a. Is all site work necessary to the installation and provision of utilities and other services properly classified by the installation? Yes  No

b. Is the associated construction project approved? Attach copies of DD Form 1391 and DA Form 4283. Yes  No

c. Construction Cost: \$\_\_ (Construction includes foundations, utilities, roads, sidewalks, parking, force protection, fencing, signage, lighting, and other site preparation (clearing, grubbing, ditching, drainage, filling, compacting, grading, and landscaping).)

8. Relocatable Building Validation.

a. To be a relocatable building, certain associated costs (columns "a" through "d", Table E-1) must not exceed 20% of the purchase cost of the relocatable building (column "f"). The relocatable building percentage for each facility type in column f must be less than or equal to 20%.

b. The facility must be classified as real property if the percentage is greater than 20% and obtained using minor construction rules contained in AR 415-15.

	(a) (\$)	(b) (\$)	(c) (\$)	(d)	(e) <sup>1</sup> (\$)	(f) (\$)	(g) <sup>2</sup> (%)	(h) <sup>3</sup>
Facility Type (e.g., barracks, admin, classroom, dayroom, arms room, maintenance, laundry, latrine, storage)	Building Disassembly (disconnect and removal from foundation)	Repackaging (including normal repair, refurbishment of components)	Non-recoverable Building Components (fasteners, seals, skirting, anchors, etc.)	Interior and exterior work added to the structure after it is placed on site. (Electrical wiring, walls, fire suppression systems, exterior finishes, flooring, lighting, wall coverings, etc.)	Foundation	Purchase Cost of Relocatable Building (Including delivery and set up)	%	Facility is relocatable (≤20%)

**Notes:**

1. "Foundation" includes blocking, footings, bearing plates, ring walls, and slabs that are directly under the building. For the purpose of this calculation, "Foundation" does 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).

2. All exterior refinishing and interior modifications made after site delivery to make the relocatable building useable for its intended occupant. This includes but is not limited to installation of gypsum board and wood paneling for walls, floor coverings (carpet), sprinkler and alarm system installation, and exterior façade improvements

3. If the percentage in column (g) is more than 20%, the structure must be obtained as real property using construction authorities.

9. Economic Analysis. An economic analysis for each facility type is attached as Enclosure 3 and has been prepared or reviewed by the US Army Corps of Engineers, Installation Support Center of Expertise (ISCX), CEHNC-IS. (For an example of an Economic Analysis and Sensitivity Chart, see Table E-3 and Table E-4.) A separate economic analysis is required for each facility type. Summary of economic analysis:

a. Total Net Present Value Lease Project Cost: \$\_\_\_ (Total Net Present Value cost of lease, including option years, delivery, setup, removal, and associated SRM sustainment and construction costs).

b. Total Net Present Value Purchase Project Cost: \$\_\_\_ (Total Net Present Value cost of purchase, delivery, setup, associated SRM sustainment and construction costs, and removal or demolition of the relocatable building at the end of use.)

c. Cost to construct replacement permanent facility: \$\_\_\_.

d. Other considerations to provide space:

1) Commercial space. Discussion: \_\_\_

2) Use or conversion of existing buildings. Discussion: \_\_\_

3) Other alternatives considered. Discussion: \_\_\_

e. The economic analysis cost is not the Approval Request cost.

(1) The Approval Request cost is only the total lease cost, set up cost, sustainment, and removal cost if included in the lease or the total purchase cost, set up cost and delivery cost for a purchase.

(2) Site Construction costs and removal costs are not to be included in the Approval Request.

10. Relocatable building information by facility type:

(a)	(b)	(c)	(d)	(e)
Relocatable Building Type (e.g., barracks, admin, classroom, dayroom, arms room, maintenance, laundry, latrine, storage)	Total Number of Buildings per Type	Total Gross Sq Ft of Each Building per Type	Per Building Purchase Cost	Lease Cost
Total:		<del>XXXXXXXXXX</del>		

11. Compliance with Standards. Relocatable buildings meet applicable Army Standards:

a. Army Installation Design Standards      Yes       No

b. Installation Design Guide                      Yes       No

- c. Force Protection/Anti-terrorism      Yes       No
- d. Accessibility      Yes       No
- e. Safety      Yes       No
- f. Seismic      Yes       No
- g. Environmental      Yes       No
- h. Construction codes and standards      Yes       No

12. Waiver Request Required. A waiver request is enclosed for each standard in paragraph 8 that is answered "No":

- a. Army Installation Design Standards      Yes       Not Required
- b. Force protection/Anti-terrorism      Yes       Not Required
- c. Accessibility      Yes       Not Required
- d. Safety      Yes       Not Required
- e. Seismic      Yes       Not Required
- f. Environmental      Yes       Not Required
- g. Construction codes and standards      Yes       Not Required

13. Legal Review. A written legal opinion, performed by the Garrison SJA, has determined that the project is legally sufficient and complies with appropriate regulations. Attached as Enclosure 5. \_\_\_.

14. Mandatory Enclosures. The following enclosures are mandatory.

- a. Enclosure 1, Justification
- b. Enclosure 2, Copies of associated construction documentation replacement Project and Site preparation (DD Form 1391 and, or DA Form 4283)
- c. Enclosure 3, Economic Analysis, with sensitivity chart, for each facility type
- d. Enclosure 4, Waiver request if in non-compliance with Army Standards.
- e. Enclosure 5, Supporting Legal Opinion
- f. Enclosure 6, Pictures of the types of relocatable buildings to be used and of their planned placement. This may be photographs of examples of similar relocatable building projects of the same configuration, size, and type of relocatable buildings to be used on this project. This could include photographs, catalogue cuts, and/or artist renderings.
- g. Enclosure 7, appropriate site plans.

Spread Sheet Data

General Information				Purchases				
Approval ID	Region	Installation	Title	Army Initiative Supported	OMA Project Approval Cost	Actual OMA Project Cost	OPA Project Approval Cost	Actual OPA Project Cost

Leases				Type and Date				Exit Strategy			
O&M funds obligated for Service Contracts	O&M Funds Obligated for Leases	Cost to Exercise Purchase Option of Lease	Type (Purchase Lease)	Yrs Req'd	Date Approved	Date Acquired	Exit Strategy	Project Title	Project Number	Project Estimate (\$M)	FYDP

**Detailed RLB Information**

For RLB projects with multiple PNs, provide number of RLBs for each respective PN

Total Number of Reloc Buildings	Total Relocatable Buildings SF	BDE, BN, CO OPS	Arms Rms	Maint	Bks	Stor	Admin-Classrm	Med Fac	Other (Dining, Gyms, Latrines)



## Exemption from Relocatable Building Approvals

The approval process contained in this memorandum does not apply to the following special circumstances and conditions:

(1) **Tents.** Tents are not considered relocatable buildings. A tent is a temporary or semi permanent portable shelter consisting of sheets of fabric or other material draped over or attached to a frame of poles. It is easy to assemble and disassemble. Tents may be attached to the ground with stakes lines or ropes and may be connected to real property utilities. A tent is accounted for as unit equipment or as personal property on an equipment property book and not governed by the relocatable building delegation. Tension Fabric type shelters such as clam shells or Sprung Shelters and other similarly constructed structures which are designed with the exterior fabric as a structural element are not considered tents but are relocatable buildings and are governed by the relocatable delegation.

(2) **Swing Space.** Relocatable buildings obtained as swing space for construction or repair projects which are promptly removed at the conclusion of the project that are funded by the approved real property project and approved on the DA Form 4283 and the DD Form 1391.

(a) Swing space is not to be the major portion of the project scope. Ownership and control of the relocatable buildings remain with the contractor.

(b) When several projects are planned and it is demonstrated that a substantial saving can be made by using swing space to support the entire sequence of projects, the Garrison Commander may approve the relocatable building as a separate action in conjunction with the first project.

(c) The relocatable buildings shall be used only for the duration of the construction or repair projects. They will be promptly removed upon completion of the projects or if any delays are encountered in execution of remaining project.

(3) **U.S. Army Corps of Engineers for support of contracting actions.** Relocatable buildings to be used by the U.S. Army Corps of Engineers to support contracting actions on funded Military Construction projects. The relocatable buildings must be removed immediately upon completion of the contract. The cost of these relocatable building are usually not part of the Military Construction Project and are a Garrison cost. Relocatable buildings are only used when real property facilities are not available. The real property facilities do not need to be located adjacent to the project work sites. The Garrison must locally approve siting and utility support for contractor-provided relocatable buildings, unless prior approval is granted by DAIM-ODC.

(4) **Contractor-owned relocatable buildings.** These types of buildings do not require approval under this policy and must be removed upon completion of the contract. The Garrison must locally approve siting. Utility support for these relocatable buildings will be metered and the costs reimbursed by the contractor.

(5) **Small sheds.** Moveable structures that are 360 sq ft or smaller that are not normally connected to real property utilities are obtained as either real property or as equipment. These small moveable structures are approved and controlled by the

## Exemption from Relocatable Building Approvals

Garrison Commander. Accounting for relocatable buildings is dictated by the manner in which they are acquired. Equipment accountability will be in accordance with AR 735-5, Policies and Procedures for Property Accountability (UIC) and real property is accounted for by AR 405-70, Utilization of Real Property. In addition, each item acquired as equipment will have a sign with unit, POC, phone number and any other information required by the Garrison Commander.

(6) **Training equipment.** This guidance does not apply to equipment used for training such as: Tactical Shelters; Tactical Training Bases (TTB) Structures; Military Operations in Urban Terrain,(MOUT) (reconfigurable trailers); or Training Aid Devices Simulators/ Simulations (TADSS) structures. Equipment in these categories will be accounted for as Unit Equipment as per subparagraph 1 above or as real property.

(7) **Unit allowance lists.** This guidance does not apply to property items that are accountable in table of allowances such as Common Table of Allowance (CTA), table of allowances (TOAs), tables of equipment (TOEs) or modified TOEs, and Table of Distributions and Allowance,(TDA), tents, portable chemical toilets, and family housing.

(8) **Mobile equipment item.** This guidance does not apply to building types and forms that are provided as an integral part of mobile equipment and that are incidental portions of such equipment components, like medical mobile units, communications vans or communications trailers.

(9) **Tactical use centrally managed items.** This guidance does not apply to tactical use relocatable buildings that are centrally controlled and managed.

(10) **American National Standards Institute (ANSI) and/or International Organization for Standardization (ISO) Shipping Containers.** This regulation does not apply to ANSI and or ISO containers owned by the Army and Managed by U.S. Army Materiel Command, Logistics Support Activity (LOGSA) Packaging Storage and Containerization Center (PSCC) AIMPMO (AR 56-4, Distribution of Materiel and Distribution Platform Management)

(11) **Short term requirements (three months or less).** This guidance apply to requirements which support local events some examples follow: Change of Command ceremonies, Deployment/Re-Deployment events; initial fielding of equipment, training exercises, MWR events which support holiday celebration and civilian community interactions, AAFES or Commissary special sales events, etc. Equipment to support these types of events will be exempt from the normal relocatable building process. They will be approved and controlled by the Garrison Commander. The equipment will be promptly removed at the conclusion of the event.

(12) **RDT&E test events.** RDT&E test events lasting less than one year will be exempt from the normal relocatable building process and will be approved by the first General Officer or SES in the chain of command of the testing agency and the Garrison Commander where the test is being conducted. The equipment will be promptly removed at the conclusion of the event.

Appendix D



DEPARTMENT OF THE ARMY  
ASSISTANT CHIEF OF STAFF FOR INSTALLATION MANAGEMENT  
600 ARMY PENTAGON  
WASHINGTON DC 20310-0600



REPLY TO  
ATTENTION OF

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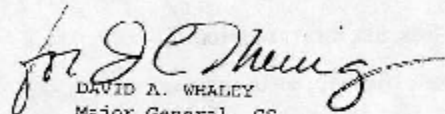
SUBJECT: New Definition of "Repair"

1. References:
  - a. Memorandum, Office of the Secretary of Defense, Comptroller, 2 Jul 97, subject: Definition for Repair and Maintenance.
  - b. AR 210-50, Housing Management.
  - c. AR 415-15, Army Military Construction Program Development and Execution.
  - d. AR 415-19, Nonappropriated-Funded Construction Project Development and Approval.
  - e. AR 420-10, Management of Installation Directorates of Public Works.
  - f. DA PAM 420-11, Project Definition and Work Classification.
2. The purpose of this memorandum is to provide a new Department of Defense standardized definition of "Repair." Reference 1.a. transmitted a new standardized definition of "Repair" to the Services (enclosure 1). This new definition is effective for all U.S. Army projects approved on or after 2 July 1997. References 1.b., 1.c., 1.d., 1.e., and 1.f. will be amended in the future to incorporate the new definition.
3. The new definition is more liberal and expands our ability to provide adequate facilities for our soldiers and civilians. See enclosure 2 for basic guidance/examples on utilizing the new definition.
4. Points of contact for additional information are Mr. Stan Nickell, DAIM-PDF-B, (703) 428-6175, fax 428-6175, e-mail "nickell@pentagon-acsa3.army.mil" for policy related issues; and Mr. Bill Allen, U.S.

GAIF-100-2  
SUBJECT: New Definition of "Repair"

Army Center for Public Works (703) 806-6057, fax (703) 806-5219,  
E-mail "bill.s.allen@cow01.usace.army.mil" for project questions and  
processing.

2 Encls

  
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US ARMY JOINT SPECIAL OPERATIONS COMMAND, ATTN: ACCS  
US ARMY CRIMINAL INVESTIGATION COMMAND, ATTN: CIBL-FEN  
US ARMY PACIFIC COMMAND, ATTN: APCS  
US ARMY, SOUTH, ATTN: SOCS  
US ARMY MEDICAL COMMAND, ATTN: DARG-ZB  
US ARMY INTELLIGENCE AND SECURITY COMMAND, ATTN: IACS  
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US ARMY RESERVE COMMAND, ATTN: AERC-CS  
19TH TAACOM, ATTN: FANCE-EN  
US ARMY MILITARY TRAFFIC MANAGEMENT COMMAND, ATTN: MTCX  
US ARMY SPACE AND STRATEGIC DEFENSE COMMAND, ATTN: CSSD-ZC  
EIGHTH US ARMY, ATTN: FKCS  
US ARMY INFORMATION SYSTEMS COMMAND, ATTN: ASCS

SUPERINTENDENT

US MILITARY ACADEMY, ATTN: MACS

CF:

ASST SEC OF THE ARMY, ATTN: ASA(FMC), ASA(IGSE), ASA(M&PA), ASA(RDA)  
ARMY GENERAL COUNSEL, ATTN: Mr. Reres and Mr. Castle  
ARMY INSPECTOR GENERAL, ATTN: EAIG  
ARMY AUDITOR GENERAL, ATTN: GAAG  
ARMY JUDGE ADVOCATE GENERAL, ATTN: DAJA  
ARMY NATIONAL GUARD BUREAU, ATTN: NGB-AMN  
HQ USACE, ATTN: CEMP-CM, CECC (Mr. Jorlings)  
HEALTH FACILITY PLANNING AGENCY, ATTN: MCMR  
ARMY CENTER FOR PUBLIC WORKS, ATTN: CECPW

**CRITERIA FOR A REPAIR PROJECT  
(DEFINITION)**

1. Repair means "to restore a real property facility, system or component to such a condition that it may effectively be used for its designated functional purpose."
  
2. When repairing a facility, the components of the facility may be repaired by replacement, and the replacement can be up to current standards or codes. For example, Heating, Ventilation, and Air Conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and provide for more capacity than the original unit due to increased demand/standards. 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) may be included as repair.
  
3. Additions, new facilities and functional conversions must be done as construction. Construction projects may be done concurrent with repair projects as long as the projects are complete and usable.

## BASIC GUIDANCE FOR THE NEW DEFINITION OF REPAIR

1. A facility must exist and be in a failed or failing condition in order to be considered for a repair project.
2. When repairing a facility you may now bring the facility (or a component of a facility) up to applicable codes or standards as repair. An example would be adding a sprinkler system as part of a barracks repair project. Another example would be adding air conditioning to meet a current standard when repairing a facility. Pursuant to the new definition, moving load-bearing walls, additions, new facilities and functional conversions must be done as construction.
3. Bringing a facility (or component thereof) up to applicable codes or standards for compliance purposes only, when a component or facility is not in need of repair, is construction.

# CHAPTER 9:



## CONTINUING RESOLUTION AUTHORITY & FUNDING GAPS

**CHAPTER 9**

**CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS**

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## CHAPTER 9

### CONTINUING RESOLUTION AUTHORITY (CRA) AND FUNDING GAPS

#### I. INTRODUCTION.

#### II. REFERENCES.

- A. Office of Management and Budget Circular A-11, Section 123 & 124, Apportionments Under a Continuing Resolution (2008) [OMB Cir. A-11].
- 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 (often referred to as the “GAO Red Book”).
- C. Continuing Resolution Authority General Guidance, Office of the Assistant Secretary of the Army - Financial Management & Comptroller (OASA-FMC), SAFM-BUC-E, August 1998 available at <http://www.asafm.army.mil/pubs/cra/cra0898.doc> [CRA Guidance] (Ch 3 at Appendix D).
- D. DOD 7000.14-R, Department of Defense Financial Management Regulations (FMRs), Glossary.
- E. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000 with changes through March 2005). [DFAS-IN 37-1] (available at <https://dfas4dod.dfas.mil/library>).

### III. DEFINITIONS.

#### A. Continuing Resolution (CR).

1. 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, providing 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, Finance and Accounting Policy Implementation, (Jan. 2000), 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, 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. CRA Guidance, pg 24.

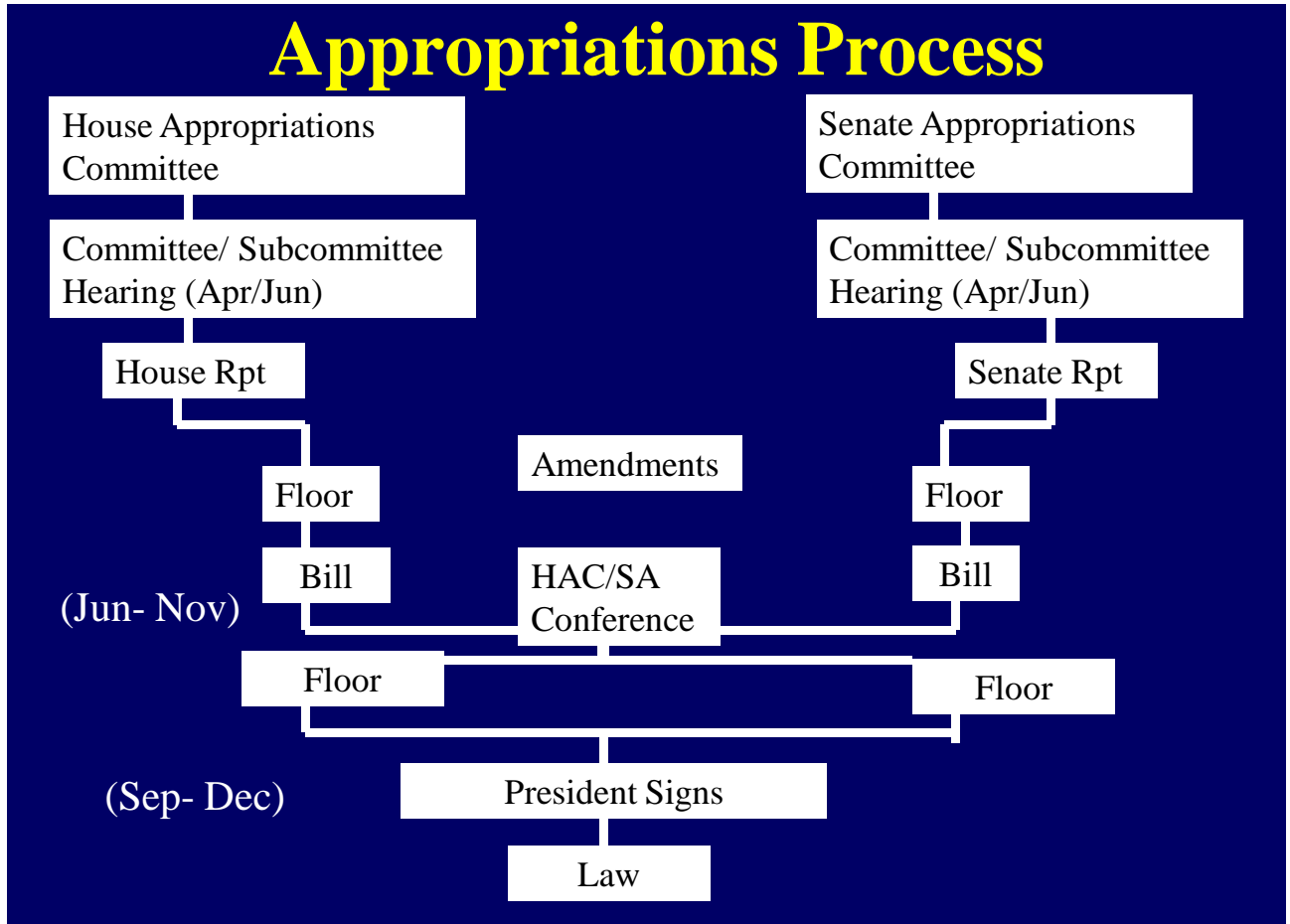
#### IV. INTRODUCTION TO THE LEGISLATIVE PROCESS.

- 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 (P.L. 94-344). Historically, one or more of the required appropriations acts are delayed well beyond Oct.1st. CRA guidance at 2.

- B. The Congressional Budget Process. The Congressional Budget Act of 1974 (Titles I-IX of P.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 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:

<i>DATE</i>	<i>ACTION</i>
1st Monday in February	President Submits Budget to Congress. 31 U.S.C. 1105(a).
February 15	CBO submits economic & budget outlook report to budget committees.
Six Wks after President submits the budget	Committees submit views & estimates to Budget Committees.
April 1	Senate Budget Committee reports budget resolution
April 15	Congress completes action on budget resolution
May 15	Annual appropriations bills may be considered in the House, even if action on budget resolution has not been completed.
June 10	House Appropriations Committee reports last annual appropriations bill.
June 15	Congress completes action on reconciliation legislation (if required by budget resolution).
June 30	House completes action on annual appropriations bills.
July 15	President submits mid-session review of his budget to Congress.

C. Appropriation Process.



1. 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.
  - a. House & Senate Appropriations Committees draft the federal appropriations acts for consideration and passage by Congress. The level of appropriations are limited by the Budget Resolution, drafted by the Budget Committee. For more information, see <http://appropriations.house.gov/jurisdiction.shtml> and <http://appropriations.senate.gov/jurisdiction.cfm>.

- b. 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>.
- 2. There are 13 appropriations acts regularly passed by Congress. The Department of Defense generally operates under two appropriations acts. Congress will pass appropriations acts separately or as a group. When the appropriations acts are passed as a group, they are referred to as a "Consolidated Appropriation Act" (CAA) or an Omnibus Appropriations Act.
  - a. When passed separately, the DOD Appropriations Act (DODAA) provides funding for most of DOD's normal operations.
  - b. The Military Construction Appropriations Act (MILCON AA) provides funding for military construction projects.
  - c. Since deploying troops to Iraq and Afghanistan, Congress has typically used Emergency Supplemental Appropriations to fund GWOT operations.
- 3. 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.
- 4. **Funding Gap.** When appropriations for the next fiscal year are not enacted by October 1st, the Congress & President must enact a Continuing Resolution or face a "funding gap."

## V. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS.

- A. Continued Operations - 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."
  - a. 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).
  - b. 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.
  - c. 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).
  - d. 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) Obligations may continue in the new fiscal year for minimum mission essential business.

- (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 September 1995, 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;<sup>1</sup>
- (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;<sup>2</sup>
- (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;

---

<sup>1</sup> 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).

<sup>2</sup> 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.

- (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, B-241730, 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. 102-396, 106 Stat. 1876 ("All obligations incurred in anticipation of this Act are hereby ratified and confirmed if otherwise in accordance with this Act.").

## 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.
  - b. Continuing Resolutions essentially employ standard language which clearly indicates that Congress intends and expects that they will be temporary. Congress utilizes such language 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 2006 provided:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* 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 the fiscal year 2006, and for other purposes, namely:

Sec. 101. . . . a. Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2005 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 2005, and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

(2) the Department of Defense Appropriations Act, 2006

\* \* \*

H.J. Res. 68 (hereinafter referred to as the FY 2006 Continuing Resolution) (emphasis added).

B. Availability of Appropriations as to Purpose under a Continuing Resolution.

1. Continuing Resolutions provide interim funding for projects or activities conducted in the prior fiscal year. To determine whether a given program or activity is covered by the CR, the Comptroller General will look to prior year legislation and its history. Special Defense Acquisition Fund, B-214236, 66 Comp. Gen. 484 (1987). Generally, the scope of a Continuing Resolution's applicability is quite broad:

Sec. 105. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any project or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

FY 2006 Continuing Resolution.

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 start.” There are several authorities to consult: Congress, GAO, and Agency policy.

a. Congress. In recent years, Congress has expressly resolved differing interpretations by explicitly defining “new starts” in the continuing resolution itself.

(1) For example, the FY 2006 Continuing Resolution provided, in part:

Sec. 102(a). No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for: (1) the new production of items not funded for production in fiscal year 2005 or prior years; (2) the increase in production rates above those sustained with fiscal year 2005 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 the fiscal year 2005. . .*

(2) Under the definition in the FY 2006 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.

b. GAO’s Take on New Starts. GAO has looked at the definition of “new start” in a series of cases.

- (1) 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) (National Advisory Council’s review of certain programs not a new project or activity). 35 Comp. Gen. 156 (1955).
  
- (2) 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 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 B-178131, Mar. 8, 1973. Note: The previous appropriation must afford adequate authority to undertake the construction. See 4 Lawrence, First Comp. Dec. 116 (1883)(finding Howard University violated the ADA under a CR by conducting building repairs that were not authorized by the outgoing appropriation or the continuing resolution).



