FISCAL LAW

COURSE

Contract and Fiscal Law Department
The Judge Advocate General's School
United States Army
Charlottesville, Virginia

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THE JUDGE ADVOCATE GENERAL'S SCHOOL
DEPARTMENT OF THE ARMY

CONTRACT AND FISCAL LAW DEPARTMENT

BIOGRAPHIES OF PROFESSORS

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MAJOR THOMAS C. MODESZTO, JA, Professor, Contract and Fiscal Law Department; B.A., Rutgers University, 1985; M.B.A., University of Illinois, 1989; J.D., University of Illinois, 1989; Judge Advocate Officer Basic Course, 1991; LL.M., Military Law, The Judge Advocate General's School, 1999. Career Highlights: Chief, Criminal Law Division; HQ, 24th ID(M) and Fort Riley, Fort Riley, Kansas, 1999-2001. Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1995-1998. Trial Defense Counsel, Vilseck Field Office, Germany, 1993-1995. Legal Assistance and Administrative Law Attorney, 3ID, Vilseck Field Office, Germany, 1992-1993. Legal Assistance Attorney; Chief, Legal Assistance; Chief Administrative Law; Chief, Claims; 2ID, Camp Casey, Korea, 1991-1992. Member of the Bar of Illinois. Admitted to practice before the U.S. Supreme Court, the U.S. District Court for the Northern District of Illinois, the U.S. Court of Appeals for the Armed Forces, and the U.S. Army Court of Criminal Appeals.

MAJOR KEVIN M. WALKER, JA, Professor, Contract and Fiscal Law Department. B.A., Purdue University, 1985; J.D., The Albany Law School of Union University, 1992; Infantry Officer Basic Course, 1985; Infantry Officer Advanced Course, 1990; Judge Advocate Officer Basic Course, 1993; U.S. Army Command and General Staff Officer Course, 1996; LL.M., Military Law, The Judge Advocate General's School, 2000. Career Highlights: Chief, Administrative/Civil Law Division; Chief, Military Justice Division, U.S. Army Special Operations Command, Fort Bragg, North Carolina, 1997-1999; Trial Defense Counsel, Fort Bragg, North Carolina, 1996-1997; Staff Judge Advocate, U.S. Forces Haiti/U.S. Support Group Haiti, Port-au-Prince, Haiti, 1995; Chief, Operational Law Division; Chief, Regulatory Law/Special Assistant U.S. Attorney, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky, 1993-1996; HHC Commander; HHC Executive Officer; Anti-Armor Platoon Leader (TOW2); HHC, 1/105th Infantry (L), 10th Mountain Division (L), NYARNG, Schenectady, New York, 1989-1992; Unit Training Officer, 5030th USARF School, 123rd ARCOM, Fort Benjamin Harrison, Indiana, 1987-1989; Rifle Platoon Leader, Company A, 2/293d Infantry, 38th Infantry Division, INARNG, Attica, Indiana, 1985-1987. Member of the Bars of New York and Connecticut; admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the
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MAJOR GREGG S. SHARP, JA, Professor, Contract and Fiscal Law Department. B.S., United States Military Academy, 1989; M.S.B.A., Boston University, 1992; J.D., University of Pittsburgh School of Law (*Summa Cum Laude*), 1995; Quartermaster Officer Basic Course, 1989; Judge Advocate Officer Basic Course, 1995; LL.M., Military Law, The Judge Advocate General's School, 2001. Career Highlights: Acquisition & Administrative Law Attorney, U.S. Army Space & Missile Defense Command, Huntsville, Alabama, 1998-2000; Trial Defense Counsel, Eighth U.S. Army, Yongsan, Korea, 1997; Claims Attorney, U.S. Armed Forces Claims Service – Korea, Yongsan, Korea, 1996; Funded Legal Education Student, University of Pittsburgh School of Law, 1992-1995; Protocol Officer, 21st Theater Army Area Command, Kaiserslautern, Germany, 1991-1992; Assistant S-4, 21st Personnel Group, Kaiserslautern, Germany, 1989-1991. Member of the Bar of Colorado; admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Armed Forces, and the U.S. Patent & Trademark Office.

CHAPTER 1

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, § 8, grants to 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. 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:

   a. Obligated funds in advance of appropriations;

   b. Commingled funds and used funds for purposes other than those for which they were appropriated; and

   c. 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 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.

LTC Tim Pendolino
Fiscal Law Course
February / March 2002

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.

C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amounts of 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 Financial Management Regulation 7000.14, Vol. 1, p. xxi [hereinafter DoD FMR].

D. Budget Authority.

1. Congress finances federal programs and activities by granting budget authority. Budget authority is also called obligational authority.

2. Budget authority means ". . . authority provided by law to enter into obligations which will result in immediate or future outlay involving Government funds . . . ." 2 U.S.C. § 622(2).

a. Examples of "budget authority" include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Cir. A-34, Instructions on Budget Execution (Nov. 2000), § 11.2 [hereinafter OMB Cir. A-34], available at http:\\www.whitehouse.gov/omb/circulars/a034/toc00.htm.

b. "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. See, e.g., 41 U.S.C. § 11 (Feed and Forage Act).

3. Agencies do not receive cash from appropriated funds to pay for services or supplies. Instead they receive the authority to obligate a specified amount.

E. Authorization Act. DFAS-IN Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000), ch. 3, para. 0304 [hereinafter DFAS-IN 37-1], available at http:\\dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm.

1. An authorization act is a statute, passed annually by Congress, that 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: (1) the Department of Defense Appropriations Act; and (2) 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. 2-13, GAO/OGC 91-5 (1991).

G. Comptroller General and General Accounting 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.

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.

III. ADMINISTRATIVE CONTROL OF APPROPRIATIONS.

A. Methods of Subdividing Funds.

1. Formal subdivisions: Appropriations are subdivided by the executive branch departments and agencies.

   a. These formal limits are referred to as apportionments, allocations, and allotments.

   b. Exceeding a formal subdivision of funds violates the ADA. 31 U.S.C. § 1517(a)(2). See DFAS-IN Reg. 37-1, ch. 3, para. 031403.

2. Informal subdivisions: Agencies may subdivide funds at lower levels, *e.g.,* within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets. These limits are **not** formal subdivisions of funds.

   a. Targets are referred to as "allowances."

   b. Incurring obligations in excess of an allowance is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation may occur, 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.

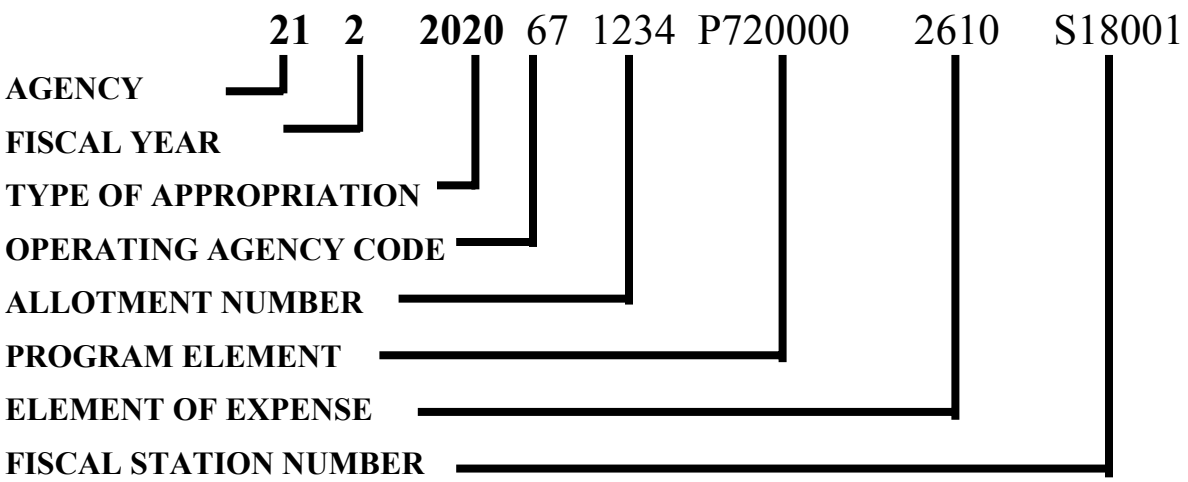
B. Accounting Classifications. See DFAS-IN Reg. 37-1, ch. 5, para. 050102.

1. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to help ensure funds are used correctly.

2. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN Reg. 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications. The XX, in DFAS-IN Reg. 37-100-XX, stands for the last two digits of the fiscal year, *e.g.,* DFAS-IN Reg. 37-100-02 is the source for accounting classification data for FY 2002 for the Department of the Army. DFAS-IN 37-100-XX is published annually. Go to http://dfas4dod.dfas.mil/centers/dfasin/library/regs.htm.

C. Understanding an Accounting Classification.

1. The following is a sample fund cite:



a. The first two digits represent the military department. The "**21**" in the example shown denotes the Department of the Army.

b. Other Department codes are:

(1) 17 - Navy

(2) 57 - Air Force

(3) 97 - Department of Defense

c. The third digit shows the Fiscal Year/Availability of the appropriation. The "2" in the example shown indicates Fiscal Year (FY) 2002 funds.

(1) Annual appropriations are used frequently in installation contracting.

(2) Other fiscal year designators encountered in installation contracting, less frequently, include:

(a) Third Digit = X = No Year appropriation, which is available for obligation indefinitely.

(b) Third Digit = 8/2 = Multi-Year appropriation, in this example, funds appropriated in FY 1998 and available for obligation until FY 2002.

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

	ARMY	NAVY/MC	AIR FORCE	OSD
Military Personnel	2010	1453/1105	3500	N/A
Reserve Personnel	2070	1405/1108	3700	N/A
National Guard Personnel	2060	N/A	3850	N/A
O&M*	**2020**	1804/1106	3400	0100
O&M, Reserve	2080	1806/1107	3740	N/A
O&M, National Guard	2065	N/A	3840	N/A
Procurement (Aircraft)	2031	1506	3010	N/A
Procurement (Missiles)	2032	N/A	3020	N/A
Procurement (Weapons & Tracked Vehicles)	2033	1507	N/A	N/A
Procurement (Ammunition)	2034	1508	3011	N/A
Shipbuilding & Conversion	N/A	1611	N/A	N/A
Other Procurement	2035	1810/1109	3080	0300
Research, Development, Test & Evaluation (RDT&E)	2040	1319	3600	0400
Military Construction	2050	1205	3300	0500
Family Housing Constr.	0702	0703	7040	0706
Reserve Construction	2086	1235	3730	N/A
National Guard Constr.	2085	N/A	3830	N/A
Environmental Restoration	0810	0810	0810	0810
Wildlife Conservation	5095	5095	5095	N/A

*Operation and Maintenance: This appropriation provides funding for the operation and maintenance of most Army activities and facilities to include training and the purchase of supplies and some equipment as well as some limited amount of construction.

IV. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

A. General Limitations on Authority.

1. The authority of executive agencies to spend appropriated funds is limited.

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

3. 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).

4. 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 DFAS-IN Reg. 37-1, ch. 8, para. 0803.

2. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

a. Expenditure of appropriations must be for a specified purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation;

b. The expenditure must not be prohibited by law; and

c. The expenditure must not be otherwise provided for, *i.e.*, it must not fall within the scope of another appropriation.

3. Appropriations Acts. DOD has nearly one hundred separate appropriations available to it for different purposes.

   a. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, Research and Development, etc.). The major DOD appropriations provided in the annual appropriations act are:

      (1) Operation & Maintenance -- used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

      (2) Personnel -- used for military pay and allowances, permanent change of station travel, etc.;

      (3) Research, Development, Test and Evaluation (RDT&E) -- used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and

      (4) Procurement -- used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement."

   b. DOD also receives smaller appropriations for other specific purposes (*e.g.*, Overseas Humanitarian, Disaster, and Civic Aid (OHDACA), Chemical Agents and Munitions Destruction, etc.).

   c. Congress appropriates funds separately for military construction.

4. Authorization Acts.

   a. Annual authorization acts generally precede DOD's appropriations acts.

b. The authorization act may clarify the intended purposes of a specific appropriation or contain restrictions on the use of the appropriated funds.

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. Again, however, expired funds are not available for new obligations.

b. There are exceptions to this general prohibition against obligating funds for new work following the period of availability.

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).

D. Limitations -- Amount.

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

a. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).

b. Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a). See 31 U.S.C. § 1517(a)(2).

c. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).

d. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342.

2. Investigating violations. If an apparent violation is discovered, the agency must report and investigate. Violations could result in administrative and/or criminal sanctions. See DOD FMR, vol. 14 (March 2001); DFAS- IN Reg. 37-1, ch. 4, para. 040204; AFI 65-608, Antideficiency Act Violations (1 May 1998), ch. 3, para. 3.1, available at http:\\afpubs.hq.af.mil/pubfiles/af/65/afi65-608/afi65-608.pdf.

a. The commander must issue a flash report within 15 working days of discovery of the violation. Air Force commanders must submit flash reports within 10 working days.

b. The MACOM commander must appoint a "team of experts," including members from the financial management and legal communities, to conduct a preliminary investigation.

c. If the preliminary report concludes a violation occurred, the MACOM commander will appoint an investigative team to determine the cause of the violation and the responsible parties. For the Army, investigations are conducted pursuant to AR 15-6, Procedure for Investigating Officers and Boards of Officers (30 Sep 1996).

d. The head of the agency (e.g., SECDEF, for the DOD) must report to the President and Congress whenever a violation of 31 U.S.C. §§ 1341(a), 1342, or 1517 is discovered. OMB Cir. A-34, para. 32.2; DOD Directive 7200.1, Administrative Control of Appropriations (4 May 1995), Encl. 5, para. R [hereinafter DODD 7200.1].

3. Individuals responsible for Antideficiency Act violations shall receive disciplinary action commensurate with the circumstances and the severity of the violation. DODD 7200.1, para. D.5. See 31 U.S.C. §§ 1349(a), 8.

V. FISCAL LAW RESEARCH MATERIALS.

A. Legislation.

1. Titles 10 and 31, United States Code.

2. Annual authorization and appropriations acts.

B. Legislative History.

1. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

2. The legislative history is not binding upon the Executive Branch. If Congress provides a lump sum appropriation without restricting what may be done with the funds, a clear inference is that it did not intend to impose legal restrictions. See SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 75-2 CPD ¶ 203.

C. Decisions.

1. The Comptroller General issues opinions concerning the propriety of appropriated fund obligations or expenditures, except for those described in paragraph 3, below. See 31 U.S.C. § 3529. Activities must request these opinions through finance officer channels in advance of an obligation or expenditure. See DOD FMR, vol. 5, ch. 1 para. 010403.B.2 (May 2001).

2. The fiscal law decisions of the Comptroller General appear in the Decisions of the Comptroller General of the United States, published by the Government Printing Office. Comptroller General opinions also are available at the General Accounting Office (GAO) website (http://www.gao.gov), through commercial legal research services (*e.g.*, LEXIS, WESTLAW), and in the Comptroller General Procurement Decisions (CPD) reporter.

3. Agency Advance Decisions. See DOD FMR, vol. 5, ch. 1, para. 010403.B.2 and vol. 5, app. E (May 2001). Per the General Accounting Office Act of 1996 (Pub. L. 104-316, § 204, 110 Stat. 3826 (1996) (codified at 31 U.S.C. § 3529)) and, as delegated by the Director, Office of Management and Budget (OMB), the following issue advance decisions for designated categories:

   a. DOD: uniformed service member pay, allowances, travel, transportation, and survivor benefits.

   b. Office of Personnel Management (OPM): civilian pay and leave.

   c. General Services Administration Board of Contract Appeals (GSBCA): civilian employee travel, transportation, and relocation.

D. Regulations.

1. DOD FMR 7000.14-R (15 Volumes). Go to http://www.dtic.mil/comptroller/fmr.

2. Army: DFAS-IN 37-1, Finance and Accounting Policy Implementation. Go to http://dfas4dod.dfas.mil/centers/dfasin/library/ar37 -1/ar37 -1/index.htm.

3. Navy: Navy Comptroller Manual.

4. Air Force: Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (formerly DFAS-DE 7200.1-R and AFR 177-16); AFI 65-608, Antideficiency Act Violations (1 May 1998); Interim Guidance on Accounting for Obligations (formerly DFAS-DE 7000.4-R and AFR 170-8); Interim Guidance on Accounting for Commitments (formerly DFAS-DE 7000.5-R and AFR 170-13); DFAS-DE 7010.1-R General Accounting and Finance Systems at Base Level (15 Feb. 1991); DFAS-DE 7010.2-R Commercial Transactions at Base Level (31 Jan. 1996); DFAS - DE 7010.3-R, Travel Transactions at Base Level. Go to http:\\dfas4dod.dfas.mil/library/publication/dfasdepubs.htm and for AFI 65-608 go to http://afpubs.hq.af.mil/pubfiles/af/65/afi65-608/afi65-608.pdf.

E. Treatises.

1. General Accounting Office, Principles of Federal Appropriations Law, 2d ed., GAO/OGC 91-5 (July 1991) (commonly referred to as the "Red Book"), available at www.gao.gov/specialpubs.

2. General Accounting Office, Accounting Guide, GAO/AFMD--PPM-2.1 (September 1990); Policies and Procedures Manual For Guidance of Federal Agencies, Title 7 (February 1990).

3. General Accounting Office, A Glossary of Terms Used in the Budget Process, GAO/AFMD-2.1.1 (July 1993).

F. Internet Services.

1. Defense Finance and Accounting Service. http://dfas4dod.dfas.mil.

2. Other Government Agency Home Pages, *e.g.*, http://www.asafm.army.mil/.

VI. CONCLUSION.

CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

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CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. INTRODUCTION.

> *"It is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril."* 4 Comp. Dec. 569, 570 (1898) (Comptroller of the Treasury discussing the Purpose Statute, 31 U.S.C. § 1301(a)).

II. STATUTORY FRAMEWORK.

A. 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. This act, generally referred to as the "Purpose Statute," was passed as part of a reorganization of the War, Navy, and Treasury Departments to limit the discretion of the Executive Branch in spending appropriations.

B. Defense Appropriations.

1. Appropriations Acts. The Department of Defense (DoD) has nearly one hundred separate appropriations available to it for different purposes.

2. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, Research and Development, etc.).

a. The major DoD appropriations provided in the annual Appropriations Act are:

(1) Personnel—used for pay and allowances, permanent change of station travel, etc.;

(2) Operation & Maintenance (O&M)—used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

(3) Procurement—used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement;" and,

(4) Research, Development, Test and Evaluation (RDT&E)—used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment.

b. DoD also receives smaller appropriations for other specific purposes (e.g., Overseas Humanitarian, Disaster, and Civic Aid; Chemical Agents and Munitions Destruction; etc.).

c. Congress appropriates funds for military construction separately.

d. The Library of Congress website contains the annual appropriations acts for all agencies. It is found at: http://lcweb/loc.gov/global/legislative/appover.html

C. Implementing the Annual Appropriations—Regulatory Guidance.

1. Accounting Guidance. The various federal agencies implement appropriations acts through funding guidance provided to subordinate activities. Service regulations assign codes for specific purposes. These codes track the various appropriations provided to DoD. The regulations and instructions also provide guidance regarding what types of expenses should be charged to each appropriation.

2. Programs. The accounting regulations of each agency further classify their accounts into programs, budget activities, and program elements for management purposes. Different program elements may or may not represent different appropriations or Congressionally "earmarked" funds within an appropriation. Therefore, charging one program element instead of another may or may not violate the Purpose Statute.

III. DETERMINING THE PROPER PURPOSE OF AN APPROPRIATION.

A. Three-Part Test for a Proper Purpose. Secretary of Interior, B-120676, 34 Comp. Gen. 195 (1954).

1. The expenditure of an appropriation must be for a particular statutory purpose, or **necessary and incident** to the proper execution of the general purpose of the appropriation.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

B. Determining the Purpose of a Specific Appropriation.

1. Legislation.

a. Organic Legislation. Organic legislation is legislation that creates an agency, establishes a program or prescribes a function. Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-33, GAO/OGC 91-5 (2d ed. 1991). For example, the Secretary of Defense has a statutory mission to "identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol." 10 U.S.C. § 1090. (Note: Organic legislation rarely provides any money for the program or activity it prescribes).

b. Appropriations Acts. Examine the language of the appropriations act for the year in question.

(1) When the language of the statute is clear, there is no need to resort to legislative history to determine congressional intent. United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) ("plain meaning" rule); Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 317, 75-2 CPD ¶ 203.

(2) If the statutory language is unclear, or will lead to an absurd result, then consult the statute's legislative history to determine congressional intent. See Mallard v. United States Dist. Court, 490 U.S. 296 (1989); Federal Aviation Admin.—Permanent Improvements to a Leasehold, B-239520, 69 Comp. Gen. 673 (1990) (conference report clearly indicated that $5.7 million was available for a permanent improvement to a leasehold).

c. Authorization Acts.

