ANNE M. BRENNAN

Ms. Anne M. Brennan is the Assistant General Counsel (Financial Management and Comptroller (FM&C).) She provides the full range of legal services to the Assistant Secretary of the Navy (FM&C) and his staff and directs the practice of law on behalf of the Department of the Navy in the field of fiscal law. Ms. Brennan received a B.A. degree from Wellesley College and a J.D. degree from Suffolk University Law School.

Robert D. Paschall

Mr. Paschall is an Associate Deputy General Counsel with the Office of General Counsel, Department of Defense, where he practices Fiscal and Federal Appropriations law. He has been with the Office of General Counsel since March 2005. From November 2002 until March 2005, Mr. Paschall was an Associate Counsel in the Business Operations Law Division of the Command Counsel's Office, United States Army Materiel Command Alexandria VA. Mr. Paschall was the senior fiscal law attorney for the command. He also specialized in acquisition law and policy. Mr. Paschall also managed the AMC Procurement Fraud Program. For his service, AMC awarded Mr. Paschall the Department of the Army's Meritorious Civilian Service.

Mr. Paschall graduated from Columbia University with a degree in Political Science. He holds a Juris Doctor from New York Law School and a Master of Laws in Environmental Law from Pace University Law School.

LAURA M. LEUSSING Deputy Associate General Counsel
General Law Division
U.S. General Services Administration

Graduated Auburn University (B.A. English, 1981), Emory University School of Law (J.D., 1985). Member of the State Bar of Georgia since 1985. Began Federal career as a member of the U.S. Army Judge Advocate General's Corps in 1986. Worked as an attorney for the Department of Labor, Benefits Review Board and as a general attorney with the U.S. Coast Guard specializing in standards of ethical conduct and fiscal law. Joined GSA's Office of General Counsel in March, 1998 as house counsel on fiscal and administrative law. Became Deputy Associate General Counsel in May 2004. Areas of practice include fiscal law, interagency transactions, FOIA & Privacy Act, Federal Advisory Committee Act, Competitive Sourcing, and support for special events (such as the Y2K initiative and Presidential Transition).

Keith R. Larson

Keith R. Larson is an attorney-advisor in the Branch of Acquisitions and Intellectual Property, Department of the Interior, Office of the Solicitor, Division of General Law. He provides advice and representation in Government contract law and fiscal law to Interior's National Business Center and its revolving fund acquisition activities. He previously served as an Associate Counsel in the Navy Office of General Counsel, Naval Air Systems Command Headquarters, where he was the designated Command legal advisor for fiscal policy. Prior to that assignment, he served as a chief field counsel in the Western District of the Defense Contract Management Agency. He also currently serves as a reserve judge advocate in the Air Force Judge Advocate General's Corps. He is a member of the ABA and its Public Contract Law Section.

James L. Weiner

Earning his J.D. in 1986 from the Washington College of Law (American University) in Washington, D.C., Jim is admitted to practice in Maryland, D.C. and Virginia. In 1991, after practicing with a small law firm, Jim joined the General Law Division of Interior's Office of the Solicitor as a procurement attorney. Jim's responsibilities include representing all Interior bureaus and offices in bid protests, contract claims, and Federal Tort claims, both administratively and in the federal courts; reviewing contracts and assistance agreements; and advising on a broad range of issues in the procurement, appropriations, administrative law, and ethics areas.

INTERAGENCY AGREEMENTS TO PROCURE SEVERABLE SERVICES: PITFALLS AND OPPORTUNITIES

Today we are going to examine severable services within the context of interagency agreements where the specific authority for funds to be transferred between agencies is something other than the Economy Act. A typical scenario may be one in which a customer agency on September 28 enters into an interagency agreement with a performing agency for lawn-cutting services. The performing agency then enters into a contract with a lawn-cutting service on December 28 with the period of performance lasting one year. What are the ramifications of these transactions? As you will hear today, there are differing opinions.