- (3) 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 (9<sup>th</sup> 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.)

c. Policy. When continuing resolutions are passed, typically agencies will come out with policy guidance that can further define the definition of a “new start.” See Appendix G for a copy of the policy guidance associated with the FY 2010 CR.

- (1) 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:

- (a) 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.

- (b) 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.
- (c) 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 which are regularly awarded and obligated in full at the beginning of the fiscal year.
- (d) 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 which 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.
- (e) 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.

(f) 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.

3. When the applicable appropriations act becomes law, expenditures made pursuant to the Continuing Resolution must be charged against the 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 2006 Continuing Resolution.

C. Availability of Appropriations as to Time under a Continuing Resolution. A Continuing Resolution provides budget authority:

1. Until a fixed cut-off date specified in the Continuing Resolution;
2. Until an appropriations act replaces it; or
3. For an entire fiscal year, if no appropriations act is passed
4. The FY 2006 Continuing Resolution provided:

a. Sec. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, 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 by both Houses without any provision for such project or activity; or

(c) November 18, 2005.

D. Availability of Appropriations as to Amount under a Continuing Resolution.

1. Current rate. Continuing Resolutions frequently authorize operations at the "current rate." "Current rate" is usually "the total amount of money which was available for obligation for an activity during the fiscal year immediately prior to the one for which the continuing resolution is enacted." This amount indicates "the level of spending which Congress desires for a program." General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 8, Continuing Resolutions at p. 8-8 (2d ed. 1992) (hereinafter GAO, Principles).
  - a. Continuing Resolutions use the "current rate" to establish the upper limit at which agencies may continue to fund a project or activity. For example, the FY 2006 Continuing Resolution contained the following language:
    - (1) Sec. 101(b) Whenever the amount that would be made available or the authority that would be granted for a project or activity under an Act listed in subsection (a) as passed by the House of Representatives as of October 1, 2005, is the same as the amount or authority that would be available or granted under the same or other pertinent Act as passed by the Senate as of October 1, 2005--(1) the project or activity shall be continued at a rate for operations not exceeding the current rate or the rate permitted by the actions of the House and the Senate, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005; or (2) if no amount or authority is made available or granted for the project or activity by the actions of the House and the Senate, the project or activity shall not be continued
    - (2) (2) if the project or activity is included in the pertinent Act of only one of the Houses, the project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the **current rate** or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2005. FY 2006 Continuing Resolution (emphasis added).
  - 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).
2. Apportionment. OMB apportions the funds appropriated by Continuing Resolutions. 31 U.S.C. § 1512. Congress often includes language in a Continuing Resolution, such as that used in the FY 2002 CR, to ease the normal apportionment requirements:

Sec. 108. Appropriations and funds made available by or authority granted pursuant to this joint resolution *may be used without regard to the time limitations for submission and approval of apportionments* set forth in section 1513 of title 31, United States Code, but nothing in this joint resolution may be construed to waive any other provision of law governing the apportionment of funds. FY 2006 Continuing Resolution (emphasis added).

3. High Initial Rates of Operation. Congress often prohibits agencies with high rates of operation early in the fiscal year from engaging in similar conduct during the life of the Continuing Resolution.

Sec. 109. Notwithstanding any other provision of this joint resolution, except section 106, for those programs that had high initial rates of operation or complete

distribution of fiscal year 2005 appropriations at the beginning of that fiscal year because of distributions of funding to States, foreign countries, grantees or others, *similar distributions of funds for fiscal year 2006 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*. FY 2006 Continuing Resolution (emphasis added).

4. 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).

E. What Happens When Congress Decides to Reduce Government Operations -- The FY 1996 Continuing Resolution.

1. More Austere Conditions. In FY 1996 Congress required agencies to operate under more austere budgetary constraints during the Continuing Resolution period.
2. The Average of the Two Rates. The FY 1996 Continuing Resolution addressed the situation where the House version of an Act funded a project or activity at a different rate than the Senate version:

[Sec. 101](b) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this section as passed by the House as of October 1, 1995, *is different* from that which would be available or granted under such Act as passed by the Senate as of October 1, 1995, the pertinent project or activity shall be continued at a rate for operations *not exceeding the average of the rates permitted by the action of the House or the Senate* under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 . . . . FY 1996 Continuing Resolution (emphasis added).

3. 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 (emphasis added).

4. Only One Version. Congress also provided fiscally restrictive language when addressing those situations where only one House of Congress had passed its version of an appropriations act as of 1 October 1995.

[Sec. 101](c) Whenever an Act listed in this section has been passed by only the House or only the Senate as of October 1, 1995, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House *at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower,* and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1995. FY 1996 Continuing Resolution (emphasis added).

5. Minimal Level. The 104th Congress provided agencies funding so that they could continue certain FY 1995 activities at a "minimal level," that is, at 90% of the "current rate" for FY 1995.

Sec. 111. Notwithstanding any other provision of this joint resolution, except section 106, whenever an Act listed in section 101 as *passed by both the House and Senate as of October 1, 1995, does not include funding* for an ongoing project or activity for which there is a budget request, or whenever an Act listed in section 101 has been passed by only the House or only the Senate as of October 1, 1995, and an item funded in fiscal year 1995 is not included in the version passed by the one



House, . . . the pertinent project or activity may be continued under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995 by increasing the rate for operations provided by section 101 to *a rate for operations not to exceed one that provides the minimal level* that would enable existing activities to continue. . . . For the purposes of the Act, the *minimal level means a rate for operations that is reduced from the current rate by 10 percent.*<sup>3</sup> FY 1996 Continuing Resolution

6. Furloughs. The initial 1996 Continuing Resolution offered agencies some relief from the "minimal level" rule. An agency could sustain operations at that rate of operations necessary to avoid furloughing Government employees, even if that rate exceeded the minimum level or rate otherwise required by the Continuing Resolution.

Sec. 112. *Notwithstanding any other provision of this joint resolution, except section 106, whenever the rate for operations for any continuing project or activity provided by section 101 or section 111 for which there is a budget request would result in a furlough of Government employees, that rate for operations may be increased to a level that would enable the furlough to be avoided. . . .* FY 1996 Continuing Resolution (emphasis added).

F. 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 (1975).

## VII. CONCLUSION.

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<sup>3</sup> The second Continuing Resolution passed by the 104th Congress increased this decrement to 25 percent.

**APPENDIX A**  
**OPINION OF THE UNITED STATES ATTORNEY GENERAL**

APPLICABILITY OF THE ANTIDEFICIENCY ACT UPON A LAPSE IN AN AGENCY'S  
APPROPRIATION

(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 or 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.<sup>4</sup> On its 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.<sup>5</sup> 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 Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments

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<sup>4</sup>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.

<sup>5</sup>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).

administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of 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.<sup>6</sup>

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.<sup>7</sup> On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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 this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal

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<sup>6</sup>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).

<sup>7</sup>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.

<sup>8</sup>Act of July 15, 1952, ch. 758, §1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

<sup>9</sup>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, § 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.

<sup>10</sup>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).

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,<sup>11</sup> 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.<sup>12</sup> 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.

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

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<sup>11</sup>The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

<sup>12</sup>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).

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.<sup>13</sup>

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

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<sup>13</sup>See 21 Op. A.G. 288.

## **APPENDIX B**

### **THE DELLINGER MEMO**

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U. S. Department of Justice

Office of Legal Counsel

Office of the  
Assistant Attorney General

Washington, D. C. 20530

August 16, 1995

MEMORANDUM FOR ALICE RIVLIN  
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

From: Walter Dellinger  
Assistant Attorney General

*WED/cls*

Re: Government Operations in the Event of a Lapse in Appropriations

This memorandum responds to your request to the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations.<sup>1</sup>

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.*<sup>2</sup>

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

<sup>1</sup> 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.

<sup>2</sup> 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.



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.

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 to Robert G. Damus, October 19, 1993. 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.<sup>3</sup> 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:

- Multi-year appropriations and indefinite appropriations.

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

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<sup>3</sup> 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.

cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.

- Express authorizations: contracting authority and borrowing authority.

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 1981 Opinion 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.<sup>4</sup>

- Personal or voluntary services "for emergencies involving the safety of human life or the protection of property."

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 in Part 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 § 1342.

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<sup>4</sup> 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).

## 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 § 1342 bar on employing personal services, officers and employees may employ personal services in excess of other authorizations by law only in emergency situations.<sup>5</sup> This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

The central interpretive task under § 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 § 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

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<sup>5</sup> The 1981 Opinion 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 § [1342] was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1884, 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 [§ 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).

enacted the modern version of the Antideficiency Act and accepted revised language for § 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 §[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 § 1342.<sup>6</sup> Combining these two sources with the statutory text, the Attorney General articulated two

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<sup>6</sup> 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 § 665(e). Most important, under § 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).

rules for identifying functions for which government officers may enter into obligations to pay for personal services in excess of legal authority other than § 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.

While we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment, see Letter from Walter Dellinger to Robert G. Damus, October 19, 1993, 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 § 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.<sup>7</sup> 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 § 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 emergency exception applies only to cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response.

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<sup>7</sup> 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").



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## APPENDIX C

### 1990 OMNIBUS BUDGET RECONCILIATION ACT AMENDMENT OF 31 U.S.C. § 1342.

#### 31 U.S.C. § 1342. Limitations on Voluntary Services.

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 the government the suspension of which would not imminently threaten the safety of human life or the protection of property.* (emphasis added).

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## APPENDIX D

**Continuing Resolution Authority General Guidance**  
Office of the Assistant Secretary of the Army (Financial Management & Comptroller)  
SAFM-BUC-E  
August 1998  
(found at <http://www.asafm.army.mil/pubs/cra/cra0898.doc>)

### Chapter 3 – Rules for Operation in the Absence of CRA

#### 8. DoD Exempt and Non-Exempt Activities.

##### a. National security.

##### (1) Exempt activities.

- (a) Units identified in and administrative, logistics and maintenance functions required to support Joint Staff contingency program major regional contingency tasking.
- (b) Units and personnel tasked in direct support of the Single Integrated Operations Plan (SIOP).
- (c) Activities and functions of the Combatant Commander's, Subordinate Component Commander's and Supporting Commander's headquarters and OSD, Joint Staff, Service and DoD Agency staffs necessary to ensure operations and maintenance integrity of essential C4I systems.
- (d) Units and activities required to operate, maintain, assess and disseminate the collection of intelligence data necessary to support tactical and strategic indications, warning and supporting force enhancement roles.
- (e) Forward based combat, combat support and combat service support units.
- (f) Forward deployed units executing CJCS or CINC operations/deployment orders, those units in operational work-up status to execute those orders and those units and activities required in direct support of those tasks.
- (g) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations.
- (h) Units and personnel preparing for or participating in operational exercises.
- (i) Essential operational training necessary to execute operational, contingency and wartime tasking.

##### (2) Non-exempt activities.

- (a) Forces identified as available T+91 and beyond.
- (b) All other units not in direct support of exempted units, functions or activities.
- (c) Technical intelligence information collection, analysis and dissemination functions not in direct support of exempted 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).

(d) Training exercises not essential to the execution of wartime, contingency or OPLAN tasking.

(e) Basic, skill, and qualification training which will obligate current year funds.

(3) Explanatory notes.

(a) Post deployment units will minimize all operations which will obligate current year funds required to prepare for follow-on operational or OPLAN tasking.

(b) Operational exercises are those exercises required to prepare units for operational, contingency or wartime taskings.

(c) Training exercises are those exercises designed to improve skill and task proficiency but not necessarily oriented towards specific operational, contingency or wartime taskings.

b. Military and Civilian Personnel.

(1) Exempt activities.

(a) All active duty military personnel and all reservists on active duty. Duty assignments may be changed by local commanders to supplement exempt activities.

(b) Reserve Components personnel in direct support of exempted activities.

(c) National Guard and Reserve military technicians in units identified as available T+90 or less.

(d) Senate-confirmed officials appointed by the President and their immediate office personnel.

(e) Civilian personnel in direct support of exempted activities, and additional civilian personnel designated by the Secretary of Defense.

(f) Minimum number of personnel lists to support exempt personnel once orderly shutdown has occurred.

(g) Civilians paid through prior appropriations, revolving, trust or nonappropriated funds.

(h) Support to international special events or commitments, as authorized by the Secretary of Defense.

(i) Host nation funded foreign national employees whose functions support exempt activities.

(j) Foreign national employees governed by country-to-country agreements that prohibit furloughs.

(2) Non-exempt activities.

(a) Civilian personnel (including host nation funded foreign national employees) not in direct support of exempted activities.

(b) Military Personnel Selection Boards and Administrative Boards.

(c) Civilian personnel whose salaries are paid with annual appropriations and later reimbursed from another source (e.g., the Foreign Military Sales Trust Fund).

(3) Explanatory notes.

(a) Active duty military personnel and active duty reservists shall report for duty pursuant to Title 37, U.S. Code. Civilian personnel shall also report for duty unless specifically directed to do otherwise.

(b) Following a lapse in appropriations, a minimum number of essential civilian personnel will be retained to execute an orderly shutdown within a reasonable timeframe and may continue to work until the shutdown is completed.

(c) Civilian personnel paid from prior year appropriations may continue to work until prior year balances are exhausted.

(d) Foreign national employees paid by the host nation are subject to the same criteria for furlough as United States employees, depending on whether their functions support exempt activities. However, the host nation may elect to continue to pay the employees, even if they are furloughed.

(e) Foreign national employees paid with U.S. funds are also subject to the same furlough criteria as United States employees. However, their terms of employment may be governed by a Status of Forces agreement between the United States and the host nation, which means that their pay may not be controlled by U.S. laws. Depending on the terms of the agreement, it may be necessary to pay those employees, even if they are furloughed.

c. Protection of Life and Property.

(1) Exempt activities.

(a) Functions or activities to the extent necessary to protect life and property and for response to emergencies, including fire protection, physical security, law enforcement/counter terrorism, intelligence support to terrorist threat warnings, Explosive Ordnance Disposal operations, emergency salvage, subsafe program, nuclear reactor safety and security, air traffic control and harbor control, search and rescue, utilities, housing and food services for military personnel, and trash removal.

(b) Emergency repair and non-deferrable maintenance to utilities, power distribution system buildings or other real property including BEQ, BOQ and housing for military personnel.

(c) Repair of equipment needed to support exempted services, including fire trucks, medical emergency vehicles, police vehicles, or material handling vehicles.

(d) Voice and data communications that support exempt activities.

(e) Civilian personnel directly involved in the exempted activities, including security guards, individuals to monitor and maintain alarms and control systems, utilities, and emergency services. This category includes the National Communications System personnel who staff the National Coordinating Center for Telecommunications and civilian personnel at the White House Communications Center.

- (f) Minimum number of personnel for receipt and safekeeping of material delivered during shutdown.
  - (g) Minimum number of personnel to control hazardous material and monitor existing environmental remediations.
  - (h) Minimum number of personnel required to perform statutory responsibilities of the Defense Mapping Agency for marine and aeronautical navigation.
  - (i) Security maintenance and ADP operators associated with protecting property at the Defense Clearance and Investigations Index facility that supports DoD law enforcement efforts.
  - (j) Oil spill and hazardous waste cleanup, environmental remediation, and pest control, only to the extent necessary to prevent imminent danger to life or property.
  - (k) Civilian Army Corps of Engineer personnel with responsibilities to local and state governments that involve imminent threats to life or property.
  - (l) Civilian specialists responsible for safe storage or transportation of hazardous materials, including ammunition, chemical munitions, photographic processing operations.
  - (m) USD(A&T) personnel responsible for providing emergency reporting response and input to the National Response Team and coordinating with EPA and other agencies on fire, safety, occupational health, environmental, explosive safety for vector borne disease management.
- (2) Non-exempt activities. Environmental activities which are not necessary to prevent imminent threat to life or property.
  - (3) Explanatory notes.
    - (a) No new remediation activities, except those exempted above, may be started.
    - (b) Unit commanders may, on their authority, require return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to life or property.
- d. ADP and Communications.
- (1) Exempt activities.
    - (a) ADP centers, including megacenters, supporting exempt functions with a minimum number of civilian personnel.
    - (b) Operation and maintenance of command, control and communications systems.
    - (c) Telecommunications centers and phone switches on installations.
    - (d) Secure conference capability at military command centers.
  - (2) Non-exempt activities. Personnel and activities associated with planning and acquisition of future ADP, telecommunications, and command and control systems.

e. DOD Medical and Dental Care.

(1) Exempt activities.

- (a) Direct patient care personnel in DoD facilities (including Uniformed Service Treatment Facilities) including doctors, nurses, medical technicians, dentists, pharmacists, and essential support personnel (cooks, custodians, etc.).
- (b) Contingency planning in major medical command headquarters.
- (c) All inpatient care in Medical Treatment Facilities.
- (d) All acute and emergency outpatient care in DoD medical and dental facilities.
- (e) DoD health care contracts for inpatient care/acute outpatient care, including medical supplies.
- (f) Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) and TRICARE contracts.
- (g) Veterinary services that support exempted activities (e.g., food supply and service inspections).
- (h) Minimum civilian personnel necessary to provide certification of eligibility for health care benefits.

(2) Non-exempt activities.

- (a) Civilian administrative staff in Medical Treatment Facilities and dental facilities not involved in exempted patient care.
- (b) Civilian personnel in major medical command headquarters who are not involved in contingency planning.
- (c) Elective surgery in DoD Medical Treatment Facilities for non-active duty personnel (both CONUS and OCONUS).
- (d) Routine physicals, preventive dental procedures, or other routine medical procedures (including vaccinations) in DoD Medical Treatment Facilities for non-active duty personnel (both CONUS and OCONUS).
- (e) Persian Gulf Illness Hotlines.

e. Training and Education.

(1) Exempt activities.

- (a) Educational activities deemed necessary for immediate support of exempted activities.
- (b) Educational activities not otherwise exempted if undertaken by active duty military personnel for other active duty military personnel only.
- (c) Installation education centers may continue to operate using borrowed military manpower so that private agencies such as colleges and universities may provide courses purchased with previously available funding.
- (d) Department of Defense Dependents Schools and Section 6 Schools.



- (2) Non-exempt activities.
  - (a) At installation education centers, new registrations which require current year funding will not be conducted.
  - (b) Education other than for exempted activities.
  - (c) Training exercises not essential to the execution of wartime, contingency or OPLAN tasking.
  - (d) Basic, skill, and qualification training which will obligate current year funds.
- (3) Explanatory notes.
  - (a) Training and education of active duty military personnel, reserve component personnel, and military technicians is governed by the National Security exemption. Both active duty and National Guard or Reserve personnel will cease training unless their unit is providing direct support to ongoing exempt activities. All military personnel performing non-exempt training in a TDY status should return to their home station as expeditiously as possible within carrier availability. This policy will result in additional costs and waste, however, under the law, no other option is available.
  - (b) Training and education of civilian personnel in support of exempt activities is permitted. All other civilian training will be terminated. Civilians participating in non-exempt training or education will be furloughed and civilian personnel on TDY for such purposes should be returned to their home stations as part of the orderly shutdown of operations.
  - (c) Civilian instructors at military schools, training centers, and military academies will be subject to the same furlough criteria as other employees. In other words, if the activity has not been identified as part of the National Security exemption, or as a protection of life and property exemption, the instructors will be furloughed. However, the schools may continue to operate, if feasible, using military instructors and borrowed military personnel.

f. Recruiting.

- (1) Exempt activities.
  - (a) Military recruiters may continue to staff recruiting offices and may contact prospective recruits if administrative office expenses have been paid with prior year funding.
  - (b) Military staff of Military Enlistment Processing Stations (MEPS) will report for duty.
  - (c) Recruiting advertising purchased with prior year funds will continue to be utilized.
- (2) Non-exempt activities.
  - (a) Official vehicles cannot be used to transport recruiters or prospective recruits.
  - (b) New enlistment contracts cannot be executed.
  - (c) New recruits are not permitted to report to MEPS, or to report for induction.

(d) Civilian administrative staff and contract physicians assigned to MEPS will not report for duty.

(e) Recruiting advertising using current year funding will not be utilized.

(3) Explanatory notes. The Secretary of Defense reserves the right to reverse the above guidance and resume normal recruiting activities after a lapse of 5 working days to avoid longer term disruption that would impair readiness. Resumption of recruiting activity is not automatic after 5 days and may be implemented only by direction of the Secretary of Defense.

g. Permanent Change of Station (PCS) and Temporary Duty (TDY).

(1) Exempt activities.

(a) PCS moves funded with prior year funds for active duty, reserve, and civilian personnel may continue till completion and will be paid.

(b) TDY travel for active duty, reserve, and civilian personnel funded and completed in the previous fiscal year will be paid.

(c) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in exempted activities may be authorized during a lapse in appropriations, but payment cannot be made until appropriations become available.

(d) PCS moves of military personnel terminating their service and returning to their home of record will continue to be processed as part of the orderly shutdown of operations.

(e) Travel funded from .0015 contingency limitation (for USACIDC mission travel) or .0017 extraordinary military expenses limitation.

(f) Government transportation tickets funded with prior year appropriations will remain valid.

(g) Travel advances may be paid only if the travel order was approved during the previous fiscal year or a previous CRA period.

(2) Non-exempt activities. PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in non-exempt activities during a lapse in appropriations will not be authorized. Non-exempt personnel on TDY will return to home station as part of shutdown procedures.

(3) Explanatory notes. All personnel performing official travel that does not support exempt activities should return to their home station as expeditiously as possible within carrier availability. This policy will result in additional costs and waste, however, under the law, no other option is available. Obligations are permitted for both TDY and PCS requirements in support of exempt activities; however, no disbursements are authorized. Under this policy, payment of travel advances or reimbursement of expenses for submitted travel vouchers will not be disbursed. While government charge cards may be used to incur obligations in support of exempt activities, the traveler is responsible for payment of the charge card bill when it is presented. Personnel should also be aware that government charge card privileges may be suspended in the event of a shutdown.

h. Army Working Capital Fund (AWCF) and Other Revolving Funds.

(1) Exempt activities.

(a) AWCF/revolving fund activities may continue to operate until cash reserves are exhausted.

(b) When cash reserves are exhausted, AWCF/other revolving fund activities in direct support of exempted activities must continue.

(c) AWCF activities may continue to accept orders financed with previously available funds, or unfunded orders from exempt organizations. Unfunded orders will be posted to accounts receivable, but will not actually be billed until appropriations are enacted.

(d) BRAC activities may continue to operate until unobligated balances are exhausted.

(2) Non-exempt activities. AWCF/revolving fund activities which provide support to non-exempt activities.

(3) Explanatory notes.

(a) Revolving funds may continue to operate utilizing prior year unobligated balances.

(b) Prudent management actions should be taken to sustain operations and minimize operational impact, including: delay of training, minimal travel, reduction in supplies, and other actions consistent with management objectives.

(c) Inter-AWCF billings will be suspended.

(d) Current year ledger transactions to military personnel accounts will be suspended.

(e) Managers may perform advance billing.

i. Contracting Activities.

(1) Exempt activities.

(a) Contracts for functions that would otherwise be exempt if performed by government employees.

(b) New contracts for exempted activities.

(c) Administration of contracts for exempt activities, including combat support and combat service support.

(d) Receipt, recordation and safe storage of material shipped and/or delivered under existing contracts.

(e) Contract payment, so long as DFAS remains operational pursuant to AWCF instructions and a valid invoice or bill, properly certified for payment, is presented.

(2) Non-exempt activities.

(a) Administration of existing contracts for non-exempt activities.

(b) Negotiation, preparation and execution of new contracts for non-exempt activities.

- (c) Supervision and inspection of ongoing construction contracts, unless the civilian salaries are paid from prior year appropriations.
- (d) Contract reconciliation and closeout procedures.
- (3) Explanatory notes.
  - (a) Contracts funded with current year funds, that do not support exempt activities, will be terminated when available funding has been exhausted. Contract terms should be structured to allow for orderly termination of the contract in the event of a funding gap, and for reinstatement of the contract when funds become available. Contracting officers should work with contractors to minimize the impact of a lapse in funding. It should be understood that termination of a contract due to a funding gap is beyond the control of the contracting officer or contracting activity, and that contractor protests of such a termination are not generally considered to be justified.
  - (b) For contract actions, options, and modifications, not within the scope of the original contract, in direct support of exempt activities, the contracting officer will cite one of three authorities for these obligations: (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 Feed and Forage Act, and (3) 31 U.S.C. 1342 for obligations for protection of life and property against imminent danger.

j. Legal Activities.

- (1) Exempt activities.
  - (a) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session after a lapse in appropriations.
  - (b) Legal support for exempted activities.
- (2) Non-exempt activities. All other legal activities.

k. Audit and Investigation Community.

- (1) Exempt activities.
  - (a) Personnel participating in an ongoing criminal investigation or working undercover.
  - (b) Personnel required to support an emergent criminal investigation if authorized by the Secretary of Defense.
- (2) Non-exempt activities. All other members of the audit and investigation community.

l. Trust Funds.

- (1) Exempt activities.
  - (a) Trust funds conducting exempted activities (for example, retirement homes).
  - (b) Trust funds with management activities routinely paid from trust fund resources.
  - (c) Trust funds managed by Defense Finance and Accounting Service (DFAS) so long as DFAS operates.

- (d) Trust funds managed by borrowed military personnel.
- (2) Non-exempt activities. All other trust fund activities.

m. Morale Welfare & Recreation/Non-Appropriated Funds.

- (1) Exempt activities.
  - (a) Activities funded entirely through NAF sources.
  - (b) Child care activities.
  - (c) MWR activities operated by NAF personnel, or those using borrowed military personnel to replace civilian employees paid by appropriated funds.
- (2) Non-exempt activities. All MWR activities staffed by civilian employees paid from appropriated funds who are not replaced using borrowed military manpower.

n. Financial Management.

- (1) Exempt activities.
  - (a) Minimum essential personnel needed to record new obligations incurred in the performance of exempt functions/operations, and to manage AWCF cash.
  - (b) Obligation adjustment and reallocation of prior year unobligated funds in support of exempt functions/operations.
- (2) Non-exempt activities.
  - (a) Preparation of budget submission data.
  - (b) Closing of accounts that expired in the previous fiscal year.
  - (c) Preparation of year-end closing statements and financial reports for the previous fiscal year.
  - (d) Investigation of Anti-deficiency Act violations.
  - (e) Research and correction of problem disbursements.
  - (f) Adjustments to prior year funds related to programs and contracts that do not support exempt functions/operations.