(1) Annual authorization acts generally accompany DoD's appropriation acts. Other federal agencies usually, but not always, have annual authorization acts. The authorization act may clarify the intended purposes of a specific appropriation, or contain restrictions on the use of the appropriated funds.

(2) Authorizations are not appropriations, and do not provide funding to the agency.

(3) Frequently, Congress appropriates funds that have not been authorized, or in excess of the amount authorized. Unless otherwise prohibited, agencies may spend such funds. See Principles of Fed. Appropriations Law, vol. I, ch. 2, GAO/OGC 91-5 (2d ed. 1991); Civil Rights Comm'n, B-246541, 71 Comp. Gen. 378 (1992). But see 10 U.S.C. § 114(a) (prohibiting the obligation or expenditure of funds for certain purposes, including procurement, RDT&E, and military construction, without separate statutory authorization).

2. Legislative History.

a. Legislative history is the record of congressional deliberations that precede the passage of a statute. It is not legislation. Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978).

b. Generally, the pertinent legislative history will consist of:

(1) Text of the bill;

(2) Reports of the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee;

(3) Conference reports;

(4) Floor debates reported in the Congressional Record; and

(5) Hearings.

c. The reports include P-1 and R-1 documents which may shed light on lawful uses of appropriations. ANGUS Chem. Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127. P-1 and R-1 documents are exhibits to DoD's budget submission which provide programmatic details to support the budget request. See generally DoD Fin. Mgmt. Reg., DoD 7000.14-R [hereinafter DoD FMR].

d. The legislative history is not necessarily binding upon the Executive Branch. 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. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.

e. Informal approval by Congress does not justify an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992 (unpub.) (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).

3. The President's Budget. The President's budget contains a detailed description of the purpose proposed for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited. The budget contains P-1 and R-1 documents and Congressional Data Sheets.

C. The Necessary Expense Rule.

1. 31 U.S.C. § 1301(a) does not require Congress to specify every item of expenditure in an appropriations act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See HUD Gun Buyback Initiative, B-285066, May 19, 2000 (unpub.). See also Department of Labor—Interagency Agreement between Employment and Training Admin. and Bureau of Int'l Affairs, B-245541, 71 Comp. Gen. 402 (1992); Department of the Army—Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 566 (1983).

2. 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).

3. In some instances, Congress has specifically authorized expenditures as "necessary expenses" of an existing appropriation. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (10 U.S.C. § 1125 authorizes the Secretary of Defense to purchase and award medals, trophies, etc. to members of armed forces for excellence in activities relating to the armed forces); 5 U.S.C. §§ 4501-4507 (Government Employees Incentive Awards Act).

4. Necessary Expense Defined.

   a. "[A]n 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. . ." Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (emphasis added).

   b. 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).

5. Determinations are fact/agency/purpose 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).

6. Typical Questionable Expenses. Agencies may have specific guidance about "questionable" expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1., ch. 4, §§ K-O (17 November 2000).

   a. Clothing. Clothing is generally a personal expense. 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). But see 5 U.S.C. § 7903 (authorizes purchase of special clothing, for government benefit, which protects against hazards); White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (tuxedo rental or purchase for employees authorized); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (safety shoes authorized).

   b. Food.

      (1) Generally, appropriated funds are not available to pay for government employees' food or refreshments within their official duty stations. Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (coffee and donuts unauthorized entertainment expense). However, agencies may pay, under **limited circumstances**, a facility rental fee that includes the cost of food. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, Dec. 1, 1999 (unpub.) (payment of fee was proper because fee was all-inclusive, not negotiable, and competitively priced to those that did not include food).

(2) Exceptions.

(a) "Light Refreshments."

(i) The agency may consider the cost of "light refreshments" as part of the agency's overall administrative costs of hosting government-sponsored conferences. See Federal Travel Regulation, Part 301-74 (found at: http://www.policyworks.gov/org/main/mt/homepage/mtt/FTR/ch301-74.html). See also Joint Federal Travel Regulation (JFTR), ch. 2, para. U2550; Joint Travel Regulation (JTR), ch. 4, para. C4950. The JFTR as well as the JTR may be found at: http://www.dtic.mil/perdiem/trvlregs.html.

(ii) A "conference" is defined as a "meeting, retreat, seminar, symposium or . . . training activities that are conferences . . ." JFTR, ch. 2, para. U2550-D; JTR ch. 4, para. C4950-D.

(iii) A majority (51%) of the attendees at the conference must be from a permanent duty station other than that of the sponsoring activity. JFTR, ch. 2, para. U2550-F5; JTR, ch. 4, para. C4950-F5.

(b) Formal Meetings and Conferences. 5 U.S.C. § 4110.

(i) The government may pay for meals while government employees are attending meetings or conferences if: 1) the meals are incidental to the meeting; 2) attendance of the employees at the meals is necessary for full participation in the meeting; and 3) the employees are not free to take meals elsewhere without being absent from the essential business of the meeting.

(ii) However, this exception does **not apply to purely internal business meetings or conferences sponsored by government agencies**. Pension Benefit Guar. Corp.—Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996); Meals for Attendees at Internal Gov't Meetings, B-230576, 68 Comp. Gen. 604 (1989).

(iii) **NOTE: This provision applies only to civilian employees.** There is no corresponding provision for military members in Title 10 of the U.S. Code. 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 limits of the PDS.

(c) Training. 5 U.S.C. § 4109; 10 U.S.C. §§ 4301 and 9301.

(i) The government may provide meals if necessary to achieve the objectives of a training program. Coast Guard—Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.).

(ii) However, an agency's characterization of a meeting as "training" is not controlling. Corps of Eng'rs—Use of Appropriated Funds to Pay for Meals, B-249795, May 12, 1993 (unpub.) (quarterly managers meetings of the Corps do not constitute "training"); See also Pension Benefit Guar. Corp.—Provision of Food to Employees, supra. (food not proper training expense if unnecessary for employee to obtain full benefit of training).

(iii) 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 AFI 65-601, vol. 1, para. 4.26.1.2

(d) Award Ceremonies. 5 U.S.C. § 4503 (civilian incentive awards); 10 U.S.C. § 1124 (military **cash** awards).

(i) Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (agency may spend $20.00 per person for luncheons provided at awards ceremonies pursuant to 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 [applies to both 5 U.S.C. § 4503 and 10 U.S.C. § 1124 which expressly permit agency to "incur necessary expense for the honorary recognition. . ."]). See also AFI 65-601, vol. 1, para. 4.31.

(ii) **NOTE**: 10 U.S.C. § 1125 governs Secretary of Defense's (SECDEF) authority to award medals, trophies, badges, etc. to members/units of armed forces for accomplishments. This statute does not have the express "incur necessary expense" language of 5 U.S.C. § 4503 or 10 U.S.C. § 1124.

c. Bottled Water. Appropriated funds are generally not available to pay for bottled drinking water for an agency's employees. However, 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). See also AFI 65-601, vol. 1, para. 4.45.

d. Entertainment.

(1) Appropriated funds generally are not available to pay for entertainment. 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 (fireworks unauthorized entertainment); See also To The Honorable Michael Rhode, Jr., B-250884, March 18, 1993 (unpub.) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

(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) (live musical performance generally entertainment; exception for agency EEO cultural and ethnic programs).

(3) It is permissible to expend appropriated funds for entertainment if authorized by statute. Golden Spike Nat'l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (statutory authority to conduct "interpretive demonstrations" includes authority to pay for musical entertainment at the 1988 Annual Golden Spike Railroader's Festival); Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club—twice).

e. Decorations. Agencies may purchase decorative items if consistent with work-related objectives and not for personal convenience. Department of State & Gen. Serv. Admin.—Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (purchase of decorations proper); The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (personal Christmas cards not proper expenditure); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee). 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, Hanukkah, etc.)

f. Business Cards. An agency may use appropriated funds to purchase business cards for its 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" of the Army O&M account).

(1) This case "overturned" a long history of Comptroller General's decisions holding that business cards were generally a personal expense. See Forest Serv.—Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

(2) Military departments have implemented individual policies on use of appropriated funds for business cards. See AR 25-30, The Army Publishing and Printing Program, para. 11-11 (21 June 1999); DoD Directive 5330.3/AFSUP1, Defense Automated Printing Service (18 Feb. 1999); AFI 65-601, vol. 1, para. 4.36; Department of the Navy (Financial Management and Comptroller) memorandum, subject: Business Cards (9 Mar. 1999).

g. Telephones. 31 U.S.C. § 1348.

(1) Generally, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences. 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); Timothy R. Manns—Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed).

(2) But see Federal Communications 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) **NOTE:** DoD has statutory authority to use appropriated funds to install, repair, and maintain telephone lines in residences owned or leased by the U.S. Government and, if necessary for national defense purposes, in other private residences. 31 U.S.C. § 1348(c). Additionally, DoD may install telephone lines in certain volunteers' residences. Such volunteers are those who provide medical, dental, nursing, or other health-care related services; volunteer services for museum or natural resources program; or programs that support service members and their families. 10 U.S.C. § 1588(f).

(4) Cell Phones. Agencies may also reimburse their employees for the actual costs associated with any official government usage of personal cell phones. See Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate B-287524, Oct. 22, 2001 (unpub.) (indicating that the agency may not, however, 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).

h. Fines and Penalties.

(1) Agencies generally may not use appropriated funds to pay fines and penalties incurred by employees. To The Honorable Ralph Regula, B-250880, Nov. 3, 1992 (military recruiter is personally liable for fines imposed for parking meter violations); Military members and employees may be reimbursed for paying a fine when the action for which the fine is imposed is a necessary part of the member's or employee's official duties. To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee pursuant to agency regulations and instructions).

(2) Agencies may pay fines imposed on the federal government when Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

i. Licenses and Certificates.

(1) Agencies generally may not use appropriated funds to pay employees' fees incident to obtaining licenses or certificates. A. N. Ross, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals). See also AFI 65-601, vol. 1, para. 4.47.

(2) 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, Oct. 28, 1994 (unpub.) (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, June 3, 1994, (unpub.) (license necessary to comply with state-established environmental standards).

(3) Recent Legislation: § 1112 of the 2002 National Defense Authorization Act, Pub. L. No. 107-107, 115 Stat. 1654 (2001), adds 5 U.S.C. §5757 which allows agencies to reimburse the expenses that their competitive service employees incur in obtaining:

(a) professional accreditation;

(b) state-imposed professional licenses; and

(c) professional certification

as well as the costs of any examinations required to obtain such credentials.

j. Unit or Regimental Coins and Similar Devices.

(1) Generally, agencies may not use appropriated funds to purchase "mementos" such as regimental coins or similar devices for distribution. Such mementos are unauthorized personal gifts unless there is a direct link between the distribution of the items and the purpose of the appropriation. See EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (1992).

(2) Congress has provided specific statutory authority for SECDEF to "award medals, trophies, badges, and similar devices" for "excellence in accomplishments or competitions." 10 U.S.C. § 1125.

(a) For example, the Army has implemented this statute in AR 600-8-22, Military Awards, para. 11-1 (25 Feb. 1995), which allows the presentation of awards for "excellence in accomplishments and competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, that is, tank gunnery, weapons competition, military aerial competition."

(b) Army Regulation 600-8-22, para 11-2 provides: "[h]owever, awards may be made on a one time basis where the achievement is unique and clearly contributes to increased effectiveness." These awards could be made in the form of a coin, trophy, plaque or other similar device. The MACOM commander or head of the principal HQDA agency must approve the purchase of coins for distribution as awards. Id. at para. 1-7d.

(c) 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.

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

(4) Similar Devices. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (appropriated funds may be used to purchase belt buckles as awards for the annual "Peacekeeper Challenge").

(5) Comptroller General opinions come to different conclusions concerning awards to civilian employees, awards to military members, and incentive awards, because each has a separate statutory basis. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (appropriated funds may be used to purchase belt buckles as awards for the annual "Peacekeeper Challenge"); Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, Aug. 27, 1980 (unpub.) (desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements).

k. Use of Office Equipment. Use of Office Equip. in Support of Reserves and Nat'l Guard, B-277678, Jan. 4, 1999 (agency may authorize use of telephone and/or facsimile machine 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/OPMReserves.htm.

7. Miscellaneous Personal Expenses.

a. Use of Appropriated Funds to Provide Fin. Incentives to Employees for Commuting by Means other than Single-Occupant Vehicle, B-250400, May 28, 1993 (unpub.) (if local air pollution control regulations require air pollution abatement plans, agencies may use appropriated funds for plan which subsidizes employees' costs for using other forms of commuting).

b. Smithsonian Inst. Use of Appropriated Funds for Legal Representation of Officers and Employees, B-241970.2, 70 Comp. Gen. 647 (1991) (payment of attorney fees improper).

c. Defense Mapping Agency—Use of Imprest Funds for a Dremel Shoe Polisher, B-243411, 1991 U.S. Comp. Gen. LEXIS 976 (July 30, 1991) (shoe polisher not authorized).

d. Department of the Navy—Purchase of Employee Identification Tags, B-237236, 69 Comp. Gen. 129 (1989) (name tags an authorized purchase).

e. Office of Personnel Mgt.—Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (purchase of air purifiers for common areas allowed).

f. Expenditures by Dep't. of Veterans Affairs Med. Ctr., B-247563.3, 1996 U.S. Comp. Gen. LEXIS 414 (Apr. 5, 1996) (appropriated funds unavailable for employee participation in local sporting events).

g. Federal Executive Board—Appropriations—Employee Tax Returns—Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129 (electronic filing of tax returns is a personal expense).

8. Expenditures for new or additional duties imposed by legislation or executive order with no additional appropriations provided.

a. May current appropriations be charged?

b. 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).

D. Expenditure Is Not Otherwise Prohibited by Law.

1. Permanent Legislation Prohibitions. See, e.g., 10 U.S.C. § 2246 (prohibition on using appropriated funds to equip, operate, or maintain a DoD golf course in CONUS unless designated remote and isolated). See also 10 U.S.C. § 983 (prohibition on using appropriated funds to contract with or provide grants to universities that prohibits or prevents access of ROTC programs and/or military recruiters).

2. Annual Appropriation Act or Authorization Act Prohibitions. See, e.g., The Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8149, 113 Stat. 1212, 1271 (1999) (restriction on use of appropriated funds to pay fines or penalties imposed on DoD or military department arising from environmental violation at a military installation or facility unless payment is specifically authorized by law).

3. Agencies may presume that restrictions in an appropriation act are 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) (restriction applicable to "this Act or any other Act" does not indicate futurity).

E. Expenditure Is Not Otherwise Provided For in a Separate Appropriation.

1. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (may not use O&M funds when foreign assistance funds available).

a. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

b. 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).

c. Limitation applies even if specific appropriation is included in the more general appropriation. Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941).

2. If there are two appropriations equally available for expenditures not specifically mentioned in either appropriation:

a. 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). Agency discretion is not questioned generally. Secretary of Agric., A-96689, 18 Comp. Gen. 285, 292 (1938).

b. **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).

c. If Congress authorizes specifically 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 (CINC Initiative Funds are in addition to amounts otherwise available for an activity).

IV. AUGMENTATION OF APPROPRIATIONS.

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 appropriated by Congress originally.

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

a. Article I, Section 9, Clause 7, of United States Constitution:

No money shall be drawn from the treasury except 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):

(1) 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 practical without any deduction for any charge or claim.

(2) See Scheduled Airlines Traffic Offices, Inc. v. Dep't. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (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:** In the FY 1999 Defense Authorization Act, Congress enacted statutory language that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts. See 10 U.S.C. § 2646.)

3. Examples 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); 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).

b. Augmenting an appropriation by retaining government funds received from another source. This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this 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); 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) (31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).

B. Receipts of Funds Authorized by Statutes. Many statutes authorize agencies to retain funds received from sources other than Congress. Some examples 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. See also 41 U.S.C. § 23 (project orders).

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.

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).

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.

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(d)(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.

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.

11. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.

C. Other Authorized Retention of Receipts and Use of Appropriations. In addition to the statutory authorities detailed above, the Comptroller General recognizes other exceptions to the Miscellaneous Receipts Statute, including:

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

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

   b. The replacement contract must be coextensive with the original contract, i.e., the agency may reprocure only those goods and services which 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 advance payments may be credited to agency appropriations. 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).

   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, 6-111, GAO/OGC 92-13 (2d ed. 1992), 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).

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, 1988 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. Department of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

V. SPECIAL PROBLEMS.

A. Investment/Expense Threshold.

1. Expenses are costs of resources consumed in operating and maintaining DoD, and are normally financed with O&M appropriations. See DoD FMR, vol. 2A, ch. 1, para. 010201. Expenses generally include:

a. Labor of civilian, military, or contractor personnel;

b. Rental charges for equipment and facilities;

c. Food, clothing, and fuel;

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

e. Real property maintenance, repair, and O&M funded minor construction projects; and

f. Assemblies, spare and repair parts, and other items of equipment not designated for centralized management and costing less than $100,000. The Department of Defense Appropriations Act, 2002, Pub. L. No. 107-117, § 8043, 115 Stat. 2230 (2002).

2. Investments are the acquisition costs of DoD capital assets, and are normally financed with procurement appropriations. These costs benefit future periods and tend to have a long-term character. Investments generally include:

a. All equipment items having a **unit cost or system cost** equal to or greater than $100,000; and

b. Construction, including equipment installed and made an integral part of the facilities.

3. Various audits have revealed that local activities use O&M appropriations to acquire computer systems and other systems costing more than the investment/expense threshold ($100,000). This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.

a. 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.

b. 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 (e.g. 100 new office computers which have as one of their primary functions the ability to tie into a network in order for their users to communicate with one another electronically).

c. 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.

d. Include standard off-the-shelf software as part of the total system cost when purchased as part of initial acquisition of equipment.

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

4. **EXAMPLE**—An agency is acquiring 100 stand-alone computers and software at $2,000 each. The computers are being purchased primarily to operate as independent workstations. The agency should use O&M funds for this acquisition. If one of the primary reasons for purchasing the computers had been so their users could tie into a network and communicate with one another via email, the computers should be purchased with Procurement funds.

B. Official Representation Funds.

1. Definition. Representation funds are appropriations made available to the executive branch that may be expended without the normal statutory controls and are appropriated for "emergency and extraordinary expenses." Congress has provided representation funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438. Representation funds have strict regulatory controls because of their limited availability and potential for abuse.

a. Controls.

(1) Statutory limitations.

(a) 10 U.S.C. § 127. Emergency and extraordinary expenses.

(i) Authorizes the Secretary of Defense and the Secretary of a military department to spend representation funds on "any purpose he determines to be proper, and such a determination is final and conclusive upon the accounting officers. . ."

(ii) Requires a quarterly report of such expenditures to the Congress.

(iii) Congressional notice requirement. The Department of Defense Authorization Act, 1996, Pub. L. No. 104-106, § 915, 110 Stat. 186, 413 (amending 10 U.S.C. § 127).

(a) Amounts in excess of $1 million – 15 days advance notice prior to obligation or expenditure.

(b) $500,000 - $1 million – 5 days advance notice.

(c) Exception to notification requirement if Secretary of Defense determines that national security objectives will be compromised.

(b) Other executive agencies may have similar controls. See, e.g., 22 U.S.C. § 2671 (authorizes State Department to pay for "unforeseen emergencies").

b. Appropriations language.

(1) For DoD, Congress provides representation funds as a separate item in the operation and maintenance appropriation. Obligation in excess of the limitation is a violation of 31 U.S.C. § 1341.

(2) Not all agencies receive representation funds. Other appropriations may not be used for representational purposes. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989); United States Embassy London—Use of Representation Funds for Reimbursement of Rental of Ceremonial Dress, B-235916, 68 Comp. Gen. 638 (1989) (State Department may use its representation allowances to pay the expenses of the Department in providing proper representation of the United States and its interests).

c. Internal agency guidance.

(1) DoD Directive 7250.13, Official Representation Funds (23 Feb. 1989).

(2) AR 37-47, Representation Funds of the Secretary of the Army (31 May 1996); AFI 65-603, Official Representation Funds: Guidance and Procedures (1 Nov. 1997); SECNAV 7042.7, Guidelines for Use of Official Representation Funds (5 Nov. 1998).

d. Procedures for Use of Representation Funds.

(1) Limitation .0012—Miscellaneous Expenses, Category A (Official Representational Funds). AR 37-47, para. 1-5a. These funds are available to extend official courtesies to dignitaries, officials, and foreign governments. AR 37-47, para. 2-1a.

(2) Limitation .0014—Miscellaneous Expenses, Category B (other than official representation, such 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.

(3) Limitation .0015—Criminal Investigation Activities. See AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities (15 Apr. 1983); AFI 71-101, vol. 1, Criminal Investigations, para. 1.18 (1 Dec. 1999) (governing counterintelligence and investigative contingency funds, also known as C-funds). See also AR 37-47, para. 1-5c.

