

# Principles of Federal Appropriations Law

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## Chapter 5

# Availability of Appropriations: Time

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## B. The *Bona Fide* Needs Rule

### 1. Background

#### a. Introduction

Over a century ago, the Comptroller of the Treasury stated, “An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such an appropriation.” 8 Comp. Dec. 346, 348 (1901). The *bona fide* needs rule is one of the fundamental principles of appropriations law: A fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made. Citations to this principle are numerous. *See, e.g.*, 33 Comp. Gen. 57, 61 (1953); 16 Comp. Gen. 37 (1936); B-289801, Dec. 30, 2002; B-282601, Sept. 27, 1999; B-235678, July 30, 1990.

Does the quotation above, from the Comptroller of the Treasury, mean that an agency’s obligation of an annual appropriation on the last day of the fiscal year can never constitute a *bona fide* need of that fiscal year? While it certainly should raise a question, the answer is, “it depends.” An agency may have perfectly valid reasons for year-end spending. For example, some programs have predictable 4<sup>th</sup> quarter surges due to cyclical or seasonal requirements. When using time-limited funding, an agency must dissect its ongoing business into discrete units of time in order to determine whether a particular transaction may be obligated against, or charged to, a specific appropriation. The *bona fide* needs rule provides an analytical framework for analyzing an agency’s financial transactions to determine the period of time to which a transaction relates.

*Bona fide* needs questions arise in many forms. Historically, as the discussion that follows will show, *bona fide* needs issues have arisen most frequently in the context of the acquisition of goods or services. An agency may enter into a contract in one fiscal year, but the contractor does not complete performance until the next fiscal year. Which fiscal year should be charged? Or, an agency may modify a contract in the year following the fiscal year in which it originally entered into the contract. Sometimes, as a result of an audit, the question may be whether an obligation already recorded was a proper charge against that fiscal year’s appropriation. Or, an agency may have taken certain actions that it should have recorded as an obligation but did not; when the time for payment arrives, the question again is which fiscal year to charge. These are all facets of the same basic question—whether an obligation bears a sufficient relationship to the legitimate needs of the time period of availability of the appropriation charged or sought to be charged.

Although the *bona fide* needs rule remains one of the bedrock principles of appropriations law, its application has changed over the years as Congress enacted statutes redefining in some instances what constitutes a *bona fide* need of a fiscal year appropriation. During a period of ever increasing budget constraints in the 1990s, Congress enacted laws providing civilian agencies more flexibility in their use of fiscal year appropriations, and expanded already existing authorities of defense agencies. Today, there is general authority permitting agencies to use fiscal year funds to acquire goods and services *via* multiyear acquisitions, and to enter into 1-year contracts for severable services that cross fiscal years. These laws have provided agencies with substantial flexibility to allocate the cost of goods and services across fiscal years, or to allocate the costs to the first fiscal year of the contract even though the goods or services may be delivered in future fiscal years.

Notwithstanding the increased flexibilities agencies now have, the *bona fide* needs rule remains an important and often complex consideration for an agency as it executes its budget. In this section, we discuss the basic concept underlying the rule. We then discuss the traditional application of the rule in sections B.2 through B.7, followed by a discussion of the recent statutory developments in the acquisition of goods and services area in sections B.8 and B.9. It is important to know both the traditional application as well as recently enacted flexibilities in order to understand the contracting options now available to agencies as they decide how to use their appropriations. We discuss the application of the rule in the grants and cooperative agreements context in section B.10.

## b. The Concept

The *bona fide* needs rule has a statutory basis. As noted in Chapter 1, the first general appropriation act in 1789 made appropriations “for the service of the present year,” and this concept continues to this time. This “one-year” concept is also reflected in 31 U.S.C. § 1502(a), sometimes called the “*bona fide* needs statute.” Originally enacted in 1870 (16 Stat. 251 (July 12, 1870)), section 1502(a) provides that the balance of a fixed-term appropriation “is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period....” The key word here is “properly”—expenses “properly incurred” or contracts “properly made” within the period of availability. *See, e.g.*, 37 Comp. Gen. 155, 158 (1957). Additional statutory support for the rule is found in the Antideficiency Act, 31 U.S.C. § 1341(a), and the so-called Adequacy of Appropriations Act, 41 U.S.C. § 11. (*Bona fide* needs questions may involve other statutory restrictions as well. It also should be apparent that they are closely related to the subject matter covered in Chapter 7 on obligations.) For an early but still relevant and useful discussion, see 6 Comp. Dec. 815 (1900).