**APPENDIX E**

**FY2008 OMB APPORTIONMENT BULLETIN**

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EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

THE DIRECTOR

September 28, 2007

OMB BULLETIN NO. 07-05

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Apportionment of the Continuing Resolution(s) for Fiscal Year 2008

1. Purpose and Background. H.J. Res. 52 will provide continuing appropriations for the period October 1 through November 16, 2007. I am automatically apportioning amounts provided by this continuing resolution (CR) as specified in section 2. This Bulletin supplements instructions for apportionment of CRs in OMB Circular No. A-11, section 123, and applies to this CR and any extensions of this CR.
2. Automatic Apportionments. See the attachment to this Bulletin for more detailed instructions on calculating the annualized amount provided by the CR. In order to calculate the amount automatically apportioned through the period ending November 16th (and any extensions of that period); multiply the annualized amount provided by the CR by the lower of:
  - the percentage of the year covered by the CR (e.g., for H.J. Res. 52 use 12.84 percent), or
  - the historical seasonal rate of obligations for the period of the year covered by the CR.

With regard to the treatment of FY 2007 supplementals, section 110 of the CR requires that the resolution be implemented so that only the most limited funding action permitted in the CR is taken. The Administration has interpreted this section to mandate that agencies in general spend at a minimum level, so as not to infringe upon the prerogative of Congress to set full-year funding levels. Funding apportioned under the CR excludes one-time, non-recurring projects and activities that were funded by those FY 2007 supplementals cited in H.J. Res. 52. Recurring and ongoing projects and activities funded by FY 2007 supplementals in Public Laws 109-295, Division A of 109-289, and Division B of Public Law 109-289 (as amended by Public Law 110-5), may be factored in to the formula if pre-approved by your OMB representative with budget responsibility for the account (section 101 of H.J. Res. 52 specifically does not include supplemental appropriations enacted in P.L. 110-28).

Under an automatic apportionment, all of the footnotes and conditions placed on the prior year apportionment remain in effect. The CR provides that FY 2007 terms and conditions apply.



3. Written Apportionments. If an agency seeks an amount for a program which is different from the total amount automatically apportioned, you must request a written apportionment from OMB. Only a very limited number of written apportionment requests are expected to be granted. Every request must be accompanied by a written justification that includes the legal basis for the exception apportionment. Once a written apportionment is approved, the terms and conditions of the automatic apportionment bulletin cease to apply to the extent changed by the written apportionment.



Jim Nussle

Attachment

## Calculating the Amount Made Available by the Continuing Resolution (CR) and the Automatic Apportionment

### 1. What is the annualized, full-year amount provided by the continuing resolution (CR)?

The FY 2007 level:

- take the full year amount enacted in the appropriations acts making funds available for FY 2007 (i.e., full-year appropriations net of any reductions, including across-the-board reductions);
- add only the recurring, ongoing supplemental FY 2007 appropriations amounts (pre-approved by the OMB representative with budget responsibility for the account) found in P.L. 109-289 (Division A), P.L. 109-295, P.L. 109-289 (Division B, as amended by P.L. 110-5);
- add or subtract transfers mandated by law (only "shall transfer", not "may transfer");

### 2. What is the amount of the automatic apportionment under a CR?

Calculate the amount automatically apportioned (whole dollars) through the period ending November 16, 2007, (and any extensions of that period) by multiplying the **annualized amount provided by the CR** by the lower of:

- the **percentage of the year** covered by the CR (rounded to the nearest hundredth) (for a 7-week CR, use 47 days/366 days=12.84 percent); or
- the **historical seasonal rate** of obligations for the period of the year covered by the CR.

### 3. How should the phrase "project or activity" be applied in determining the CR level?

In the context of determining the rate for operations under the CR, OMB has interpreted the term "project or activity" to refer to the total appropriation, that is, the budget account level. GAO's view has been consistent with OMB's (see page 8-24 of the Principles of Federal Appropriations Laws, Third Edition, Volume II, issued by GAO).

### 4. How should mandatory appropriations be treated?

A continuing resolution is an appropriations bill. As such, it normally does not affect mandatory appropriations provided in substantive or authorizing legislation. Therefore, for accounts with a mix of discretionary and mandatory appropriations, the mandatory budget authority component that is enacted in substantive or authorizing legislation should be taken out before calculating the amount provided by the CR. Changes in mandatory programs that were enacted in 2007 appropriations Acts are assumed to continue during the duration of the CR under the terms and conditions provided in such Acts.

5. **Are entitlement and other mandatory payments whose budget authority was provided in Appropriations Acts for fiscal year 2007 continued at the FY 2007 level or FY 2008 program level?**

Section 111 of H.J. Res. 52 allows entitlements and other mandatory payments whose BA was provided in Appropriations Acts for FY 2007 to continue at the "rate to maintain program levels under current law, under the authority and conditions provided in the applicable appropriations Act for fiscal year 2007...". In other words, these programs can operate at the FY 2008 program level. However, the appropriated administrative expenses associated with these programs must be based on the FY 2007 levels.

6. **How will section 112 of H.J. Res. 52 regarding civilian personnel compensation and benefits be apportioned by OMB?**

Section 112 allows OMB limited authority to mitigate furloughs. It does not provide additional total budget authority for the fiscal year. Rather, it allows OMB to apportion the BA at a greater rate than the daily rate. OMB will be applying this authority in the most restrictive fashion. You must be pre-approved by your OMB representative with budget responsibility for the account before requesting a written apportionment from OMB. OMB will require written documentation that the following pre-condition from section 112 of the CR has been satisfied by the agency: *"except that....such authority provided under this section shall not be used until after the department or agency has taken all necessary actions to reduce or defer non-personnel-related administrative expenses."*

## APPENDIX F

DoD Appropriation/Authorization History FY 2008/2009/2010

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**FY 2008 Appropriation/Authorization History**

<b>1st CR</b>	10/01/07 to 11/16/07	Enacted 9/29/07	P.L. 110-92 H.J.Res. 52
<b>2nd CR</b>	11/17/07 to 12/14/07	Enacted 11/13/07	P.L. 110-116 H.R. 3222
	Amends the 1st CRA to 12/14/07 & adds new sections		
<b>2008 DODAA (DoD Appropriations Act)</b>		Enacted 11/13/07	P.L. 110-116 H.R. 3222
	DoD Baseline \$\$ but no \$\$ specifically for GWOT.64		
<b>3rd CR</b>	12/15/2007 to 12/21/07	Enacted 12/14/07	P.L. 110-137 H.J. Res. 69
	Amends the 1st CR to change the date to 12/21/07.		
<b>4th CR</b>	12/22/2007 to 12/31/07	Enacted 12/21/07	P.L. 110-149 H.J. Res. 72
	Amends the 1st CR date to 12/31/07 & adds new sections		
<b>CAA Consolidated Appropriations Act, 2008</b>	Enacted 12/26/07		P.L. 110-161 H.R. 2764
	Contains funds for all federal agencies in one act (13 divisions) Div L contains Emergency Supplemental Appropriations for GWOT Div I contains DoD MILCON AA appropriations.		
<b>2008 NDAA Nat'l Defense Authorization Act</b>	Enacted 12/28/07	Vetoed 12/18/07	H.R. 1585
	Authorized Appropriations for FY08 for DoD, MILCON etc. Pres Bush vetoed the NDAA b/c Section 1083 would have frozen substantial Iraqi assets in the U.S. including the Development Fund for Iraq (DFI), the Central Bank of Iraq (CBI), and commercial entities in the US in which Iraq has an interest. It would have overturned litigation decisions favorable to Iraq & created a new federal cause of action against Iraq. The veto impacted the implementation of service- members pay & bonuses that were set to begin 1 Jan 08.		
<b>2008 NDAA Nat'l Defense Authorization Act</b>	Enacted 01/28/08		P.L. 110-181 H.R. 4986 111 STAT. 3
<b>Supplemental &amp; FY09 Bridge Approp. Act</b>	Enacted 6/30/08		P.L. 110-252 HR 2642
	Defense Bridge Fund Appropriations FY 2009, Available 1 Oct 2008 - 30 Sept 2009		

**FY 2009 Appropriation/Authorization History**

<p><b>Supplemental Appropriations Act (SAA) 08</b>          * Included DoD &amp; DoS Bridge funding for FY2009</p>	<p>Enacted 6/30/08;          Bridge funds available 1 Oct 2008</p>	<p>P.L. 110-252</p>
<p><b>Consolidated Security, Disaster Assistance, &amp; Continuing Appropriations Act (CAA), 2009</b>          * Contains Continuing Resolution through 3/6/09 for everyone but DoD, Homeland Security, MILCON/VA</p>	<p>Enacted 9/30/08</p>	<p>P.L. 110-329</p>
<p><b>Duncan Hunter National Defense Authorization Act for Fiscal Year 2009</b>          *Contains Authorizations for DoD, MILCON, and DoE</p>	<p>Enacted 10/14/08</p>	<p>P.L. 110-417</p>
<p><b>American Recovery and Reinvestment Act of 2009</b>          * Stimulus Bill          * Making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes.          * Includes \$\$ for DoD MILCON, VA, Dept of Homeland Security, DoS</p>	<p>Enacted 2/17/09</p>	<p>P.L. 111-5</p>
<p><b>Joint Resolution (Continuing Resolution)</b>          *Extends CAA's continuing resolution until 11 March 2009.</p>	<p>Enacting 3/6/09</p>	<p>P.L. 111-6</p>
<p><b>Omnibus Appropriations Act, 2009</b>          *Contains FY09 funding for Dept's of Ag., Commerce, Energy, Interior, Labor, Health &amp; Human Services, Legis. Branch Approp, <b>DOS &amp; Related Programs</b>, Transportation, Homeland Security.</p>	<p>Enacted 3/11/09</p>	<p>P.L. 111-8</p>

## FY 2010 Appropriation/Authorization History

<b>1<sup>st</sup> Continuing Resolution</b> attached to the Legislative Branch Appropriations Act, 2010 as Division B. <i>CR expiration date: 31 October 2009</i>	Enacted 10/01/09	Div. B. P.L. 111-68
Dept. of Agriculture Appropriations Act	Enacted 10/16/09	P.L. 111-80
Dept of Energy Appropriations Act	Enacted 10/28/09	P.L. 111-85
Dept. of Homeland Security Appropriations Act	Enacted 10/28/09	P.L. 111-83
National Defense Authorization Act for Fiscal Year 2010.	Enacted 10/28/09	P.L. 111-84
<b>2<sup>nd</sup> Continuing Resolution</b> attached to the Dept of Interior & Environment's Appropriation Act, 2010 as Division B. <i>CR expiration date: 18 Dec. 2009</i>	Enacted 10/30/09	Div. B., P.L. 111-88
DODAA, 2010	Enacted 12/19/09	P.L. 111-118



## FY 2011 Appropriation/Authorization History

<b><u>1<sup>st</sup> Continuing Resolution</u></b> <i>CR expiration date: 3 December 2010</i>	Enacted 09/30/2010	P.L. 11-242
<b><u>2<sup>nd</sup> Continuing Resolution</u></b> –extension (H.J. Res 101) <i>CR expiration date: 18 December 2010</i>	Enacted 12/2/10	P.L. 111-290
<b><u>3<sup>rd</sup> Continuing Resolution-</u></b> extension (H.J. Res 105) <i>CR expiration date: 21 December 2010</i>	Enacted 12/18/10	P.L. 111-317
<b><u>4<sup>th</sup> Continuing Resolution-</u></b> extension <i>CR expiration date: 4 March 2011</i>	Enacted 12/22/10	P.L. 111-322



## APPENDIX G

### 2011 DOD CR GUIDANCE

Subject: **FY 2011 OPERATIONS UNDER A CONTINUING RESOLUTION (CR) MESSAGE NO.1**

Originator: /C=US/O=U.S.

GOVERNMENT/OU=DOD/OU=ARMY/OU=ORGANIZATIONS/L=CONUS/L=WASHINGTON

DC/OU=DA

HQDA SECRETARIAT(UC)/OU=ASA(FMC)(UC)

DTG: 221000Z Sep 10

Precedence: PRIORITY

DAC: General

To: /C=US/O=U.S. GOVERNMENT/OU=DOD/OU=AUTODIN PLAS/OU=AIG

6-AZ/OU=ALARACTUNCLASSIFIED//

PASS TO ALL DCSRMS, RESOURCE MANAGERS, COMPTROLLERS, BUDGET OFFICERS, FINANCE AND ACCOUNTING OFFICERS, PROGRAM EXECUTIVE OFFICERS, PROJECT MANAGERS, DISBURSING OFFICERS, ARMY NATIONAL GUARD ADJUTANTS GENERAL, US PROPERTY AND FISCAL OFFICERS, CONTRACTING OFFICER REPRESENTATIVES, CIVILIAN PERSONNEL OFFICERS, US DEFENSE ATTACHE OFFICERS.

#### 1. REFERENCES:

A. DFAS-IN REGULATION 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION (MAY 2008), CHAPTER 3 PARA. 0308.

B. ARMY RESOURCE FORMULATION GUIDE, VOLUME 7, BUDGET EXECUTION, APPENDIX C, CONTINUING RESOLUTION AUTHORITY GENERAL GUIDANCE, 16 JULY 2010.

#### 2. PURPOSE: TO PROVIDE SPECIFIC INSTRUCTIONS ON CONTINUING RESOLUTION (CR) AUTHORITY. THIS

MESSAGE APPLIES TO ALL ARMY APPROPRIATIONS AND TO ALL DOD APROPRIATIONS MANAGED BY ARMY.

3. CURRENT CR STATUS: THE SENATE APPROPRIATION COMMITTEE PASSED THEIR VERSION OF THE FY 11 DEFENSE APPROPRIATIONS BILL; THE HOUSE IS NOT EXPECTED TO VOTE BEFORE 30 SEPTEMBER 2010. IT IS HIGHLY UNLIKELY CONFERENCE ACTION CAN BE COMPLETED PRIOR TO 1 OCTOBER.

ACCORDINGLY, ARMY ACTIVITIES SHOULD BE PREPARED TO OPERATE UNDER A CONTINUING RESOLUTION FOR THE START OF FY 2011. AT THIS TIME, UP THE INITIAL CR IS EXPECTED TO RUN UNTIL MID NOVEMBER 2010.

#### 4. NORMAL OPERATING RULES UNDER A CR INCLUDE:

A. OPERATIONS MAY CONTINUE AT A RATE NOT TO EXCEED THE AVERAGE DAILY FY 2010 RATE AND AT MINIMUM ESSENTIAL LEVELS (SUBJECT TO THE AVAILABILITY OF OBLIGATION AUTHORITY PROVIDED VIA PBAS /GFEBs). THE OMB CR FORMULA IS EXPECTED TO INCLUDE FY 2010 BASE, OCO AND SUPPLEMENTAL FUNDING LESS SUPPLEMENTAL MILITARY CONSTRUCTION FUNDING.

B. NO NEW STARTS OR EXPANSION OF ONGOING PROGRAMS.

C. NO NEW MULTIYEAR PROCUREMENTS SHALL BE MADE UTILIZING ADVANCE PROCUREMENT FUNDING FOR ECONOMIC ORDER QUANTITY PROCUREMENT.

D. FOR THOSE PROGRAMS WHICH HAD HIGH INITIAL RATES OF OPERATION OR COMPLETE DISTRIBUTION OF FY 2010 FUNDS DUE TO DISTRIBUTION OF FUNDING

TO STATES, GRANTEEES OR OTHERS, SIMILAR DISTRIBUTIONS OF FUNDS FOR FY 2011 SHALL NOT BE MADE.

E. DISBURSEMENTS MAY BE MADE FOR FY 2011 OBLIGATIONS MADE DURING THE CR PERIOD.

F. FUNCTIONS TRANSFERRED BETWEEN APPROPRIATIONS (FROM FY 2010 TO FY 2011) SHALL BE FUNDED DURING CR BY THE APPROPRIATION THAT FUNDED THE FUNCTION IN FY 2010.

G. UNDER CR, EXECUTION FOR MILCON/AFH IS LIMITED TO PLANNING AND DESIGN, UNSPECIFIED MINOR CONSTRUCTION, ONGOING PROJECTS ALREADY AUTHORIZED, AND AFH OPERATIONS. CONTINGENCY CONSTRUCTION AUTHORITY IS NOT AVAILABLE UNDER THE CR.

5. FY 2011 ALLOCATIONS WILL BE INPUT INTO PBAS AND GFEBs BEFORE 2400 HRS EDT 30 SEPT WASH DC TIME. ARMY WILL CLOSEOUT PBAS AND GFEBs AT 2400 HRS EDT 30 SEPT WASH DC TIME FOR FY 2010. COMMANDS SHALL ADHERE TO YEAR END INSTRUCTIONS.

6. CR POINTS OF CONTACT ARE MS. DEBORAH MANNER, SAFM-BUC-E, DSN (312) 222-7868 OR COMMERCIAL (703) 692-7868 OR MR. GARY GERAETS, SAFM-BUC-E, DSN (312) 222-7375 OR COMMERCIAL (703) 692-7375

7. EXPIRATION DATE OF THIS MESSAGE IS MIDNIGHT, 30 SEP

11.\*\*\*\*\*

ALARACT 308/2010

DTG: 010156Z OCT 10

THIS MESSAGE HAS BEEN SENT BY THE PENTAGON TELECOMMUNICATIONS CENTER ON BEHALF OF DA WASHINGTON DC//ASA FM & C//.

**SUBJECT: FISCAL YEAR 2011 OPERATIONS UNDER A CONTINUING RESOLUTION (CR) MESSAGE NO.2**

PASS TO ALL DCSRMS, RESOURCE MANAGERS, COMPTROLLERS, BUDGET OFFICERS, FINANCE AND ACCOUNTING OFFICERS, PROGRAM EXECUTIVE OFFICERS, PROJECT MANAGERS, DISBURSING OFFICERS, ARMY NATIONAL GUARD ADJUTANTS GENERAL, US PROPERTY AND FISCAL OFFICERS, CONTRACTING OFFICER REPRESENTATIVES, CIVILIAN PERSONNEL OFFICERS, US DEFENSE ATTACHE OFFICERS.

1. REFERENCES:

A. DFAS-IN REGULATION 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION (MAY 2008), CHAPTER 3 PARA. 0308.

B. ARMY RESOURCE FORMULATION GUIDE, VOLUME 7, BUDGET EXECUTION, APPENDIX C, CONTINUING RESOLUTION AUTHORITY GENERAL GUIDANCE, 16 JULY 2010.

2. PURPOSE: TO PROVIDE SPECIFIC INSTRUCTIONS ON CONTINUING RESOLUTION (CR) AUTHORITY. THIS MESSAGE APPLIES TO ALL ARMY APPROPRIATIONS AND TO ALL DOD APPROPRIATIONS MANAGED BY ARMY.

3. CURRENT CR STATUS. THE SENATE AND THE HOUSE OF REPRESENTATIVES HAVE PASSED CR LEGISLATION AND THE PRESIDENT SIGNED THE BILL INTO LAW ON SEPTEMBER 30, 2010. THE CR RUNS FROM 1 OCTOBER 2010 THROUGH 3 DECEMBER 2010. ACCORDINGLY, ARMY ACTIVITIES SHOULD BE PREPARED TO OPERATE UNDER A CONTINUING RESOLUTION FOR THE START OF FY 2010 FOR 64 DAYS.

4. NORMAL OPERATING RULES UNDER A CR INCLUDE:

A. OPERATIONS MAY CONTINUE AT A RATE NOT TO EXCEED THE AVERAGE DAILY FY 2010 RATE AND AT MINIMUM ESSENTIAL LEVELS (SUBJECT TO THE

AVAILABILITY OF OBLIGATION AUTHORITY PROVIDED VIA PBAS/ GFEBs). THE OMB CR FORMULA IS EXPECTED TO INCLUDE FY 2010 BASE, OVERSEAS CONTINGENCY OPERATIONS( OCO), AND SUPPLEMENTAL FUNDING, LESS SUPPLEMENTAL FUNDING FOR MILITARY CONSTRUCTION AND HAITI RELIEF.

B. NO FUNDING MAY BE USED FOR NEW STARTS OR EXPANSION OF ONGOING PROGRAMS.

C. NO NEW MULTIYEAR PROCUREMENTS SHALL BE MADE UTILIZING ADVANCE PROCUREMENT FUNDING FOR ECONOMIC ORDER QUANTITY PROCUREMENT.

D. FOR THOSE PROGRAMS THAT WOULD OTHERWISE HAVE HIGH INITIAL RATES OF OPERATION OR COMPLETE DISTRIBUTION OF FY 2011 FUNDS DUE TO DISTRIBUTION TO STATES, GRANTEEES OR OTHERS, SUCH COMPLETE DISTRIBUTIONS SHALL NOT BE MADE AND NO GRANTS SHALL BE AWARDED.

**E.**

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# CHAPTER 10:



# OPERATIONAL FUNDING

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: “1. A military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission. 2. The process of carrying on combat, including movement, supply, attack, defense, and maneuvers needed to gain the objectives of any battle or campaign.
  - 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 I-2).
  - 3. Army Field Manual (FM) 3.0, *Operations*, is the cornerstone of Army operational doctrine. It discusses “full spectrum operations,” a concept requiring Judge Advocates to be able to assist commanders in understanding the various sources for funding the diverse missions confronting leaders.

- B. Framework for Analysis: The 5 W's of Funding Military Operations with the correct appropriation.



1. Within the broad framework of “full spectrum” military operations, Judge Advocates should expect a myriad of fiscal challenges as U.S. military, allied forces, and partner agencies engage in dynamic strategies to “restore stable peace.” Understanding fiscal resources and limitations is critical to mission accomplishment, and military lawyers should endeavor to assist commanders in a legal, responsible, and ethical manner.
2. Most fiscal issues concerning the funding of “operations” will follow the traditional Purpose-Time-Amount analysis. This is essentially an in-depth analysis of the “purpose” prong but with special emphasis on contingency operation and funding foreign militaries, foreign governments, and other entities not traditionally funded by the military departments’ Operation and Maintenance (O&M) funds.
3. 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. Appendix A provides a generalized step by step method for determining the purpose and identifying an appropriate funding source, while Appendix B provides a consolidated picture of the more commonly used DoD operational funding sources. ***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 MILITARY 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 constraining 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.

Although the Constitution provides a basic framework for appropriations law, Congress has created a much more robust legislative framework for appropriations (Purpose – Time – Amount). In the field of foreign assistance, fully understanding the fiscal legislative framework is critical in determining how to legally fund specific missions.

## IV. THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING

### A. Fiscal Legislative Controls

There is NO deployment exception to the fiscal law framework! The same Purpose – Time – Amount fiscal limitations that regulate the obligation and expenditure of funds apply to funding the military’s foreign assistance activities (See chapters 2-4 Fiscal Law Deskbook). Congress does provide; however, special appropriations and/or authorizations to fund 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).<sup>1</sup>
  - 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

The appropriation draws the “pot of money” from the U.S. Treasury with a basic purpose attached to it, while an authorization may provide additional purposes for which that “pot of money” may be used. In practice, JA’s tend to construe “pots of money” by authorization, e.g. CERP, rewards, etc.

1. Congress has used the yearly NDAA as a vehicle to provide additional authorizations for the funds that are appropriated in the yearly DoD

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<sup>1</sup> 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.

Appropriations Act (DoDAA). Many of these additional authorizations exceed the basic purpose of the appropriation to which they were linked.<sup>2</sup>

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 the yearly expenses and investment activities of DoD, not including the funding of contingency operations. These activities are referred to as “baseline operations,” funded with “baseline funds.”
  - c) Military Construction Appropriation Act (MILCONAA): Appropriates Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD.
3. Current administrative policy is to consolidate appropriations into one, with “supplemental” appropriations for any shortfalls and/or unforeseen events. In the past, Congress has funded the current conflicts in Afghanistan and Iraq with “supplemental” appropriations, sometimes called “wartime” or “emergency” supplemental.
4. The current status of DoD authorization and appropriation acts are as follows (as of 1 February 2010):
  - a) 2011 DoDAA: Enacted by the President on 15 April 2011.<sup>3</sup> Before its passage, DoD was operating from funds temporarily authorized in Continuing Resolution Authorities (CRAs).<sup>4</sup> Six successive authorities were enacted by the President on 30 September 2010, 4 December 2010, 18 December 2010, 22 December 2010, 22 December 2010, 2 March 2011, and 18 March 2011.<sup>5</sup>

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<sup>2</sup> For example, the Commander’s Emergency Response Program (CERP) authorizes the use of DoD O&M for purposes (“small scale projects...urgent humanitarian or urgent reconstruction needs” of Iraqi and Afghan civilian populations) that do not fall squarely within the operating expenses of the military.

<sup>3</sup> Department of Defense and Full-Year Continuing Appropriations Act for Fiscal Year 2011, Pub. L. No. 112-10 (Apr. 15, 2011) [hereinafter 2011DoDAA], available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1473enr/pdf/BILLS-112hr1473enr.pdf>.

<sup>4</sup> See Fiscal Law Deskbook, Chapter 9, Continuing Resolution Authority.

<sup>5</sup> Continuing Resolution Authorities for Fiscal Year 2011, Pub. L. No. 111-242 (Sep. 30, 2010) [hereinafter CRA], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3081enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3081enr.txt.pdf).