(4) Limitation .0017—Intelligence Activities. See AR 381-141(C), Intelligence Contingency Funds (30 July 1990); AFI 71-101, Criminal Investigations, para. 1.18 (1 Dec. 1999) (governing counterintelligence and investigative contingency funds, also known as C-funds). See also AR 37-47, para. 1-5d.

e. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. AR 37-47, para. 2-1. See AFI 65-603, para. 1; SECNAVINST 7042.7J, para. 6. Official courtesies are subject to required ratios of authorized guests to DoD personnel. See, e.g., AR 37-47, paras. 2-1b and 2-5. 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 in honor of authorized guests;

(3) Entertainment of local authorized guests for civic or community relations;

(4) New commander receptions;

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

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

(1) No more than $225.00. See AR 37-47, para. 2-9a(1). See also AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).

(2) No gifts to DoD personnel. AR 37-47, para. 2-9c. See also AFI 65-603, para. 4; SECNAVINST 7042.7J, para. 6c(1).

g. Levels of expenditures. Levels of expenditures are to be "modest." AR 37-47, para. 2-2a; AFI 65-603, para. 1-2 ($10,000 per event threshold - AR 37-47, para. 2-2b).

h. Prohibitions on Using Representational Funds. AR 37-47, para. 2-10; AFI 65-603, para. 5; SECNAVINST 7042.7J, para. 6d.

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

(2) In accordance with AR 37-47, para. 2-10 (see AFI 65-603, para. 5), 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.

(3) Retirements and change of command ceremonies, unless approved in advance by the Secretary of the Army (SA). AR 37-47, para. 2-4g. See AFI 65-603, para. 5.1; SECNAVINST 7042.7J, para. 6d(10); 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).

i. Approval and accounting procedures. AR 37-47, Chapter 3. See AFI 65-603, para 4; SECNAVINST 7042.7J, para 8.

(1) Fiscal year letters of authority. AR 37-47, para. 3-1b.

(2) Written appointment of certifying and approving officer.

(3) Written appointment of representation fund custodian.

(4) Funds must be requested and made available before obligation. Requests for retroactive approval must be forwarded to the SA or his designee. AR 37-47, para. 3-1d.

(5) Legal review. AR 37-47, para. 3-1f(2).

2. Community Relations and Public Affairs Funds. AR 360-1, para. 4-5.

a. Public affairs funds are not a separate subdivision of the operation and maintenance account.

b. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

C. Minor Construction. Note: this section contains only a brief overview of the construction funding rules that frequently lead to purpose violations. For more details on the construction funding rules in general, see 61st Fiscal Law Deskbook, ch. 5, Construction Funding, infra.

1. Generally, agencies may not erect, repair, or improve a public building absent a specific appropriation from Congress. 41 U.S.C. § 12; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

2. Congress has given DoD specific statutory authority to use up to $500,000 in operation and maintenance funds for unspecified minor construction projects and up to $1,000,000 in operation and maintenance funds for unspecified minor construction projects intended to correct a deficiency that threatens life, health, and/or safety. 10 U.S.C. § 2805(c).

3. The $500,000 limitation applies to each project. A "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 The Honorable Michael B. Donley, B-234326.15, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (Air Force improperly split project involving a group of twelve related buildings into multiple projects).

D. Deployments. See The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

1. Construction.

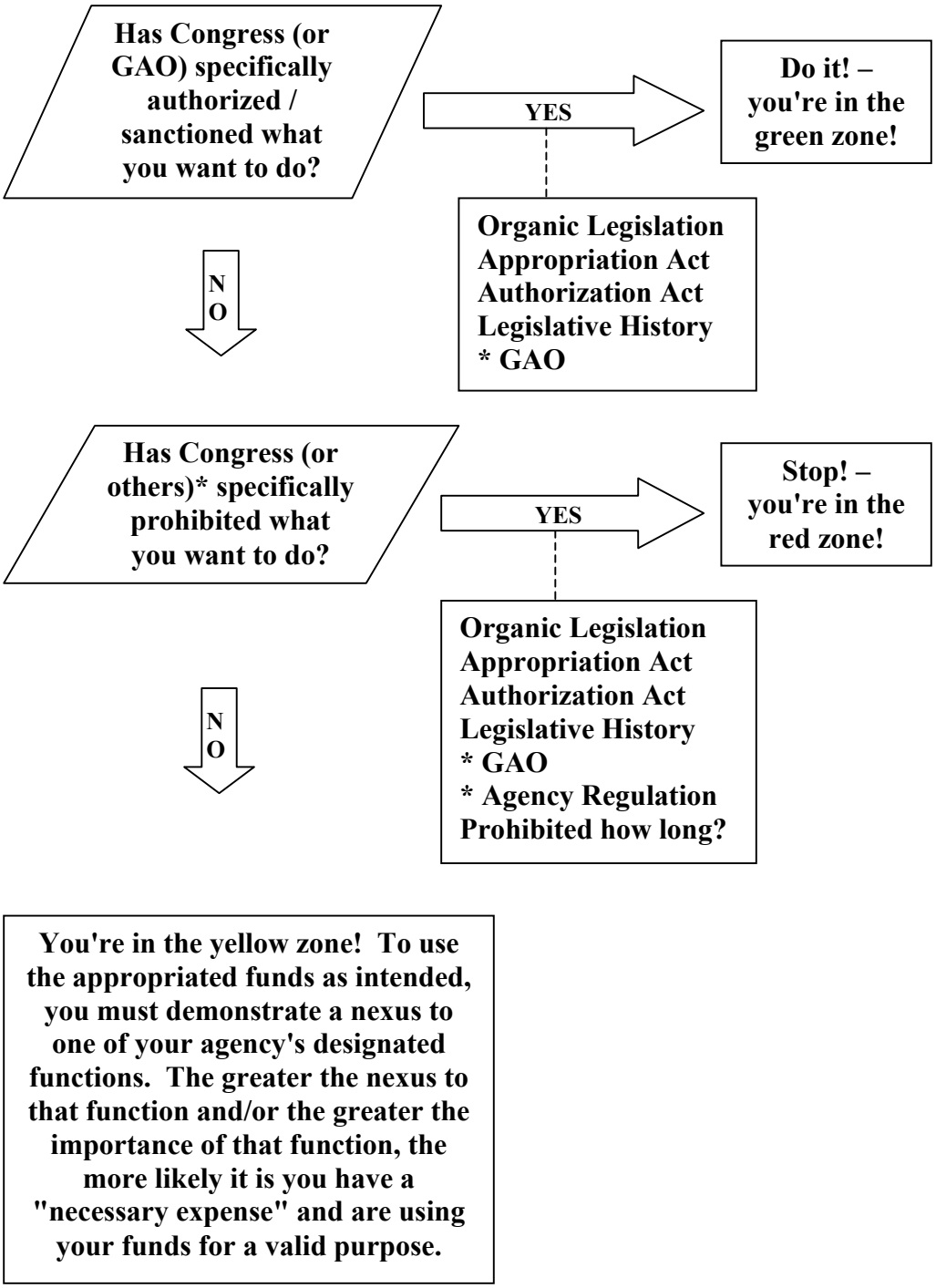
2. Foreign Humanitarian Assistance.

3. Foreign Military Assistance.

4. U.S. Military Training.

VI. CONCLUSION.

PURPOSE FLOWCHART



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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. **Obligation**. An obligation is any act that legally binds the government to make payment. Obligations represent the amounts of orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period.

B. **Appropriations Act**. An appropriations act is the most common form of budget authority. It is a statutory authorization by an Act of Congress to incur obligations and make payments out of the U.S. Treasury for specified purposes.

C. **Authorization Act**. An authorization act is a statute, passed by Congress, which authorizes the appropriation of funds for programs and activities. An authorization act does not provide budget authority. That authority stems only from the appropriations act.

MAJ Tom Modeszto
Fiscal Law Course
February/March 2002

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

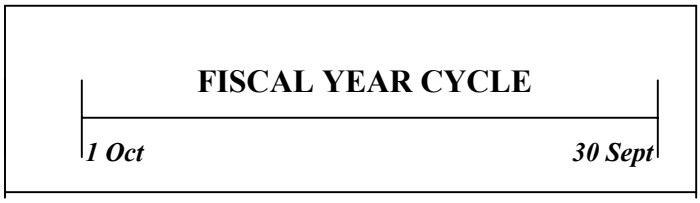
E. **Bona Fide Needs.** The balance of an appropriation is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made during the period of availability. 31 U.S.C. § 1502(a).

F. **Expired Appropriations.** Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a).

G. **Closed Appropriations.** Appropriations 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).

III. LIMITATIONS BASED UPON THE TYPE OF APPROPRIATION.

A. General.



1. The Time Rule: An appropriation is available for obligation for a definite period of time. Agencies must obligate appropriations during this period of availability, or the authority to obligate expires. 31 U.S.C. § 1552.

2. 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. 31 U.S.C. § 1341(a)(1)(B). 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 option exercised after Presidential signature of appropriations act but before OMB apportionment was proper.) Agencies must avoid situations that require "coercive deficiency" appropriations. Project Stormfury - Australia - Indemnification of Damages, B-198206, 59 Comp. Gen. 369 (1980).

3. Generally, the time limitations apply to the obligation of funds, not the disbursement of them. Secretary of Commerce, B-136383, 37 Comp. Gen. 861, 863 (1958).

4. Absent express statutory authority in the appropriations act itself, agencies may not obligate funds after their period of availability expires. 31 U.S.C. §1502; National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 (1991).

B. Period of Availability for Various Appropriations.

1. Funds are presumed to be available for obligation only during the fiscal year in which they are appropriated. 31 U.S.C. § 1502; 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, e.g., DOD Appropriations Act, 2001, Pub. L. No. 106-259, § 8003, 114 Stat. 656 (2000).

3. The appropriations act language controls 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).

4. 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-34, Instructions on Budget Execution, § 21.1 (August 1985). See Section VII, infra.

C. Types of Appropriations Described by Period of Availability.

1. The largest annual DOD appropriations are:

   a. Operations & Maintenance (O&M); and

   b. Personnel.

2. The major multiple year appropriations usually provided to the Department of Defense, and their periods of availability, are:

   a. Research, Development, Test and Evaluation (RDT&E) Appropriations - 2 years;

   b. Procurement Appropriations - 3 years;

   c. Shipbuilding and Conversion, Navy - 5 years, except that the Navy may incur certain obligations over longer periods;

   d. Military Construction Appropriations - 5 years;

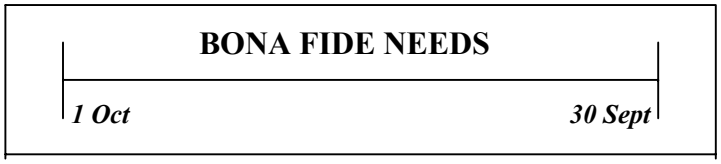
   e. Chemical Agents and Munitions Destruction, Defense - various periods.

   f. 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.

   g. Stock and Industrial Funds (Working Capital Funds) - indefinite (No Year).

3. 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).

IV. LIMITATIONS BASED UPON THE BONA FIDE NEEDS RULE.



A. Statutory Basis. The Bona Fide Needs Rules states:

> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

31 U.S.C. § 1502(a).

B. General.

1. Agencies may obligate appropriated funds only for properly incurred expenses of the period of availability of the appropriation. That is, the requirement must represent bona fide needs 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); DFAS-IN 37-1, para. 080302.

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

C. Practical Considerations.

1. 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 (needs).

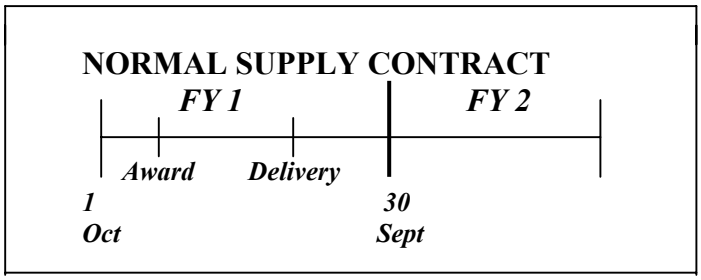
2. A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government. DFAS-IN Reg. 37-1, para. 070501.

3. The government must intend that the contractor start work promptly and perform in accordance with the contract terms. DOD Reg. 7000.14-R, Financial Management Regulation, vol. 3, para. 080303.

4. The requirements of the government and the nature of a product or service determine when bona fide needs arise.

5. Determining the bona fide needs for an acquisition requires the exercise of judgment.

D. Bona Fide Needs Rule Applied to Supply Contracts.



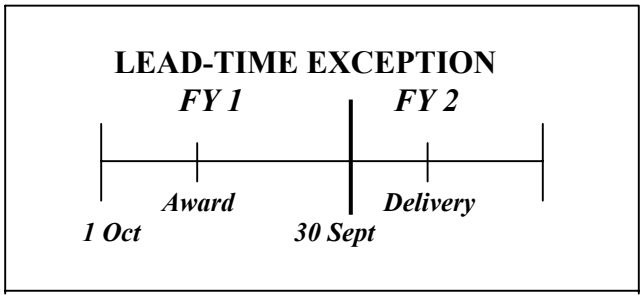
1. Generally, bona fide needs are determined by when the government actually requires (will be able to use or consume) the supplies being acquired.

2. Accordingly, agencies generally must obligate for 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 needs of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the lead-time exception and the stock-level exception. DOD Reg. 7000.14-R, vol. 3, para. 080303.

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



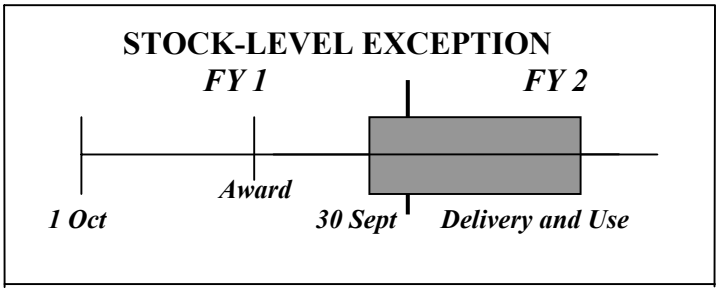
a. Delivery Time. This aspect of the exception recognizes that the agency has a need for, but cannot obtain the item, in the current FY. In this situation, if an agency cannot obtain materials in the same FY in which they are needed and contracted for, delivery in the next FY does not violate the Bona Fide Needs Rule. However, the time between contracting and delivery must not be excessive and 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).

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. Thus, an agency may contract in one FY for delivery in the second FY if the material contracted for will not 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 2001 funds is appropriate for a delivery on or before a required delivery date of 14 November 2001. (Remember 1 October 2001 is the beginning of FY 2002). This represents the bona fide needs of FY 2001. However, if the government directs the contractor to withhold delivery until after 14 November 2001, there is not a bona fide need for the item in FY 2001 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2002.

(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 2001, then the government must use FY 2002 funds.

5. *Stock-Level Exception to the Bona Fide Needs Rule*. The stock level exception permits agencies to purchase sufficient supplies to maintain adequate and normal stock levels.



a. 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.

b. For example, the government may award a contract to maintain the normal, authorized stock levels of repair parts in August 2001 and may require delivery in September 2001, using FY 2001 funds, even if the government knows that the government will not <u>use</u> the repair parts until early October 2002 (i.e., FY 2002).

c. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited. Mr. H. V. Higley, B-134277, Dec. 18, 1957 (unpub.).

E. Bona Fide Needs Rule Applied to Service Contracts.

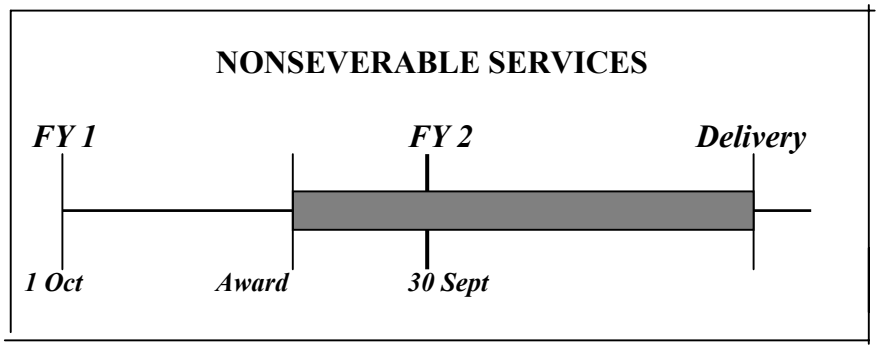
1. *General Rule*: Bona fide needs for services do not arise until the services are rendered. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985).

2. *Types:* For purposes of the Bona Fide Needs Rule, services fall into two broad categories:

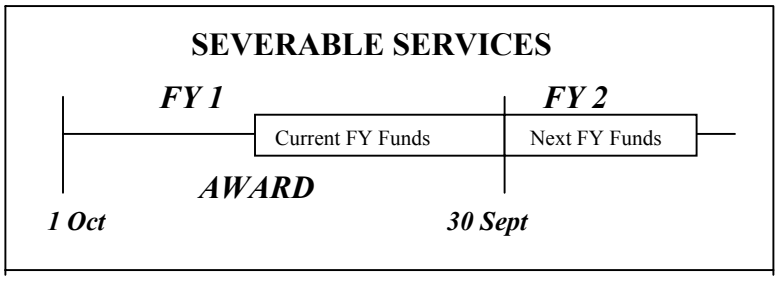
a. Nonseverable service contracts; and

b. Severable service contracts.

3. *Nonseverable Services*: A service is nonseverable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years. Thus, 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); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986); Comptroller General to W.B. Herms, Department of Agriculture, B-37929, 23 Comp. Gen. 370 (1943).



4. *Severable Services*: A service is severable if it can be separated into components that independently meet a separate need of the government. As a general rule, severable services are the bona fide needs 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, 65 Comp. Gen. 154 (1985). Thus, 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.



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

F. Bona Fide Needs Rule Applied to Training Contracts. Training courses that begin on or about 1 October may constitute a bona fide need of the prior year if the scheduling of the course is beyond the control of the agency and the time between award of the contract and performance is not excessive. DFAS-IN 37-1. tbl. 8-1; Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-277886.2, Aug. 3, 1989 (unpub.).

G. Bona Fide Needs Rule Applied to Construction Contracts.

1. Contracts for construction must fulfill a bona fide need arising within the funds' period of availability. 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 Kepplinger, B-235086, Apr. 24, 1991 (unpub). 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.

2. 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. When 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 2001 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 2002 and the contract should be awarded in FY 2002. Accordingly, use of FY 2001 funds under these facts violates the Bona Fide Needs Rule.

H. Multiple Year Appropriations.

1. The Bona Fide Needs Rule applies to multiple year appropriations. 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. Administrative controls, including regulations, may impose independent restrictions on the use of multi-year funds. See, e.g., DOD Reg. 7000.14-R, Financial Management Regulation, vol. 2A, Budget Formulation and Presentation; AR 70-6.

V. 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. Bid Protests;

2. Terminations for Default;

3. Terminations for Convenience; and

4. Contract Modifications.

B. 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 General Accounting Office (GAO), or in a federal court. 31 U.S.C. § 1558; FAR 33.102(c); DFAS-IN 37-1, para. 080608.

C. Terminations for Default.

1. If a contract or order is terminated for default, and bona fide needs still exist for the supplies or services, then the originally-obligated funds remain available for obligation for a reprocurement, even if they otherwise would have expired. The agency must award the reprocurement contract for substantially the same item or service without undue delay. DFAS-IN 37-1, para. 080607; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976).

2. If additional funds are required for the replacement contract, and the funds have otherwise expired, then the original year's funds may be used to fund the additional cost (and if insufficient or unavailable, then current funds may be used). See DFAS-IN 37-1, tbl. 8-7.

D. Terminations for Convenience of the Government.

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. DFAS-IN 37-1, para. 080606.

2. *Exceptions.*

a. Funds originally obligated may be used in a subsequent fiscal year to fund a replacement contract if the original contract is terminated for convenience pursuant to a court order or to a determination by the GAO or other competent authority that the award was improper. DFAS-IN 37-1, para. 080606, tbl. 8-7; Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988).

b. This exception includes terminations for convenience resulting from a contracting officer's determination that the award was

clearly erroneous. Navy, Replacement Contract, B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117; DFAS-IN 37-1, para. 080606.

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 continuing bona fide needs for the goods or services involved;

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

   d. The contracting officer executes the replacement contract without undue delay after the original contract is terminated for convenience. DFAS-IN 37-1, para. 080606, tbl. 8-7.