There are several reasons we thought that this was an important topic to address. First, Congress continues to be interested in interagency agreements as is evidenced by section 811 of the National Defense Authorization Act For Fiscal Year 2006, Public Law Number 109-360, in which Congress requires inspector generals (IGs) of various agencies to review the procurement policies, procedures, and internal controls of performing agencies to determine whether these agencies are compliant with the procurement requirements of the customer agency, in this case, the Department of Defense. Second, the IGs of various government agencies continue to audit funding purchases made through interagency agreements. In the past, the IGs have focused on whether there was a legitimate need for customer agencies to use the services of other agencies; whether the customer agencies' requirements were clearly defined; and, whether funds were properly used and tracked. The result of some of these audits was the unfortunate finding of violations of the Antideficiency Act. Third, the Government Accountability Office (GAO) has not issued an opinion directly on point, although as Hannah Laufe will discuss here today, GAO has issued several decisions focusing on interagency transactions that are governed by statutory authority other than the Economy Act that are relevant to the discussion. Finally, as will quickly become evident, the lawyers at different customer and performing agencies do not agree on the law.

To frame the issue, we thought it was important for the panelists to keep the following questions in mind:

(1) What authority does a customer agency use to enter into an interagency agreement for severable services? Is it the specific authority of the franchise or revolving fund of the performing agency? Does 41 U.S.C. § 253l or 10 U.S.C. § 2410a apply to interagency severable services agreements? (Both 42 U.S.C. § 253l and 10 U.S.C. § 2410a permit the customer agency to enter into a severable services contract for a period that begins in one fiscal year and ends in the next fiscal year if the contract period does not exceed one year.)

(2) What authority does the performing agency use to enter into a contract with a vendor for severable services? Is it 41 U.S.C. § 253l, or, if the customer agency is a defense agency, is it 10 U.S.C. § 2410a?

(3) Can an ordering agency enter into an interagency agreement with a franchise or revolving fund, and extend performance on a 12-month severable services contract so that performance on the contract ends more than 12 months after the point at which the ordering agency entered into the interagency agreement, *i.e.*, incurred an obligation?

(4) Are interagency agreements involving severable services any different from interagency agreements involving non-severable services? How does the Bona Fide Needs Rule apply to interagency agreements for severable services? In the same way that it applies to interagency agreements for nonseverable services?

(5) Finally, when does the 12-month period of performance begin? For example, when the ordering agency enters into an interagency agreement with the performing agency, as illustrated in Timeline 1? When the performing agency enters into a contract with a vendor, as illustrated in Timeline 2?

The ordering agency is ultimately responsible for the use of its own funds. However, these are important questions for both the ordering and performing agency, as both are responsible for complying with appropriations laws.

Throughout the discussion, we will be referring to a timeline that highlights the differing positions between the customer and performing agencies.

We will leave time for questions at the end.

Let's get started.

Severable Services Contracts and the *Bona Fide* Needs Rule

An appropriation is available only to fulfill a genuine or *bona fide* need of the period of availability for which made. 31 U.S.C. § 1502(a). Service contracts are generally viewed as chargeable to the appropriation current at the time the services are rendered, particularly where the services are continuing or recurring in nature. 38 Comp. Gen. 316 (1958). However, a need may arise in one fiscal year for services, which by their very nature cannot be separated for performance in separate fiscal years. The question whether to charge the services to the appropriation current on the date of contract award or to charge the appropriation current on the date the services are rendered turns on whether the services are severable or nonseverable ("entire"). 23 Comp. Gen. 370, 371 (1943).

A task is severable if it can be separated into components that independently meet a separate and ongoing need of the government. Thus to the extent that a need for a specific portion of a continuing service arises in a subsequent fiscal year, that portion is severable and chargeable to appropriations available in the subsequent fiscal year. Severable service contracts may not cross fiscal year lines unless authorized by statute. 71 Comp. Gen 428 (1992);

As stated in a 1953 Comptroller General decision:

> "The need for current services . . . arises only from day to day, or month to month, and the Government cannot, in the absence of specific legislative authorization, be obligated for services by any contract running beyond the fiscal year."