- b) 2011 NDAA: Enacted by the President on 7 January 2011.<sup>6</sup>
- c) 2010 MILCONAA: Enacted by the President on 16 December 2009 as part of the 2010 Consolidated Appropriations Act (CAA), also containing the Veteran’s Affairs Appropriations.<sup>7</sup>
- d) 2010 DoDAA: Enacted by the President on 19 December 2009.<sup>8</sup> Before its passage, DoD was operating from funds temporarily authorized in Continuing Resolution Authorities (CRAs).<sup>9</sup> CRA 1, enacted on 30 September 2009 (and as continued in CRA 2, 3, and 4) authorizes continued appropriations for DoD at the same rate as the 2009 DoDAA, the 2009 Supplemental Appropriations Act, and Chapter 2, Title IX of the 2008 Supplemental Appropriations Act.<sup>10</sup>
- e) 2010 SAA: Enacted by the President on 29 July 2010.<sup>11</sup>

C. “Permanent” vs. “Temporary” Authorizations

- 1. Permanent Appropriations and Authorizations are inserted into the appropriate Title of the U.S. Code (e.g., Title 10 for DoD). These are presumed authorized until Congress modifies or eliminates the authorization in a later statute.
- 2. Temporary Authorizations are not inserted into the U.S. Code. As a result, they automatically cease to exist once the period of availability is complete unless Congress subsequently re-authorizes the provision in later legislation.

D. The Military’s Role in Funding Foreign Assistance

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<sup>6</sup>National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-84 (Oct. 28, 2009) [hereinafter 2011 NDAA], available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr6523enr/pdf/BILLS-111hr6523enr.pdf>.

<sup>7</sup> Consolidated Appropriations Act for Fiscal Year 2010, Pub. L. No. 111-117, div. E (Dec. 16, 2009) [hereinafter MILCONAA], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3288enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf).

<sup>8</sup> Department of Defense Appropriations for Fiscal Year 2010, Pub. L. No. 111-118 (Dec. 19, 2009) [hereinafter DoDAA], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3326enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3326enr.txt.pdf).

<sup>9</sup> See Fiscal Law Deskbook, Chapter 9, Continuing Resolution Authority

<sup>10</sup> See generally Legislative Branch Appropriations Act, 2010, div. B (Continuing Appropriations for 2010) (October 1, 2009), Pub. L. No. 111-68 [hereinafter CRA 1], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h2918enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2918enr.txt.pdf).

Consolidated Security, Disaster Assistance, and Continuing Appropriations Act 2009, Pub. L. No. 110-329, div C (Sep. 30, 2008) [hereinafter 2009 DoDAA], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h2638enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2638enr.txt.pdf).

2008 Supplemental Appropriations Act, Pub. L. No. 110-252 (June 30, 2008), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:h2642enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2642enr.txt.pdf).

<sup>11</sup> Supplemental Appropriations Act for Fiscal Year 2010, Pub. L.No. 111-212 (Jul. 29, 2010) [hereinafter SAA], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_public\\_laws&docid=f:publ212.111.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_public_laws&docid=f:publ212.111.pdf).

Generally, DoD may only obligate appropriated O&M and Procurement funds when the primary purpose is to benefit the U.S. Military directly.

1. General Rule: The DoS funds Foreign Assistance to foreign nations, NOT the DoD! 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.
2. Two Exceptions to the General Rule:
  - a) Little “t” training: DoD may fund the training (not goods and services) of foreign militaries with O&M *only when* the purpose of the training is to enhance Interoperability, Familiarization, and Safety during combined training. (See Appendix B, The Honorable Bill Alexander.) Little “t” training involves a few Servicemembers, is short in duration, and relatively inexpensive. With little “t” training, DoD Servicemembers are the primary beneficiary of the training experience, not the foreign partner.
  - b) Specific Appropriation and/or Authorization from Congress. Congress may provide specific authority (found in both permanent Title 10 authorities and temporary authorizations) to fund activities that benefit a foreign military, government or population.

## V. 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.<sup>12</sup> The legal authority for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.<sup>13</sup>
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

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<sup>12</sup> See *The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984)

<sup>13</sup> 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>.



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)<sup>14</sup> 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 also 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.<sup>15</sup>

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 & Democratically; (3) Investing in People; (4) Economic Growth; and (5) Humanitarian Assistance.<sup>16</sup>
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 which interface with DoD operations.

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<sup>14</sup> See Pub. L. No. 105-118, Foreign Operations, Export Financing, and Related Programs Appropriations Act, section 570, “Limitation on Assistance to Security Forces.” Section 8058 of the 2011 DoDAA continues this prohibition.

<sup>15</sup> See, e.g. Section 8058, 2011DoDAA, *supra* note 3.

<sup>16</sup> See “Foreign Assistance Standardized Program Structure and Definitions,” April 8, 2010, *available at* <http://www.state.gov/documents/organization/141836.pdf> (last accessed June 21, 2010). Each of these broad programs contains several sub-elements.

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).<sup>17</sup>
  - 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.
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).<sup>18</sup>
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.

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<sup>17</sup> 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.

<sup>18</sup> 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.dsc.osd.mil/samm/>.

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)<sup>19</sup> and The Arms Export Control Act of 1976 (AECA).<sup>20</sup> 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.
      - (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:

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<sup>19</sup> 22 U.S.C. § 2151 et seq.

<sup>20</sup> 22 U.S.C. § 2751 et seq.

- (a) Countries or international organizations are only eligible for FMS transactions if the POTUS makes a determination of their eligibility.<sup>21</sup> 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 Assistance Management Manual (SAMM) chapters 4-6 as well as online at [http://www.dscamilitary.com/cust\\_guide2006/](http://www.dscamilitary.com/cust_guide2006/).
- (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).<sup>22</sup>
  - (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).

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<sup>21</sup> SAMM, Table C4.T2 contains a list of current eligibility status for Countries and International Organizations.

<sup>22</sup> 22 CFR part 121

- (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.
- 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.<sup>23</sup>
    - (b) Some Significant Military Equipment (SME) must be purchased through FMS.

## 2. U.S. Financed DoS Security Assistance.

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<sup>23</sup> See ITAR part 123 for regulatory procedures for licensing to export defense articles.

- 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.<sup>24</sup> Loaned funds must be repaid over a period not to exceed 12 years unless otherwise approved by Congress.
  - (3) Amount:
    - (a) FY 2011 DoDAA, section 2112 appropriated \$5,385,000,000 (note: there are additional caveats and instructions on use).
    - (b) FY 2010 Consolidated Appropriations Act (CAA) appropriated \$4,195,000,000.
    - (c) FY 2010 Supplemental Appropriations Act (SAA) appropriated an additional \$100,000,000, available until 30 September 2012. Of this, \$50,000,000 shall be made available for assistance for Pakistan and \$50,000,000 shall be made available for assistance for Jordan.
  - (4) Practitioner's Notes:
    - (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.<sup>25</sup>

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<sup>24</sup> 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/cgi-bin/getdoc.cgi?dbname=111\\_cong\\_bills&docid=f:h3288enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3288enr.txt.pdf).

- 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)<sup>26</sup>
- (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).<sup>27</sup>
- (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;

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<sup>25</sup> See “Defense Security Cooperation Agency Guidelines for Foreign Military Financing of Direct Commercial Contracts,” August 2009.

<sup>26</sup> Foreign Assistance Act (FAA) § 506(a)(1)

<sup>27</sup> FAA § 506(a)(2)

- (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.<sup>28</sup>
- (3) Peacekeeping Operations Drawdown Authority -, 22 U.S.C. § 2348a(c)(2).<sup>29</sup>
  - (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).
    - (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.<sup>30</sup>
    - (iii) Limitations: requires 15 day prior CN.

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<sup>28</sup> 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).

<sup>29</sup> FAA § 552(c)(2).

<sup>30</sup> 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.



- (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.<sup>31</sup> 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.<sup>32</sup>
  
- 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.
    - (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:

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<sup>31</sup> This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act.

<sup>32</sup> For example, Congress also provided \$165M reimbursement for the AFSA Drawdown. *See*, Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.

- (a) 30 days prior CN for 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.<sup>33</sup> 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.
- d) Complex Crises Fund (CCF) – § 2108 FY 2011 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 2011
  - (3) Amount: \$40,000,000
  - (4) Practitioner Notes:

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<sup>33</sup> SAMM, paragraph C11.5.1

- (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...”<sup>34</sup>
- 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<sup>35</sup> 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
    - (c) Increase awareness of internationally recognized human rights.
  - (2) Time/Amount: FY 2011 CAA appropriates \$106,000,000 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.<sup>36</sup>

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<sup>34</sup> DoS Executive Budget Summary, Function 150 & Other International Programs, available at <http://www.state.gov/documents/organization/135888.pdf>.

<sup>35</sup> 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.

- f) Pakistan Counterinsurgency Capability Fund (PCCF) –2009 SAA (as continued by §2112 FY 2011 CAA)
- (1) Purpose: to build and maintain the counterinsurgency capability of the Pakistani security forces (including the Frontier Corps), to include program management and the provision of equipment, supplies, services, training, and facility and infrastructure repair, renovation, and construction.
  - (2) Time: the FY 2009 SAA appropriations are available for obligation on 30 September 2009 and will expire on 30 September 2012.
  - (3) Amount: \$700,000,000.
  - (4) Practitioner Notes: DSCA executed on behalf of DoS. This fund serves essentially the same purpose as the DoD’s Pakistan Counterinsurgency Fund and can be “merged and available for the same purposes and for the same time period as the appropriation or fund to which transferred.”
- g) 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: \$305,000,000 in §2111, FY 2011 CAA.
  - (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

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<sup>36</sup> 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/>.

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 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.<sup>37</sup>
  - b) Time: generally 2 year period of availability.
  - c) Amount:
    - (1) 2011 CAA: \$5,958,101,000 (referred to as “level for..accounts”)
      - (a) Rescinds \$120,000,000 appropriated in previous fiscal years
    - (2) 2010 SAA:
      - (a) \$1,620,000,000 available until 30 September 2012,
      - (b) \$770,000,000 available until 30 September 2012 for “necessary expenses for emergency relief, rehabilitation, and reconstruction aid, and other expenses related to Haiti.
      - (c) \$100,000,000 available until 30 September 2012 for assistance for Jordan.
    - (3) 2010 CAA: \$6,337,000,000 available until 30 September 2011.
    - (4) 2009 SAA: \$2,970,000,000 available until 30 September 2010.

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<sup>37</sup> USAID is the Agency primarily responsible for expenditure of these funds.

- d) 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 Iraq and Afghanistan.
  - (3) The FY 2011 CAA prohibits use of ESF for direct government to government assistance in Afghanistan and Pakistan unless the Sec. of State certifies that the relevant implementing agency is (1) qualified to manage the funds, (2) written agreement is made as to clear and achievable goals, and (3) established mechanism to ensure intended use.
  - (4) 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.
  - (5) Funds should also be used to the maximum extent practicable to emphasize participation of women.
- e) Practitioner Notes: ESF OCO funds are often used to fund PRT's and Rule of law activities.

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*.”<sup>38</sup>
- b) Time: generally 2 year period of availability.
- c) Amount:
  - (1) FY 2010 CAA: \$1,597,000,000 available through 30 September 2011.

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<sup>38</sup> 22 U.S.C. § 2291 (4) (emphasis added).

- (2) FY 2010 SAA: \$1,034,000,000 available through 30 September 2012.
  - (a) Not less than \$650,000,000 be made available for assistance for Iraq (of which \$450,000,000 is for one-time start up costs and limited operational costs of the Iraqi police program; and \$200,000,000 is for implementation, management, security, communications, and other expenses related to the Iraqi police program).
  - (b) Not less than \$169,000,000 shall be made available for assistance for Afghanistan, and not less than \$40,000,000 shall be made available for assistance for Pakistan.
  - (c) Not less than \$175,000,000 shall be made available for Mexico for judicial reform, institution building, anti-corruption, and rule of law activities.

d) 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.”<sup>39</sup>
- (2) The Office of Civilian Police and Rule of Law Programs (CIVPOL) falls under the INL umbrella. The CIVPOL has the broad mission of providing law enforcement, criminal justice, and corrections experts and assistance in “post-conflict societies and complex security environments.”<sup>40</sup>
- (3) INL also receives funding, from the DOD’s Iraq Security Forces Fund (ISFF) and Afghanistan Security Forces Fund (ASFF) appropriations via interagency acquisitions (IAs) and interagency

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<sup>39</sup> Bureau of International Narcotics and Law Enforcement Affairs Department of State Webpage, *available at* <http://www.state.gov/p/inl/>.

<sup>40</sup> See Office of Civilian Police and Rule of Law Programs, <http://www.state.gov/p/inl/civ/index.htm> (last visited on 20 Aug. 2009).

*transfer of funds.*<sup>41</sup> The ISFF/ASFF contains Congressional “transfer authority,” which authorizes the DOD to transfer these ISFF/ASFF to other agencies to further the basic purposes of the ISFF/ASFF.<sup>42</sup> DOD, for example, transferred over \$1.42 billion to the Bureau of International Narcotics and Law Enforcement Affairs since the enactment of the ISFF in fiscal year 2005.<sup>43</sup>

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 the logistics infrastructure and may be called upon to assist with transport and provision of supplies and aid. (see VI.D.).<sup>44</sup>

## **VI. DEPARTMENT OF DEFENSE AUTHORIZATIONS AND APPROPRIATIONS**

- A. General Rule: DoS has the primary responsibility, authority, and funding to conduct Foreign Assistance on behalf of the U.S. Government.

There are two exceptions to this general rule- (1) Little “t” training and (2) specific appropriation or authorization from Congress for the DoD to conduct foreign assistance.

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<sup>41</sup> *See, e.g.*, Fiscal Law Deskbook, ch 11, Interagency Acquisitions (IA), for additional information on the execution of ISFF/ASFF IAs.

<sup>42</sup> *See, e.g.*, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005); *see also* 2008 Supplemental Appropriations Act, Pub. L. 110-252, Title IX, Ch. 2 (30 June 2008).

<sup>43</sup> 2008 SIGIR Report 25 (Jul. 30, 2008).

<sup>44</sup> 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).



1. Little “t” training: training or instruction of foreign forces with the primary purpose of for interoperability, safety, and/or familiarization. (also called Interoperability training). Funded with DoD O&M.<sup>45</sup>
  - a) The factual support for the stated DoD intent and training effect should guide the advising attorney in determining whether a training event is Little “t” interoperability training or whether it should be classified as Big “T” Security Assistance Training. Big “T” Security Assistance Training of foreign forces has the primary purpose to improve the operational readiness of the foreign forces must be funded with DoS authorizations and appropriations. Factors to consider: cost of training, current level of training of the foreign troops before training vs. the expected level of training of the foreign troops after training is complete, and amount of DoD time and resources expended to provide the training.
  - b) Examples:
    - (1) Little “t” training: A two-hour block of safety instruction on C-130 entry and egress for already airborne qualified foreign troops who are participating in a one month-long Combined Airborne Parachute Exercise. The training is of short duration, the cost is low, and their level of training is not significantly enhanced as they are already airborne qualified. Fund with DoD O&M.
    - (2) Big “T” Training: Training foreign troops to become airborne qualified during a month-long airborne school. The duration of the training is long, the cost is likely significant, and most importantly, the level of training of the foreign troops is significantly increased. Fund with DoS appropriations/authorizations as this is Security Assistance Training, unless DoD has separate authority to conduct this training provided by Congress.
2. Statutory Appropriation or Authorization: Specific authority for DoD to fund foreign assistance authority either a Title 10 “permanent” or a temporary authorizations/appropriations.

B. Framework for Defense Authorizations and Appropriations.

Recalling that foreign assistance is a means by which Commanders conduct a variety of operations, Judge Advocates must understand the nature or type of operation to be

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<sup>45</sup> 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.”

funded. Unfortunately, Congress does not provide authorities and authorization in specified categories. One may find it helpful to consider funding authorities in THREE general categories: 1. Building and Funding Coalition Partners, 2. DoD Aid and Assistance to Foreign Civilians, 3. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO). Within these three general categories, Judge Advocates will find both permanent and temporary authorities to fund operations. To most effectively ensure that the purpose of both the operation and funding source match, Judge Advocates should be involved in early stages of the operational planning process.

C. Building and Funding Coalition Partners.

Within this functional category, there are two general subgroups of funds: those that fund joint exercise and training, and those that provide logistic support to foreign forces. When foreign forces are our partners in contingency operations, Congress may additionally provide temporary authorities that can fund both training and logistic support. Notably, there are two permanent funds with significant flexibility that can fund activities the activities involved in building, training and supporting foreign partners.

1. Emergency & Extraordinary Expenses (“Triple E” or “EEE”): 10 U.S.C. § 127.
  - a) Purpose: “for any emergency or extraordinary expense which cannot be anticipated or classified.”
  - b) Time: 1 year O&M funds
  - c) Amount: the 2011 DoDAA authorizes 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: \$14,804,000 in Navy O&M
    - (4) Secretary of the Air Force: \$7,699,000 in AF O&M
  - d) Approval Authority: Secretary of Defense, Secretaries of the military departments, and Inspector General. Authority may be delegated (and re-delegated).
  - e) 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.

f) Practitioner Notes:

- (1) Common Use: .0012 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 likely to be tapped due to regulatory controls.

2. Combatant Commander Initiative Funds (CCIF): 10 U.S.C. § 166a

a) Purpose:

- (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: 2011 DoDAA authorizes the following
  - (1) \$50,000,000 of DoD O&M.
  - (2) *plus* additional \$12,500,000 DoD O&M to be used in support of OND and OEF.
  - (3) Limitations:
    - (a) 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.
    - (b) No more than \$10,000,000 may be used to pay the expenses of foreign countries participating in joint exercises.
    - (c) No more than \$5,000,000 may be used to provide military education and training to military and related civilian personnel of foreign countries.
    - (d) No funds may be used for any activity which Congress has denied authorization.
- d) Approval Authority: Initiatives nominated by Combatant Commanders with final approval authority of CJCS.<sup>46</sup>
- e) Practitioner Notes:
  - (1) Funding: Coordination is key. Funds are controlled by CJCS, and projects are competitively selected.
  - (2) Common Use: Unforeseen contingency requirements that are critical to combined war-fighting readiness.

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<sup>46</sup> CJCSA 7401.01E (1 July 2009): Combatant Commander Initiative Fund. NOTE: this is a limited release instruction and not for public release.

- (3) Like “Triple E” or “EEE” funds, the CCIF is exceptionally flexible from a legislative perspective, though it is subject to high approval authority levels and policy limitations.
3. Subgroup One: Funding Joint and Combined Exercises and Training.<sup>47</sup>
    - a) SOF Training as Joint Combined Exchange Training (JCET): 10 U.S.C. § 2011
      - (1) Purpose: for SOF training costs in joint/combined training exercises and for the incremental expenses of foreign forces *if the primary purpose* of the joint-combined training exercise is to train our SOF in learning to train foreign forces. (SOF includes civil affairs and psychological operations forces).
      - (2) Time: DoD O&M specific for SOF = 1 yr
      - (3) Amount: as budgeted by SOF
      - (4) Practitioner’s Notes: Unless assigned to a SOF unit, these funds will not be an available resource. This fund is really a benefit to the U.S., because it trains us to work with foreign forces. Where available, the Commander, SOCOM or other Combatant Command may pay any of the following expenses related to training of SOF:
        - (a) Expenses of training in conjunction with the armed forces or security forces of a friendly foreign country.
        - (b) Expenses of deploying SOF for training.
        - (c) Incremental expenses incurred by the friendly developing foreign country incurred as a result of the 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.

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<sup>47</sup> Joint — “Connotes activities, operations, organizations, etc., in which elements of two or more Military Departments participate;” Combined – “Between two or more forces or agencies of two or more allies.” See Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, (12 April 2001, as amended through April 2010).

- (e) Does not include pay, allowances, and other normal costs of the country's personnel.
  
- b) 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 cooperation.
  - (2) Time/Amount: O&M funds (1 year)/ Broad authorization that is limited by the services' individual implementing guidance.<sup>48</sup>
  - (3) Approval Authority: Secretary of Defense or Service Secretaries
  
- c) Bilateral or Regional Cooperation Programs: 10 U.S.C. § 1051
  - (1) Purpose: for the payment of travel, subsistence, similar personal expenses, and other expenses of defense personnel of developing countries in connection with the attendance of such personnel at a multilateral, bilateral, or regional conference, seminar, or similar meeting.<sup>49</sup>
  - (2) Approval Authority: Secretary of Defense upon a determination that the attendance of such personnel and the expenses are in the national security interests of the United States.
  - (3) Practitioner's Notes:
    - (a) 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.
    - (b) This authority is in addition to LATAM COOP.
  
- d) Regional Centers for Security Studies: 10 U.S.C. § 184(f)(3) (DoD Directive 5200.41)

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<sup>48</sup> For the Army, the Deputy Chief of Staff, G 3/5/7, has responsibility for implementing this program. See AR 11-31 (24 October 2007).

- (1) Purpose: waiver of costs of conferences, seminars, courses of instruction or similar educational activities for foreign military officers and foreign civilian defense and security officials from a developing country if in the U.S. national security interest.
  - (2) Time/Amount: Waived costs are paid from appropriations available to the Regional Centers. May use current year funds for courses that end in the next fiscal year (may cross fiscal years).
  - (3) Approval Authority: Secretary of Defense
- e) 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. Authorized activities and expenses:
    - (a) Activities of traveling contact teams, to include transportation, translation services, and administrative expenses associated;
    - (b) Activities of military liaison teams;
    - (c) Civilian or military personnel exchanges between DoD and defense ministries of foreign governments;
    - (d) Military personnel exchanges between units of the U.S. and foreign armed forces;
    - (e) Seminars and conferences held primarily in a theater of operations;
    - (f) Publication distribution primarily in a theater of operations;
    - (g) Personnel expenses for DoD civilian and military personnel provided they relate to participation in any activity described in (c), (d), (e), or (f) above;
    - (h) Reimbursement of military personnel appropriations accounts for pay and allowances of reserve component personnel for service while engaged in any activity above;

- (i) Assignment of personnel under (c) or (d) above on a non-reciprocal basis where Secretary of Defense determines assignment rather than exchange is in the interests of the U.S.
    - (i) Newly created in 2010 NDAA § 1207
    - (ii) Authority expires 30 September 2012
  - (j) Foreign government pays personnel costs to include salary, per diem, cost of living, travel, language training. DoD covers costs of training programs to orient/familiarize/certify, incidental facility use, and U.S. directed TDY costs.
- (2) Time/Amount: Funds appropriated may be used for programs/activities that begin in one fiscal year and end in another (specifically authorized within the statute).
- (3) Approval Authority: Secretary of Defense provides funds as follows:
- (a) To the combatant commander upon request;
  - (b) To an officer designated by C, JCS for areas not under a combatant commander;
  - (c) To the head of any DoD component.
- (4) Practitioner Notes: activities may not be conducted in any country not approved for activity by the Secretary of State or within a country not authorized for assistance under the FAA.<sup>50</sup>
- f) **Bilateral & Multilateral Exercise Programs (Developing Countries Combined Exercise Program (DCCEP)): 10 U.S.C § 2010**
- (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

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<sup>50</sup> The Leahy Amendment to the 1997 to the Foreign Operations Appropriations Act prohibits U.S. security assistance to foreign military or security units “against whom exist credible allegations of gross violations of human rights.”



- (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: Secretary of Defense after consultation with the Secretary of State
- (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 logistic support to foreign forces.

- a) Acquisition & Cross-Servicing Agreements (ACSA): 10 U.S.C. § 2341–2350<sup>51</sup> (governed by DoDD 2010.9 and implemented by CJCSI 2120.01).
  - (1) Purpose: bilateral agreements for the reimbursable mutual exchange of Logistics Supplies, Services, and Support (LSSS) excluding Significant Military Equipment (SME).<sup>52</sup> Must use proper purpose funds for LSSS acquired. Two authorities/methods exist:

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<sup>51</sup> Governed by DoDD 2010.9 (28 April 2003): Acquisition and Cross-Servicing Agreements; Implemented by CJCSI 2120.01 (27 November 2006): Acquisition and Cross-Servicing Agreements.

<sup>52</sup> 10 U.S.C. § 2350, LSSS is defined as “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. Such term includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act.”

- (a) Acquisition Only Authority (AoAs) (10 U.S.C. § 2341): Limited authority for DoD to acquire LSSS for deployed forces from eligible countries and organizations.<sup>53</sup>
- (b) Cross-Servicing Agreement (10 U.S.C. § 2342): Permits DoD to both purchase LSSS as well as provide LSSS on a reimbursable basis with eligible countries.<sup>54</sup> Requires consultation with DoS.

(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<sup>55</sup>:
  - (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.
- (c) Payment-in-Kind (PIK): Reimbursement must occur within 90 days of initial provision of LSSS.<sup>56</sup>
  - (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.<sup>57</sup>

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<sup>53</sup> Eligible Countries 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.

<sup>54</sup> Eligible Organizations include: NATO countries and subsidiaries, UN or any regional international organization, and non-NATO governments when designated by the Secretary of Defense. For non-NATO members, the Secretary of Defense must, after consultation with the Secretary of State, that an agreement is in the interest of the national security of the U.S and must submit notice to specified committees of the Senate and House at least 30 days prior.

<sup>55</sup> 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.

<sup>56</sup> DoD FMR, Volume 11A, Chapter 8, para. 080202A.

- (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.
- (e) Equal Value Exchange (EVE): Reimbursement must occur within 1 year of initial provision of LSSS.<sup>58</sup>
  - (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

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<sup>57</sup> *Id.* at para. 080202B.

<sup>58</sup> *Id.*

(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: Secretary of Defense (consultation with Secretary of State for non-NATO). May be delegated.<sup>59</sup>
- (b) Transaction Approval Authority: Personnel are designated specifically based on knowledge and experience to carry out transactions. ACSA that are complex or involve 10 USC chapter 137 require a warranted contract officer.

(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 meals at dining facilities on bases in Afghanistan and Iraq.
- (d) Contact your COCOM G4 for a complete list of ACSA's.

b) ACSA-*Lend* Authority: 2011 NDAA §1203.

- (1) Purpose: Temporary Authority exists to *Lend* military equipment, on a non-reimbursable basis to our coalition partners (1) in Iraq

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<sup>59</sup> 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.

and 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 2011 (FY11).<sup>60</sup>

(3) Approval Authority:

(a) COCOM Commanders are designated as approval authorities by Secretary of Defense.

(b) When lending in connection with training, a notice and wait period is required. Sec. Def. 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 Iraqi or Afghan militaries.