E. Contract Modifications Affecting Price.

1. General. 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.

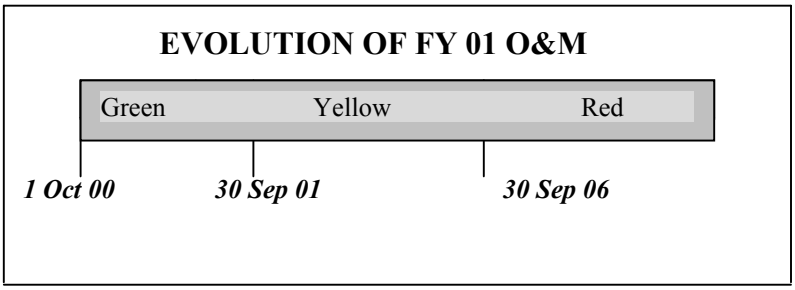
2. When a contract modification does not represent a new requirement or liability, but instead only modifies the amount of the government's pre-existing liability, then such a price adjustment is a bona fide need of the same year in which funds were obligated for the original contract. When a price adjustment is attributable to an "antecedent liability," then original funds are available for obligation for the modification. 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. If a contract modification adds capability, expands performance, or increases quantities in response to new or amended requirements, then the original funds may not be available for obligation even if such modification comes within the Changes clause. An obligation resulting from this type of modification may amount to a new obligation that is chargeable to funds current at the time the modification is made. 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-207433, 83-2 CPD ¶ 401 (1983).

VI. USE OF EXPIRED/CLOSED APPROPRIATIONS.

A. Definitions.



1. **Current Appropriations**. Appropriations whose availability for new obligations has not expired under the terms of the applicable appropriations act.

2. **Expired Appropriations**. Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a).

3. **Closed Appropriations**. Appropriations that are 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 period.

   b. Appropriations remain available for recording, adjusting, and liquidating prior obligations properly chargeable to the account. 31 U.S.C. § 1553(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. The head of the agency must approve all changes in excess of $4 million.

   a. For all changes exceeding $25 million, the head of the agency 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); DOD 7000.14-R, vol. 3, paras. 100204-05.

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).

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.

5. For DOD, there are additional restrictions on using pre-FY 1992 expired appropriations. See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1004, 106 Stat. 2481 (1992).

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 obligated and unobligated balances in the account 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. Extreme caution should be used when agencies "adjust" closed accounts. *See* GEN. ACCT. OFF.REPT.NO. 01-697, *CANCELLED DOD APPRPRIATIONS, $615 Million of Illegal or Otherwise Improper Adjustments*, (July 26, 2001).

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(d); Appropriation Accounting - Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130.

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).

4. Charges shall be limited to the lesser of:

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

(2) one percent (1%) of the current appropriation available for the same purpose. 31 U.S.C. § 1553(b)(2).

VII. MULTIPLE YEAR FUNDS AND MULTIPLE YEAR CONTRACTS.

A. References.

1. AR 70-6.

2. AFI 65-601.

3. DOD Reg. 7000.14-R, Financial Management Regulation, vol. 2A, Budget Formulation and Presentation.

B. Introduction.

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

2. We will not consider the contract law issues concerning multi-year contracting and contracts containing options in this course.

C. Basic Concepts.

1. 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. OMB Circular A-34, Instructions on Budget Execution (Aug. 1985).

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

   a. Overseas, Humanitarian, Disaster, and Civic Aid: 2 years.

   b. Procurement: 3 years.

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

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

   e. Military Construction: 5 years.

D. Statutory Controls.

1. The Bona Fide Needs Rule applies to multiple year appropriations. Defense Technical Information Center-Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989). A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 2000 RDT&E Army Appropriation, which is available for obligation until 30 September 2001, may be obligated for the needs of FY 2000 and 2001; it is not available for the needs of FY 2002.

2. The exceptions to the Bona Fide Needs Rule relating to acquisitions to maintain stock levels and lead time for special goods also apply. This statutory rule is limited by administrative policies, discussed later.

E. Administrative Controls: Program Objectives.

1. *Procurement Appropriations*: Program managers using procurement appropriations 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 Reg. 7000.14-R, vol. 2A, para. 010202.

2. *RDT&E Appropriations*: Program managers using RDT&E may prefer to dribble out funding among various programs, giving more to those programs showing progress and withholding from other programs.

3. The managers of procurement appropriations and RDT&E appropriations have diametrically opposing outlooks on funding programs within their purview. As a result, two different funding policies exist.

F. Full Funding Policy.

1. DOD Reg. 7000.14-R, vol. 2A, para. 010202.C.6. describes the full funding policy as follows:

> At the time of contract award, funds are available to cover the total estimated cost to deliver the contract quantity of complete, militarily usable end items. If a future-year appropriation is required for delivery of the end items, then the end items are not fully funded.

2. The purpose of the full funding policy is to ensure that the amount requested each year will buy a specific quantity of end items. Absent this policy, agencies might conceal the total cost of an end item by splitting the costs among fiscal years or by budgeting for end items piecemeal.

3. Full Funding and Contract Terms.

a. Full funding is primarily a budgeting concept. An agency may initiate an acquisition for a procurement item only if the funds for

the total estimated cost of the contract quantity are available for obligation.

b. The acquisition need not be for the total quantity or for usable end items. For example, the government may divide the annual procurement quantity among several contracts. Similarly, the government may award several contracts for both component parts and for the ultimate end items, and then furnish as government-furnished property (GFP) the component parts to the producers of the ultimate end items. A program is not "fully funded" only if delivery of usable end items requires a future-year appropriation.

4. Efficiency dictates two general exceptions to the full funding policy. DOD Reg. 7000.14-R, vol. 2A, para. 010202.B.

a. 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.

b. 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. 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 Reg. 7000.14-R, vol. 2A, para. 010202.B.3.

c. Advance economic order quantity (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 Reg. 7000.14-R, vol. 2A, para. 010202.B.4.

d. The DOD full funding policy is not statutory. Violations of the full funding policy do not necessarily violate the Antideficiency 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).

G. Incremental Funding Policy.

1. The government executes the Research, Development, Test, and Evaluation Program by incremental funding of contracts and other obligations. DOD Reg. 7000.14-R, vol. 2A, para. 010211.

2. 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.

3. 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, pursuant to a DFARS interim rule. See DFARS Part 232.7 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).

4. 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).

VIII. CONTRACT FORMATION AND TIME LIMITATIONS

A. References.

1. FAR Subpart 17.2.

2. FAR Subpart 32.7.

3. FAR Subpart 37.1.

B. 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 ¶ 19,450; 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 synopsized the contract with the option(s) in the Commerce Business Daily, and must have priced and evaluated the option at the time of contract award. FAR 17.207(f). 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.

c. The government must determine that the option is the most advantageous means of filling a requirement.

d. The government must have funds available.

e. 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).

f. 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, e.g., 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).

g. 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.

C. Requirements or Indefinite Quantity Contracts.

1. Requirement 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.

D. Contracts on the Fiscal Year Cycle.

1. The government may award contracts with terms that coincide with the fiscal year, i.e., from 1 October to 30 September.

2. This technique burdens contracting offices and invites fiscal problems when Congress delays passing appropriations acts and when CR periods or funding gaps occur.

3. Within DOD, consider using the authority of 10 U.S.C. § 2410a to award severable service contracts that cross fiscal years. Civilian agencies should consider using 41 U.S.C. § 253*l* for the same purpose. The Coast Guard, of course, may rely on 10 U.S.C. § 2410a(b).

IX. CONCLUSION

A. Basic Rules Relating to Time.

1. Agencies may not obligate funds before they are appropriated.

2. Agencies may not incur new obligations after the period of availability ends.

3. Appropriations are presumed to be one-year funds, unless expressly stated otherwise.

4. Different appropriations have different periods of availability.

B. Bona Fide Needs Rule.

1. Agencies may obligate funds only for the bona fide needs of the period of availability of the appropriation.

2. "Supply" exceptions to the Bona Fide Needs Rule (lead time and stock level) authorize obligation during the period of availability and delivery of the supplies in a subsequent fiscal year.

3. Severable services are the bona fide need of the year in which performed (though 10 U.S.C. § 2410a permits the award of contracts for such services across fiscal years). Contracts for nonseverable services may obligate current funds for performance to be completed in a subsequent fiscal year.

C. Multiple-Year Funds.

1. Appropriations are presumed to be annual. Multiple-year appropriations are identified specifically as such in appropriations acts.

2. The Bona Fide Needs Rule applies to multiple-year appropriations.

3. Administrative regulations may impose strict controls on the use of multiple year appropriations in the "out years." These restrictions may be more stringent than those imposed by statute.

D. Rules Governing Expired and Closed Appropriations.

1. Agencies may use expired funds only to liquidate or adjust prior obligations.

2. Fixed appropriations are canceled for all purposes five years after the period of availability ends.

CHAPTER 4

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CHAPTER 4

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-34, Section 13, Application of Obligations (2000) [hereinafter OMB Cir. A-34].

C. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 7, Obligation of Appropriations (2d ed. 1992).

D. DOD Directive 7200.1, Administrative Control of Appropriations (May 1995); DOD Instruction 7000.14, DOD Financial Management Policy and Procedures (Nov. 1992); DOD 7000.14-R, DOD Financial Management Regulation, Vol. 3, Budget Execution – Availability and Use of Budgetary Resources (Jan. 2001) [hereinafter DOD 7000.14-R].

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February/March 2002

E. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, ch. 7 (Commitments) & ch. 8 (Obligation Management) (Jan. 2000) [hereinafter DFAS-IN 37-1] (*available at* https://dfas4dod.dfas.mil/library).

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 (April 2000)[hereinafter DFAS-DE, Commitments]; and Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Accounting For Obligations (April 2000) [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. 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.

3. 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.

4. 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 7000.14-R, vol. 3, ch. 15, para. 150202A.

5. 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. DFAS-IN 37-1, Chapter 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 7000.14-R, vol. 3, ch. 15, para. 150202A5.

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.[1] DOD 7000.14-R, vol. 3, ch. 15, para. 150202A1.

   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 in Chapter 7. 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 undelivered order or accrued expenditure will not exceed available funds. DOD 7000.14-R, vol. 3, ch. 15, para. 150202A1. 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.

5. Agencies cancel outstanding commitments when the committed funds expire for obligation. DOD 7000.14-R, vol. 3, ch. 15, para. 150202A6.

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[1] A commitment document is an order form used to ensure that funds are available prior to incurring an obligation. Commitments in the Army may be accomplished using DA Form 3953 (Purchase Request and Commitment) 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 4-B and 4-C to view these forms. A number of organizationsare using *PRweb*, a paperless Purchase Request and Commitment process which is part of the AcquiLine suite of acquisition software. Information about AcquiLine can be found at American Management System's (AMS) (the commercial vendor's) website: http://acquiline.ams.com/.

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 7000.14-R, 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 7000.14-R, 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 7000.14-R, 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 7000.14-R, vol. 3, ch. 8, para. 080202B.

4. Open-end contracts and option agreements. Commit funds only when the amount estimated is reasonably firm. DOD 7000.14-R, vol. 3, ch.8, para. 080202C.

5. Contract Amendments or Engineering Changes. Commit an amount based on a stated cost limitation. DOD 7000.14-R, 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 7000.14-R, vol. 3, ch. 8, para. 080202E.

7. Imprest Funds.[2] Record as a commitment before funds are advanced to the imprest fund cashier. DFAS-DE, Accounting For Commitments, p. 4-2; see also Appropriations Accounting for Imprest Fund Advances Issued to Cashiers, B-240238, 70 Comp. Gen. 481, (May 8, 1991).

8. 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.

[2] An imprest fund is a "cash fund of a fixed amount established by an advance of funds, 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. 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. 020902 and DFAR 213.305(d).

e. 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 177-102.

f. 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.

9. 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 7000.14-R, para. 080202F.

b. Blanket Purchase Agreements. DFAS-DE, Accounting For Commitments, p. 4-2.

IV. OBLIGATION OF FUNDS.

A. Definitions.

1. Obligations. 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-34, para. 13.1.

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

2. Obligate funds only to satisfy the bona fide needs of the current fiscal year. 31 U.S.C. § 1502(a); DOD 7000.14-R, vol. 3, ch. 8, para. 080303A.

3. Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. DOD 7000.14-R, vol. 3, ch. 8, para. 080303B.

4. Generally, obligate current funds when the government incurs an obligation (incurs a liability). DOD 7000.14-R, vol. 3, ch. 8, para. 080302. Some exceptions include:

a. Contract award following a bid protest when authorized by 31 U.S.C. § 1558, Availability of funds following resolution of a formal protest or other challenge.

(1) Section 1558 provides that funds available to an agency for obligation for a contract at the time of a protest to the General Accounting Office (GAO), or at the time an action is commenced under administrative procedures or for a judicial remedy, shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action, if—

(a) the action involves a challenge to a solicitation for a contract; a proposed award of a contract; an award of a contract; or 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.

(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.

b. Replacement contracts for contracts that have been terminated for default. DOD 7000.14-R, vol. 3, ch. 8, para. 080303D; Lawrence W. Rosine Co., B-185405, August 13, 1976, 55 Comp. Gen. 1351, 76-2 CPD ¶ 159; and

c. "In-scope" contract changes. DOD 7000.14-R, vol. 3, ch. 8, para. 080304B; DFAS-IN 37-1, tbl. 8-7, para. 1a.

5. 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.

6. 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 7000.14-R, 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.

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 7000.14-R, vol. 3, ch. 8, para. 080501.

2. Fixed-Price contracts with escalation, price redeterminations, and incentive provisions. DOD 7000.14-R, 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 Prospective 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.

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 incentives cannot be used because contractor performance cannot be measured objectively.

e. 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. OMB Cir. A-34, para. 13.5. 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 7000.14-R, vol. 3, ch.8, para. 080502.

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, or the Limitation of Funds clause, FAR 52.232-22. 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 7000.14-R, vol. 3, ch. 8, para. 080503.

(3) Cost-Plus-Award-Fee (CPAF) Contract. FAR 16.305 and 16.405-2.

(a) The contractor receives its costs; a base fee[3] that is fixed at award; and, possibly, an additional award fee based upon the quality of the contractor's performance.

(b) 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 7000.14-R, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

(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 7000.14-R, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

(5) Cost-Sharing Contract. FAR 16.303.

(a) The contractor receives no fee and an agreed-upon portion of its allowable costs.

(b) Obligate based on total estimated cost of contract. OMB Cir. A-34, para. 13.5.

(6) Time-and-Materials (T&M), FAR 16.601, and Labor-Hour (L-H) Contracts, FAR 16.602.

[3] For DOD contracts, base fees are limited to 3% of the estimated cost at time of award. DFARS 216.405-2(c)(ii)(2)(b).

(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 7000.14-R, 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) The government must buy the minimum quantity, but may purchase up to the maximum quantity. The government issues delivery orders as needs arise.

(b) 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 7000.14-R, vol. 3, ch. 8, para. 080504; DFAS-IN 37-1, tbl. 8-1;

(2) Indefinite delivery-definite quantity contracts. FAR 16.502.

(a) The quantity and price are fixed. The government issues delivery orders 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.

(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.

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 7000.14-R, 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 7000.14-R, vol. 3, ch. 8, para. 080510A.

b. A purchase order requiring acceptance by the vendor before a firm commitment 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 of delivery. DOD 7000.14-R, vol. 3, ch. 8, para. 080510B.

7. Service Contracts.

a. General rule. Services 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, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216. Thus, service contracts generally may not cross fiscal years, and agencies must fund service contracts with dollars available for obligation on the date the contractor performs the services. DFAS-IN 37-1, para. 080603.

b. Nonseverable services exception. 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).

c. Statutory exceptions. 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. § 253*l*.

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 17.201.

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.

c. For severable service contracts, option years are treated as new contracts. Therefore, when the severable service contract has renewal options, obligate funds for the basic period and any penalty charges for failure to exercise options. DFAS-IN 37-1, ch. 8, para. 080603(B).

9. Rental Agreements and Leases of Real or Personal Property. Generally, obligate for one month at a time throughout the term of the rental agreement. Determine the amount of the obligation by analyzing the government's rights to terminate the rental agreement or lease. DOD 7000.14-R, vol. 3, ch. 8, para. 0806.

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 7000.14-R, 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 7000.14-R, 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 7000.14-R, 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 7000.14-R, vol. 3, ch. 8, para. 080605.

e. The government may enter into leases of structures and real property in foreign countries for periods up to 5 years (10 years for military family housing). 10 U.S.C. § 2675. Obligations for such leases may not exceed the period of availability of the funds with which the lease is financed. A lease for more than 12 months, or one which crosses fiscal years, requires obligation of funds in the full amount of the lease, limited by the period of availability of the funds being used, i.e., obligation of funds for the total number of months remaining in the period of availability is required. Obligate for the months after the end of the period of availability in subsequent fiscal years. DOD 7000.14-R, 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 7000.14-R, 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 7000.14-R, 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. 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 (31 U.S.C. § 1535). DOD 7000.14-R, 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 7000.14-R, vol. 3, ch. 8, para. 080603A; DFAS-IN 37-1, tbl. 8-2.

(2) Economy Act orders. Obligate funds when the performing activity accepts the order in writing. Adjust undelivered Economy Act orders issued against annual or multiple year appropriations downward at the end of the period of availability of the funds. DOD 7000.14-R, vol. 3, ch. 8, para. 080703B; DFAS-IN 37-1, tbl. 8-2.

d. Orders required by law to be placed with another U.S. governmental agency, such as the Federal Prison Industries (18 U.S.C. § 4124), or the Government Printing Office (44 U.S.C. § 111). Record as an obligation by the requiring agency in the amount stated in the order when the order is issued. DOD 7000.14-R, vol. 3, ch. 8, para. 080704; DFAS-IN 37-1, tbl. 8-2.

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 7000.14-R, vol. 3, ch. 8, para. 080801.

a. Adjust obligations for undelivered stock fund orders when a change notice affecting price, quantity, or an acceptable substitution is received. DOD 7000.14-R, 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 7000.14-R, 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 7000.14-R, 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 7000.14-R, 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 7000.14-R, 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 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.

C. Limitations on use of Expired or Current Funds to adjust obligations. 31 U.S.C. § 1553(c); DOD 7000.14-R, 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 7000.14-R, 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 7000.14-R, vol. 3, ch. 10, para. 100204.

c. 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 7000.14-R, 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 which 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 7000.14-R, 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 7000.14-R, vol. 3, ch. 8, para. 080512.

3. If a contract is terminated for convenience pursuant to a court order or determination by other competent authority (board of contract appeals, General Accounting Office, or contracting officer) that the original 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.

B. Termination for Default. After a contract is terminated for default, the government may still have a bona fide need for the supply or service. In such a case, the originally obligated funds remain available for obligation for a reprocurement contract, notwithstanding the expiration of the normal period of availability, if:

1. The replacement contract is awarded without undue delay after the original contract is terminated for default;

2. its purpose is to fulfill a bona fide need that has continued from the original contract; and

3. the replacement contract is awarded on the same basis and is similar substantially in scope and size as the original contract. See Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 81-2 CPD ¶ 33; DFAS-IN 37-1, 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.

2. A protest or other action consists of a protest filed with the General Accounting 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.

3. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558.

a. A request for reconsideration of a GAO protest must be made within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b).

b. The appeal of a protest decision of a district court or the Court of Federal Claims must be filed with the Court of Appeals for the Federal Circuit within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).

B. Ratification of Unauthorized Commitments. Charge against the funds that would have been charged had the obligation been valid from its inception. FAR 1.602-3; DFAS-IN 37-1, tbl. 8-6, para. 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 7000.14-R, 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 7000.14-R, vol. 3, ch. 8, para. 080304E; DFAS-IN 37-1, tbl. 8-6, para. 14.