33 Comp. Gen. 90, 92 (1953)

Where the service provided constitutes a specific, entire job with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year, the task should be financed entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future years. Thus a nonseverable contract is essentially a single undertaking that cannot feasibly be subdivided. B-257977, Nov. 15, 1995; 23 Comp. Gen 370 (1943). Determination of what constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of the particular case. B-277165, Jan. 10, 2000.

The *bona fide* needs rule is one of the fundamental principles of appropriations law. Its application, however, has changed over the years as Congress enacted statutes redefining in some instances what constitutes a *bona fide* need of a fiscal year appropriation. Congress has enacted laws that provide agencies with more flexibility in their use of fiscal year appropriations, and today, most federal agencies have authority to enter into 1-year severable services contract at any time during the fiscal year and extending into the next fiscal year, and to obligate the total amount of the contract to the

appropriation current at the time the agency entered into the contract. 10 U.S.C. § 2410a (defense agencies); 41 U.S.C. § 253*l* (civilian agencies); 41 U.S.C. § 253*l*-1 (Comptroller General); 41 U.S.C. § 253*l*-2 (Library of Congress); 41 U.S.C. § 253*l*-3 (Chief Administrative Officer of the House of Representatives); 41 U.S.C. § 253*l*-4 (Congressional Budget Office). This authority, in effect, redefines for an agency that elects to contract under authority of one of these sections its *bona fide* need for the severable services for which it is contracting.

A 1996 Comptroller General decision demonstrates how the Air Force took advantage of this authority to maximize efficient use of its fiscal year appropriation. The Air Force had intended to award a 12-month severable services contract for vehicle maintenance beginning on September 1, 1994 (fiscal year 1994), and running until August 31, 1995 (fiscal year 1995), using 10 U.S.C. § 2410a. The Air Force, however, learned that it did not have sufficient unobligated fiscal year 1994 funds to cover the contract. To avoid Antideficiency Act problems, but taking advantage of section 2410a, the Air Force entered into a 4-month contract, beginning September 1, 1994, and running until December 31, 1994, and included an option to renew the contract at that time. The option could be exercised only by the Air Force, not the contractor, by affirmative written notification to the contractor. GAO concluded that the Air Force's obligation was only for 4 months, and under authority of section 2410a, it constituted a *bona fide* need of fiscal year 1994 and was properly chargeable to fiscal year 1994. Also, GAO found no Antideficiency Act violation. GAO stated that with the option to renew for 8 months, the Air Force had incurred "a naked contractual obligation that carries with it no financial exposure to the government." B-259274, May 22, 1996.

Recent Comptroller General Decisions Pertaining To Interagency Transactions Governed by Authorities Other Than the Economy Act

Unless authorized by law, transfers of funds between federal agencies and instrumentalities are prohibited by law. 31 U.S.C. § 1532. *See also* B-289380, July 31, 2002. Congress enacted the Economy Act, 31 U.S.C. § 1535, to permit a federal agency to provide goods or services to another federal agency, or to another account within the same agency, on a reimbursable payment basis. B-301561, June 14, 2004.

The Economy Act governs interagency transactions when there is no other, more specific, authority. 59 Comp. Gen. 415, 416 (1980). For example, when an intragovernmental revolving fund (a revolving fund which conducts business-like operations mainly within and between government agencies) provides specific authority for funds to be transferred between agencies, the Economy Act does not govern the transaction. B-301561, June 14, 2004.

The following GAO decisions pertain to interagency transactions governed by authorities other than the Economy Act:

Transfer of Fiscal Year 2003 Funds from the Library of Congress to the Office of the Architect of the Capitol, B- 302760, May 17, 2004

The Economy Act requirement that the ordering agency deobligate a fiscal year appropriation at the end of the fiscal year to the extent that the performing agency has not performed does not apply to transactions governed by statutory authority other than the Economy Act. An interagency transaction that permits the transfer of funds between the two agencies is, in some ways, not unlike a contractual transaction. For example, similar to a contractual transaction for a nonseverable service, at the time the agencies involved in the transaction enter into an interagency agreement, the ordering agency incurs an obligation for the costs of the work to be performed, and the amount obligated remains available to pay these costs once the work is completed.

Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sept. 6, 2001

Section 103(e) of Pub. L. No. 106-481, which specifies that amounts in the FEDLINK revolving fund are available to the Librarian "without fiscal year limitation" to carry out the FEDLINK program, does not permit the Library to retain unexpended fiscal (or fixed) year appropriations advanced by a customer agency that are not needed for costs the Library incurred in filling the order. The Library may not reserve the unexpended amounts to cover future year orders placed by the customer agency.

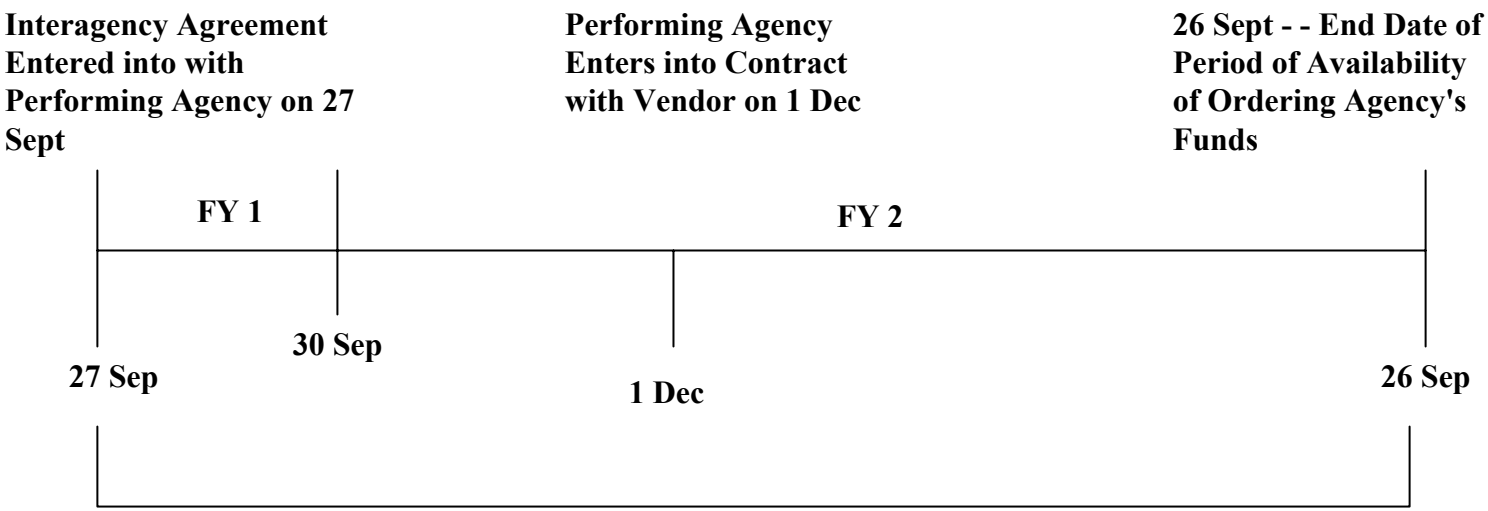
National Archives and Records Administration Records Center Revolving Fund—Advance Payments, B-306975, Feb. 27, 2006

The National Archives and Records Administration (NARA) Revolving Fund proposed to bill its customers at the beginning of each month based on its estimate of services it would provide that month and to adjust the next month's bill to reflect actual costs of services rendered. If a customer advances fiscal year funds for September's estimated costs, NARA may not credit excess amounts in adjusting October's bill. NARA must return the excess to the customers. These funds would not be available for obligation of the next fiscal year commencing October 1.

Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001

The U.S. Total Army Personnel Command (PERSCOM) entered into an agreement with the General Services Administration's (GSA) Federal Systems Integration and Management Center (FEDSIM), which derives its financing from the Information Technology Fund, a revolving fund. The agreement envisioned a three-phase project; however, PERSCOM obligated fiscal year 1997 funds to cover only the first phase. Because PERSCOM entered into an agreement for only the first phase of the project and incurred an obligation during the period of availability of the appropriation only for the first phase, PERSCOM may not apply the expired balance of the amount originally obligated for the first phase of the project to complete the remaining project phases.

Timeline 1

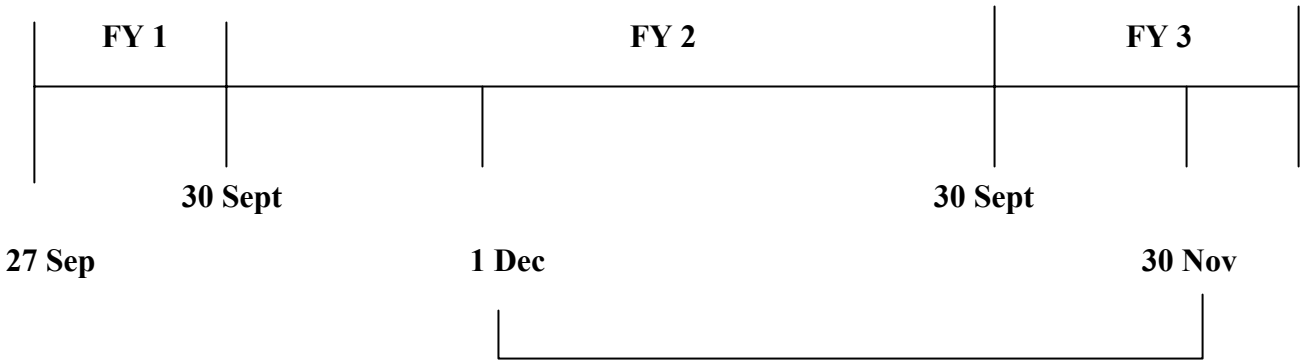

Interagency Agreement Entered into with Performing Agency on 27 Sept
Performing Agency Enters into Contract with Vendor on 1 Dec
26 Sept - - End Date of Period of Availability of Ordering Agency's Funds
FY 1
FY 2
27 Sep
30 Sep
1 Dec
26 Sep

Timeline 2

Interagency Agreement Entered into with Performing Agency on 27 Sept

Performing Agency Enters into Contract with Vendor on 1 Dec

30 Nov – End of Performance Period



TITLE 41 - PUBLIC CONTRACTS

CHAPTER 4 - PROCUREMENT PROCEDURES

SUBCHAPTER IV - PROCUREMENT PROVISIONS

Sec. 2531. Severable services contracts for periods crossing fiscal years

(a) Authority

The head of an executive agency may enter into a contract for procurement of severable services for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

(b) Obligation of funds

Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a) of this section.

TITLE 10 - ARMED FORCES

Subtitle A - General Military Law

PART IV - SERVICE, SUPPLY, AND PROCUREMENT

CHAPTER 141 - MISCELLANEOUS PROCUREMENT PROVISIONS

Sec. 2410a. Contracts for periods crossing fiscal years: severable service contracts; leases of real or personal property

(a) Authority. - (1) The Secretary of Defense, the Secretary of a military department, or the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, may enter into a contract for a purpose described in paragraph (2) for a period that begins in one fiscal year and ends in the next fiscal year if (without regard to any option to extend the period of the contract) the contract period does not exceed one year.

(2) The purpose of a contract described in this paragraph is as follows:

(A) The procurement of severable services.

(B) The lease of real or personal property, including the maintenance of such property when contracted for as part of the lease agreement.

(b) Obligation of Funds. - Funds made available for a fiscal year may be obligated for the total amount of a contract entered into under the authority of subsection (a).