(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.

c) Global Lift and Sustain: 10 U.S.C. § 127d<sup>61</sup>

(1) Purpose:

(a) To provide LSSS, including air-lift and sea-lift, to partner nation forces worldwide in support of the combined

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<sup>60</sup> See 2009 NDAA § 1204, Pub. L. No. 110-417 (Oct. 14, 2008), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_bills&docid=f:s3001enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s3001enr.txt.pdf)

<sup>61</sup> Created in 2007 NDAA § 1201. Originally codified as 10 U.S.C. § 127c. (also see 1234 of 2008 NDAA). Most recently modified and expanded by 2011 NDAA §1202.

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. ***If it would directly benefit the U.S. armed forces, support may also be provided to nonmilitary logistics, security, or similar agency of an allied government.***<sup>62</sup>

- (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) By policy may NOT be used in Iraq and Afghanistan due to the availability of specific temporary authority— Iraq/Afghanistan Lift and Sustain.

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<sup>62</sup> Expansion in 2011 NDAA §1202.

- (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) Coalition Support Fund (CSF): currently at 2011 NDAA § 1213
  - (1) Purpose: reimburse key cooperating nations (i.e., Pakistan, Jordan..) for logistical, military, and other support (**including access**) provided to support the U.S. in OND and OEF. Reimbursement may be monetary or through “in kind” reimbursement of:
    - (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 funds
  - (3) Amount:
    - (a) 2011 DoDAA: not to exceed \$1,600,000,000
    - (b) 2010 NDAA authorized not to exceed \$1,600,000,000; the 2010 DoDAA appropriated only \$1,570,000,000 for reimbursement.
    - (c) 2009 Continuing Resolution Act continued 2008 authorization, and the 2009 Supplemental Appropriation in June 2006 authorized \$1,000,000,000 until expended.

- (4) Approval Authority: Secretary of Defense with Secretary of State concurrence and 15 day prior notice to Congress (unless reimbursement is for access based on international agreement).
- (5) Practitioner Notes:
  - (a) Requires quarterly reports to Congress.
  - (b) A 2008 GAO report that found a lack of accountability over Pakistan reimbursement claims has heightened scrutiny on Pakistan claims.
  - (c) Notably, the CSF expanded in several ways over the course of contingency operations. It now includes reimbursements for “access,” and it 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.
  - (d) Funding administered by DSCA.
- f) Iraq/Afghanistan Lift and Sustain: currently at 2011 DoDAA § 9006
  - (1) Purpose: “provide supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Iraq and Afghanistan.”
  - (2) Time: 1 year, DoD O&M funds.
  - (3) Amount: no limitation provided in FY 2011. The 2008 NDAA contains the only limitation on obligations to the amount of \$400,000,000.
  - (4) Reporting requirements: Secretary of Defense must provide quarterly reports to the congressional defense committees.
  - (5) Practitioner Notes:
    - (a) Limitation: DoD uses the Iraq/Afghanistan Lift and Sustain Authority in Iraq and Afghanistan and may not use Global Lift and Sustain.



- (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.
  
- g) Building Partner Capacity (BCP) and Equip Authority: currently at 2011 NDAA § 1207. (also called “Train and Equip” or “1206 funds” because originally in § 1206)
  - (1) Purpose: provide equipment, supplies, and training 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 (a new provision in the 2009 NDAA).
  
  - (2) Time: 1 year DoD O&M funds
  
  - (3) Amount: \$350,000,000 annually through FY11
    - (a) During FY 10 and FY 11, no more than \$75,000,000 may be used to assist foreign nations to participate in or support military and stability operations in which the U.S. Armed Forces are participating.
    - (b) During FY 12, no more than \$100,000,000 may be used for the purposes in (a) above.
  
  - (4) Approval Authority: Secretary of Defense with Secretary of State concurrence and 15 day prior Congressional notification. (NOTE: this has NOT been delegated).
  
  - (5) Practitioner Notes:

- (a) All programs MUST include elements that promote:
  - (b) observance and respect for human rights and fundamental freedoms and
  - (c) respect for legitimate civilian authority within that country
  - (d) available for military forces only, not security forces (though a subsequent amendment authorizes use for maritime security forces).
  - (e) Practitioners should note that this temporary authority can also be included in the general category of Counterinsurgency/terrorism and Overseas Contingency Operations. Functionally, the purpose of this authority is to build partners who can assist in such operations.
- h) Special Operations Forces (SOF) Support: currently in 2011 NDAA § 1201 (originally in §1208, so often referred to as “1208 funds”). This authorization is the SOF equivalency of “1206” BCP.
- (1) Purpose: “to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing operations by United States special operations forces to combat terrorism.”
  - (2) Time: 1 year DoD O&M funds
  - (3) Amount: \$45,000,000 annually
    - (a) FY 05 through FY 08: \$25,000,000 annually
    - (b) FY 08 through FY 09: \$35,000,000 annually
    - (c) FY10: \$40,000,000
  - (4) Approval Authority: Secretary of Defense (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 the SOF are located PRIOR to disbursing funds.

- (b) Secretary of Defense must notify congressional defense committees within 48 hours of use.

(5) Practitioner Notes:

- (a) Unless assigned to a SOF unit, JA's are unlikely to have access to these funds.
- (b) In the 2011 Joint Explanatory Statement to the 2011 NDAA, Congress expresses concern with DoD's lack of reporting compliance and notification. As such, they added additional reporting requirements for the Asst. Sec.Def. for Special Operations and SOC. This provides an example of Congressional response when DoD fails to comply with requirements.

D. DoD Aid and Assistance to Foreign Civilians<sup>63</sup>

Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA): 10 U.S.C. §§ 401, 402, 404, 407, 2557, 2561.<sup>64</sup> OHDACA is a funding source for specific permanent authorizations; those authorizations contain the actual purpose of OHDACAs use to support missions that fall within them.

a) Time/Amount: Generally 2 year funds.

- (1) 2011 DoDAA: \$108,032,000 (available until 30 September 2012)
- (2) 2010 DoDAA: \$109,869,000 (available until 30 September 2011)
- (3) 2010 SAA: No additional appropriation; however, amounts were appropriated specifically to each service as follows to reimburse O&M accounts for amounts transferred to OHDACA for Haiti emergency relief efforts in response to the January 2010 earthquake (note: these amounts are one time reimbursement and NOT carried through with the FY 2011 CRA):
  - (a) Army: \$213,300,000 additional O&M.
  - (b) Navy: \$187,600,000 additional O&M.

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<sup>63</sup> See The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq. general authority for humanitarian assistance for civilian populations.

<sup>64</sup> 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.

- (c) Marine Corps: \$30,700,000 additional O&M.
- (d) Air Force: \$218,400,000 additional O&M.
- (4) 2009 DoDAA: \$83,200,000 (available until 30 September 2010)
- (5) 2008 DoDAA: \$102,780,000 of which:
  - (a) \$63,300,000 available until 30 September 2009
  - (b) \$40,000,000 available *solely* for foreign disaster relief and response activities (§ 404) until 30 September 2010 (3 years).

2. Individual Authorizations:

- a) 10 U.S.C. § 401: Humanitarian and Civic Assistance (HCA)<sup>65</sup>
  - (1) Purpose: provide HCA in Conjunction with Military Operations.
    - (a) Secretary concerned must determine that the activities will promote (1) security interests of both the U.S. and the country where activities carried out; and (2) the specific operational readiness skills of the servicemembers participating in the activities.
    - (b) HCA is defined as:
      - (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<sup>66</sup>

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<sup>65</sup> See DoD Directive 2205.2

- (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.
  - (b) 2011 DoDAA: O&M is authorized for 401 purposes in two ways. The DoDAA states that “within funds appropriated for the operation and maintenance of the Armed Forces, funds are hereby appropriated for [HCA] costs *incidental to authorized operations and pursuant to authority granted in section 401...*” (emphasis added). DOD’s current implementing regulation, DODD 2205.02, dtd 2 Dec 2008 discusses the role of Combatant Commands in the programming of O&M funded HCA; because the Combatant Commands are allocated HCA funds, Command SOPs and policy guidance is applicable and may vary.
  - (c) 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.”<sup>67</sup> Thus, when conducted an HCA operation using EITHER OHDACA or O&M funds, unit funds may be expended for “incidental costs” associated with carrying out such HCA.
- (3) Approval Authority:
- (a) OHDACA- DSCA (implemented by the Security Assistance Management Manual).

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<sup>66</sup> 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.” DoDI 8220.02 includes language matching this congressional intent.

<sup>67</sup> 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).

- (b) O&M Minimal Costs – COCOM Commander (implemented by DoDD 2205.01).
  - (c) O&M Incidental costs – this could be a lower level authority, including the purchasing officer or field operating officer (FOO) during an operation. Judge Advocates should check with local command regulations and policies when advising on the expenditure of O&M for incidental costs.
- (4) Practitioner’s Notes:
- (a) Example incidental use: doctor’s examination of a few villagers for a few hours with the administration of several shots and issuance of medicine while accompanying a Civil Affairs unit on a mission to discuss local issues with the local leaders.
  - (b) Must have Secretary of State approval (though DoDD 2205.10 does not require State’s approval for “minimal cost HCA.”)
  - (c) Limitations: (1) cannot duplicate other forms of U.S. economic assistance; (2) not for military or paramilitary activities; (4) expenses may not include costs of the military operation that would have occurred regardless of the HCA.
  - (d) “De minimis” HCA. There is no term or equivalent in the current legislative and policy framework. In practice, this term may refer to “incidental cost” HCA, but it would be limited to using unit O&M to support an HCA operation.
- b) 10 U.S.C. § 402: Transportation of Humanitarian Relief Supplies to Foreign Countries (Denton program).
- (1) Purpose: transport to any country, without charge,<sup>68</sup> supplies furnished by NGO’s for humanitarian assistance on a space-available basis.

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<sup>68</sup> 10 U.S.C. § 402(d)(2) authorizes the Secretary of Defense to require reimbursement for costs incurred with transport.

- (2) Practitioner's Notes: Before transporting supplies, the Secretary of Defense must determine:
  - (a) The transport of the supplies is consistent with U.S. foreign policy;
  - (b) The supplies are suitable for humanitarian purposes and in usable condition;
  - (c) Legitimate humanitarian need exists for the supplies by the people for whom intended;
  - (d) Supplies will, in fact, be used for humanitarian purposes; and
  - (e) Adequate arrangements have been made for the distribution of the supplies in the destination country.
  - (f) Coordinate with DoS 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.<sup>69</sup>
- (2) Approval Authority: President has delegated authority to the Secretary of Defense who must have concurrence of Secretary of State.<sup>70</sup>
- (3) Practitioner's Notes:
  - (a) Within 48 hours of commencing relief activities, the President must transmit a report to Congress.

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<sup>69</sup> 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.

<sup>70</sup> 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.

- (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
  - (1) Purpose: to carry out humanitarian demining activities that promote either (1) the U.S. and the country where the demining 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.



- (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.<sup>71</sup>
- (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:

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<sup>71</sup> 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 servicemembers. 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. Practitioners must pay particular attention to the 5Ws when using these funds.

1. **Commander’s Emergency Response Program (CERP):** DoD FMR vol 12 chapter 27. **The 2011 NDAA §1212 provides significant updates and limitations as noted below.**

- a) General Purpose: (as updated by the 2011 NDAA §1212- key changes are italicized)
  - (1) “(1) authorizes *United States* military commanders *to carry out small-scale projects designed to meet* urgent humanitarian relief requirements *or* urgent reconstruction requirements within their areas of responsibility; and

(2) (2) provides an immediate *and direct benefit* to the people of Iraq or Afghanistan.”<sup>72</sup>

b) Specific Purposes: as provided in DoD FMR vol 12, ch. 27

(1) Includes, but not limited to: water & sanitation, food production & distribution, agriculture/irrigation, electricity, healthcare, education, telecommunications, economic, financial mgmt improvements, transportation, 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<sup>73</sup>

c) Time: 1 year DA O&M funds (\* formerly DoD O&M funds)

d) Amount:

(1) FY 2011:

(a) NDAA § 1212 \$100M DoD O&M Iraq; \$400M DoD O&M Afghanistan<sup>74</sup>

(b) DoDAA §9005: \$500,000,000 Army O&M

(2) FY 2010

(a) NDAA § 1222: \$1,300,000,000 DoD O&M

(b) DoDAA § 9005: \$1,200,000,000 Army O&M from the Title IX Overseas Contingency Operations (OCO) funds<sup>75</sup>

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<sup>72</sup> The previous purpose language as provided in the 2006 NDAA§ 1202(g), Pub. L. No. 109-163; 119 Stat. 3456: “[to enable] military commanders in Iraq [and Afghanistan] to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi [and Afghan] people.”

<sup>73</sup> Exhaustive list is contained in DoD FMR vol 12, chp 23 para 270104. Contains DoD guidance for CERP and primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures.

<sup>74</sup> Funds were shifted at the request of DoD from CERP to the new Afghanistan Infrastructure Fund which is intended to carry out larger scale projects in coordination with DoS.

<sup>75</sup> This section also provides that \$500,000,000 of this amount will only be available five days after the Secretary of Defense has conducted a review of the CERP program and provides a report of findings to the congressional defense committees.

- (c) \$50,000,000 may be transferred to Secretary of State to support ANSP.<sup>76</sup>
  - (3) FY 2009: 2008 NDAA authorized \$977,441,000 DoD O&M; 2009 NDAA \$1,500,000,000 DoD O&M
  - (4) FY 2008 NDAA: \$977,441,000 DoD O&M; 2008 CAA: \$500,000,000 DoD O&M
  - (5) FY 2007 DoDAA § 9006: \$500,000,000 DoD O&M; 2007 ESAA: \$456,400,000 additional DoD O&M.
- e) Approval Authority:<sup>77</sup>
- (1) Iraq:<sup>78</sup>
    - (a) Projects > \$500,000 - \$1,000,000: Theater CERP Program Manager-- Commander, MNC-I. (Projects must be reported to Congress with detailed information and progress/status).
    - (b) No appropriated funds for projects > \$1,000,000 to \$2,000,000 unless certified by Secretary of Defense or Deputy Secretary of Defense
    - (c) Projects are capped at \$2,000,000. Exceeding this cap requires Secretary of Defense to waive restriction and to provide Congress with notification of the waiver with justification
  - (2) Afghanistan<sup>79</sup>
    - (a) Projects: \$500,000 - \$1,000,000: Commander, USFOR-A. (May be delegated to lower unit commanders)

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<sup>76</sup> Authority expires 30 September 2010.

<sup>77</sup> Projects > \$500,000 must be awarded by a warranted contracting officer.

<sup>78</sup> 2009 NDAA

<sup>79</sup> Afghanistan CERP SOP, dtd Dec 2009.

- (b) Projects \$1,000,000 - \$2,000,000: Commander, CENTCOM (may be delegated to the Commander, USFOR-A)

f) Limitations:

- (1) The following are prohibited for CERP: direct or indirect benefit to US or coalition military forces; goods/services/funds to national armies; entertainment; purchase of firearms/ammo/UXO; rewards; duplicative services; salaries/pensions for government employees; Psyops; Individuals or individual businesses.
- (2) Iraq specific restrictions: Projects over \$750,000 should be funded on a cost-share basis with GoI.<sup>80</sup>
- (3) Construction: DoD FMR para 270102 no longer includes the concept of “build” and instead focuses on “reconstruction” and “restore.” Reconstruction as used here does not limit efforts to restore previous conditions/structures in Afghanistan.<sup>81</sup>
- (4) **New in 2011 NDAA:**
  - (a) No CERP project, to include any ancillary or related elements of the project, may be in excess of \$20,000,000.
  - (b) In Afghanistan, projects  $\geq$ \$5,000,000 require 15 days prior written notice to Congressional Defense Committees of (NOTE: § 9005 of the FY11 DoDAA does not restrict this requirement to just Afghanistan)
    - (i) Location, nature, purpose of proposed project, including how it is intended to advance the military campaign plan
    - (ii) Budget and implementation timeline
    - (iii) Sustainment plan

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<sup>80</sup> DoD FMR vol 12 chp 27 para 270103D: cost sharing may be waived with proper justification indicating a direct benefit to U.S. security objectives.

<sup>81</sup> See Memorandum- GEN Petraus, 11 June 2009.

g) Practitioner's Notes:<sup>82</sup>

- (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, and ultimately limited by Congress to no more than \$20M per project in the 2011 NDAA. At DoD request, Congress shifted a significant portion of the authorized CERP budget for FY2011 to a newly created authority called the Afghanistan Infrastructure Fund. This fund authority will provide for those large scale projects to be implemented by DoS.
- (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) CERP-funded projects do not need to be competed and may be "sole-sourced" or restricted to Iraqi and/or Afghan companies.<sup>83</sup>
- (4) Foreign Claims Act does not apply to the use of CERP appropriated funds; therefore, solatia or condolence payments may be used to compensate individual civilians for the death or physical injury resulting from U.S. or coalition military operations.<sup>84</sup>
- (5) Projects >\$25,000 require formal legal review.
- (6) Example Projects: repair/refurbish water and sewer lines; cleaning highways by removing waste and debris; transporting water to remote villages; upgrading schools and clinics; purchasing medical supplies; refurbish playgrounds/youth centers/mosques.
- (7) Although the 2010 NDAA § 1222 expanded the CERP program in Afghanistan to authorize the Secretary of Defense to transfer funds to Secretary of State to support the Afghan National Solidarity

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<sup>82</sup> In both Iraq and Afghanistan, the command comptrollers publish policy guidance in the Money as a Weapon System (MAAWS). Both the MAAWS (Iraq) and MAAWS-A (Afghanistan) are available at the CLAMO website under the "What's Hot" link at <http://www.jagcnet2.army.mil/8525751D00557EFF>.

<sup>83</sup> §1202 FY NDAA contained a "waiver authority" that authorized "the Secretary may waive any provision of law not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of authority." Pursuant to this, the Secretary of Defense waived the Competition in Contracting Act for CERP-funded projects.

<sup>84</sup> *Id.* The Secretary of Defense also waived the Foreign Claims Act.

Program (ANSP),<sup>85</sup> **this authority was not contained within the 2011 NDAA § 1212.**

(8) 2010 NDAA § 1222 also authorized the Secretary of Defense, in coordination with GIRoA and Secretary of State, to utilize FY10 CERP to support the reintegration into Afghan society of those individuals who have renounced violence against the GIRoA. **This authority was provided as a separate reintegration activities authority in the 2011 NDAA § 1216.**

h) Historical Information: CERP was originally funded with seized Iraqi assets.<sup>86</sup> 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.<sup>87</sup> Congress first appropriated funds under CERP for both Iraq and Afghanistan in the FY 2004 ESAA.

2. Reintegration Activities in Afghanistan: currently 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 2011

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<sup>85</sup> At least 15 days prior to a transfer, the Secretary of Defense must determine that the transfer would enhance counterinsurgency or stability operations in Afghanistan and submit the determination to the congressional defense committees

<sup>86</sup> 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).

<sup>87</sup> 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.

- c) Amount: no more than \$50,000,000 FY 2011 DoD O&M
  - d) 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.
3. **NEW**: Afghanistan Infrastructure Fund (AIF): 2011 NDAA §1217; 2011 DoDAA
- a) Purpose: to develop and carry out infrastructure projects in Afghanistan of the following types:
    - (1) Water, power, and transportation projects and related maintenance and sustainment costs
    - (2) Other projects in support of the counterinsurgency strategy in Afghanistan
  - b) Time: through 30 September 2012 (NOTE: the FY2011 DoD O&M fenced off under this program specifically remains available beyond the normal 1 year period for O&M)
  - c) Amount: \$400,000,000
  - d) Practitioner Notes:
    - (1) This is a newly created authorization in FY2011 for those larger scale projects that Congress felt inappropriate for use of CERP.
    - (2) SecState and SecDef will jointly develop projects, and DoS will implement in coordination with DoD unless it is jointly determined that DoD should implement.
    - (3) Congressional notification of 30 days prior is required before obligating or expending funds to carry out a project or transfer to DoS.



4. Iraqi-Funded CERP (I-CERP)
  - a) History: Iraqi-funded program based on an MOU between the Iraq Supreme Reconstruction Council and MNF-I.<sup>88</sup>
  - b) Purpose: primarily to enable Commanders to execute reconstruction for the benefit of the Iraqi people in the 15 NON-KURDISH provinces.
    - (1) Four basic purposes:
      - (a) Water purification plants
      - (b) Schools
      - (c) Health clinics
      - (d) City Planning Facilities (GoI, Provincial, and Local Government Offices)
    - (2) By Exception (MSC/MND CG approval required), I CERP may be used for:
      - (a) Roads
      - (b) Sewers
      - (c) Irrigation
      - (d) Non-reconstruction projects that promote small business development
  - c) Time: not funded with U.S. appropriated funds, so the same time restrictions of U.S. law do not apply.
  - d) Amount: the GoI originally funded I-CERP with \$300,000,000.
  - e) Practitioner's Notes:

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<sup>88</sup> See MNF-I FRAGO 08-166, dtd 17 April 2008 and MNC-I FRAGO 08-322, dtd 19 Apr 2008.

- (1) Improper augmentation of CERP appropriation funds? Language by Congress in §1214 of the 2009 NDAA indicates that Congress does not consider I-CERP to be an illegal augmentation.
- (2) Congress refers to funds that DoD controls favorably, such as those provided by the Government of Iraq.
- (3) Additionally, Congress provided its general view on the use of GoI funds for the reconstruction effort that the GoI should assume increasing responsibility for funding/executing projects currently funded by the U.S. under CERP.

5. 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: 2011 NDAA § 1031 reauthorizes O&M funding for this authority until 30 September 2011.
- 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.

(3) The 2007 NDAA provided additional dollar limit authority. Theater regulations delegate the following general approval authorities to subordinate commanders. Practitioners must note that the dollar thresholds are subject to both legislative and policy changes frequently; thus, the following sums are general guidelines:

(a) BCT Commander: \$10,000/payment

(b) Company Commander: \$500/payment or \$1000/month (can be increased to \$10,000 per month with BCT commander approval).

e) Practitioner's Notes:

(1) Not a weapons buy-back program (DoD currently has no such program); however, rewards money can be paid for information leading to recovery of Iraq Security Forces Fund (ISFF)

(2) U.S. citizens, U.S. officers/employees, or employees of a contractor of the U.S. are not eligible to receive rewards.

6. Iraq Security Forces Funds (ISFF)

a) Purpose: allows the Commander, US Forces-Iraq (USF-I), or the Secretary's designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of Iraq, including the provision of equipment, supplies, services, training, Facility and infrastructure repair, and renovation." \* **Effective 1 January 2010, the Secretary of Defense designated the Commander, US Forces-Iraq to oversee the ISFF when MSTCI-I stood down.**

b) Time/Amount:

(1) FY 2011 DoDAA: \$1,500,000,000 available through 30 September 2012

(2) FY 2010 SAA: \$1,000,000,000 available through 30 September 2011.

(3) No appropriation in the FY 2010 DoDAA; however, some funds are still available for obligation from previous appropriations.

- (4) 2009 SAA: rescinds \$1,000,000,000 from 2009 Bridge Supplemental (which was only available until Sept. 30, 2009) but appropriates \$1,000,000,000 (avail. thru Sept. 30, 2010)
  - (5) 2008 CAA: \$1,500,000,000 (avail. thru Sept. 30, 2009); 2008 SAA: \$1,500,000,000 (avail. thru Sept. 30, 2009).
  - c) Approval Authority: Commander, U.S. Forces-Iraq.
  - d) Limitations in Iraq:
    - (1) Construction: 2009 NDAA § 1508 (continued through 2011 NDAA § 1533) prohibits obligating or expending ISFF for “acquisition, conversion, rehabilitation, or installation of facilities in Iraq for the use of the Government of Iraq...” This provision is NOT applicable to CERP.
    - (2) Cost Sharing Requirement of 80% unless an item of significant military equipment or on the U.S. Munitions List.
    - (3) No more than \$1B may be obligated until the SecDef certifies that the GoI has demonstrated a commitment to:
      - (a) Adequately build the logistics and maintenance capacity of the ISF
      - (b) Develop the institutional capacity to manage the ISF independently
      - (c) Develop a culture of sustainment for equipment provided by the U.S.
  - e) Legislative History: started as an O&M authorization to support the “New Iraqi Army” and Afghan National Army. Became a separate appropriation in the 2005 Emergency Supplemental and added “security force” language in the ISFF purpose.
7. Afghanistan Security Forces Fund (ASFF): currently in 2011 NDAA §§ 1531; 2011 DoDAA (Title IX Overseas Contingency Operations)
- a) Purpose: “allowing the Commander, Combined Security Transition Command- Afghanistan (CSTC-A), or the Secretary’s designee, to provide assistance, with the concurrence of the Secretary of State, 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) 2011 DoDAA: \$11,619,283,000 (avail. thru Sept. 30, 2011).
  - (a) Up to \$15,000,000 may be used for coalition police trainer life support costs
- (2) 2010 SAA: \$2,604,000,000 (avail. thru Sept. 30, 2011).
- (3) 2010 DoDAA: \$6,562,769,000 (avail. thru Sept. 30, 2011).
- (4) 2009 SAA: \$3,606,939,000 (avail. thru Sept. 30, 2010); 2009 Bridge Supplemental: \$2,000,000,000 (avail. thru Sept. 30, 2009-ONE year only).
- (5) 2008 CAA: \$1,350,000,000 (avail. thru Sept. 30, 2009); 2008 SAA: \$1,400,000,000 (avail. thru Sept. 30, 2009).

c) Practitioner Notes:

- (1) These funds (and ISFF) 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) Up to \$15,000,000 may be used for coalition police trainer life support costs

8. Pakistan Counterinsurgency Fund (PCF): currently 2011 NDAA § 1220.

- a) Purpose: to build and maintain the counterinsurgency capability of Pakistan forces through the provision of “assistance (including program management and the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction) to the security forces of Pakistan (including military forces, police forces, and the Frontier Corps)”

b) Time/Amount:

- (1) 2011 DoDAA: \$800,000,000 through 30 September 2012
- (2) 2011 NDAA § 1220 re-authorized funds through 30 September 2011.
- (3) 2010 NDAA § 1224 re-authorized appropriated funds in 2009 through Sept. 30, 2010. Authorized transfer authority:
  - (a) Additional amounts may be transferred to PCF by the Secretary of State.
  - (b) Secretary of Defense may transfer from the PCF to other funds where PCF will adopt the purpose of the fund to which transferred. (changes “color”).
- (4) 2009 SAA: appropriated \$400,000,000 (avail. thru Sept. 30, 2010).

c) Limitations:

- (1) Assistance must be provided in a manner that promotes observance of and respect for human rights and fundamental freedoms and respect for legitimate civilian authority in Pakistan.
- (2) 2010 NDAA provides that not more than \$4,000,000, an increase from \$2,000,000 in 2009, may be used to provide humanitarian assistance to the people of Pakistan and only as part of civil-military training exercises for forces receiving assistance. This fund is distinguishable from CERP, which is available in Iraq and Afghanistan and does not have a civil-military training exercise requirement for use.

d) Approval Authority: requires concurrence from Secretary of State. Secretary of Defense may delegate his authority to obligate.<sup>89</sup>

9. Office of Security Cooperation-Iraq Support: 2011 DoDAA §9014

- a) Purpose: to support the United States “transition activities in Iraq by undertaking facilities renovation and construction associated with

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<sup>89</sup> 2009 SAA also created the Pakistan Counterinsurgency Capability Fund (PCCF) under the authority of DoS with an appropriation of \$700,000,000. Both House and Senate Committee reports indicate the intent for DoD fund to expire and DoS to assume authority. DSCA is the executing body for both.

establishing Office of Security Cooperation locations, at no more than four sites..”