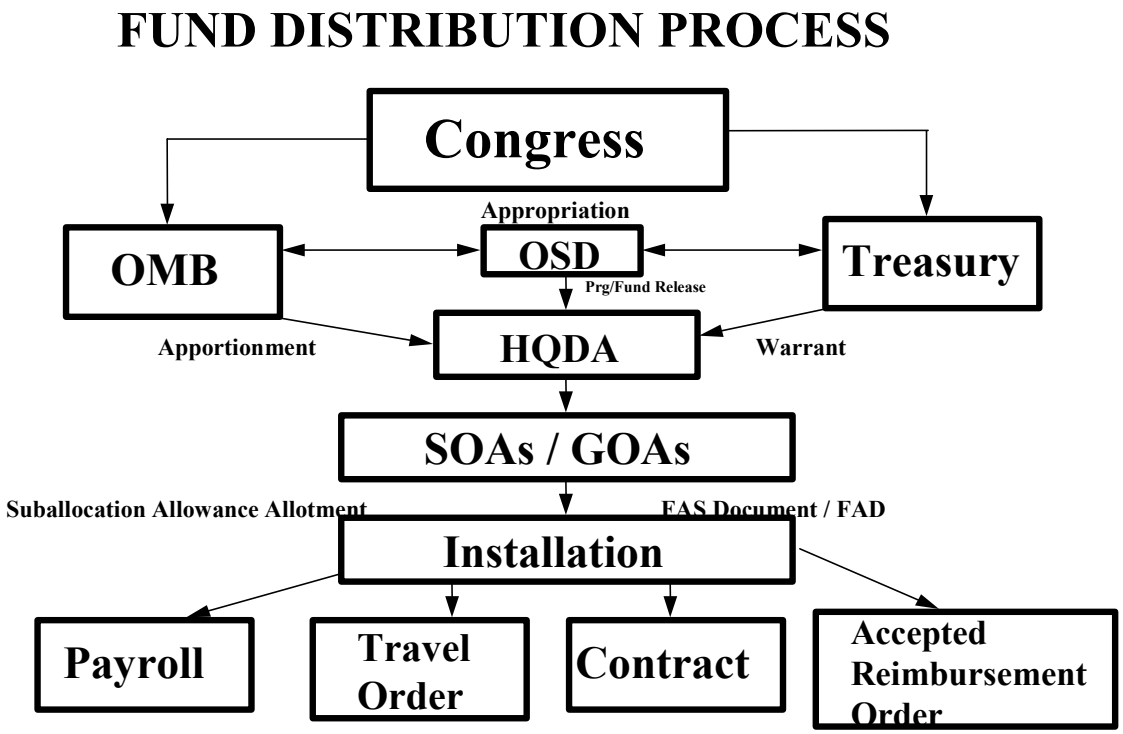
3. Judgments or monetary awards. Initially, the government may pay judgments from a permanent appropriation called the Permanent Judgment Appropriation (Judgment Fund). 31 U.S.C. § 1304. The Contract Disputes Act (CDA) requires agencies to reimburse the Judgment Fund for CDA judgments. 41 U.S.C. § 612(c). 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. DOD 7000.14-R, vol. 3, ch. 8, para. 080304F1; DFAS-IN 37-1, tbl. 8-6, para. 15; Bureau of Land Mgt. - Reimbursement of CDA Payments, B-211229, 63 Comp. Gen. 308 (1984).

4. Attorney fees and other expenses. These costs are not payable by the Judgment Fund. Record obligations against current funds at the time the awards are made by the deciding official or by the court. DFAS-IN 37-1, tbl. 8-6.

IX. CONCLUSION.

A. APPENDIX 4-A

1. Fund Distribution Process



B. APPENDIX 4-B

DA Form 3953 (Purchase Request and Commitment)

C. APPENDIX 4-C

AF Form 9 (Request for Purchase)

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. 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?

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, 2001 through July, 2002. Because FY 2001 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 2002. What do you advise? Is there a Bona Fide Needs

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?

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 2001 O&M, Army funds. However, the proposed awardee's price is $650,000. What do you advise?

CHAPTER 5

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CHAPTER 5

CONSTRUCTION FUNDING

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students will:

1. Understand the statutes and regulations governing the fiscal aspects of military construction.

2. Understand how to apply construction funding rules to routine problems.

B. 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. 4270.36, DOD Emergency, Contingency, and Other Unprogrammed Construction Projects (17 May 1997) [hereinafter DOD Dir. 4270.36].

E. DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 6, Military Construction/Family Housing Appropriations (June 2000) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 6].

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F. DOD Reg. 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 8, Real Property Maintenance/Minor Construction (June 2000) [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) [hereinafter DFAS-IN 37-1].

I. AR 415-15, Army Military Construction Program Development and Execution (4 Sep. 1998) [hereinafter AR 415-15].

J. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (15 Apr. 1998) [hereinafter AR 415-32].

K. AR 420-10, Management of Installation Directorates of Public Works (15 Apr. 1997) [hereinafter AR 420-10].

L. AR 420-18, Facilities Engineering, Materials, Equipment, and Relocatable Building Management (3 Jan. 1992).

M. DA Pam 415-15, Army Military Construction Program Development and Execution (25 Oct. 1999) [hereinafter DA Pam 415-15].

N. DA Pam 420-11, Project Definition and Work Classification (7 October 1994) [hereinafter DA Pam 420-11].

O. AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994) [hereinafter AFI 32-1021].

P. AFI 32-1031, Operations Management (1 July 1997) [hereinafter AFI 32-1031].

Q. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (1 Sep. 1999) [hereinafter AFI 32-1032].

R. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch. 9, Military Construction Appropriations (21 Oct. 1994) [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 (21 Oct. 1994) [hereinafter AFI 65-601, vol. 1, ch. 21].

T. OPNAVINST 11010.20F, Facilities Projects Manual (7 June 1996) [hereinafter OPNAVINST 11010.20F].

U. Major Earle D. Munns, *An Analysis of the Military Construction Codification Act*, ARMY LAW., Nov. 1987, at 19.

V. M. Warner Meadows, *Has DOD "Repaired" a Component of the Construction Funding Analysis?* ARMY LAW., Mar. 1998, at 15.

W. M. Warner Meadows, *Military Construction Funding, Variation in Cost Rules*, ARMY LAW., Aug. 1998, at 20.

III. BACKGROUND.

A. Congressional Oversight of the Military Construction Program.

1. Congressional oversight is pervasive and extensive.

2. Military departments may only accomplish minor military construction projects (i.e., projects with an approved cost of $1.5 million or less) without prior Congressional approval, and military departments must still notify Congress of minor military construction projects with an approved cost of $750,000 or more.

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. 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."

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."

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."

E. Appropriate Committees of Congress. 10 U.S.C. § 2801(c)(4). The term "appropriate committees of Congress" means "the Committee on Armed Services and the Committee on Appropriations of the Senate and the Committee on Armed Services and the Committee on Appropriations of the House of Representatives."

V. SOURCES OF MILITARY CONSTRUCTION FUNDING.

A. Military Construction Appropriations Act. See, e.g., Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (2001).

1. Provides funds for the DOD's specified and unspecified military construction programs.

2. Funds are generally available for 5 years.

B. Department of Defense Appropriations Act. See, e.g., Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, 114 Stat. 656 (2000).

1. Provides miscellaneous "pots" of money for military construction projects.

2. Funds are generally available for 1 year. But see Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999) (providing funds for quality of life enhancements "which shall remain available for obligation until September 30, 2001").

VI. SOURCES OF MILITARY CONSTRUCTION FUNDING AUTHORITY.

A. "Specified" Military Construction Projects. 10 U.S.C. § 2802. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects authorized by law.

1. Source of Funding. See, e.g., Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (2001); H.R. CONF. REP. NO. 107-246 (2001). Congress provides annual funding and approval for "specified" military construction projects in the Military Construction Appropriations Act.

a. Congress funds the entire military construction program with lump sum appropriations. The Army's principle appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.[1]

b. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by project.

[1] The statutory requirements for the construction and improvement of military family housing are at 10 U.S.C. §§ 2821-2837.

2. Authorized Use.

a. Congress normally "specifies" military construction projects expected to exceed $1.5 million.[2]

b. A military department may not carry out military construction projects expected to exceed $1.5 million without specific Congressional authorization and approval.

B. "Unspecified" Minor Military Construction (UMMC) Projects. 10 U.S.C. § 2805(a).

1. Source of Funding. See, e.g., Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (2001); H.R. CONF. REP. NO. 107-246 (2001). Congress provides annual funding and approval for UMMC projects in the Military Construction Appropriations Act.

a. Congress appropriates "Unspecified Minor Construction" funds to each military department in the conference report that accompanies the Military Construction Appropriations Act; however, the conference report does not break down these appropriations any further (e.g., by project).

b. The Army refers to its "unspecified" appropriation as "Unspecified Minor Military Construction, Army" (UMMCA). See AR 415-15, para. 1-1a(1); Glossary, sec. I.

2. Authorized Use. 10 U.S.C. § 2805(a). See AR 415-15, para. 1-6b(1) and app. B; AFI 32-1021, ch. 4; AFI 32-1032, para. 3.3.3; AFI 65-601, vol. 1, para. 9.12.6; OPNAVINST 11010.20F, para. 6.4.4. The Secretary concerned may use these funds to carry out UMMC projects not otherwise authorized by law.

a. An UMMC project is defined as a military construction project with an approved cost of $1.5 million or less.

[2] Congress may also specify projects under $1.5 million. See, e.g., Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (2001); H.R. CONF. REP. NO. 107-246 (2001).

b. However, 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.

3. Requirements for Use. 10 U.S.C. § 2805(b).

a. Before beginning an UMMC project with an approved cost greater than $750,000, the Secretary concerned must approve the project.

b. In addition, the Secretary concerned must:

(1) Notify the appropriate committees of Congress;[3] and

(2) Wait 21 days.[4]

C. UMMC Projects Financed by Operation & Maintenance (O&M) Funds.

1. General Prohibition on the Use of O&M Funds. 41 U.S.C. § 12.

a. 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.

[3] 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).

[4] The Air Force imposes a 30-day waiting period. AFI 32-1021, para. 4.5.

b. 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:

(1) Require specific Congressional authorization for military construction projects; and

(2) Prohibit the use of other, more general appropriations for military construction projects.

2. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See AR 415-15, para. 1-6c(1); AR 420-10, para. 4-1c; AFI 32-1021, para. 4.2; OPNAVINST 11010.20F, para. 6.1.1.f. The Secretary of a military department may use O&M funds to finance UMMC projects costing less than:[5]

a. $1.5 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.[6]

b. $750,000 if the project is intended for any other purpose.[7]

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[5] The thresholds for O&M funded projects were raised from $500,000 to $750,00, 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. Projects approved prior to that date continue to carry the $500,000 or $1 Million limitation. The service regulations will require revision to comport with the statutory change. 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.

[6] There is no specific guidance as to what constitutes a "deficiency that threatens life, health, or safety." The legislative history contains no guidance. Neither the DoD Regulations, nor the Service regulations are of assistance. At least one Army MACOM has issued limited guidance. See, Appendix B: Memorandum, Deputy Chief of Staff for Personnel and Installation Management, AFEN-ENO, subject: Funding and Approval Authority, 6 March 2000. 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 $500,000. AFI 32-1032, para 5.1.2.1.

[7] AR 420-10, para. 4-1c, requires Army activities to use O&M funds for construction projects that cost less than the statutory thresholds. In fact, AR 420-10, para. 4-1c, requires Army activities to obtain prior approval from HQDA if they want to use UMMCA funds for construction projects costing $500,000 or less.

D. Exercise-Related UMMC Projects.

1. All Exercise-Related Projects. See Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 113, 115 Stat. 246 (2001); 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).

   a. 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.

   b. The SECDEF must provide this notice 30 days before the start of the exercise.

2. Exercise-Related UMMC Projects Coordinated[8] or Directed[9] by the Joint Chiefs of Staff (JCS) Outside the U.S.[10]

   a. O&M Funds. 10 U.S.C. § 2805(c)(2). See AR 415-32, para. 3-5.

      (1) General Rule. The Secretary of a military department may not use O&M funds to finance exercise-related UMMC projects coordinated or directed by the JCS outside the U.S. [NOTE: Congress passed 10 U.S.C. § 2805(c)(2) in response to The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984)].

[8] JCS-coordinated exercises are minor exercises that require JCS coordination because they involve the units or forces of more than one military department. AR 415-32, para. 3-3, and Glossary, sec. II.

[9] JCS-directed exercises are exercises that are of interest to the Joint Chiefs of Staff, but directed by a strategic mobility or major commander-in-chief. AR 415-32, para. 3-3.

[10] JCS coordinated or directed exercises include: (1) joint training exercises such as Atlantic Resolve, AHUAS TARA, and BRIGHT/STAR; and (2) combined training exercises such as FUERTES CAMINOS. AR 415-32, para. 3-3, and Glossary, Sec. II.

(2) Exception.

(a) The Secretary of a military department may arguably use O&M funds to finance minor and/or temporary structures (e.g., tent platforms, field latrines, shelters, range targets, installed relocatable structures)[11] or any structures which are completely removed at the end of an exercise. See The Hon. Bill Alexander, supra (noting that the "temporary structure" exception is extremely limited in scope). But cf. AR 415-32, para. 3-5c. (stating that "the Army may use [O&M] funds, except when the exercise-related construction is JCS directed or coordinated outside the United States").

(b) Compare combat and contingency operations. See Memorandum, Deputy General Counsel (Ethics & Fiscal), Office of the General Counsel, Department of the Army, Subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (stating that the Army should use O&M funds to build structures during combat and contingency operations if the structures "are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations"); see also Office of the General Counsel, Fiscal Law Outline, Section P: Current Issues, <http://www.hqda.army.mil/ogc/eandfoutline-secp.htm>.

[11] To determine whether a facility is "temporary," you need to focus on the duration and purpose of the facility's use rather than the materials used. AR 415-32, para. 3-5c.

b. UMMC Funds. 10 U.S.C. § 2805(a)(2). See AR 415-32, para. 3-5d. The statute states that the Secretary of a military department may not use more than $5 million of its UMMC funds to finance exercise-related UMMC projects coordinated or directed by the JCS outside the U.S. during any fiscal year. In practice, exercise related construction is funded with funds specifically identified by Congress for this purpose. These funds are administered by the Joint Staff.[12]

E. Emergency Construction Projects. 10 U.S.C. § 2803. See DOD Dir. 4270.36; AR 415-15, paras. 1-6b(2) and 5-19, app. C; AFI 32-1021, para. 5.2.1; AFI 65-601, vol. 1, para. 9.12.3; OPNAVINST 11010.20F, para. 6.4.2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The Secretary of a military department may use this authority to carry out emergency construction projects not otherwise authorized by law.

2. Requirements for Use.

a. Before using this authority, the Secretary concerned must determine that:

(1) The project is vital to:

(a) National security; or

(b) The protection of health, safety, or the quality of the environment; and

(2) The project is so urgent that deferral until the next Military Construction Appropriations Act would be inconsistent with:

(a) National security; or

[12] For FY 02, there is $6,305,000 available for these projects. In FY01, this amount was $6,196,000.

(b) The protection of health, safety, or the quality of the environment.

b. In addition, the Secretary concerned must:

(1) Notify the appropriate committees of Congress;[13] and

(2) Wait 21 days.

3. Source of Funding.

a. The Secretary concerned must use unobligated military construction funds to finance these projects.[14]

(1) Congress must normally approve a reprogramming request for the project.[15]

(2) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

b. The Secretary concerned may not obligate more than $30 million per fiscal year for emergency construction.

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[13] 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).

[14] 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).

[15] The Secretary concerned must submit a reprogramming request to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.36, 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 415-15, app. C., para. C-4 (noting that Congress will probably not approve a reprogramming request unless there is truly a dire need for the project).

4. Limitations.

a. Legislative History. H.R. Rep. No. 97-612 (1982).

(1) The legislative history of the MCCA indicates that the Secretaries of the military departments should rarely use this authority.[16]

(2) 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 415-15, app. C, para. C-2a.

b. 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]." See AR 415-15, para. 5-19.

c. Army Limitations. AR 415-15, app. C, para. C-3.

(1) Although 10 U.S.C. § 2803, technically covers both military construction and family housing projects, the Army only uses this authority for military construction projects.

(2) AR 415-15, app. C, para. C-3, indicates that the Army should execute emergency construction projects under its UMMC program, if possible.

[16] 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).

F. Contingency Construction Projects. 10 U.S.C. § 2804. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(6); AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20F, para. 6.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The SECDEF 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.[17]

2. Requirements for Use.

a. Before using this authority, the SECDEF must determine that deferral of the project until the next Military Construction Appropriations Act would be inconsistent with:

(1) National security; or

(2) National interest.

b. In addition, the SECDEF must:

(1) Notify the appropriate committees of Congress;[18] and

(2) Wait 21 days.[19]

3. Source of Funding. The SECDEF must use funds specifically appropriated for contingency construction to finance these projects.[20]

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[17] 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. 4270.36, para. 4.2.2.

[18] 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.2 (detailing the requirements for reprogramming requests). But see DOD Dir. 4270.36, para. 3.2 (stating that reprogramming is not necessary for these projects).

[19] 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.

[20] Congress provides an annual appropriation for contingency construction projects. See, e.g., H.R. CONF. REP. NO. 107-246 (2001) (authorizing $10,000,000 for contingency construction for FY 02) and H.R. CONF. REP. NO. 106-710 (2000) (authorizing $6,000,000 for contingency construction for FY 01). Congress has been dramatically increasing the amount of funding dedicated to contingency operations. By contrast, in FY 00, the amount was $938,000.

4. Limitations.

a. Legislative History. H.R. Rep. No. 97-612 (1982).

(1) 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.

(2) 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.

b. DOD Limitations.

(1) DOD Dir. 4270.36, para. 3.4, requires the Heads of DOD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.

(2) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.F.4, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

c. Army Limitations. AR 415-15, para. 1-6b(6).

(1) The Army generally reserves this authority for projects that support multi-service requirements.

(2) Commanders should normally process urgent projects that support only one service under 10 U.S.C. § 2803.

d. Air Force Limitations. AFI 32-1021, para. 5.2.3.1.

(1) The use of this authority is rare.

(2) The Air Force must consider using its 10 U.S.C. § 2803 authority first.

G. Reserve Component Construction Authorities.

1. Specified Military Construction Projects. 10 U.S.C. § 18233. The Secretary of Defense may carry out military construction projects authorized by law.

a. 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.

b. 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).

c. 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).

2. Military Construction Funded with Operation & Maintenance accounts. 10 U.S.C. § 18233a. AR 140-483, Ch. 7.

a. Unspecified Minor Military Construction.
10 U.S.C. § 18233a(a)(1). Unlike Active Duty, RC UMMC projects are funded with O&M appropriations. Similar funding limits apply.

(1) Expenditure or contributions in excess of $1.5 million may not be made until the SECDEF has notified the appropriate committees of Congress of the location, nature, and estimated cost of the project, and waited 21 days after notification.

(2) This limitation does not apply to facilities acquired by lease, or to projects specifically approved by Congress. 10 U.S.C. § 18233a(a)(2)(A) & (B).

(3) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to $3 million. 10 U.S.C. § 18233a(a)(2)(C).

b. Minor construction projects. 10 U.S.C. § 18233a(b).

(1) Projects intended solely to correct a deficiency that threatens life, health or safety may have an approved cost of up to $1 million. 10 U.S.C. § 18233a(b)(1).

(2) For any other project, the limit is $500,000. 10 U.S.C. § 18233a(b)(2).

H. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(7) and app. D, para. D-2; AFI 32-1021, para. 5.2.4; AFI 65-601, vol. 1, para. 9.12.5; OPNAVINST 11010.20F; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. 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:

a. A declaration of war; or

b. A Presidential declaration of a national emergency.[21]

2. Requirements for Use. The SECDEF must notify the appropriate committees of Congress;[22] however, there is no waiting period associated with the use of this authority.

3. Source of Funding. The SECDEF must use unobligated military construction funds, including funds appropriated for family housing, to finance these projects.

4. On November 14, 1990, President 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. President George W. Bush invoked this authority on 16 November 2001. See Executive Order No. 13235, 66 Fed. Reg.58,343 (2001).

I. Environmental Response Actions. 10 U.S.C. § 2810. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. 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.

2. Requirements for Use.

a. Before using this authority, the SECDEF must determine that the project is necessary to carry out an environmental response action under:

(1) The Defense Environmental Restoration Program, 10 U.S.C. §§ 2701-2708; or

[21] 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. 4270.36, para. 4.2.3. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.H.

[22] 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).

(2) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675.

b. In addition, the SECDEF must:

(1) Notify the appropriate committees of Congress;[23] and

(2) Wait 21 days.[24]

3. Source of Funding. The SECDEF must use funds specifically appropriated for environmental restoration to finance these projects.[25]

J. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DOD Dir. 4270.36; AR 415-15, para. 1-6b(3) and app. D, para. D-1; AFI 32-1021, para. 5.2.2; AFI 65-601, vol. 1, para. 9.12.7; OPNAVINST 11010.20F, para. 6.4.3; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

1. Authorized Use. The Secretary of a military department may use this authority to repair, restore, or replace a facility that has been damaged or destroyed.[26]

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[23] 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).

[24] DOD Reg. 7000.14-R, 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.

[25] Congress provides annual appropriations for environmental restoration projects. See, e.g., Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999). See DOD Dir. 4270.36, para. 3.2 (stating that reprogramming is not necessary for these projects). But see DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.G.2 (detailing the requirements for reprogramming requests).

[26] 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.

2. Requirements for Use. If the estimated cost of the project exceeds the UMMC threshold (i.e., $1.5 million), the Secretary concerned must:

a. Notify the appropriate committees of Congress;[27] and

b. Wait 21 days.

3. Source of Funding.

a. O&M Funds. See H.R. REP. NO. 97-612 (1982); see also AR 415-15, app. D, para. D-1c(3) and fig. D-1; AFI 32-1021, para. 5.2.2.2.

(1) The Secretary concerned may use O&M funds if the cost of the project is $500,000 or less.

(2) The Secretary concerned may also use O&M funds to repair or restore a facility temporarily to:

(a) Prevent additional significant deterioration;

(b) Mitigate a serious life or safety hazard; or

(c) Avoid severe degradation of a critical mission.

[27] 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.2 (detailing the requirements for reprogramming requests); AR 420-10, para. 4-8 (providing for expedited project approval and execution procedures).

b. Military Construction (MILCON) Funds.[28] See H.R. REP. NO. 97-612 (1982).