While the rule itself is universally applicable, determination of what constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of the particular case. 70 Comp. Gen. 469, 470 (1991); 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. at 159.

In its most elementary form—where the entire transaction (contract or purchase, delivery or other performance, and payment) takes place during the same fiscal year—the rule means simply that the appropriation is available only for the needs of the current year. A common application of the rule in this context is that an appropriation is not available for the needs of a future year. For example, suppose that, as the end of a fiscal year approaches, an agency purchases a truckload of pencils when it is clear that, based on current usage, it already has in stock enough pencils to last several years into the future. It would seem apparent that the agency was merely trying to use up its appropriation before it expired, and the purchase would violate the *bona fide* needs rule.

We do not mean to suggest that an agency may purchase only those supplies that it will actually use during the fiscal year. Agencies normally maintain inventories of common use items. The *bona fide* needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the “need”

being to maintain the inventory level so as to avoid disruption of operations. The problem arises when the inventory crosses the line from reasonable to excessive. Future years' needs and year-end spending are covered further in section B.2 of this chapter. Prior years' needs are covered in section B.3 of this chapter.

*Bona fide* needs questions also frequently involve transactions that cover more than one fiscal year. In the typical situation, a contract is made (or attempted to be made) in one fiscal year, with performance and payment to extend at least in part into the following fiscal year. The question is which fiscal year should be charged with the obligation. In this context, the rule is that, in order to obligate a fiscal year appropriation for payments to be made in a succeeding fiscal year, the contract imposing the obligation must have been made within the fiscal year sought to be charged, and the contract must have been made to meet a *bona fide* need of the fiscal year to be charged. *E.g.*, 70 Comp. Gen. 664, 667 (1991); 64 Comp. Gen. 359, 362 (1985); 35 Comp. Gen. 692 (1956); 20 Comp. Gen. 436 (1941); 16 Comp. Gen. 37 (1936); 21 Comp. Dec. 822 (1915); 4 Comp. Dec. 553 (1898); B-289801, Dec. 30, 2002; B-257977, Nov. 15, 1995.

The principle 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 applies even though the funds are not to be disbursed and the exact amount owed by the government cannot be determined until the subsequent fiscal year. *E.g.*, 71 Comp. Gen. 502 (1992); 21 Comp. Gen. 574 (1941). Thus, in a case where the United States entered into an agreement with a state to provide assistance for the procurement of civil defense items for the state and to pay a specified percentage of the cost, the Comptroller General found that the need arose in the year the agreement with the state was made. Therefore, appropriations current at that time were to be charged with the cost, notwithstanding the fact that the states or the United States may not have negotiated and executed the actual procurement contracts with suppliers, including the exact price, until a subsequent fiscal year. 31 Comp. Gen. 608 (1952).

Several sections of this chapter, starting with B.4, explore the application of the *bona fide* needs rule in various aspects of government contracting in which transactions cover more than one fiscal year. We have structured these sections in large measure on a comprehensive and well-documented article by Capt. Dale Gallimore entitled *Legal Aspects of Funding Department of the Army Procurements*, 67 Mil. L. Rev. 85 (1975).

The *bona fide* needs rule applies to multiple year as well as fiscal year appropriations. 55 Comp. Gen. 768, 773–74 (1976); B-235678, July 30, 1990. *See also* 64 Comp. Gen. 163, 166 (1984). In other words, an agency may use a multiple year appropriation for needs arising at any time during the period of availability.

An argument can be made, not wholly without logic, that a multiple year appropriation can be obligated at any time during its availability, but only to meet a *bona fide* need of the year in which the funds were appropriated. Suppose, for example, that an agency receives a 2-year appropriation every year. For fiscal year 1989, it receives an appropriation available through fiscal year 1990; for fiscal year 1990, it receives an appropriation available through fiscal year 1991, and so on. It is possible to apply the *bona fide* needs rule to require that the fiscal year 1990 appropriation be used only for needs arising in fiscal year 1990, although obligation may occur any time prior to the end of fiscal year 1991. The Comptroller General specifically rejected this approach in 68 Comp. Gen. 170 (1989), holding that the Defense Logistics Agency could use its fiscal year 1987 2-year Research and Development appropriation for a need arising in fiscal year 1988. “There is no requirement that 2-year funds be used only for the needs of the first year of their availability.” *Id.* at 172.

It follows that the *bona fide* needs rule does not apply to no-year funds. 43 Comp. Gen. 657, 661 (1964). *See also* B-279886, Apr. 28, 1998. Without a prescribed period of availability, there is no fixed period

during which the *bona fide* need must arise, and thus no fixed period in which the funds must be obligated and expended.

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