- b) Time/Amount: up to \$129,000,000 of DoD 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.

## VII. 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<sup>90</sup> higher priority transferee.

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<sup>90</sup> 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.

3. The 5W's 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.

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.<sup>91</sup>
- 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)<sup>92</sup> 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:<sup>93</sup>

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<sup>91</sup> The Secretary of Defense may exempt itself for national security purposes (see § 501).

<sup>92</sup> 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.

<sup>93</sup> 40 U.S.C. § 102



- (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 “excess” unless it is not required by an 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.<sup>94</sup> 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.

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<sup>94</sup> 40 USC 701

- (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.”
- (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.<sup>95</sup>
- (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 that 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

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<sup>95</sup> 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.

DoD screening must fail to produce results unless the requirement to screen the property has been waived at the DUSD, (L&MR) level.<sup>96</sup>

- b) Property is requisitioned on an “as is/where is” basis.<sup>97</sup>
- 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.<sup>98</sup>
  - (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.

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<sup>96</sup> DoD 4160.21-M, Ch. 9.

<sup>97</sup> *See* DRMS-I 4160.14.

<sup>98</sup> Other special programs include Computers for Schools (Dep. Of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

- (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.
- (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.”<sup>99</sup>
  - b) This law has received recent attention and application, as the U.S. continues drawdown in Iraq and begins to drawdown in Afghanistan. Practitioners of fiscal law are often asked about “retrograde” operations, a term that loosely encompasses the process of transferring equipment to Iraq.<sup>100</sup>

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<sup>99</sup> Chapter 9 of the Defense Material Disposition Manual, DoD 4160.21-M provides DoD guidance on FEPP disposal.

<sup>100</sup> The Army Field Manual for Operations, FM 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 when referring to the property disposition process. The term as it is used in the context of property transfer in Iraq, 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.

- 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).
  - (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 Iraq, 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.<sup>101</sup> 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

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<sup>101</sup> See DoD 4160.21-M, ch. 9.

purposes. Judge Advocates should ensure that they understand the actual command intent with regard to “retrograde.”<sup>102</sup>

- (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. OND (formerly OIF) and 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 Iraq or Afghanistan is \$30,000,000.<sup>103</sup> A recent memorandum raises the transfer threshold above \$30,000,000 for six specifically identified large bases in Iraq.<sup>104</sup>
- 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 both Iraq and Afghanistan (Note: monetary value is based on depreciated value):

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<sup>102</sup> 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.

<sup>103</sup> See Memorandum, Alan F. Estevez, Acting Under Secretary of Defense for Logistics and Material Readiness, to Commanding General, Multi-National Forces, Iraq, Subject: Authority to Transfer Foreign Excess Personal Property in Iraq (9 October 2009); and 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 (11 May 2011).

<sup>104</sup> See Memorandum, Alan F. Estevez, Principal Deputy to the Assistant Secretary of Defense for Logistics and Material Readiness, to Commanding General, US Forces, Iraq, Subject: Request for Increased Authority for Foreign Excess Personal Property Transfers at Large Bases (22 February 2011).

- (1) \$0 - \$9,999.99: O-6 Level Commander
- (2) \$10,000 - \$49,999.99: First GO/FO in the Chain of Command
- (3) \$50,000 - \$999,999.99: USF-I or USFOR-A J4
- (4) \$1,000,000 and above: DUSD (L&MR)

3. Practitioner Notes:

- a) “FEPP is a distinct category of property not to be confused with “excess and surplus.”<sup>105</sup> 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 Iraq, as well as an initial authorization applicable to 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

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<sup>105</sup> DoD 4160.21-M, ch. 9, para. A(1).

involved, added eligible transferees, added locations from which property could be transferred, 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 V.C.2.(c) *supra*.

E. Iraq/Afghanistan Defense Articles and Services Transfer: 2010 NDAA § 1234 (current extension at 2011 NDAA § 1214)

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, 2011.
3. Amount: aggregate replacement value of articles transferred and services provided may not exceed \$750,000,000 (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. Requires a 30 day prior report on the plan for disposition of equipment in Iraq/Kuwait to appropriate congressional committees before it can be used (including deconflicting requirements relative to natural disasters and domestic emergencies). 15 day notice of specific transfers must be given before property may transfer, and quarterly reporting requirements apply.
5. Practitioner Notes: eligible defense articles are
  - a) Present in Iraq as of approval of 2010 NDAA,
    - (1) Immediately prior to transfer were in use to support Iraq operations, and
    - (2) Are no longer required by U.S. forces in Iraq



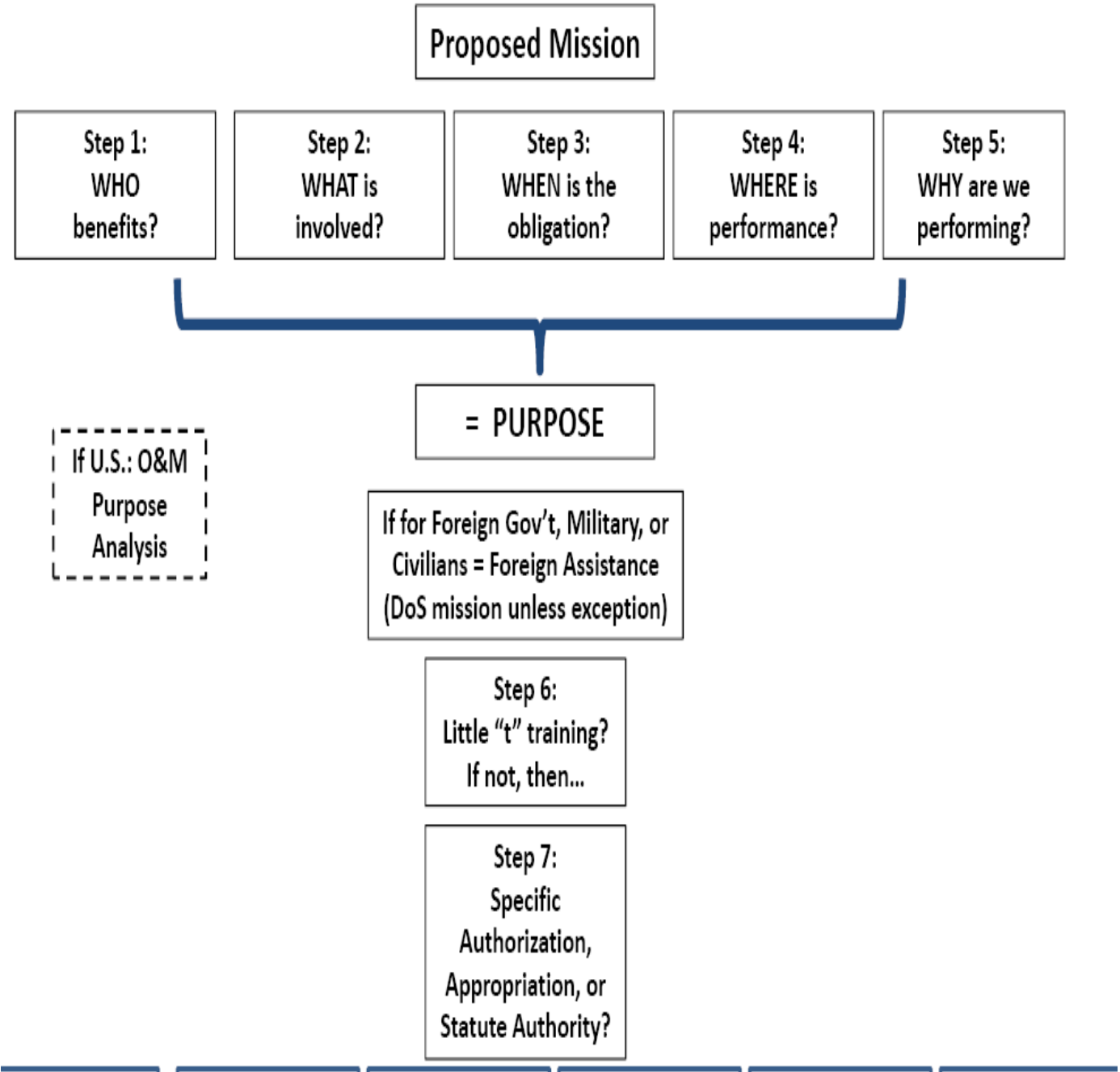
- b) Present in Kuwait as of approval of 2010 NDAA
  - (1) Prior to transfer to Kuwait were in use to support Iraq operations, and
  - (2) Are no longer required by U.S. forces in Iraq or Kuwait.
- c) This authority is broader than EDA transfers as transfers of both excess and non-excess would be allowed as long as the requirement for use in 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:**





# CHAPTER 11:



## FINAL JUDGMENTS, AWARDS, & SETTLEMENTS

**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 certain settlements, awards, and judgments).
- B. 41 U.S.C. § 612 (permitting payment of claim under the Contract Disputes Act).
- C. Treasury Financial Manual (TFM) 6-3100, vol I, Certifying Payments and Recording Corresponding Intragovernmental Receivables in the Federal Government's Judgment Fund (Sep. 2000) [hereinafter TFM 6-3100]. Available at <http://www.fms.treas.gov/tfm/vol1/v1p6c310.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://www.dtic.mil/comptroller/fmr>.
- F. Defense Finance and Accounting Service--Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000) [hereinafter DFAS-IN 37-1]. Available at <https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm>.
- G. Defense Finance and Accounting Service--Denver Reg. 7010.2-R, Commercial Transactions at Base Level (Jan. 1996) [hereinafter DFAS-DE 7010.2-R].
- H. Army Federal Acquisition Regulation Supplement, pt. 5133.212-90-9 [hereinafter AFARS].
- I. Air Force Instr. 65-601, vol I, Budget Guidance And Procedures (3 March 2005) [hereinafter AFI 65-601].

## II. DEFINITIONS.

- A. Judgment. A judgment is a “decision issued by a court . . . that resolves, as far as the court is concerned, by ruling on the issue in that case.” *See* Ralph C. Nash et al., *The Government Contracts Reference Book*, p. 316 (2d ed., 1998).
- B. Consent Judgment. A consent judgment 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). DoD FMR, Glossary; DFAS-IN 37-1, Glossary, p. 11; AFI 65-601, vol I, Glossary, p. 328.
- 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 for 5 years and is available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a); DoD FMR, Glossary, p. xii; DFAS-IN 37-1, Glossary, p. 11; AFI 65-601, vol I, Glossary, p. 331.
- 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. 31 U.S.C. § 1552(a); DoD FMR, Glossary, p. vi; DFAS-IN 37-1, Glossary, p.11; AFI 65-601, vol I, Glossary, p. 324.



### III. OBLIGATION OF FUNDS FOLLOWING SETTLEMENT OF A CLAIM.

Obligate funds using the same obligation rules that are used for normal contracts. DFAS-IN 37-1, Table 8-6, para. 14.

- A. If the settlement relates to an in-scope contract change (the "relation-back theory"), fund it from the appropriation cited on the original contract. DoD FMR, vol. 3, ch. 8, para. 080304.B; DFAS-IN 37-1, Table 8-7, para. 1; 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. 10, ch. 12, para. 120207.A; 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).
  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. 120207.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); Message, 201432Z FEB 01, DFAS-IN, Subject: Contract Disputes Act Settlements and the Judgment Fund, para 6.
  3. If the appropriation that was used to fund the original contract has closed / canceled, current funds must be obligated. *See* DoD FMR, vol. 10, ch. 12, para. 100201.E; 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). *See also* DoD FMR, vol. 10, ch. 12, para. 100201.F.3; AFI 65-601, vol. I, para. 6.5.2.
- 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-D; 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. 41 U.S.C. § 612(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. Cl. 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 legislation following each successful claim against the United States thereby reducing or eliminating the amount of interest successful claimants would receive. *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 any costs of 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:
      - i. A United States District Court judgment made pursuant to 28 U.S.C. § 2414;
      - ii. A Court of Federal Claims judgment made pursuant to 28 U.S.C. § 2517 or 41 U.S.C. § 612(a); and
      - iii. 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 interests of the United States.

- b. Awards (administrative adjudications) made pursuant to:
  - i. The Federal Tort Claims Act (28 U.S.C. § 2672);
  - ii. The Small Claims Act (31 U.S.C. § 3723);
  - iii. The Military Claims Act (10 U.S.C. § 2733);
  - iv. The Foreign Claims Act (10 U.S.C. 2734);
  - v. The National Guard Claims Act (32 U.S.C. § 715);
  - vi. The National Aeronautics and Space Act of 1958 (42 U.S.C. § 2473); and
  - vii. The Contract Disputes Act of 1978 by a Board of Contract Appeals (41 U.S.C § 612(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:
  - i. A compromise settlements negotiated by the Department of Justice (DOJ) to dispose of actual or imminent litigation (28 U.S.C. § 2414); and
  - ii. 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 Otherwise Be Provided For. One of the keystones 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 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 extent that agency appropriations are not otherwise available); 31 U.S.C. § 1304(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 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 (where another more specific appropriation exists but contains insufficient funds to pay the judgment, the agency's only recourse is to seek additional funds from Congress).
  - 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. § 612.
1. Any monetary judgment against the United States must be paid in accordance with the procedures applicable under the Judgment Fund statute. *See* DoD FRM, vol. 10, ch. 12, para. 120208.
  2. The agency must reimburse the Judgment Fund for any payment made by the agency using the Fund. *See* 41 U.S.C. § 612(c); DoD FMR, vol. 3, ch. 8, para. 080304.F; 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. 120207.B; Message, 201432Z FEB 01, DFAS-IN, Subject: Contract Disputes Act Settlements and the Judgment Fund, para 6; AFARS 5133.212.90-9(b) and (c)(2)(iii); *See, e.g., Casson Constr. Co., GSBICA 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. § 612(c); DoD FMR, vol. 10, ch. 12, para. 120209. 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.
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 comptroller. *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. § 611; *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. Cl. 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. FAR 33.208(c); DoD FMR, vol. 10, ch. 12, para. 120210.B.
- F. Payment of Attorney Fees. The general rule is that each party pays its own legal expenses. The Equal Access to Justice Act (EAJA) 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). Attorneys fees awarded under the EAJA are not 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.

## 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. 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.fms.treas.gov/judgefund>.
  3. Detailed guidance on the procedures for submitting requests for payment is located at <http://www.fms.treas.gov/judgefund>; 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.fms/treas.gov/judgefund/regulations.html>); 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 procurement 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 reprocur 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.**

# CHAPTER 12:



# REPROGRAMMING & TRANSFER

**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)
- C. DOD Regulation 7000.14-R, Financial Management Regulation, volume 3, chapters 3, 6, and 7 [hereinafter DOD FMR] available at <http://www.defenselink.mil/comptroller/fmr/>.
- D. Defense Financial and Accounting Service - Indianapolis 37-1, Finance and Accounting Policy and Implementation, ch. 3, para. 0306 (May 2008) available at <http://www.asafm.army.mil/secretariat/document/37-1reg/37-1reg.asp>.
- E. Air Force Instruction 65-601, Volume I, ch. 2, para. 2.3, Budget Guidance and Procedures (3 March 2005) 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.fmo.navy.mil/policies/regulations.htm>.

- G. U.S. Government Accountability Office, Principles of Federal Appropriations Law, 2-24 to 2-31 (3d ed., vol. I, 2009) [hereinafter GAO Principles of Fed. Appropriations Law] available at <http://www.gao.gov/legal/redbook.html>.
- H. Office of Management and Budget, Circular No. A-11, Preparation, Submission, and Execution of the Budget (June 2008) available at [http://www.whitehouse.gov/omb/circulars/a11/current\\_year/a11\\_toc.html](http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html).

### III. DEFINITIONS

- A. **Reprogramming.** Reprogramming is the use of “funds in an appropriations account for purposes other than those contemplated at the time of appropriation.” 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 subcommittees. DOD FMR, vol. 2A, ch. 1, para. 010107.B.51 (October 2008).
- 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 (October 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 subcommittees. Some transfers even require the approval of OMB or the President. DOD FMR, vol. 3, ch. 3, para. 030202. OMB Circular No. A-11, p. 43, Sec. 20, fn 1 (June 2008).

### IV. TRANSFERS DISTINGUISHED FROM REPROGRAMMING

- A. **Transfers.** GAO, Principles of Fed. Appropriations Law, p. 2-24.
  - 1. Transfers shift money between appropriations accounts.
  - 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.
  - c. Transfers to/from “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.<sup>1</sup>
  - 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.

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<sup>1</sup> 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 (DODAA) FY 2009, Pub. L. No. 110-329, § 8005 (2008); DODAA FY 2010, Pub. L. No. 111-118, § 8005 (2009).
  - (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 (Nov. 2008); DODAA FY 2010, Pub. L. No. 111-118, § 8005 (2009).
- (2) Specific Transfer Authority. Congress authorizes or directs the movement of funds to support specific programs. See, e.g., Defense Drug Interdiction and Counter-Drug Activities, DODAA FY 2010, Pub. L. No. 111-118, Title VI, (2009). This provision allows the transfer of nearly \$1.1B 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).

e. Examples of transfers

- (1) **General Transfer Authorities**

- (a) Transfers from Working Capital Funds. Normally, in the annual DOD Appropriation Acts, 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).<sup>2</sup>
- (b) Transfers from the Army Operations 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.<sup>3</sup>

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<sup>2</sup> Section 8005 of the FY 2010 DOD Appropriations Act permits DOD to transfer up to \$4.1B 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. Department of Defense Appropriations Act for FY 2010, Pub.L. No. 111-118, § 8005 (2009).

<sup>3</sup> Section 8072 of the FY 2010 DOD Appropriations Act permits the Secretary of Defense to transfer up to \$106.7M from the Army's operations and maintenance appropriation to any other DOD appropriation for "other activities of the Federal Government." Department of Defense Appropriations Act for FY 2010, Pub.L. No. 111-118, § 8072 (2009).

(2) **Specific Transfers Authorities**

- (a) Military Pay. There is a recurring provision in the DOD Appropriation Acts concerning transferring funds from DOD-wide O&M to appropriations for military pay.<sup>4</sup>
- (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.<sup>5</sup>
- (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.<sup>6</sup>

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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<sup>4</sup> Section 8053 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. Department of Defense Appropriations Act for FY 2010, Pub.L. No. 111-118, § 8053 (2009). 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.

<sup>5</sup> Section 8075 authorizes the transfer up to \$202M 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.” Department of Defense Appropriations Act for FY 2010, Pub.L. No. 111-118, § 8075 (2009).

<sup>6</sup> Section 8017 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. Department of Defense Appropriations Act for FY 2010, Pub.L. No. 111-118, § 8017 (2009). 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.

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.<sup>7</sup>

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; 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.

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<sup>7</sup> *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).
  
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."<sup>8</sup> 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.
  
  - 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. Agencies may submit actions only for higher priority items, based on unforeseen military requirements, than those for which the funds were originally appropriated. See Department of Defense Appropriations Act FY 2010, Pub. L. No. 111-118, § 8005 (2009).
  
7. Items ineligible for reprogramming. Agencies may not submit actions on items for which funds have previously been requested from Congress but denied. See Department of Defense Appropriations Act FY 2010, Pub. L. No. 111-118, § 8005 (2009).

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<sup>8</sup> GAO, Principles of Fed. Appropriations Law, p.2-30-31.

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, 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<sup>9</sup> 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.<sup>10</sup>

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<sup>9</sup> “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 Explanatory Statement for the FY 2009 DODAA. For example, prior approval would be required 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 exceeds the \$10 million threshold for the military personnel appropriation).

<sup>10</sup> See *e.g.* Explanatory Statement for the FY 2009 DODAA, 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.



- 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.<sup>11</sup> For specific notification and approval procedures. 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.
- f. Most fund shifting/movements that make use of *general transfer authority*.<sup>12</sup> DOD FMR, vol. 3, ch. 6, para. 060401.C, for exceptions.

**B. “Internal” Reprogrammings.** DOD FMR, vol. 3, ch. 6, para. 060402.

- 1. “Internal” reprogrammings are not, technically, formal reprogramming actions. Internal reprogrammings 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:

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<sup>11</sup> Section 8080 of the DOD Appropriation Act FY 2010 states, “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.” Department of Defense Appropriations Act for FY 2010, Pub.L. No. 111-118, § 8080 (2009).

<sup>12</sup> Note that DOD uses a “Reprogramming Action” (DD 1415) 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 which 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 which “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.

- 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.<sup>13</sup> “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.
- 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.

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.

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<sup>13</sup> 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.

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 semiannual 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 projects.
- f. For any family housing project relocation project to be accomplished by 10 U.S.C. 2827.

2. **Notice to Congress is Required**<sup>14</sup> 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.

\*Note: 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.

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.

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<sup>14</sup> 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.

\*Note: 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, Chap 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, when 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**



# CHAPTER 13:



## NON- APPROPRIATED FUNDS

**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.
- 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, July 6, 2009.
- E. DODI 1015.11, Lodging Policy, October 6, 2006.
- 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 (with Change 1, dated 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, 30 July 2008.
- O. Air Force Instruction (AFI) 34-201, Use of Nonappropriated Funds, 17 June 2002 (Supplement 29 November 2007).
- 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 9, para. 0904; AR 215-1, Chapter 18.

B. Nonappropriated Fund Instrumentality (NAFI).

1. A DoD organizational and fiscal entity supported in whole or in part by NAFs. It acts in its 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, E.2.13.
2. It is 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, E.2.13; 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 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.

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. NAF support is provided by the coordinating installation, usually the one nearest the supported unit. 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) expenditures which can be used for NAF expenditures necessary to contribute to the overall morale and welfare of the community. Permissible expenditures include individual recognition programs, commander’s call, and welcoming orientations at which light refreshments may be provided (excludes alcoholic beverages and meals or equivalents); memorial observances at which flowers or charitable contributions in lieu of flowers may be provided; and changes of command ceremonies on a modest basis. AFI 34-201, para 12.4.
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. 406g.

#### IV. MANAGEMENT OF MWR PROGRAMS.

##### A. Army. AR 215-1, Chapter 2.

1. The Secretary of the Army establishes, maintains and disestablishes joint NAFIs, and coordinates joint Service matters with the Under Secretary of Defense for Personnel and Readiness. An example is the joint Army and Air Force regulation covering the Army and Air Force Exchange Service (AAFES) (see AR 215-8 / AFI 34-211(I)).
2. The Assistant Chief of Staff for Installation Management (ACSIM) is the Army staff proponent and focal point for all MWR programs and NAFIs. The ACSIM exercises supervision over IMCOM and the U.S. Army Family and Morale, Welfare, and Recreation Command (FMWRC).
3. The Assistant Secretary of the Army for Financial Management and Comptroller (ASA(FM&C)) provides financial oversight of appropriated funds (APFs) and nonappropriated funds (NAFs).
4. The Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA(M&RA)) is responsible for MWR, NAFIs, and affiliated personnel.
5. Army Commands have no residual Base Operations MWR functions except deploying units and the U.S. Army Accessions command.
6. The Commander, Installation Management Command (IMCOM), acts as the single integrator and synchronizer with IMCOM regions, the ARSTAF/ACSIM, FMWRC functional proponents, and Army Commands, and in coordination with FMWRC, assists in the development, integration, and reporting of Army MWR Baseline Standards. The IMCOM:
  - a. Is a direct reporting unit under the Assistant Chief of Staff for Installation Management. Activated on 24 October 2006, IMCOM consolidated three organizations under a single command:

- (1) The former Installation Management Agency (IMA),
  - (2) The former Community and Family Support Center, now called Family and Morale, Welfare, and Recreation Command (FMWRC), which is a subordinate command of IMCOM, and
  - (3) The former Army Environmental Center, now called the Army Environmental Command (AEC), which is a subordinate command of IMCOM.
- b. Its mission is to manage Army installations to support readiness and mission execution. Oversees all facets of installation management such as construction, barracks and Family housing, Family care, food management, environmental programs, Soldier and Family MWR programs, logistics, public works, and installation funding.
7. The Commander, Family and Morale, Welfare, and Recreation Command (FMWRC):
- a. Develops program guidance, standards and procedures to implement approved Army policies and recommends MWR and NAF policy to the ACSIM;
  - b. Develops plans, strategies, programs, policies, and operating guidance for the management and administration of MWR programs; creates and coordinates the MWR strategic plans and disseminate guidance through the IMCOM for synchronization, integration, and implementation; and
  - c. Acts as the Army proponent for all aspects of NAF financial management to include the Armed Forces Recreation Centers and the Army Recreation Machine Program.