(1) 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.[29]

(a) Congress must normally approve a reprogramming request for the project.[30]

(b) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.

(2) 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.

4. Limitations.

a. DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.J.5, states that: "Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request]."

b. Army Limitations. AR 415-15, app. D, para. D-1c(2) restricts the use of this authority for family housing projects.

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[28] MILCON funds are the funds Congress appropriates under the Military Construction Appropriations Act. They include both "specified" funds and UMMC funds.

[29] 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); see also AR 415-15, app. D, para. D-1c(4).

[30] The Secretary concerned must submit reprogramming requests to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.36, para. 3.2; AR 415-15, app. D, para. D-1d. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.6 (requiring prior congressional notification and approval for reprogramming action).

c. Air Force Limitations. AFI 32-1021, para. 5.2.2.1, provides additional criteria for repairing damaged Air Force facilities.

(1) The damaged or destroyed facility must have been in use (or planned for use) at the time it was damaged or destroyed.

(2) 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").

(3) A MAJCOM may not use this authority to correct space deficiencies.

d. 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 11010.20F, para. 6.4.3 (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").[31]

[31] OPNAVINST 11010.20F, para. 6.4.3, defines "major restoration" as "a restoration costing in excess of 50 percent of the cost of completely replacing the facility."

VII. 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.

VIII. DEFINING THE SCOPE OF THE PROJECT.

A. Project splitting (a.k.a. incrementation)[32] is prohibited!! See AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1b; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20F, para. 6.2.1.

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[32] 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.

b. Each part is in itself complete and usable.

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

d. In order to determine what constitutes a stand alone project, i.e., a complete and usable facility, a comparison of interdependence as opposed to facility interrelations should be made . . . ."

See DA Pam 420-11, Glossary, sec. II; see also AR 415-15, Glossary, sec. II (distinguishing between the phasing of construction and incremental construction).

1. 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; AR 415-15, para. 2-3a; AR 415-32, Glossary, sec. II; AR 420-10, para. 4-1c; AFI 32-1021, para. 3.2.1; OPNAVINST 11010.20F, para. 6.1.1.f; 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 split a project involving 12 related trailers into 12 separate projects).

2. An agency may not treat "clearly interrelated"[33] 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).

B. Guidance and Restrictions.

1. Legislative History. H.R. REP. NO. 97-612 (1982).

a. The conference report that accompanied the MCCA specifically prohibited:

(1) Splitting a project into increments to avoid:

(a) An approval threshold; or

(b) The UMMC cost ceiling;

[33] 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*, 87th Cong. (1962); Hon. Sam Rayburn, Comp. Gen., B-133316 (Jan. 24, 1961); and Hon. Sam Rayburn, Comp. Gen., B-133316 (Mar. 12, 1962).

(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.[34]

(1) A military department could carry out an UMMC construction project before another military construction project if:

(a) The UMMC construction project satisfied a new mission requirement; and

(b) The UMMC construction project would provide a complete and usable facility that would meet a specific need during a specific period of time.

(2) A military department could carry out an UMMC construction project after another military construction project to satisfy a new mission requirement that arose after the completion of the other project.

2. DOD Guidance and Restrictions. DOD Reg. 7000.14-R, vol. 3, ch. 17, paras. 170102.I and 170102.L.

a. As a general rule, DOD Components may not engage in incremental construction (i.e., the planned acquisition or improvement of a facility through a series of minor construction projects).

[34] The conference report indicated that a military department should rarely use these exceptions. H.R. REP. NO. 97-612 (1982).

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.

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 420-10, para. 4-4; DA Pam 420-11, para. 1-7n.

a. AR 420-10, para. 4-4a, 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 420-10, para. 4-4b, 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 11010.20F, para. 2.2.5, generally requires shore activities to incorporate all work required to meet a requirement in a single facility in a single project.

b. OPNAVINST 11010.20F, para. 6.2.1., 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 11010.20F, para. 6.2.1.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 11010.20F, para. 6.2.1.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 11010.20F, para. 6.2.3, only permits multiple minor construction projects in a single facility if:[35]

(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.

[35] Cf. OPNAVINST 11010.20F, para. 6.2.1.a (imposing similar requirements for construction work involving multiple facilities).

IX. 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 415-15, para. 2-3a, and Glossary, sec. II; AR 415-32, Glossary, sec. II; AR 420-10, Glossary, sec. II; DA Pam 420-11, para. 1-6c; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20F, ch. 6, para. 6.1.1. Construction includes:

a. The erection, installation, or assembly of a new facility.

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.[36]

(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.

e. Related site preparation, excavation, filling, landscaping, or other land improvements.[37]

B. Maintenance and Repair.

1. Maintenance and repair projects are not construction. AR 420-10, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20F, ch. 3, para. 3.1.1, and ch. 4, para 4.1.1. Therefore, maintenance and repair projects are not subject to the $500,000 O&M limitation on construction.[38] 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").

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[36] 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, 2002, Pub. L. No. 107-64, § 107, 115 Stat. 474 (2001).

[37] This includes the foundation, site work, and utility work associated with the setup of a relocatable building. DA Pam 420-11, para. 1-6c(6).

[38] But see 10 U.S.C. § 2811. If the estimated cost of a repair project exceeds $5 million, the Secretary concerned must approve the project in advance. 10 U.S.C. § 2811(b). If the estimated cost of a repair project exceeds $10

2. Definitions.

a. Maintenance.

(1) AR 420-10, 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, attch 1.

(3) OPNAVINST 11010.20F, para. 4.1.1, 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."

(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).

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million, the Secretary concerned 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. § 2811(d).

(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.[39]

(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 415-15, para. 2-3b; AR 420-10, 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.

[39] DOD Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105, and AR 415-15, para. 2-3b, provide the same example. Both state 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 that 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;[40]

(iii) Relocating or reconfiguring components (e.g., partitions, windows, and doors) during a major repair project if they are replacements for existing components;[41]

(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

[40] 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.

[41] 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;[42] 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, attch 1. The term "repair" means to restore real property, real property systems, and real property components to such a condition that the Air Force may use it effectively for its designated functional purpose. However, AFI 32-1032, para. 4.1.2, specifically states that real property, real property systems, and real property components "need not have failed to permit a repair project." (emphasis added).

(a) The term "repair" includes:

[42] Under certain circumstances, the Army may classify a utility system or component as "failing" if it is energy inefficient or technologically obsolete. See AR 420-10, 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);[43]

(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 <u>not</u> include:

(i) Expanding a facility's foundation beyond its current footprint;

(ii) Elevating or expanding the "functional space" of a facility;

[43] 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;[44] or

(xiii) Repairing a facility if the repair work exceeds 70% of the facility's replacement cost.[45]

[44] 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 11010.20F, para. 3.1.1.[46] 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:[47]

(a) The modification or addition of building or facility components or materials to meet current safety, building, or environmental codes (e.g., correcting seismic or life safety deficiencies; installing fire protection; and removing asbestos containing materials);

(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 components with higher quality or more durable components if the replacement does not substantially increase the capacity or change the function of the component;

(d) The replacement of energy consuming equipment with more efficient equipment if:

(i) The shore activity can recover the additional cost through cost savings within 10 years;

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[45] 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. 5.1.2.3.3.

[46] This regulatory provision pre-dates the DOD's new definition of repair. See DOD Repair Memorandum.

[47] OPNAVINST 11010.20F, para. 3.1.3, contains several additional examples of repair projects.

(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.).

(2) The term "repair" does not include:

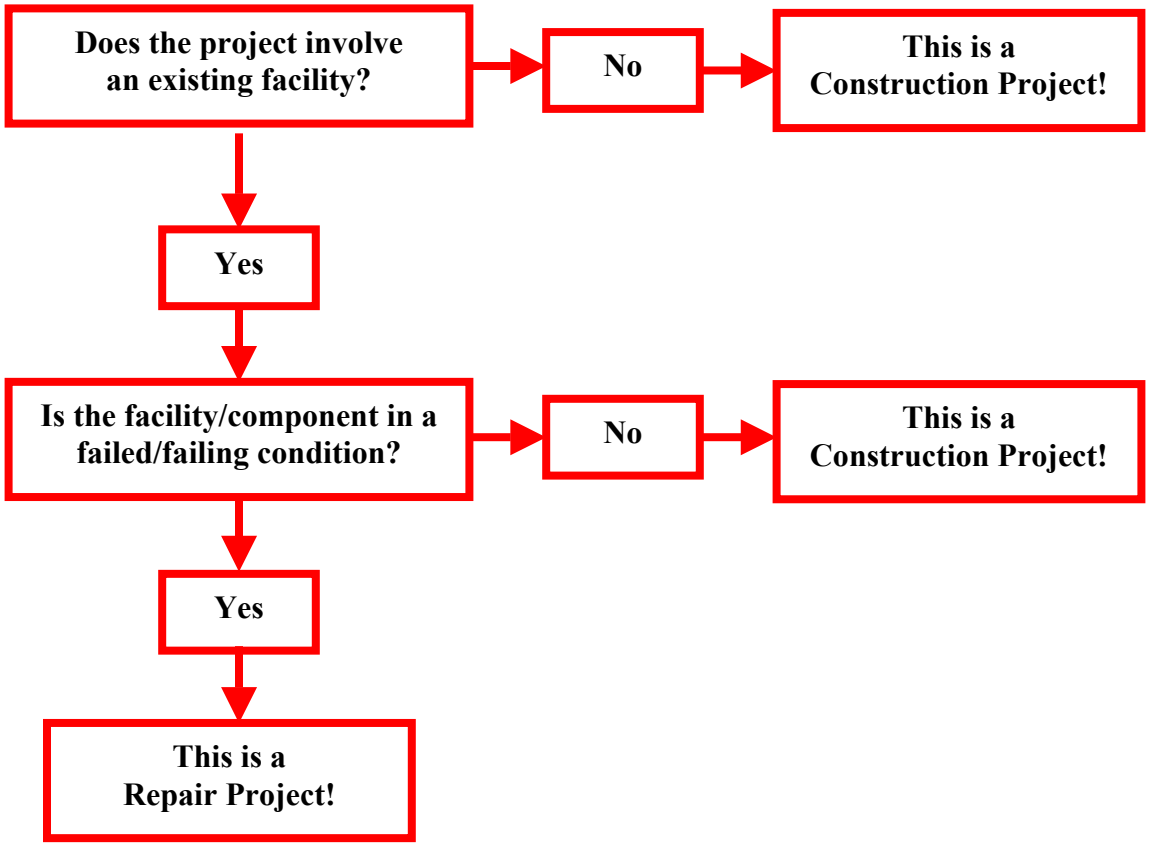
(a) Additions, expansions, alterations, or modifications required solely to meet new purposes or missions;

(b) The extension of facility systems or components to areas the shore activity is not repairing and/or areas not previously served;

(c) Increases to exterior facility dimensions or utility plant capacity; and

(d) Alterations to quarters to meet current DOD or Navy design standards.

3. Analysis.



4. Concurrent Work. AR 420-10, para. 4-6a; AFI 32-1032, paras. 3.4.3 and 4.1.2.2.5.

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.

X. DETERMINING THE FUNDED/UNFUNDED COSTS OF THE PROJECT.

A. Applicability of Project Limits. AR 420-10, Glossary, sec. II; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20F, ch. 2, para. 2.1.1. 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 420-10, para. 4-6c, and Glossary, sec. II; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, attch 1; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20F, para. 2.1.1.e.

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;[48]

b. Installed capital equipment;[49]

c. Transportation costs for materials, supplies, and unit equipment;[50]

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[48] AR 420-10, para. 4-6c, specifically includes government-owned materials, supplies, and services as funded costs. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 070102.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); DA Pam 420-11, Glossary, sec. II (stating that "Army owned materials, supplies, or items of installed capital-type equipment must be charged to construction projects as funded project costs").

[49] 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;[51]

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 420-10, para. 4-6f, and Glossary, sec. II; AFI 32-1021, attch 1; AFI 65-601, vol. 1, para. 9.14; OPNAVINST 11010.20F, para. 2.1.1.f.

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

c. Are not reimbursed by appropriations available to fund the project.

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[50] 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).

[51] 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).

2. Unfunded costs include, but are not necessarily limited to:

a. Military and civilian prisoner labor;

b. Depreciation of government-owned equipment;[52]

c. Materials, supplies, and equipment obtained for the project on a non-reimbursable basis as excess distributions from another military department or federal agency.[53]

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. Gifts from private parties;[54]

g. Contract or in-house planning and design costs;[55] and

h. Donated labor and material.[56]

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[52] Equipment maintenance and operation costs are funded costs.

[53] Transportation costs are funded costs.

[54] 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/.

[55] See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 070102.I.4 (stating that planning and design costs are excluded from the cost determination for purposes of determining compliance with 10 U.S.C. § 2805). But see OPNAVINST 11010.20F, para. 2.1.1.f. (stating that planning and design costs are funded costs in design-build contracts).

3. Report unfunded costs to higher headquarters even though they do not apply toward the military construction appropriation limitations.

XI. SELECTING THE PROPER APPROPRIATION.

A. 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 $1.5 million ($3 million if the project is intended solely to correct a deficiency that threatens life, health, or safety), use UMMC funds.

3. If the approved cost of the project is greater than $1.5 million, use "specified" MILCON funds.

B. Exceeding a Statutory Threshold. AR 415-15, app. B, para. B-4a; AFI 32-1021, para. 4.7.

1. Exceeding a statutory threshold violates the Purpose Statute and may result in a violation of the Antideficiency Act. See AR 415-15, app. B., para. B-4a.

2. When a project exceeds—or is expected to exceed a statutory threshold—the department or agency must:

a. Stop all work immediately;

b. Review the scope of the project and verify the work classification; and

[56] The acceptance of donated labor may violate the prohibition against accepting voluntary services. 31 U.S.C. § 1342.

c. Consider deleting unnecessary work.[57]

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 Antideficiency 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.[58]

C. Authorized Variations.[59] 10 U.S.C. § 2853; AR 415-15, paras. 5-16 and 5-17; AFI 65-601, vol. 1, para. 9.4.3; AFI 32-1021, para. 4.6.5; OPNAVINST 11010.20F.

1. Cost Increases.

---

[57] The department or agency must avoid project splitting. Therefore, the department or agency should only delete truly unnecessary work. AR 415-15, app. B, para. B-4b(3).

[58] 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.

[59] 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."

a. The Secretary of a military department may increase the cost of a "specified" military construction project by the lesser of:

(1) 25% of the appropriated amount; or

(2) 200% of the UMMC ceiling (i.e., $3 million).

b. However, the Secretary concerned must first determine that:

(1) The increase 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.

2. Scope Decreases. The Secretary of a military department may also reduce the scope of a "specified" military construction project by not more than 25% of the amount approved for the project.

3. Notification Requirements. The Secretary concerned must notify the appropriate committees of Congress of any cost increases or scope reductions that exceed the authorized variations.

XII. VERIFYING THE IDENTITY OF THE PROPER APPROVAL AUTHORITY.

A. Approval of Construction Projects.

1. Army. AR 415-15, app. B; AR 420-10, para. 4-3a.

a. MACOM commanders may approve – or delegate approval authority for – UMMC projects costing $750,000 or less ($1.5 million or less if the project is intended solely to correct a deficiency that threatens life, health, or safety).[60]

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. AR 415-15, app. B.

2. Air Force. AFI 32-1032, paras. 1.4 and tbl 1.1; AFI 65-601, vol. 1, tbl 9.1.[61]

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).[62]

b. The SAF/MII approves UMMC projects costing between $500,000 and $1.5 million.

---

[60] MACOM commanders may delegate their approval authority to MACOM staff or subordinate commanders, who may then redelegate the authority. AR 420-10, para. 4-3a.

[61] These regulatory provisions pre-date the amendment that increased the statutory threshold for O&M projects to $500,000.

[62] The AF/ILE may further delegate this authority. AFI 32-1032, para. 1.4.

3. Navy. OPNAVINST 11010.20F, app. B, tbl 1.

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.

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 11010.20F, tbl 1.

B. Approval of Maintenance and Repair Projects.[63]

1. Army. AR 420-10, para. 4-5.

a. MACOM commanders may normally approve – or delegate approval authority – for maintenance and repair projects costing $2 million or less.[64]

b. HQDA approves maintenance and repair projects costing $2 million or more.

[63] Before a military department can carry out a repair project that costs more than $5 million, the Secretary concerned must approve the project. 10 U.S.C. § 2811(b). In addition, if the project costs more than $10 million, the Secretary concerned must notify the appropriate committees of Congress in writing. 10 U.S.C. § 2811(d).

[64] MACOM commanders may delegate their approval authority to MACOM staff, subordinate commanders, or installation commanders, who may then redelegate the authority. AR 420-10, para. 4-3a.

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 11010.20F, app. B, tbl. 1.

a. The C.O. approves recurring maintenance projects, specific maintenance projects costing $1 million or less, and general repair projects costing $1 million or less.

b. The Major Claimant approves specific maintenance projects costing $1 million or more and general repair projects costing between $1 million and $5 million.

c. The ASN(I&E) approves general repair projects costing $5 million or more.

XIII. CONCLUSION.

A. Use a structured methodology to analyze construction funding issues.

B. Document rationale for funding decisions.

C. Different rules may apply during overseas exercises and contingency operations.

DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104

February 22, 2000

MEMORANDUM FOR ASSISTANT SECRETARY (FINANCIAL MANAGEMENT & COMPTROLLER)

SUBJECT: Construction of Contingency Facility Requirements

This memorandum supercedes a memorandum from this office dated January 21, 1997, subject as above, regarding the proper funds to use for construction of facilities to support military operations.

Operation and Maintenance, Army appropriations are the appropriate funding source for acquisition of materials and/or cost of erection of structures during combat or contingency operations, as defined in 10 U.S.C. Section 101(a)(13) that are clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations. Such structures may not be used for the purpose of satisfying requirements of a permanent nature at the conclusion of combat or contingency operations. Military Construction, Army appropriations shall be used in all other situations, including all construction used after the termination of military operations necessitating the construction, except those minor construction projects authorized pursuant to 10 USC Section 2805(c).

Matt Reres
Deputy General Counsel
(Ethics & Fiscal)

DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
1777 HARDEE AVENUE SW
FORT MCPHERSON GEORGIA 30330-1062

REPLY TO
ATTENTION OF

AFEN-ENO

06 MAR 00

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Funding and Approval Authority

1. References:

a. Memorandum, AFPI-ENO, 7 Dec 98, SAB.

b. AR 420-10, Management of Installation Directorates of Engineering and Housing, 15 Apr 97.

2. The purpose of this memorandum is to provide installation commanders an updated, consolidated listing of Engineer funding and approval limitations. The enclosed table provides the different levels of approval authority and supersedes reference 1a.

3. Installation commanders are authorized to delegate their approval authority to their staff as necessary, except as otherwise noted. Installations must document Life, Health and Safety (LHS) deficiencies and verbally discuss with FORSCOM prior to approving minor construction projects using Operation and Maintenance, Army (OMA) funds (L account).

4. All appropriated funded and non-appropriated funded projects requiring approval by higher headquarters will be forwarded to FORSCOM, ATTN: AFEN-ENO. For non-appropriated funded (NAF) projects, also provide a copy to this headquarters, ATTN: AFPI-MWS. For more information, contact Muthu Kumat at this headquarters, AFEN-ENO, DSN 367-5311 or COMM 404-464-5311, E-mail address: kumarm@forscom.army.mil, or FAX: DSN 367-7751/7697.