8. Garrison Commanders ensure adherence to applicable law and DoD/HQDA policies and regulations; plan, manage, fund and operate MWR programs and services based on Army Baseline standards; and develop annual NAF budgets and manage APF Management Decision Evaluation Packages and NAF resources.
9. 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.
10. NAFI Councils.
  - a. A governing body of active duty Soldiers or civilian employees appointed or elected to assist in the management of the 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 nongoverning council is a review body that recommends and reports to the commander on general or specific matters concerning the management of the NAFI.<sup>1</sup> 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.

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<sup>1</sup> Nongoverning councils may also include military retirees and family members.

2. Major Commander (MAJCOM):
  - 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 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. 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. 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.* Commanders fund these activities almost entirely with APFs. AR 215-1, para. 3-7. The DoD goal is to fund these activities with 100% APFs (and a minimum of 85% APFs). DODI 1015.10, para. E.6.1. The use of NAFs is limited to:

- (1) Specific expenses for which APFs are not authorized; or
- (2) When such use is not otherwise prohibited and it has been certified in writing that APF support is not available. AR 215-1, para.5-14b; see also AFI 65-106, para. 2.1.1.
- (3) 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. AR 215-1, para. 3-8; AFI 65-106, para. 2.1.2. The DoD goal is to fund these programs with a minimum of 65% APFs. DODI 1015.10, para. E.6.1.

(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. AR 215-1, para. 3-9; AFI 65-106, para. 2.1.3.

(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. AR 215-1, para. 5-4.

(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 Soldier's 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. 5-14b);
    - 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. 5-14b); 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, Appendix L, 16 Oct. 2006 (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*.

See AR 215-1, Chapter 9, for a discussion of MWR during mobilization, contingency, and wartime operations.
- 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.<sup>2</sup>
  
- 2. This constitutes augmentation of appropriations and violates the Antideficiency Act.

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<sup>2</sup> Note that this does not include acquisitions accomplished through UFM or MWR USA. Congress statutorily authorized both of these funding mechanisms.

3. Use of APF employees to perform NAF functions beyond those which are authorized. This 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.

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. Requires 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.



**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).

# **CHAPTER 14:**



# **LIABILITY OF ACCOUNTABLE OFFICERS**

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. § 3528 (specifying when the Comptroller General may relieve certifying officers from liability).
- D. 31 U.S.C. § 3527 (specifying when the Comptroller General may relieve other accountable 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://www.defenselink.mil/comptroller/fmr>.
- F. 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 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 individuals.” This includes “all personnel, whether military or civilian, who are certifying officers, [departmental] accountable officials as defined in [DOD FMR, Vol. 5, Ch. 33], and disbursing officers. The term also includes 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; see also DOD FMR, Vol. 5, Ch. 1, para. 010802.B (defining “Accountable official” as including “DOs, certifying officers, cashiers, procurement officers, departmental accountable officials, and other employees who by virtue of their employment are responsible for the obligation, custody, and payment of government funds”).
  
3. “Departmental Accountable Officials” are “[i]ndividuals who are responsible in the performance of their duties for providing to a certifying officer information, data, or services that the certifying officer directly relies upon in the certification of vouchers for payment.” DOD FMR, Vol. 5, Ch. 33, para. 330812.
  
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 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).

Absent statutory authority, agency officials who are not designated “certifying official” are not personally liable for illegal, improper, or incorrect payments. Dep’t of Def. Accountable Officials – Local Nat’ls Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006); Veteran Affairs – Liab. of Alexander Tripp, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005); 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 and Other Accountable Officers Distinguished.

1. Certifying Officer.

- a. Within DOD, a certifying officer is defined as a “DoD military member or civilian employee of the Department appointed in writing to certify a voucher for payment.” DOD FMR, Vol. 5, Ch. 33, para. 330806. A DOD certifying officer is also defined as “an individual designated to attest to the correctness of statements, facts, accounts, and amounts appearing on a voucher, or other documents.” DOD FMR, Vol. 5, Glossary.
  - b. Certification is “the act of attesting to the legality, propriety and correctness of a voucher for payment as provided for in 31 U.S.C. 3528.” DOD FMR, Vol. 5, Ch. 33, para. 330805.
2. Other Accountable Officers. Any other officer or employee, including one not involved directly in government fiscal operations, who has custody or control of federal funds.
- a. Disbursing Officer. A military member or a civilian employee of a DoD Component designated to disburse money and render accounts according to laws and regulations governing the disbursement of public money. All DO appointees must be U. S. citizens. DOD FMR, Vol. 5, Glossary. See generally 31 U.S.C. § 3325; DOD FMR, Vol. 5, Ch. 2.
  - b. 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. 020603.B; see 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).
  - c. Other agents and custodians.

- (1) 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. DOD FMR, Vol. 5, Ch.2, para. 020604.
- (2) 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. 020701.
- (3) 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. 020905.

### **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 legality of the proposed payment under the appropriation or fund involved; and
  - c. 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.
    - d. 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. DOD FMR, Vol. 5, Ch. 1, para. 010503.B. The certifying officer may rely on data received from automated systems that have been certified as accurate and reliable in accordance with Section 4 of the Federal Managers Financial Integrity Act, 31 U.S.C. § 3512. DOD FMR, Vol. 5, Ch. 33, para. 330303.A.
  2. Certifying officers must ensure vouchers are computed correctly.
  3. Liability attaches when an official makes an erroneous payment based on an improperly certified voucher. 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. 1, sec. 0104.
2. 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. 1, para. 010503.A.

3. Note: An older version of DOD FMR specifically provided that DOD disbursing officers were not liable for payments made in reliance upon properly certified vouchers. DOD FMR, Vol. 5, Ch. 1, para. 010501.C (August 1999). The April 2005 revision removed that language.

C. DOD 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. However, the GAO held 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. See 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. See Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §1005, 116 STAT 2458, 2631-32 (2002).

4. Implementing the new law, DOD FMR, Vol 5., Ch. 33, para. 3307, now provides: “Departmental accountable officials shall be pecuniarily liable for illegal, improper or incorrect payments that result from information, data or services they negligently provide to a certifying officer, and upon which, the certifying officer directly relies in accordance with the provisions of 10 U.S.C. 2773a.” 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 pecuniarily liable for such loss. 10 USC § 2773a(c)(3); DOD FMR, Vol. 5, Ch. 1, para. 010503.C.
5. “Departmental Accountable Officials” are defined as “[i]ndividuals who are responsible in the performance of their duties for providing to a certifying officer information, data, or services that the certifying officer directly relies upon in the certification of vouchers for payment. They are pecuniarily liable for erroneous payments resulting from their negligent actions in accordance with section 2773a of title 10, United States Code.” DOD FMR, Vol. 5, Ch. 33, para. 330812.
6. “Departmental Accountable Officials” include, but are not limited to personnel with certain responsibilities relating to the Government Purchase Card program, temporary duty travel, contract and vendor pay, civilian and military pay, permanent change of station, and Centrally Billed Accounts. DOD FMR, Vol. 5, Ch. 33, para. 330302. These include persons such as Agency Program Coordinators (APCs), approving officials, authorizing officials, cardholders, resource managers, fund holders, Automated Information System administrators, contracting officers, receiving officials, personnel officers, employees’ supervisors, and supervisors of time and attendance clerks.
7. Departmental Accountable Officials 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. 330505.
8. The GAO looked at the DoD practice of hiring local nationals as Departmental Accountable Officials and found no specific authority which restricted the DoD’s authority to appoint employees paid from appropriated funds. However, the GAO questioned the wisdom of appointing Departmental Accountable Officials who potentially would 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 they are not a certifying or disbursing officer. Those entrusted with funds are liable for **any and all** losses. DoD does not use the term “Possessory” Accountable Officers, but defines Accountable Officers/Accountable Individuals 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.
2. There is **no liability limitation** for these accountable officers. Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990).

E. The Nature of Accountable Officer Liability.

1. Accountable officers (with the exception of departmental accountable officials – see paragraph 3 below) are strictly liable for losses or erroneous payments of public funds. They are “insurers” of public funds in their custody or for which they are otherwise responsible. Liability does not attach for losses due to an “overwhelming necessity” (*e.g.*, acts of God) or acts of the public enemy. See 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); DOD FMR, Vol. 5, Ch. 33, sec. 3307. Due to the absence of modern decisions implicating the “overwhelming necessity” and public enemy exception, the exception arguably has been relegated to a historic fact.
2. Lack of fault or negligence, however, may provide a basis for relief from the obligation to repay the loss. See 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. 33, sec. 3307.

3. Departmental accountable officials are liable for an illegal, improper, or incorrect payment that results from their fault or negligence. 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, sec. 3307. However, it is not clear whether negligence is presumed. Until April 2005, DOD FMR, Vol. 5, Ch. 33, sec. 3309 and appendix C, para. G, provided that DOD “accountable officials” were not strictly liable, and that no presumption of negligence applied to those personnel. In April 2005, sec. 3309 and the entire appendix C were deleted. The current DOD FMR is silent on whether negligence is presumed.

#### 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.
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.
  - a. DOD FMR, Vol. 5, Ch. 1, para. 010802.E explains:

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.

Id.; see Memorandum, Department of Justice, to Department Employees, subject: Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (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. See 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 belated (April 2005) DOD action in changing DOD FMR consistent with the DOJ opinion follows similar action initiated by the Department of Treasury in 2004. See 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).

B. Advance Agency Decisions.

- 1. See DOD FMR, Vol. 5, Ch. 1, sec. 0108, and Appendix E (updated 2009) .
  
- 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, as of April 2005, employees may seek an advance decision from the General Counsel concerning the propriety and legality of any obligation or claim presented to them for approval, certification, or payment. DOD FMR, Vol. 5, Ch. 1, para. 0108.
- a. Such advance decisions will “shield” the employee from liability in that DOD will not seek to recover a payment from the employee if the General Counsel issued an opinion advising that the payment could legally be made. DOD FMR, Vol. 5, Ch. 1, para. 010802.D.
  - b. As of 2009, 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.
    - (4) Federal Civilian employees’ travel, transportation and relocation expenses and allowances: Civilian Board of Contract Appeals.

- c. For advance decisions regarding the propriety or legality of certifying or paying a questionable voucher or claim, DOD FMR, Vol. 5, Ch. 25, para. 250302.A, provides that “a certifying officer, DO, or the head of any agency, may request an advance decision from an authorized official.” All requests for advance decisions are forwarded through the General Counsel of the Department of Defense (DoD) Component or the Defense Finance and Accounting Service (DFAS) to the Deputy General Counsel (Fiscal), DoD (DGC(F)), for determination. DOD FMR, Vol. 5, para. 250302.B. See DOD FMR, Vol. 5, Appendix E for addresses.

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 and the officer did not know, or reasonably could not have known, that the information was incorrect. 31 U.S.C. 3528(b)(1)(A); see 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); or
  - b. The obligation was in good faith, no law specifically prohibited the payment, and the government received some benefit. 31 U.S.C. § 3528(b)(1)(B); see 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 officer 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. See 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 irregularities when a loss is less than \$3,000. See 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/decisions/ppm7.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).
  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. 060201, 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. 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. The Comptroller General determined that “armed forces” under the statute refers to the Army, Navy, Air Force, and Marines but not defense agencies. See Mr. Jeffrey Elmore, B-307693, 2007 U.S. Comp. Gen. LEXIS 70 (Apr. 12, 2007). Under the broad language of the DOD FMR, however, all relief requests must go to DOD for determination. See DOD FMR, Vol. 5, Ch. 6, sec 0603 (“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 designee, to make the required determinations and grant or deny relief. DOD FMR, Vol. 5, Ch. 6, sec. 0603.
4. The standard for relief of certifying officers under 31 U.S.C. § 3528 (and DOD FMR, Vol. 5, Ch. 6, para. 060205.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. 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. 060205.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 this determination within the Secretary of Defense’s findings that are binding on the Comptroller General for certifying officers of the “armed forces.” In light of the new (April 2005) changes to DOD FMR, Vol. 5, discussed in Section IV above, the practical effect of 31 U.S.C. § 3528(b)(2) on DOD certifying officers outside the Army, Navy, Air Force, and Marines from the Comptroller General’s perspective is not yet known. The DOD FMR, Vol. 5, Ch. 6, sec. 0603, clearly provides that the Secretary of Defense’s determination is binding.

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 a 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. 060205.A provides only this two-prong standard for relief of a disbursing official:
    - 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 doesn't include the first prong of the statutory standard is because a previous version of DOD FMR had specifically stated that disbursing officers are not liable for payments properly certified by certifying officers even if the payments turn out to be illegal, improper, or incorrect. See DOD FMR, Vol. 5, Ch. 1, para. 010501.C (August 1999 version). That specific language no longer exists in the current version of DOD FMR, Vol. 5, Ch. 1.
  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. 0603.
- 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. 060107, contains the identical standard and applies it to disbursing officials as well as other accountable individuals. Accountable individuals include disbursing officers, certifying officers, 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. See DOD FMR, Vol. 5, Glossary (definition of “Accountable Individual”).
  3. Under the statute, the SECDEF’s 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). Thus, because the Comptroller General did not make the relief decision in cases of physical losses anyway, the April 2005 changes to DOD FMR, Vol. 5, which eliminate DOD’s recognition of the Comptroller General’s statutory authority to relieve DOD accountable officers, make no practical difference in cases of physical losses.
  4. The SECDEF 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. 0603.
- I. Relief of DOD Departmental Accountable Officials for Illegal, Incorrect, or Improper Payments.
1. DOD FMR, Vol. 5 doesn’t actually state any standards for relief of departmental accountable officials.

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.

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. See 5 U.S.C. § 5512(b). By doing this, the individual can get his matter heard in federal court.

K. Legislative Relief. Private and collective relief legislation.

**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). Permanently establish means that the officer has agreed to repay the loss or the appropriate authority has denied relief.
2. DOD FMR requires a formal investigation for physical losses of \$750 or more or erroneous payments induced by fraud. The commander may investigate other losses formally as well. See DOD FMR, Vol. 5, Ch. 6. Chapter 6 provides detailed guidance on when investigations must be conducted and 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. See 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); DOD FMR, Vol. 5, Ch. 6.
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 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 negligence. Hence, accountable officers must familiarize themselves with applicable laws/regulations. See DOD FMR, Vol. 5, ch.1, para. 010502.
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).
3. The failure of an audit to catch an improper payment does not break the proximate cause chain for liability. Mr. Clarence Maddox, B-303920, 2006 U.S. Comp. Gen. LEXIS 54 (Mar. 21, 2006).
4. As noted previously, the previous version of DOD FMR, Vol. 5, Ch. 33, sec. 3309 and appendix C provided that a presumption of negligence does not apply to acts of DOD “accountable officials.” Those portions of Volume 5 were deleted in April 2005. The current DOD FMR is silent as to whether there is any presumption of negligence for 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.
2. If negligence occurred and it was the proximate cause of the loss or deficiency, the Comptroller General may not 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 Captain John J. Geer, B-238123, 70 Comp. Gen. 298 (Feb. 27, 1991).

**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%); see also 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. See DOD FMR, Vol. 5, chs. 28-32.

**VIII. CONCLUSION.**

# CHAPTER 15:



## FISCAL LAW RESEARCH

**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).
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, Congress occasionally combined some or all of the appropriations into a consolidated appropriations act. *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007). Alternatively, Congress occasionally funded some agencies' requirements through a series of continuing resolutions without ever passing an annual appropriation act. *See, e.g.*, Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, 121 Stat. 8 (2007) (funding several agencies through the end of the fiscal year via this fourth in a series of continuing resolutions). 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).

4. In addition to LEXIS<sup>TM</sup>- and Westlaw<sup>TM</sup>-based research, one can utilize the Thomas website (<http://www.thomas.gov>) within the Library of Congress to conduct research on legislation enacted since 1973. This website also has a consolidated listing of appropriation legislation enacted since 1998 and a list of pending appropriation bills for the current or upcoming fiscal year. The Pentagon Library, available at <http://www.whs.mil/library/DODlaw.html>, also contains a listing 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. 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 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).

2. While 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.”
3. 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, so if I want to find a codified 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 I want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, I would probably start with 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. You can run a general boolean or natural language search on either a specialized legal database, such as LEXIS<sup>TM</sup> or Westlaw<sup>TM</sup>, or on the Government Printing Office (GPO) website, *available at* <http://www.gpoaccess.gov/uscode/index.html>.

## 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. Disbursing officials, certifying officials, and agency heads are entitled to advance decisions. 31 U.S.C. § 3529. 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. 010801 (Jun 2009). DOD FMR, Vol. 5, Ch. 1, para. 010802.E explains:

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. For a description of the process to obtain advanced decisions within DOD, see Chapter 14, Liability of Accountable Officers, of The Judge Advocate General's School Fiscal Law Deskbook.

- D. 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://www.gao.gov/legal/decisions.html>.
3. The GAO website also contains electronic listings and copies of opinions issued within the past month and 6 months respectively. You can also subscribe to a GAO electronic alert that issues daily notifications of the reports, decisions, and opinions that GAO has issued. You may register for this service 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

E. Principles of Federal Appropriations Law (a.k.a. “The Red Book”).

- 1. Third edition was published beginning in 2004 by the Government Accountability Office, Office of General Counsel. In 2009, GAO published an annual update of the Third Edition, Volumes I and II. The most current version of The Redbook is available at <http://www.gao.gov/legal/redbook.html>.
- 2. 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).

F. U.S. GOV’T ACCOUNTABILITY OFFICE, TITLE 7 OF THE GAO POLICY AND PROCEDURES MANUAL FOR GUIDANCE OF FEDERAL AGENCIES (1993).

1. A substantial portion of the general guidance issued by GAO to executive agencies was first codified into the GAO Policy and Procedures Manual for Guidance of Federal Agencies in 1957. The manual has 8 major parts called titles. Of these 8 titles, only Title 7 remains viable. The GAO website lists points of contact for information on matters covered by the other titles at <http://www.gao.gov/special.pubs/ppm.html>. This same website contains a link to Title 7.
  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 a Mr. Tom Armstrong, (202) 512-8257.
- G. 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, PREPARING, SUBMITTING, AND EXECUTING THE BUDGET (June 2002), § 51, *available at* <http://www.whitehouse.gov/omb/rewrite/circulars/a11/02toc.html>.
- 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, 2B (Oct. 2008), *available at* <http://www.defenselink.mil/comptroller/fmr/>. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volume 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://www.defenselink.mil/comptroller/>.
  3. The Army’s budget materials can be found at:  
<http://www.asafm.army.mil/budget/fybm/fybm.asp>.

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/fmc/>.
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/xabout/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. 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.

- 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 own 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, BUDGET GUIDANCE AND PROCEDURES para. 4.36 (3 Mar. 2005); Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999), available at <http://www.fmo.navy.mil/docs/buc.pdf>.

- 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 allow you to perform a boolean search 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/](http://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: <https://www.doctrine.quantico.usmc.mil/>.
  - 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](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](http://www.uscg.mil/directives/default.asp).
  - h. JAGCNET. Those individuals with a JAGCNET password may conduct a search of the text of all publications contained within the JAGCNET library of publications (most DOD regulations and TJAGSA deskbooks) at [www.jagcnet.army.mil](http://www.jagcnet.army.mil).
2. 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. Department of Defense Financial Management Regulation. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, *available at*, <http://www.defenselink.mil/comptroller/fmr/>, 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 Antideficiency 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 which are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army). The DFAS for DOD Library is available at: <https://dfas4dod.dfas.mil/library/>. 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/secretariat/document/dfas37-100/dfas37-100.asp>.
  - (2) DFAS-IN REGULATION 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION, *available at* <http://www.asafm.army.mil/secretariat/document/37-1reg/37-1reg.asp>.



- (3) DFAS-DE INTERIM GUIDANCE ON PROCEDURES FOR ADMINISTRATIVE CONTROL OF APPROPRIATIONS AND FUNDS MADE AVAILABLE TO THE AIR FORCE (Sep. 1999) (formerly DFAS-DE 7200.1-R and AFR 177.16), *available at* <https://dfas4dod.dfas.mil/library/publication/dfasdepubs.htm>.
- (4) DFAS-DE 7000.4.R, Accounting for Obligations (Sept. 2006), *available at* <https://dfas4dod.dfas.mil/library/publication/dfasdepubs.htm>.
- (5) DFAS-DE INTERIM GUIDANCE ON ACCOUNTING FOR COMMITMENTS (Oct. 2003) (formerly DFAS-DE 7000.5-R and AFR 170-13), *available at* <https://dfas4dod.dfas.mil/library/publication/dfasdepubs.htm>.
- (6) DFAS-DE INTERIM GUIDANCE ON PROCEDURES FOR TRAVEL ACCOUNTING OPERATIONS (Jul. 2001) (formerly DFAS-DE 7010.3-R and AFR 177-103), *available at* <https://dfas4dod.dfas.mil/library/publication/dfasdepubs.htm>.

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 utilize 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.

<b>Website Name</b>	<b>Web Address</b>
<u>A</u>	
ABA Lawlink Legal Research Jumpstation:	<a href="http://www.abanet.org/tech/ltrc/lawlink/home.html">http://www.abanet.org/tech/ltrc/lawlink/home.html</a>
ABA Network	<a href="http://www.abanet.org/">http://www.abanet.org/</a>
ABA Public Contract Law Journal (PCLJ)	<a href="http://www.abanet.org/contract/operations/lawjournal/journal.html">http://www.abanet.org/contract/operations/lawjournal/journal.html</a>
ABA Public Contract Law Section	<a href="http://www.abanet.org/contract/admin/home.html">http://www.abanet.org/contract/admin/home.html</a>
Ability One	<a href="http://www.abilityone.gov/index.html">http://www.abilityone.gov/index.html</a>
Acquisition Review Journal	<a href="http://www.dau.mil/pubscats/Pages/ARJ.aspx">http://www.dau.mil/pubscats/Pages/ARJ.aspx</a>
Defense Acquisition Portal	<a href="https://dap.dau.mil/Pages/Default.aspx">https://dap.dau.mil/Pages/Default.aspx</a>
ACQ Web- Office of the Undersecretary Of Defense for Acquisition & Tech	<a href="http://www.acq.osd.mil/">http://www.acq.osd.mil/</a>
Air Force Acquisition	<a href="http://ww3.safaq.hq.af.mil/">http://ww3.safaq.hq.af.mil/</a>
Air Force Alternative Dispute Resolution (ADR) Program	<a href="http://www.adr.af.mill">http://www.adr.af.mill</a>
Air Force Audit Agency	<a href="http://www.affaa.af.mil/">http://www.affaa.af.mil/</a>
Air Force Civil Engineer Support Agency	<a href="http://www.afcesa.af.mil/">http://www.afcesa.af.mil/</a>
Air force FAR Supplement	<a href="http://farsite.hill.af.mil/vfaffara.htm">http://farsite.hill.af.mil/vfaffara.htm</a>
Air Force Contracting Home Page	<a href="http://ww3.safaq.hq.af.mil/contracting/">http://ww3.safaq.hq.af.mil/contracting/</a>
Air Force Financial Management & Comptroller	<a href="http://www.saffm.hq.af.mil/">http://www.saffm.hq.af.mil/</a>
Air Force General Counsel	<a href="http://www.safgc.hq.af.mil/">http://www.safgc.hq.af.mil/</a>
Air Force Site, FAR, DFARS, Fed Reg	<a href="http://farsite.hill.af.mil/">http://farsite.hill.af.mil/</a>
Air Force Home Page	<a href="http://www.af.mil/">http://www.af.mil/</a>

Website Name	Web Address
<u>A</u>	
Air Force Logistics Management Agency	<a href="http://www.aflma.hq.af.mil/">http://www.aflma.hq.af.mil/</a>
Air Force Materiel Command FAR	<a href="http://farsite.hill.af.mil/vfafmc1.htm">http://farsite.hill.af.mil/vfafmc1.htm</a>
Supplement	
Air Force Materiel Command Staff Judge	<a href="https://www.afmc-mil.wpafb.af.mil/HQ-">https://www.afmc-mil.wpafb.af.mil/HQ-</a>
Advocate	<a href="AFMC/JA/">AFMC/JA/</a>
Air Force Publications	<a href="http://www.e-publishing.af.mil/">http://www.e-publishing.af.mil/</a>
Acquisition Central	<a href="http://www.acquisition.gov/">http://www.acquisition.gov/</a>
Anti-Deficiency Act Guidance	<a href="http://asafm.army.mil/offices/fo/ada.aspx?OfficeCode=1500">http://asafm.army.mil/offices/fo/ada.aspx?OfficeCode=1500</a>
Anti-Deficiency Act violation database - GAO	<a href="http://www.gao.gov/ada/antideficiencyrpts.htm">http://www.gao.gov/ada/antideficiencyrpts.htm</a>
Anti-Deficiency Act Investigation Manual	<a href="http://asafm.army.mil/offices/fo/ada.aspx?OfficeCode=1500">http://asafm.army.mil/offices/fo/ada.aspx?OfficeCode=1500</a>
Armed Services Board of Contract Appeals	<a href="http://docs.law.gwu.edu/asbca/">http://docs.law.gwu.edu/asbca/</a>
Armed Services Board of Contract	<a href="http://docs.law.gwu.edu/asbca/rule.htm">http://docs.law.gwu.edu/asbca/rule.htm</a>
Appeals Rules, EAJA and ADR procedures	
Army Acquisition (ASA(ALT))	<a href="http://www.alt.army.mil">www.alt.army.mil</a>
Army Audit Agency	<a href="http://www.hqda.army.mil/AAAWEB/">http://www.hqda.army.mil/AAAWEB/</a>
Army Contracting Command	<a href="http://aca.saalt.army.mil/">http://aca.saalt.army.mil/</a>
Army Corps of Engineers Home Page	<a href="http://www.usace.army.mil/">http://www.usace.army.mil/</a>
Army Corps of Engineers Legal Services	<a href="http://www.usace.army.mil/CECC/Pages/Home.aspx">http://www.usace.army.mil/CECC/Pages/Home.aspx</a>
AFARS – Army Federal Acquisition Regulation Supplement	<a href="http://farsite.hill.af.mil/vfafara.htm">http://farsite.hill.af.mil/vfafara.htm</a>
Army Financial Management & Comptroller	<a href="http://www.asafm.army.mil/">http://www.asafm.army.mil/</a>
Army General Counsel	<a href="http://www.hqda.army.mil/ogc/">http://www.hqda.army.mil/ogc/</a>
Army General Counsel Ethics Page	<a href="http://www.hqda.army.mil/ogc/eandf.htm">http://www.hqda.army.mil/ogc/eandf.htm</a>
Army Home Page	<a href="http://www.army.mil/">http://www.army.mil/</a>
Army Materiel Command Web Page	<a href="http://www.amc.army.mil/">http://www.amc.army.mil/</a>
Army Materiel Command Command Counsel	<a href="http://www.amc.army.mil/pa/COMMANDCOUNSEL.asp">http://www.amc.army.mil/pa/COMMANDCOUNSEL.asp</a>
Army Portal	<a href="https://www.us.army.mil/portal/portal_home.jhtml">https://www.us.army.mil/portal/portal_home.jhtml</a>
Army Publications	<a href="http://www.apd.army.mil/">http://www.apd.army.mil/</a>
Army Program Executive Office for Simulation, Training & Instrumentation (PEO STRI)	<a href="http://www.peostri.army.mil">www.peostri.army.mil</a>

Website Name	Web Address
<b><u>B</u></b>	
Bid Protest, GAO Decisions	<a href="http://www.gao.gov/decisions/bidpro/bidpro.htm">www.gao.gov/decisions/bidpro/bidpro.htm</a>
Bid Protest GAO Procedures	<a href="http://www.gao.gov/decisions/bidpro/bid/bibreg.html">www.gao.gov/decisions/bidpro/bid/bibreg.html</a>
Bid Protests Webpage from the American Bar Association (ABA) Public Contract Law Section	<a href="http://www.abanet.org/contract/federal/bidpro/">http://www.abanet.org/contract/federal/bidpro/</a>
Budget of the United States	<a href="http://www.gpoaccess.gov/usbudget/index.html">http://www.gpoaccess.gov/usbudget/index.html</a>
<b><u>C</u></b>	
CASCOM Home Page	<a href="http://www.army.mil/cascom/">U.S. Army Combined Arms Support Command (CASCOM)</a>
CECOM	<a href="http://www.army.mil/cecom/">U.S. Army CECOM</a>
CENTCOM Contracting	<a href="http://www2.centcom.mil/sites/contracts/Pages/Default.aspx">http://www2.centcom.mil/sites/contracts/Pages/Default.aspx</a>
Center for Law and Military Operations (CLAMO)	<a href="https://www.jagcnet.army.mil/8525751D00557EF">https://www.jagcnet.army.mil/8525751D00557EF</a>
Central Contractor Registration (CCR)	<a href="http://www.ccr.gov/">http://www.ccr.gov/</a>
Civilian Board of Contract Appeals	<a href="http://www.cbca.gsa.gov/">http://www.cbca.gsa.gov/</a>
Coast Guard Home Page	<a href="http://www.uscg.mil">http://www.uscg.mil</a>
Code of Federal Regulations	<a href="http://www.gpoaccess.gov/cfr/index.html">http://www.gpoaccess.gov/cfr/index.html</a>
Commission on Wartime Contracting	<a href="http://www.wartimecontracting.gov/">http://www.wartimecontracting.gov/</a>
Comptroller General Decisions	<a href="http://www.gao.gov/legal/decisions.html">http://www.gao.gov/legal/decisions.html</a>
Comptroller General Bid Protest Decisions	<a href="http://www.gao.gov/decisions/bidpro/bidpro.htm">http://www.gao.gov/decisions/bidpro/bidpro.htm</a>
Comptroller General Legal Products	<a href="http://www.gao.gov/legal.htm">http://www.gao.gov/legal.htm</a>
Congressional Bills	<a href="http://www.gpoaccess.gov/bills/index.html">http://www.gpoaccess.gov/bills/index.html</a>
Congressional Documents	<a href="http://www.gpoaccess.gov/legislative.html">http://www.gpoaccess.gov/legislative.html</a>
Congressional Documents via Thomas	<a href="http://thomas.loc.gov/">http://thomas.loc.gov/</a>
Congressional Record	<a href="http://www.gpoaccess.gov/crecord/index.html">http://www.gpoaccess.gov/crecord/index.html</a>
Contingency Contracting/Contractors on the Battlefield	<a href="https://www.alt.army.mil/portal/page/portal/oasaalt/SAAL-ZP-Contingency-Contracting">https://www.alt.army.mil/portal/page/portal/oasaalt/SAAL-ZP-Contingency-Contracting</a>
Contract Pricing References Guides	<a href="http://www.acq.osd.mil/dpap/cpf/contract_pricing_reference_guides.html">http://www.acq.osd.mil/dpap/cpf/contract_pricing_reference_guides.html</a>
Contractor on the Battlefield Resource Library	<a href="http://www.aschq.army.mil/home/BattlefieldResourceLibrary.html">http://www.aschq.army.mil/home/BattlefieldResourceLibrary.html</a>
Cornell University Law School (extensive list of links to legal research sites)	<a href="http://www.law.cornell.edu">www.law.cornell.edu</a>
Cost Accounting Standards Board (CASB)	<a href="http://www.whitehouse.gov/omb/procurement/casb.html">http://www.whitehouse.gov/omb/procurement/casb.html</a>
Court of Appeals for the Federal Circuit (CAFC)	<a href="http://www.cafc.uscourts.gov/">http://www.cafc.uscourts.gov/</a>
Court of Federal Claims	<a href="http://www.usfc.uscourts.gov">www.usfc.uscourts.gov</a>

Website Name	Web Address
<b>D</b> Davis Bacon Wage Determinations DCAA - Electronic Audit Reports	<a href="http://www.gpo.gov/davisbacon/">http://www.gpo.gov/davisbacon/</a> <a href="http://www.dcaa.mil/FOIA/FOIA_Reading_Room.html">http://www.dcaa.mil/FOIA/FOIA_Reading_Room.html</a>
Defense Contract Audit Agency (DCAA) DCAA Contract Audit Manual Debarred List (known as the Excluded Parties Listing System)	<a href="http://www.dcaa.mil/cam.htm">Defense Contract Audit Agency (DCAA) www.dcaa.mil/cam.htm</a> <a href="http://epls.arnet.gov">http://epls.arnet.gov</a>
Defense Acquisition University Publications & Periodicals	<a href="http://www.dau.mil/pubscats/default.aspx">http://www.dau.mil/pubscats/default.aspx</a>
Defense Acquisition Regulations Directorate (the DAR Council)	<a href="http://www.acq.osd.mil/dpap/dars/index.htm">http://www.acq.osd.mil/dpap/dars/index.htm</a>
Defense Acquisition University (DAU) Defense Competitive Sourcing & Privatization	<a href="http://www.dau.mil/">http://www.dau.mil/</a> <a href="http://www.acq.osd.mil/ie/housing.shtml">http://www.acq.osd.mil/ie/housing.shtml</a>
Defense Comptroller Defense Contract Management Agency (DCMA)	<a href="http://www.dtic.mil/comptroller/">http://www.dtic.mil/comptroller/</a> <a href="http://www.dcmamail.com">http://www.dcmamail.com</a>
Defense Finance and Accounting Service (DFAS)	<a href="http://www.dod.mil/dfas/">http://www.dod.mil/dfas/</a>
Defense Finance and Accounting Service (DFAS) IN Manual 37-100	<a href="http://www.asafm.army.mil/secretariat/document/dfas37-100/dfas37-100.asp">http://www.asafm.army.mil/secretariat/document/dfas37-100/dfas37-100.asp</a>
Defense Logistics Agency (DLA) Defense Procurement and Acquisition Policy: Contingency Contracting	<a href="http://www.dla.mil/default.aspx">http://www.dla.mil/default.aspx</a> <a href="http://www.acq.osd.mil/dpap/pacc/cc/index.html">http://www.acq.osd.mil/dpap/pacc/cc/index.html</a>
Defense Standardization Program	<a href="http://dsp.dla.mil/">http://dsp.dla.mil/</a>
Defense Tech Info. Ctr home page Department of Commerce, Office of General Counsel, Contract Law Division	<a href="http://www.dtic.mil">http://www.dtic.mil</a> <a href="http://www.ogc.doc.gov/contract_law.html">http://www.ogc.doc.gov/contract_law.html</a>
Department of Energy Acquisition Guide	<a href="http://management.energy.gov/policy_guidance/Acquisition_Guide.htm">http://management.energy.gov/policy_guidance/Acquisition_Guide.htm</a>
Department of the Interior Acquisition Regulation	<a href="http://www.doi.gov/pam/aindex.html">http://www.doi.gov/pam/aindex.html</a>
Department of Justice Department of Justice Legal Opinions	<a href="http://www.usdoj.gov">http://www.usdoj.gov</a> <a href="http://www.usdoj.gov/olc/opinionspage.htm">http://www.usdoj.gov/olc/opinionspage.htm</a>
Department of Navy Issuances (DONI) website	<a href="http://doni.daps.dla.mil/default.aspx">http://doni.daps.dla.mil/default.aspx</a>
Department of Veterans Affairs DFARS Web Page (Searchable)	<a href="http://www.va.gov">http://www.va.gov</a> <a href="http://www.acq.osd.mil/dpap/dars/dfars/index.html">www.acq.osd.mil/dpap/dars/dfars/index.html</a>
DOD Busopps DOD Financial Management Regulations	<a href="http://www.dodbusopps.com/">http://www.dodbusopps.com/</a> <a href="http://www.dtic.mil/comptroller/fmr/">http://www.dtic.mil/comptroller/fmr/</a>
DOD General Counsel DOD Home Page	<a href="http://www.defenselink.mil/dodgc/">http://www.defenselink.mil/dodgc/</a> <a href="http://www.defenselink.mil">http://www.defenselink.mil</a>

Website Name	Web Address
<b><u>D</u></b>	
DOD Inspector General (Audit Reports)	<a href="http://www.dodig.mil/audit/reports/">http://www.dodig.mil/audit/reports/</a>
DOD Instructions and Directives	<a href="http://www.dtic.mil/whs/directives/">http://www.dtic.mil/whs/directives/</a>
DOD Pubs & Regs	<a href="http://www.dtic.mil/whs/directives/corres/pub1.html">http://www.dtic.mil/whs/directives/corres/pub1.html</a>
DOD Purchase Card Program	<a href="http://dodgpc.us.army.mil/">http://dodgpc.us.army.mil/</a>
DOD Standards of Conduct Office (SOCO)	<a href="http://www.defenselink.mil/dodgc/defense_ethics/">http://www.defenselink.mil/dodgc/defense_ethics/</a>
<b><u>E</u></b>	
Estrategy	<a href="http://www.estrategy.gov/">http://www.estrategy.gov/</a>
Excluded Parties Listing System	<a href="http://epls.arnet.gov">http://epls.arnet.gov</a>
Executive Orders	<a href="http://www.gpoaccess.gov/executive.html#presidential">http://www.gpoaccess.gov/executive.html#presidential</a>
<b><u>F</u></b>	
Federal Acquisition Institute (FAI)	<a href="http://www.fai.gov/">http://www.fai.gov/</a>
Federal Acquisition Regulation (FAR)	<a href="https://www.acquisition.gov/far/">https://www.acquisition.gov/far/</a>
FAR Site (Air Force) (searchable; contains other procurement regulations)	<a href="http://farsite.hill.af.mil/">http://farsite.hill.af.mil/</a>
Federal Business Opportunities (FedBizOpps)	<a href="http://www.fedbizopps.gov/">http://www.fedbizopps.gov/</a>
Federal Legal Information Through Electronics (FLITE)	<a href="https://aflsa.jag.af.mil/php/dlaw/dlaw.php">https://aflsa.jag.af.mil/php/dlaw/dlaw.php</a>
Federal Marketplace	<a href="http://www.fedmarket.com/">http://www.fedmarket.com/</a>
Federal Prison Industries, Inc (UNICOR)	<a href="http://www.unicor.gov/">http://www.unicor.gov/</a>
Federal Procurement Data System	<a href="https://www.fpds.gov/">https://www.fpds.gov/</a>
Federal Register via GPO Access	<a href="http://www.gpoaccess.gov/nara/index.html">http://www.gpoaccess.gov/nara/index.html</a>
Financial Operations (Jumpsites)	<a href="http://www.asafm.army.mil">http://www.asafm.army.mil</a>
Financial Management Regulation (DOD)	<a href="http://www.dtic.mil/comptroller/fmr/">http://www.dtic.mil/comptroller/fmr/</a>
FindLaw	<a href="http://www.findlaw.com">http://www.findlaw.com</a>
Fiscal Budget Process Dictionary	<a href="http://www.gao.gov/new.items/d05734sp.pdf">http://www.gao.gov/new.items/d05734sp.pdf</a>
<b><u>G</u></b>	
Government Accountability Office (GAO) Comptroller General Appropriation Decisions	<a href="http://www.gao.gov/decisions/appro/appro.htm">http://www.gao.gov/decisions/appro/appro.htm</a>
Government Accountability Office (GAO) Comptroller General Bid Protest Decisions	<a href="http://www.gao.gov/decisions/bidpro/bidpro.htm">http://www.gao.gov/decisions/bidpro/bidpro.htm</a>
Government Accountability Office (GAO) Comptroller General Decisions via GPO Access	<a href="http://www.gpoaccess.gov/gaodecisions/index.html">http://www.gpoaccess.gov/gaodecisions/index.html</a>



Website Name	Web Address
<b><u>G</u></b>	
Government Accountability Office (GAO) Comptroller General Legal Products GAO Home Page	<a href="http://www.gao.gov/legal.htm">http://www.gao.gov/legal.htm</a>
GovCon (Government Contracting Industry)	<a href="http://www.gao.gov/">http://www.gao.gov/</a> <a href="http://www.govcon.com/content/homepage">http://www.govcon.com/content/homepage</a>
Government Online Knowledge Portal	<a href="http://www.golearn.gov/">http://www.golearn.gov/</a>
Government Printing Office (GPO)	<a href="http://www.gpo.gov">http://www.gpo.gov</a>
GSA Advantage	<a href="http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&amp;contentId=11887&amp;noc=T">http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&amp;contentId=11887&amp;noc=T</a>
<b><u>J</u></b>	
JAGCNET (Army JAG Corps Homepage)	<a href="http://www.jagcnet.army.mil/">http://www.jagcnet.army.mil/</a>
JAGCNET (The JAG Legal Center & School (TJAGLCS) homepage)	<a href="https://www.jagcnet.army.mil/8525736A005BC8F9">https://www.jagcnet.army.mil/8525736A005BC8F9</a>
Joint Contracting Command— Iraq/Afghanistan Training and Documentation Site	<a href="http://www.jcci-training.net/">http://www.jcci-training.net/</a>
Joint Electronic Library (Joint Publications)	<a href="http://www.dtic.mil/doctrine/s_index.html">http://www.dtic.mil/doctrine/s_index.html</a>
<b><u>L</u></b>	
Library of Congress	<a href="http://www.loc.gov/index.html">http://www.loc.gov/index.html</a>
<b><u>M</u></b>	
Marine Corps Home Page	<a href="http://www.usmc.mil">http://www.usmc.mil</a>
MWR Home Page (Army)	<a href="http://www.ArmyMWR.com">http://www.ArmyMWR.com</a>
<b><u>N</u></b>	
NAF Financial (Army)	<a href="http://www.armymwr.org/financialmanagement/default.aspx">http://www.armymwr.org/financialmanagement/default.aspx</a>
National Aeronautics and Space Administration (NASA) Acquisition	<a href="http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi">http://prod.nais.nasa.gov/cgi-bin/nais/index.cgi</a>
National Industries for the Blind	<a href="http://www.nib.org">www.nib.org</a>
National Industries for the Severely Handicapped (NISH)	<a href="http://www.nish.org">www.nish.org</a>
National Partnership for Reinventing Government (aka National Performance Review or NPR). Note: the library is now closed & only maintained in archive.	<a href="http://govinfo.library.unt.edu/npr/index.htm">http://govinfo.library.unt.edu/npr/index.htm</a>

Website Name	Web Address
<b><u>N</u></b>	
Navy Financial Management and Comptroller	<a href="http://www.fmo.navy.mil/policies/regulations.htm">http://www.fmo.navy.mil/policies/regulations.htm</a>
Navy General Counsel	<a href="http://www.ogc.navy.mil/">http://www.ogc.navy.mil/</a>
Navy Home Page	<a href="http://www.navy.mil">http://www.navy.mil</a>
Navy Forms online	<a href="http://navalforms.daps.dla.mil/web/public/home">http://navalforms.daps.dla.mil/web/public/home</a>
Navy Electronic Directives (NEDS) now called the Department of Navy Issuances (DONI) website	<a href="http://doni.daps.dla.mil/default.aspx">http://doni.daps.dla.mil/default.aspx</a>
North American Industry Classification System (formerly the Standard Industry Code—second weblink)	<a href="http://www.census.gov/eos/www/naics/">http://www.census.gov/eos/www/naics/</a> <a href="http://www.osha.gov/oshstats/sicser.html">http://www.osha.gov/oshstats/sicser.html</a>
<b><u>O</u></b>	
Office of Federal Procurement Policy (OFPP) Best Practices Guides	<a href="http://www.whitehouse.gov/omb/procurement/pbsa/guide_pbsc.html">http://www.whitehouse.gov/omb/procurement/pbsa/guide_pbsc.html</a>
Office of Government Ethics (OGE) OGE Ethics Advisory Opinions	<a href="http://www.usoge.gov">http://www.usoge.gov</a> <a href="http://www.usoge.gov/ethics_guidance/opinions/opinions.aspx">http://www.usoge.gov/ethics_guidance/opinions/opinions.aspx</a>
Office of Management and Budget (OMB)	<a href="http://www.whitehouse.gov/omb/">http://www.whitehouse.gov/omb/</a>
<b><u>P</u></b>	
Pentagon Library	<a href="http://www.whs.mil/library/DODlaw.html">http://www.whs.mil/library/DODlaw.html</a>
Per Diem Rates Travel and transportation allowance committee	<a href="http://www.defensetravel.dod.mil/">http://www.defensetravel.dod.mil/</a>
Per Diem Rates (OCONUS)	<a href="http://aoprals.state.gov/">http://aoprals.state.gov/</a>
Producer Price Index	<a href="http://www.bls.gov/ppi/">http://www.bls.gov/ppi/</a>
PubKLaw Wesbite	<a href="http://www.pubklaw.com/">http://www.pubklaw.com/</a>
Public Contract Law Journal	<a href="http://www.pclj.org/">http://www.pclj.org/</a>
Public Papers of the President of the United States	<a href="http://www.gpoaccess.gov/pubpapers/search.html">http://www.gpoaccess.gov/pubpapers/search.html</a>
Purchase Card Program	<a href="http://dodgpc.us.army.mil/">http://dodgpc.us.army.mil/;</a> <a href="http://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html">http://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html</a>
<b><u>R</u></b>	
Rand Reports and Publications	<a href="http://www.rand.org/publications/">http://www.rand.org/publications/</a>
Regulations / DA pams Army Publishing Agency	<a href="http://www.apd.army.mil/">http://www.apd.army.mil/</a>
Redbook	<a href="#">GAO: Legal Products</a>

Website Name	Web Address
<b><u>S</u></b> Service Contract Act Directory of Occupations	<a href="http://www.dol.gov/esa/whd/contracts/sca.htm">http://www.dol.gov/esa/whd/contracts/sca.htm</a>
Share A-76	<a href="http://sharea76.fedworx.org/sharea76/Home.aspx">http://sharea76.fedworx.org/sharea76/Home.aspx</a>
Small Business Administration (SBA)	<a href="http://www.sba.gov/">http://www.sba.gov/</a>
Small Business Administration (SBA)	<a href="http://www.sba.gov/GC/">http://www.sba.gov/GC/</a>
Government Contracting Home Page	
Small Business Innovative Research (SBIR) & Small Business Technology Transfer (STTR)	<a href="http://www.acq.osd.mil/sadbu/sbir/">http://www.acq.osd.mil/sadbu/sbir/</a>
Special Inspector General for Iraq Reconstruction	<a href="http://www.sigir.mil/">http://www.sigir.mil/</a>
Standard Industry Code (now called the North American Industry Classification System)	<a href="http://www.osha.gov/oshstats/sicser.html">http://www.osha.gov/oshstats/sicser.html</a> ; <a href="http://www.census.gov/eos/www/naics/">http://www.census.gov/eos/www/naics/</a>
Steve Schooner, Professor GWU homepage	<a href="http://www.law.gwu.edu/Faculty/profile.aspx?id=1740">http://www.law.gwu.edu/Faculty/profile.aspx?id=1740</a>
<b><u>T</u></b>	
Thomas website	<a href="http://www.thomas.gov">www.thomas.gov</a>
<b><u>U</u></b>	
UNICOR (Federal Prison Industries, Inc.)	<a href="http://www.unicor.gov">www.unicor.gov</a>
USA.gov	<a href="http://www.usa.gov/">http://www.usa.gov/</a>
U.S. Business.gov (sponsored by SBA)	<a href="http://www.business.gov">http://www.business.gov</a>
U.S. Code	<a href="http://uscode.house.gov">http://uscode.house.gov</a>
U.S. Code	<a href="http://www.gpoaccess.gov/uscode/index.html">http://www.gpoaccess.gov/uscode/index.html</a>
U.S. Congress on the Net-Legislative Info	<a href="http://www.thomas.gov">www.thomas.gov</a>
U.S. Court of Appeals for the Federal Circuit (CAFC)	<a href="http://www.cafc.uscourts.gov/">http://www.cafc.uscourts.gov/</a>
U.S. Court of Federal Claims	<a href="http://www.uscfc.uscourts.gov/">http://www.uscfc.uscourts.gov/</a>
<b><u>W</u></b>	
Where in Federal Contracting?	<a href="http://www.wifcon.com/">http://www.wifcon.com/</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
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
APC.....	Asia Pacific Center for Security Studies
APF's.....	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
ASCSA.....	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 (Former name of 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  
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 8-29

COFC..... Court of Federal Claims  
 COMMITS..... Commerce Information Technology Solutions  
 COR..... Contracting Officer Representative  
 COTR..... Contract Officer’s Technical Representative  
 COTS..... Commercially Available of 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 30-5  
 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  
 DAR.....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 14-3  
 DBA..... Defense Base Act 31-24  
 DBOF..... Defense Business Operations Fund  
 DCA..... Defense Communications Agency  
 DCAA..... Defense Contract Audit Agency  
 DCAAM..... Defense Contract Audit 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  
 EDA..... Excess Defense Articles  
 EEE..... Emergency and Extraordinary Expenses  
 EEO.....Equal Employment Opportunity  
 EFT..... Electronic Funds Transfer  
 EIT..... Electronic and Information Technology  
 ENG BCA.....US 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 FY04  
 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)  
 FEDBIZOPS..... 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 Contract..... 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 Contract..... Fixed Price Incentive Contract  
 FPR..... Final Proposal Revision 8-50  
 FP-R Contract.... 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  
 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

IAW.....Inspection, Accordance and Warranty  
 IBCA.....Department of Interior Board of Contract Appeals  
 ID/IQ..... Indefinite Quantity/Indefinite Delivery Contract  
 IDS..... Individual Replacement Site 31-9  
 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  
 ITARs..... International Traffic in Arms Regulations  
 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 29-7  
 JRC..... Joint Reception Center 31-3  
 JTR..... Joint Travel Regulation  
 JWOD..... Javits-Wagner-O’Day Act

KO..... Contracting Officer

L-H Contract... Labor-Hour Contract

L&S..... Lift and Sustain  
LATAM COOP.... Latin American Cooperation  
LBCA.....Department of Labor Board of Contract Appeals  
LDs..... Liquidated Damages  
LHWCA..... Longshoreman and Harbor Worker’s Compensation Act 31-24  
LOA..... Letter of Agreement  
LOA..... Letter of Authorization 31-10\  
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 (MNCI CJ8)  
MAC..... Multi-agency Contract  
MACOM..... Major Command  
MAS..... Multiple Award Schedule 9-43  
MCA..... Military Construction, Army  
MCCA..... Military Construction Codification Act  
MEJA..... Military Extraterritorial Jurisdiction Act 31-20  
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’s..... Non-Appropriated Funds  
NAFI..... Non-Appropriated Fund Instrumentality  
NAICS..... North American Industry Classification Code 13-2  
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 31-13  
NPR..... National Performance Review  
NSN.....National Stock Number  
NTE Price..... Not to exceed price

O&M.....Operations and Maintenance  
OCI.....Organizational Conflicts of Interest

OFCC.....Office of Federal Contract Compliance  
OFDA.....Office for Foreign Disaster Assistance  
OFPP..... Office of Federal Procurement  
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  
PFB..... Procurement Fraud Branch, Contract and Fiscal Law Division, US Army Legal Services Agency  
PFP..... Partnership for Peace  
PIA..... Procurement Integrity Act 17-8  
PIK..... Payment-in-Kind  
PMR..... Procurement Management Review  
POA..... Period of Availability  
POLAD..... DOS Political Advisor  
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  
 RSA..... Randolph Sheppard Act for the Blind 13-32  
 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 32B-8  
 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 6-56  
 SOW..... Statement of Work  
 SPS..... Standard Procurement System  
 SSA..... Source Selection Authority 8-55  
 SSEB..... Source Selection Evaluation Board  
 SSP.....Source Selection Plan  
 STARS..... GWAC Vehicle managed by GSA  
  
 T4C..... Termination for Convenience  
 T4D..... Termination for Default  
 TAA..... Trade Agreements Act 13-43  
 T&E..... Train and Equip  
 T&M Contract.....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..... Undefined 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 16-5

WAWF.....Wide Area Work Flow  
WD.....Wage Determination  
WDOL..... Wage Determinations Online  
WHA..... Walsh-Healy Public Contracts Act 14-20  
WHCA.....War Hazards Compensation Act 31-24