FOR THE COMMANDER:

Encl

GEOFFREY D. MILLER
Major General, USA
Deputy Chief of Staff for Personnel
and Installation Management

AFEN-ENO
SUBJECT: Funding and Approval Authority

DISTRIBUTION:
COMMANDER
FIFTH UNITED STATES ARMY AND FORT SAM HOUSTON, ATTN: AFKB-CG
I CORPS AND FORT LEWIS, ATTN: AFZH-CG
III CORPS AND FORT HOOD, ATTN: AFZF-CG
FORT RILEY, ATTN: AFZN-CG
FORT CARSON, ATTN: AFZC-CG
10TH MOUNTAIN DIVISION AND FORT DRUM, ATTN: AFZS-CG
24TH INFANTRY DIVISION AND FORT STEWART, ATTN: AFZP-CG
101ST AIRBORNE DIVISION AND FORT CAMPBELL, ATTN: AFZB-CG
JOINT READINESS TRAINING CENTER AND FORT POLK, ATTN: AFZX-CG
NATIONAL TRAINING CENTER AND FORT IRWIN, ATTN: AFZJ-CG
FORT DIX, ATTN: AFTZ-CO
FORT MCPHERSON, ATTN: AFZK-CO
FIRST U.S. ARMY, ATTN: AFKA-CG
THIRD U.S. ARMY, ATTN: AFRD-CG
U.S. ARMY RESERVE COMMAND, ATTN: AFRC-CG

MILITARY CONSTRUCTION, ARMY (MCA)
OPERATION AND MAINTENANCE, ARMY (OMA)
FUNDING LIMITATIONS, APPROVAL AUTHORITIES

PROJECT REQUIREMENT	HQDA	FORSCOM	Installation	Reference
I. Military Construction, Army (MCA)				
a. Major MCA	Not Authorized	Not Authorized	Not Authorized	AR 415-15
b. Unspecified Minor MCA (UMMCA)	$1.5M (1.) $3M (3.)	Not Authorized	Not Authorized	AR 415-15 App. B PL 104-106, 10 USC, Sect 2811
II. Operation & Maintenance, Army (OMA)				
a. Maintenance (K-Account)	>$3M (2.)	$3M	$3M	AR 420-10 FORSCOM Memo, 11 DEC 95
b. Repair (K-Account)	>$3M (2.)	$3M	$3M (4.)	AR 420-10 FORSCOM Memo, 11 DEC 95
1. If repair cost, including alterations, is greater than 50% of facility replacement cost	>$500K (2.)	Delegated	$500K (4.)	AR 420-10 FORSCOM Memo, 11 DEC 95
c. Minor Construction (L-Account)	Not Applicable	Delegated	$500K $1M (3.)(4.)	PL 104-106 10 USC, Sect 2811 AR 415-15 & 420-10

(1.) Assistant Chief of Staff for Installation Management (ACSIM) approval. (2.) Assistant Secretary of the Army (ASA IL&E) approval. **(3.) Correction of life, health or safety (LHS) deficiencies. Installation must document the LHS deficiencies and verbally review with FORSCOM before giving approval.** (4.) Installation commander can approve repair or alteration work on WWII Temporary buildings in excess of $20/SF, but cannot redelegate (FORSCOM memo 17 Mar 95)

ARMY FAMILY HOUSING
FUNDING LIMITATIONS, APPROVAL AUTHORITIES

PROJECT REQUIREMENT	HQDA	FORSCOM	Installation	Reference
I. New Construction (BP 1000)	$2M per Project; (4.)	Not Authorized	Not Authorized	AR 210-50
II. Improvements/Revitalization (BP 6000)	$2M per Project; <$50K/DU (4.)	Not Authorized	Not Authorized	AR 210-50
III. Maintenance & Repair (BP 1920) (Non-GFOQ)				
a. Per Project	>$1M (1.)	Delegated	<$1M (1.)	AR 210-50
b. Per DU	>$20K (1.) (2.) <$50K (3.)(7.)	Delegated	<$20K (1.)	AR 210-50 PL 106-52
IV. Operations, Maintenace, & Repair (O&M)- (GFOQ)				
a. Single Major M&R project per DU per yr	>$20K (1.) (2.)(7.)	Delegated	<$20K	AR 210-50 PL 106-52
b. Total M&R per DU per yr	>$25K (2.)(6)(7.)	Delegated	<$25K	AR 210-50 PL106-52
c. O&M per DU	>$50K (5)(7.)	Delegated	<$50K	AR 210-50 PL106-52

(1.) Project cost will not exceed 50% of dwelling unit replacement cost and includes incidental improvements.
(2.) Projects must be reported to Congress one year prior to planned obligation. (3.) Fire or natural disaster damaged DU.
(4.) If funding is available within existing amount appropriated by Congress. All projects authorized and appropriated by Congress.
(5.) ASA-O&M greater than $50K when maintenance and repair (BP 1920) is less than $25K. (6.) Includes M&R of security and antiterrorism measures. Excludes work associated with communications equipment required by occupants to perform their mission.
(7.) Lead Based Paint & Asbestos abatement which cause total project cost to exceed $20K/DU can be approved by HQDA.

6 MAR 2000

ARMY FAMILY HOUSING
FUNDING LIMITATIONS, APPROVAL AUTHORITIES

PROJECT REQUIREMENT	HQDA	FORSCOM	Installation	Reference
V. Incidental Improvements (BP 1920) per DU per FY	>$3K (1.)	Delegated	<$3K (1.)(4.)	AR 210-50
a. Per Project	>$500K	Delegated	<$500K	AFPI-ENO 14 JAN 97
VI. AFH Cumulative Major Maintenance, Repair and Incidental Improvements				
b. BP 1920 per DU per FY	> $20K (4.)	Delegated	$20K	AR 210-50
VII. M&R (BP 1920) with concurrent improvements per DU	M&R > $20K (2.) Improvement $50K (3.)	Delegated	Total $20K(5) Improvement $3K (1) (4.)	AR 210-50

Notes: (1.) Limit for improvements to quarters of family having an exceptional family member is $ 20K, DAIM-FDH-F, Memo, 27 Oct 99, Subject: Interim Policy Change, AFH Maintenance and Repair (M&R) Limitation. (2.) Projects must be reported to Congress one year prior to planned obligation. (3.) Reprogram under BP 1000 or BP 6000. (4.) Incidental improvements cannot increase size of DU, increase # of rooms, add A/C, or add new or alter garages, carports, storage sheds, detached facilities, patios, decks, porches, perimeter fencing, or lawn sprinkler systems. (5) Includes costs for concurrent incidental improvements and excludes costs for asbestos and lead-based paint abatement.

NON-APPROPRIATED FUNDS (NAF)
REAL ESTATE, OTHER PROCUREMENT
FUNDING LIMITATIONS, APPROVAL AUTHORITIES

REQUIREMENT	HQDA	FORSCOM	Installation	Reference
I. Non-Appropriated Funds (NAF)				
a. NAF Minor Construction	Not Authorized	$200-$500K	$200K	AR 415-19/215-1 AFPI-MWS MEMO 6 Feb 98
b. Combined NAF/APF or Special Const	Unlimited	Delegated	500K (APF) $200K (NAF)	AR 415-19/215-1
c. NAF Maintenance	Unlimited	Delegated	$2M (1.) (2.)	AR 420-10/215-1
d. NAF Repair				
1. Cost < 50% of facility replacement cost	Unlimited	Delegated	$2M (1.) (2.)	AR 420-10/215-1
2. Cost, including alteration, is greater than 50% of facility replacement cost	Unlimited	Delegated	$500K	AR 420-10/215-1
II. Real Estate				
a. Short-Term Leases	Not Applicable	Not Applicable	$500	C1 to AR 405-10
b. Initiate Acquisition Actions				
1. Requests	Not Applicable	Unlimited	Unlimited	AR 405-10
2. Acquisition Report	Not Applicable	Not Authorized	Not Authorized	AR 405-10
3. Lease Execution	Not Applicable	Not Authorized	Not Authorized	AR 405-10
(Listing Continues Next Page....)				

(1.) M&R projects over $500K will be reported to USA CFSC along with annual capital purchase and construction budget.
(2.) Installation Commanders must certify that no APF funds are available if NAF are used .

NON-APPROPRIATED FUNDS (NAF)
REAL ESTATE, OTHER PROCUREMENT
FUNDING LIMITATIONS, APPROVAL AUTHORITIES

REQUIREMENT	HQDA	FORSCOM	Installation	Reference
II. Real Estate (continued...)				
c. Approve Disposal (Form 337)	Not Applicable	>$200K	$200K	AR 405-90
d. Reports of Availability				
1. Special Events	Not Applicable	Not Authorized	(4.)	AR 405-80
2. Other New - Time Frame	>5 Years	5 years	Not Authorized	AR 405-80
3. Renewals - Time Frame	Not Applicable	Delegated	5 years	AR 405-80
III. Other Procurement				
a. Base Level Commercial Equipment (BCE) (with OPA funds)	Not Applicable	Not Applicable	>$100K	PL 104-61, Sect 8065
b. Noncentrally managed commercial Equipment (BCE) (with OMA funds)	Not Applicable	Not Applicable	<$100K	PL 104-61, Sect 8065
c. Centrally managed commercial Design Vehicles (with OPA funds)	Unlimited (3.)	None	None	AR 58-1
d. Noncentrally managed commercial Design Vehicles (with OMA funds)	Not Applicable	<$100K	None	AR 58-1
e. Relocatable Building 1. Lease	<$100K & <1 yr (1.) >$100K & >1 yr (2.)	Delegated	$50K/ 1 year	AR 420-18 FORSCOM Memo, 27 Apr 95
2. Lease Extension	<$100K & <1 yr (1.) >$100K & >1 yr (2.)	Delegated	$50K/ 1 year	AR 420-18 FORSCOM Memo, 27 Apr 95
3. Transfers (Other Locations)	<$100K & <1 yr (1.) >$100K & >1 yr (2.)	Delegated	$50K/ 1 year	AR 420-18 FORSCOM Memo, 27 Apr 95
4. Purchase	No Authority (1.) Unlimited (2.)	Not Authorized	Not Authorized	AR 420-18
5. Continued Use Beyond 3 years	No Authority (1.) Unlimited (2.)	Not Authorized	Not Authorized	AR 420-18

Notes: (1.) ACSIM can approve. (2.) Assistant Secretary of the Army (ASA) can approve. (3.) Tank Automotive Command can approve. (4.) Seven (7) consecutive days or up to 30 days in a 12-month period.

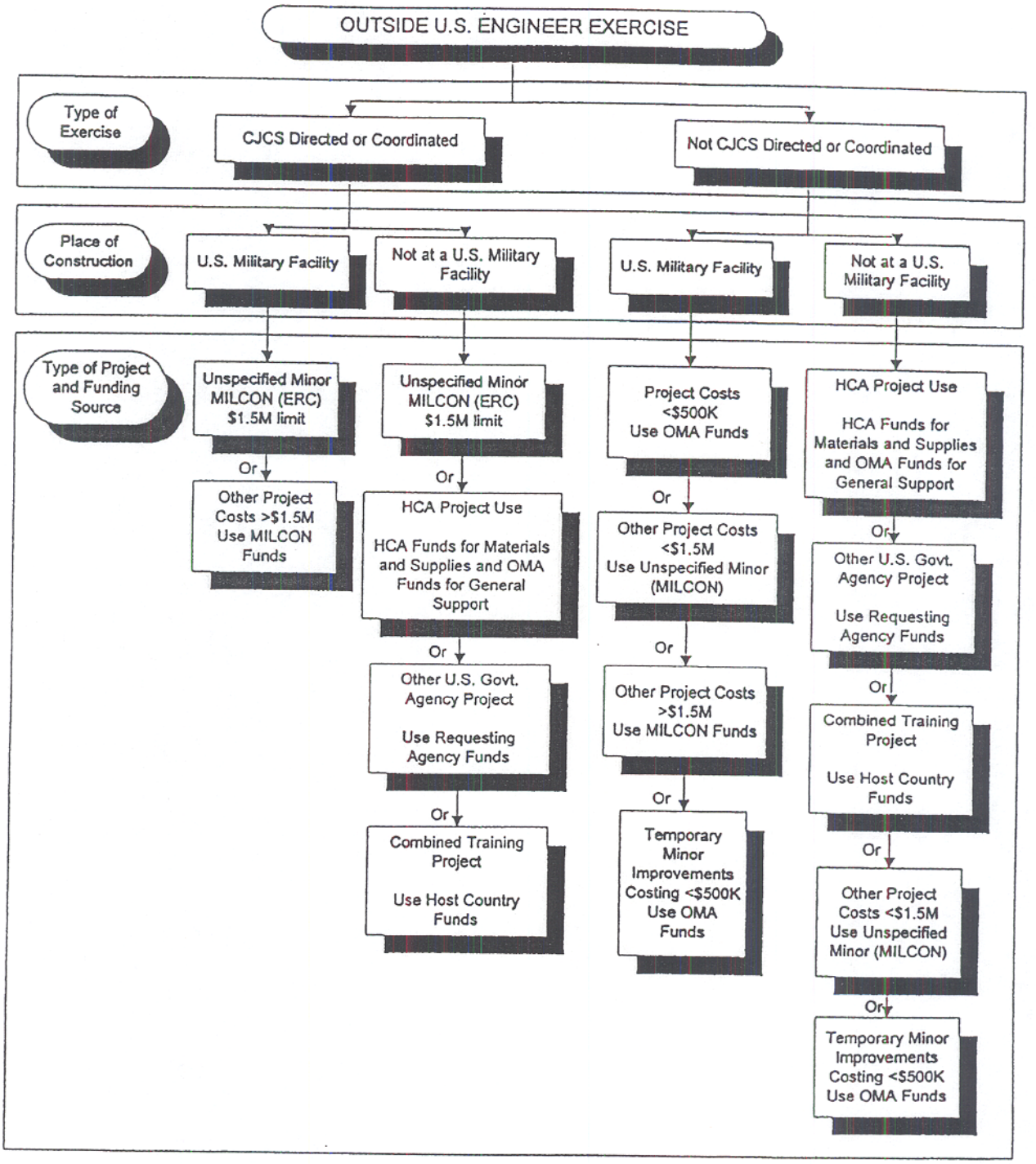

Figure 3-1. Engineer Exercise Conducted Outside the United States

CHAPTER 6

THE ANTIDEFICIENCY ACT

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CHAPTER 6

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 Cir. A-34, Instructions on Budget Execution (Dec. 1995), available at www.whitehouse.gov/omb/circulars/a034.

F. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 14 (Aug. 1995) [hereinafter DOD 7000.14-R]. Go to http://www.dtic.mil/comptroller/fmr.

G. Air Force Instr. (AFI) 65-608, Antideficiency Act Violations (May 1998).

H. Interim Guidance on Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter Air Force Procedures for Administrative Control of Appropriations] available at http://dfas4dod.dfas.mil/centers/dfasde/denvercenter/regulations.htm.

I. Defense Finance and Accounting Service--Indianapolis Reg. (DFAS-IN) 37-1, Finance and Accounting Policy Implementation (Jan. 2000), go to http://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1.

J. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).

LTC Tim Pendolino
Fiscal Law Course
February / March 2002

III. FISCAL CONTROLS AT THE APPROPRIATION LEVEL. THE FIRST LEVEL -- 31 U.S.C. § 1341.

A. In Excess of. 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). USEC Portsmouth Gaseous Diffusion Plant "Cold Standby" Plan, B-286661, Jan. 19, 2001, ___ Comp. Gen. ___; Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992).

1. 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).

2. 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. 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).

B. In Advance of. 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).

C. Sequestered Funds. An officer or employee may not make or authorize an expenditure or obligation, or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(C) and (D).

D. Exceptions. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law.

1. The statute specifically must authorize entering into a contract in advance of or in excess 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).

   a. Example: 41 U.S.C. § 11 permits the DOD and the Coast Guard to contract without an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current fiscal year (FY). Report use of this authority to the next higher level of command. See DOD 7000.14-R, 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 41 U.S.C. § 11 is "contract" authority, and does not authorize disbursements. See Air Force Procedures for Administrative Control of Appropriations, § 4, para. E.

2. Certain statutes authorize the execution of multiyear contracts. See, e.g., 10 U.S.C. §§ 2306c, 2306b, 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).

E. 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).

1. Activities may initiate certain contracting actions prior to an appropriation if the solicitation and contract include the clause, FAR 52.232-18, Availability of Funds. See To Charles R. Hartgraves, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485 (award without clause violated the ADA).

2. The government may not accept supplies or services under these contracts until the contracting officer has given notice that funds are available.

F. 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).

IV. APPORTIONMENT. THE SECOND LEVEL -- 31 U.S.C. §§ 1512 – 1513, 1517(A)(1).

A. 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 this authority to the Office of Management and Budget (OMB).

B. 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 objects. OMB Cir. A-34, para. 21.1.1.

C. Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. 31 U.S.C. § 1512.

1. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:

   a. Military and civilian pay increases;

   b. Laws enacted after budget submission which require additional expenditures; or

   c. Emergencies involving life or property.

2. 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).

D. Prohibitions.

1. An officer or employee of the United States may not make or authorize an obligation or expenditure that exceeds an apportionment. 31 U.S.C. § 1517 (a)(1).

2. The statute does not prohibit obligating **in advance of** an apportionment. See Cessna Aircraft Co. v. Dalton, 126 F.3d 1442 (Fed. Cir. 1997); but see Air Force Procedures for Administrative Control of Appropriations, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are apportioned).

V. ADMINISTRATIVE DIVISION OF APPORTIONMENTS. THE THIRD LEVEL. 31 U.S.C. § 1514.

A. 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:

1. OMB Cir. A-34, para. 31.5. This circular applies to all agencies and requires OMB approval of fund control systems.

2. DOD Dir. 7200.1, Administrative Control of Appropriations; DOD FMR, vol. 14, app. A, (March 2001).

3. DFAS-IN 37-1, Finance and Accounting Policy Implementation; Air Force Procedures for Administrative Control of Appropriations; NAVCOMPT 7300.101; MCOs P4200.15 and P7300.8.

B. Administrative Subdivisions of Funds. OMB Cir. A-34, para. 21.1; DOD FMR, vol.14, app. A (March 2001).

1. 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 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).

2. 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. An officer or employee may not make or authorize an obligation or expenditure that exceeds a formal subdivision established by regulations. See 31 U.S.C. §1517(a)(2).

Discussion Problem: On 30 August, Fort Tiefort 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 recorded this obligation as $120,000. As a result, the Directorate of Resource Management believed erroneously that the Fort still had $50,000 left in the O&M allowance. In order 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?

VI. ANTIDEFICIENCY ISSUES.

A. Purpose Statute. 31 U.S.C. § 1301(a). A violation of the Purpose Statute also may lead to a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517. 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; To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984). Officials **may** be able to avoid an antideficiency violation if:

1. Proper funds were available at the time of the erroneous obligation;

2. Proper funds were available continuously from the time of the erroneous obligation; and

3. Proper funds were available for the agency to correct the erroneous obligation.

See Air Force 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).

Discussion Problem: The Chief of Staff at Fort Tiefort 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 Tiefort, the Chief commissions a world-renowned military artist to create a painting that captures the spirit of Fort Tiefort 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 Tiefort uses O&M funds to cover the entire $150,000 cost of this venture. Any ADA problems here?

B. "Bona Fide Needs Rule."

1. A violation of the Bona Fide Needs Rule, i.e., 31 U.S.C. § 1502, 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; Air Force Procedures for Administrative Control of Appropriations, § 10, para. G.

2. To determine whether a Bona Fide Needs Rule violation is correctable, follow the same analytical process used for correcting a purpose violation.

C. Operation and Maintenance (O&M) Funds.

1. 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 DOD FMR, vol. 14, ch. 10 (March 2001); cf. Air Force Procedures for Administrative Control of Appropriations, § 6, para. C.6 ("Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation."). See also The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable).

2. DOD activities may use O&M funds for purchase of investment items costing less than $100,000. See Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8046, 113 Stat. 1240 (1999). Use of O&M in excess of this threshold is a purpose violation and may trigger an antideficiency violation. See DOD FMR, vol. 14, ch. 10 (March 2001); Air Force Procedures for Administrative Control of Appropriations, § 6, para. C.2.

Discussion Problems:

--- On 3 August 2001, the Fort Tiefort contracting officer awarded a contract for 50 off-the-shelf computers for a total of $110,000. 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 2001. Any fiscal issues here?

--- On 1 July 2001, the Fort Tiefort contracting officer awarded a $690,000 contract for the construction of a storage facility. The contract was funded with FY 2001 O&M funds. Things went smoothly until 8 October 2001 when the contracting officer issued what she thought was an in-scope contract modification increasing the contract price by $50,000. The contracting officer cited FY 2001 O&M funds on the modification. On 28 October, the Army Audit Agency (AAA) conducted a random audit of the Fort's contracting process and determined that the 8 October modification was outside the scope of the original contract. Any fiscal issues here?

D. Indemnification Provisions. Open-ended indemnification provisions violate 31 U.S.C. § 1341. See United States Park Police Indemnification Agreement, B-242146, 1991 US Comp. Gen. LEXIS 1070, Aug. 16, 1991; 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. There are statutory exceptions to this rule. See, e.g., 10 U.S.C. § 2354 (research/development contracts may contain indemnity provisions for unusually hazardous risks); 50 U.S.C. § 1431 (President may exempt certain defense-related agreements from Antideficiency Act); 42 U.S.C. § 2210(j) (NRC and DOE may initiate indemnification agreements).

E. 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. This is not a violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984); Availability of Funds for Payment of Intervenor Attorney Fees, B-208637, 62 Comp. Gen. 692 (1983).

F. Option Penalties. Contracts that include separate charges for failure to exercise options violate the Antideficiency Act. Honeywell Info. Sys., Inc., B-186940, 56 Comp. Gen. 167 (1976); Burroughs Corp., B-186313, 56 Comp. Gen. 142 (1976).

G. Augmentation. An ADA violation may arise if an agency retains 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.).

H. Unauthorized Commitments. Would an unauthorized commitment trigger an antideficiency violation? See DFAS-IN 37-1, ch. 9, para. 090211; Air Force Procedures for Administrative Control of Appropriations, § 10, para. E.

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?

VII. 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.).

1. Voluntary services are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. 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. Acceptance of voluntary services does not create a legal obligation. 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.

B. Examples of Voluntary Services Authorized by Law.

1. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).

2. 5 U.S.C. § 3111 (student intern programs).

3. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).

4. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).

5. 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).

6. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).

C. 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.

D. 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. 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. An employee may not waive compensation 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. Tiefort's MACOM (Major Command) has been pushing subordinate commands to implement the MACOM 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. Tiefort that the CG there decided to expand the program. Under Ft. Tiefort'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?

VIII. 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.

IX. PASSENGER CARRIER USE. 31 U.S.C. § 1344; 41 C.F.R. Subparts 101-6.4 and 102-34.

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 antideficiency 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).

X. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS.

A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518; AFI 65-608, para. 4.11.

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. DOD Dir. 7200.1; DOD FMR, vol. 14, ch. 9 (March 2001); Memorandum, Comptroller, Dep't of Defense, subject: Violations of the Antideficiency Act (19 Dec. 1994).

2. Good faith or mistake of fact does not relieve an individual from responsibility for a violation. 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.

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A knowing and willful violation of the Antideficiency Act is a Class E felony. See 18 U.S.C. § 3559(a)(5). Punishment may include a $5,000 fine, confinement for two years, or both. Knowing and willful concealment of a violation is a felony. 18 U.S.C. § 4.

XI. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-34, para. 32.1; DOD FMR, vol. 14, chs. 4-7 (March 2001); 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) [hereinafter Supplemental Guidance]; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3,4.

A. Flash Report. The commander of an Army activity at which a suspected violation occurs must send a flash report through command channels to DA within 15 days of discovery. DFAS-IN 37-1, ch. 4, para. 040204.B. For the Air Force, suspected violations must be reported within 10 working days to the cognizant MAJCOM, Field Operating Activity (FOA), or Direct Reporting Unit (DRU) Financial Management organization. See AFI 65-608, para. 3.3.

B. Investigations.

1. The first step is a preliminary review. The MACOM Commander (or commander at next higher level above the activity where the violation occurred) must appoint a team of experts consisting of an individual with resource management experience, an attorney, and an individual with expertise in the functional area in which the violation occurred. This team must conduct the preliminary review to determine whether an Antideficiency Act violation has occurred. For Army activities, the results of the preliminary review must reach DA not later than 90 days from the date of discovery of the potential violation. See Supplemental Guidance. For the Air Force, the review must be completed and reported to SAF/FMFP no later than 90 days from the review start date.

2. If the preliminary review determines that a violation occurred, the appointing authority must appoint an investigative team to conduct a formal investigation. In the Army, formal investigations are conducted under the provisions of AR 15-6. See Supplemental Guidance; see also DOD FMR, vol. 14, chs. 4-6 (March 2001). Air Force investigators follow the guidance in AFI 90-301, Inspector General Complaints (12 Aug. 1999). A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within 9 months of the date of discovery of the violation. See DOD FMR, vol. 14, ch. 5 (March 2001).

3. If the investigating officer believes criminal issues may be involved, he should suspend the investigation immediately and consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. See DOD FMR, vol. 14, ch. 5 (March 2001).

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 party 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. I (March 2001).

a. Generally, the responsible party 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. Cf. To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.

b. There often will be officials who had knowledge of either factor. The person in the best position to prevent the ultimate error, however, is the highest ranking official who was aware of both factors.

D. Reports to the President and Congress.

1. The Secretary of Defense must report violations to the President and Congress. OMB Cir. A-34, para. 32.2; DOD FMR, Vol. 14, Ch. 7, para. E (March 2001).

2. Contents of the report.

a. Administrative information;

b. Nature of the violation;

c. Identification of the responsible individual;

d. Cause and circumstances of the violation;

e. Administrative discipline imposed;

f. Actions taken to correct the violation; and

g. Statement of the responsible individual.

XII. CONTRACTOR RECOVERY WHEN THE ACT 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 MACOM 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, in keeping with the installation closure plan, the Corps of Engineers had conveyed the building to the State one month before the award of the renovation contract. Any problems here?

XIII. CONCLUSION.

CHAPTER 7

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CHAPTER 7

NONAPPROPRIATED FUNDS

I. INTRODUCTION.

A. What are Nonappropriated funds (NAFs)? 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. 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), billeting, and certain religious and educational programs. 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. 010101.

B. 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).

C. NAFs are audited.

1. 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. For example, see Nonappropriated Funds, Opportunities to Improve DOD's Concessions Committee, GAO/NSIADF/AIMD-98-119, April 30, 1998.

2. Agency Inspector Generals. The DOD IG has issued reports on Navy Ship Stores Operations (Report No. 96-123, May 17, 1996), and the Armed Forces Recreation Center - Orlando (Report No. 95-308, September 21, 1995).

MAJ John Siemietkowski
Fiscal Law Course
February/March 2002

II. REFERENCES.

A. 10 U.S.C. § 2783, Nonappropriated fund instrumentalities: financial management and use of nonappropriated funds.

B. DOD Directive (DODD) 1015.1, Establishment, Management, and Control of Nonappropriated Fund Instrumentalities, August 19, 1981.

C. DODD 1015.2, Military Morale, Welfare and Recreation (MWR), June 14, 1995.

D. DODD 1015.6, Funding of Morale, Welfare and Recreation Programs, August 3, 1984.

E. DODD 1015.11, Lodging Resource Policy, December 9, 1996.

F. DODD 1330.9, Armed Services Exchange Regulations, December 15, 1986.

G. DOD 7000.14-R, DOD Financial Management Regulation, Volume 13, Nonappropriated Funds Policy and Procedures.

H. DODI 1000.15, Private Organizations on DOD Installations, October 23, 1997.

I. DODI 1015.10, Programs for Military Morale, Welfare and Recreation (MWR), November 3, 1995.

J. DODI 1015.12, Lodging Program Resource Management, October 30, 1996.

K. DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare and Recreation (MWR) Category C Revenue-Generating Activities, June 17, 1998.

L. DODI 7000.12, Financial Management of Morale, Welfare and Recreational Activities, May 27, 1987.

M. Assistant Secretary of Defense (Force Management Policy) Memorandum, Subject: DOD Morale, Welfare and Recreation Utilization, Support and Accountability (DOD MWR USA) Practice, July 23, 1997.

N. Army Regulation (AR) 165-1, Chaplain Activities in the United States Army, February 27, 1998.

O. AR 215-1, Morale, Welfare and Recreation Activities and Nonappropriated Fund Instrumentalities, 25 October 1998.

P. AR 215-7, Civilian Nonappropriated Funds and Morale, Welfare and Recreation Activities, 26 January 2001.

Q. Army MWR Academy Senior Managers' Handbook (obtained at www.armymwr.com under "MWR Academy; Publications").

R. AR 60-10/AFR 147-7, Army and Air Force Exchange Service General Policies, 17 June 1988.

S. AR 60-20/AFR 147-14, Army and Air Force Exchange Service Operating Policies, 15 December 1992.

T. Air Force Instruction (AFI) 34-201, Use of Nonappropriated Funds, 25 July 1994.

U. AFI 34-262, Services Programs and Use Eligibility, 1 March 1999.

V. AFI 65-106, Appropriated Fund Support of MWR and Nonappropriated Fund Instrumentalities, 28 October 1994.

W. SECNAVINST 1700.12, Operation of Morale, Welfare and Recreation Activities, 18 September 1997.

III. DEFINITIONS.

A. Nonappropriated Fund Instrumentality (NAFI). [1]

1. An integral organization and fiscal entity that performs an essential Government function. It acts in its own name to provide or assist other DOD organizations in providing MWR programs for military personnel, their families, and authorized civilians. 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. DODD 1015.1, Enclosure 2, Definitions; AR 215-1, Glossary.

2. 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.

B. Morale, Welfare and Recreation Program (MWR). Those military 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 the esprit de corps, comfort, pleasure, contentment, as well as mental and physical productivity of authorized DOD personnel. They include recreational and leisure-time programs, self-development programs, resale merchandise and services, or general welfare programs. AR 215-1, Glossary.

C. Army MWR Fund (AMWRF). Army central NAFI managed by the U.S. Army Community and Family Support Center (USACFSC) that provides up to 90% of funds for approved NAF major construction and supports other Army-wide MWR programs.

D. Installation MWR Fund (IMWRF). A NAFI established for the purpose of providing installation/community MWR activities, including food and beverage, retail recreation, lodging, and community support services.

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[1] The Department of Defense is not the only agency which has NAFIs. For example, the Department of Agriculture's Graduate School receives no APF support. The school's only source of income is the tuition and fees it charges its students. Congress authorizes the Graduate School to function as a NAFI under 7 U.S.C. § 2279b.

E. Chaplain's Fund. Every Chaplain's Fund is legally constituted as an instrumentality of the United States. The funds are NAFs that provide supplemental support for the religious practices and requirements of DOD personnel and family members. AR 165-1, para. 14-2.

F. Unit Funds. Separate funds 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 5, section IV; DOD 7000.14-R, Volume 13, Chapter 9.

IV. CASH MANAGEMENT, BUDGETING, AND SOURCES OF NAFI REVENUE.

A. NAFI Cash Management Standard. AR 215-1, para. 11-5.

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).[2]

B. NAFI Budgeting.

1. Each IMWRF budget is submitted to its MACOM, and will include:

a. a commander's narrative;

b. annual operating budget;

c. five-year financial plan;

[2] Navy regulations require that NAFIs "break even," achieved when net income equals net expenses, including depreciation expense. SECNAVINST 1700.12, para. 5.

d. monthly and five-year cash projections; and

e. construction, capital purchase, and maintenance and repair budget and schedule.

2. MACOMs will review and approve installation and community budgets unless authority is deferred to USACFSC. Consolidated MACOM budgets are submitted to USACFSC by 1 September.

C. NAFI Revenue Sources.

1. Funding of IMWRFs.

a. Commonly known as the single fund, an IMWRF is the NAFI under which most installation MWR activities are organized and NAFs administered.[3]

b. Some MWR activities, such as exchange activities, Civilian Post Restaurant Funds, Civilian Welfare Funds, and the Stars and Stripes newspaper, support the installation; however, their management structure is not within the purview of the Installation Morale, Welfare, and Recreation Fund (IMWRF). AR 215-1, para. 1-6; AFI 34-201, para. 1.5.

c. NAFs generated by each MWR activity are pooled into the IMWRF and allocated to MWR activities based on installation priorities and the provisions of AR 215-1. AR 215-1, para. 4-6.

d. IMWRFs are sustained with locally generated NAFs and authorized APF support. The revenue comes from local sales of goods and services and user fees and charges. For example, the IMWRF receives locally generated income from AAFES package stores and telephone contract profits as earned, plus a percentage of AAFES revenue generated on the installation. AR 215-1, para. 11-6.

[3] AR 215-1, para. 5-2, requires the consolidation of separate NAFIs into the IMWRF unless there is no IMWRF or when impractical or prohibited. Consolidation minimizes the number of NAFIs and reduces overhead expenses.

e. MACOMs may subsidize unprofitable IMWRFs with surplus NAFs available from other MACOM IMWRFs. AR 215-1, para. 4-6b(1).

2. Funding of the AMWRF. AR 215-1, para. 11-8.

a. Resources for the AMWRF are primarily obtained from recreation machine revenue, and from AAFES dividends and interest from the temporary investment of funds that have been programmed but not yet spent.

b. Monthly Capital Reinvestment Assessment (CRA) is a percentage of total revenue from installation and MACOM NAFIs, as determined by the MWR Board of Directors (BOD) and published annually in the NAF budget letter of instruction. This amount is transferred to the AMWRF to assist in funding Army priorities.[4]

c. AMWRF resources are devoted primarily to funding NAF major construction and other program investments. AR 215-1, para. 11-11.

V. MANAGEMENT OF MWR ACTIVITIES.

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).

[4] 10 U.S.C. § 2219 limits the amount of NAFs that an IMWRF can retain to that which is necessary to meet installation cash requirements. Amounts in excess of that amount shall be transferred to a single nonappropriated MWR account.

2. The Assistant Chief of Staff for Installation Management (ACSIM) is the Army staff proponent and focal point for all MWRs and NAFIs. The ACSIM exercises supervision over the U.S. Army Community and Family Support Center (USACFSC), a field operating agency of the Army.

3. The Assistant Secretary of the Army for Financial Management (ASA(FM)) 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 personnel. ASA(M&RA) serves on the MWR Board of Directors, along with six four-star commanders and the SGM of the Army.

5. The Commander, U.S. Army Community and Family Support Center (USACFSC):

   a. Recommends MWR and NAF policy to the ACSIM;

   b. Issues MWR NAF budget guidance, provides input to APF budget guidance, provides NAF financial oversight, and prescribes and uses effective management controls; and

   c. Provides custody over all central NAFs maintained at USACFSC, and acts as administrator of the Army MWR fund (AMWRF). Examples of NAFIs that USACFSC centrally manages:

      (1) Army Morale Welfare and Recreation Fund (AMWRF);

      (2) Army Billeting Fund;

      (3) Army Recreation Machine Fund;

      (4) Army Banking and Industrial Fund (ABIF);

      (5) Army Central Insurance Fund;

(6) Hale Koa Armed Forces Recreation Center;

(7) Armed Forces Recreation Center-Orlando (Shades of Green);

(8) Armed Forces Recreation Center - Europe, Garmisch and Chiemsee, Germany;

(9) Dragon Hill Lodge, Seoul, Korea.

6. Commanders of major Army commands (MACOMs) exercise budget oversight of MWR activities and NAFIs operated by installations and unit funds, and ensure APFs and NAFs are used as authorized.

7. Installation Commanders:

a. plan, manage, and operate MWR programs;

b. plan, manage, and operate the installation MWR fund (IMWRF), and other installation NAFIs based on mission requirements, community needs, and DA requirements; and

c. Appoint NAFI fund managers[5] and councils.[6]

8. The Director of Personnel and Community Activities (DPCA or DCA):

a. serves as the installation fund manager;

b. advises the command on MWR activities;

[5] Duties of fund managers are detailed in AR 215-1, para. 5-6.

[6] NAFI council guidelines are at AR 215-1, paras. 5-8 through 5-10.

c. plans, develops and implements through subordinates all aspects of the MWR; and

d. ensures program operations maintain the fiscal integrity of the fund.

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 Air Force Chief of Staff.

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.

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. The Navy is regionalizing its MWR NAF activities.

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.

VI. FUNDING SUPPORT OF MWR ACTIVITIES.

A. 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 activities are authorized.[7] AR 215-1, para. 11-4a. NAFs are used to supplement APF shortfalls or fund activities not authorized APF support. See generally AR 215-1, para. 4-11.

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.

B. APF Support of MWR. Appendix D to AR 215-1 contains the specific areas of support that Army commanders may fund with APFs. Attachment 1 to AFI 65-106 contains similar guidance for Air Force Management and Funding.

[7] The DOD goal is to obtain 100% APF for Category A and 65% for Category B activities.

1. APF support can be direct, indirect, or common.

a. Direct APF Support. Generally limited to Category A and B MWR activities. Includes support or expenses incurred in the management, administration, and operation of MWR activities 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 activities 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 activities. 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. 4-2e.

2. MWR Categories. Fund support for MWR activities 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 activities. They are:

a. Category A - Mission Sustaining Activities. Commanders fund these activities almost entirely with APFs. 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. 4-1a; See also AFI 65-106, para. 2.1.1.

(3) Examples of Category A activities:

(a) Libraries and Information Services;

(b) Recreation Centers;

(c) Gymnasiums, fieldhouses, pools for aquatic training, and other physical fitness facilities/training programs; and

(d) Armed Forces Professional Entertainment Program Overseas.

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. 4-1b; AFI 65-106, para. 2.1.2.

(1) Examples:

(a) Arts and Crafts;

(b) Bowling centers (12 lanes or less);

(c) Child development services;

(d) Information, ticketing, and registration services;

(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; and

(f) Stars and Stripes newspaper.

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. 4-1c; AFI 65-106, para. 2.1.3.

(1) Remote or isolated sites approved by Congress.

(a) Category C MWR activities at sites designated as remote or isolated receive APFs on the same basis as Category B MWR activities. APFs are also authorized for use to equip, operate, or maintain golf courses at remote/isolated sites and at sites located OCONUS. AR 215-1, para. 4-4.

(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) Outdoor recreation, including cabin/cottage operations, rod and gun activities, skiing operations, stables, flying activities; and

(e) 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. 4-7 and 4-8; 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. 4-11.

1. In all cases, NAFs are used judiciously and not as a matter of convenience.

2. NAFs are returned to authorized patrons by providing needed MWR services and capital improvements. AR 215-1, para. 1-8; AFI 34-201, para. 4.1.

3. 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 activities dependent upon the NAFI. AR 215-1, para. 7-5.

4. Funds from supplemental NAFIs support only the requirements for which they were established. Aaron v. United States, 27 Fed. Cl. 295 (1992) (class action suit challenging excess vehicle registration fees used to fund MWR activities); 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 activities).

B. 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. 4-12a.

2. Pay costs of items or services authorized to be paid from APFs when APFs are available. AR 215-1, para. 4-12b. Exceptions to this policy include:

   a. when the appropriate official certifies in writing that APFs cannot satisfy the requirement;

   b. when functions, programs, and activities to be funded with NAFs are integral to the functions for which the NAFI was established; and

   c. when the DOD MWR Utilization, Support and Accountability (USA) policy applies.

3. Support private organizations. AR 215-1, para. 4-12c; AFI 34-201, para. 4.2.22.

4. Contract with Government personnel, military or civilian, except as authorized in AR 215-4. AR 215-1, para. 4-12n.

5. 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. 4-12i. 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.

6. Purchase personal items such as memo pads or greeting cards, including personalized memo pads to be used at work. AR 215-1, para. 4-12k. See also AFI 34-201, para. 4.2.17.

VIII. FUNDING PROGRAMS FOR CONSTRUCTION.

A. APF support for construction of MWR facilities is generally determined by the category of the MWR activity. AR 215-1, para. 10-4b.

B. Some MWR construction projects are jointly funded by APFs and NAFs. AR 215-1, para. 10-4c.

IX. NAF FISCAL ISSUES.

A. DOD MWR Funding Policy. DOD is currently assessing the Uniform Resource Demonstration (URD) and the MWR Utilization, Support and Accountability (USA) Practice, the results of which will form the basis for DOD MWR funding policy. Both practices are designed to give MWR managers funding flexibility.

1. The URD was created by the FY 1996 Defense Authorization Act. Pub. L. No. 104-106, § 335, 110 Stat. 186, 262 (1996).

a. The URD concept was tested at six installations. Fort Campbell and White Sands Missile Range represented the Army.

b. Participating installations used NAF laws and regulations to spend APFs authorized for MWR programs.

c. The URD has expired. The Army proposed legislation making the program (Uniform Resource Expanded Program, or UREP) permanent, but it did not pass.

2. DOD established the USA Practice in 1997 through a directive-type memorandum. Memorandum from Assistant Secretary of Defense (Force Management and Policy), dated 23 July 1997, subject: DOD Morale, Welfare and Recreation Utilization, Support and Accountability Practice.

a. Commanders and APF and NAF resource managers execute a Memorandum of Agreement to use NAFs to provide APF authorized services in support of MWR programs.

b. Authorized services include personnel services, supplies, furniture, fixtures and equipment, routine maintenance, and other operating expenses for specified MWR programs.

c. The NAFI receives APF payment for these services from operating accounts that support the installation's base operations.

d. NAFIs must keep an accounting of the funds. If the NAFI will not obligate the funds before they expire, the NAFI must return the funds for obligation elsewhere.

B. Use of NAF employees to perform APF functions. An example is using a NAF contracting officer to perform APF contract actions. This constitutes augmentation of appropriations and violates the Antideficiency Act.

C. Use of APF employees to perform NAF functions beyond those which are authorized. This violates the Purpose Statute and the Antideficiency Act.

D. Contracting with NAFIs. 10 U.S.C. § 2482a. This statute states that a DOD agency or instrumentality that supports the operation of the DOD exchange or MWR system may enter into a contract or other agreement with another element of DOD or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the exchange or MWR system.

E. 10 U.S.C. § 2424. The DOD can contract noncompetitively with overseas exchanges in an amount not exceeding $50,000.

F. No COFC jurisdiction over self-funding entities. Furash & Co. v. United States, 252 F.3d 1336 (Fed. Cir. 2001). COFC does have jurisdiction over exchanges. 28 U.S.C. § 1491(a)(1). Boards have jurisdiction over CDA disputes with Commissary baggers. Enrique (Hank) Hernandez, ASBCA No. 53011, 01-2 BCA ¶ 31,220.

G. Golf Courses. 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. § 2246. 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).

H. MWR patronage eligibility. See DODI 1015.10, Encl. 3. Programs are established primarily for active duty, but 26 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. With ASA(MRA) approval, Category C activities can be opened up to the general public.

I. Billeting Operations. Effective 1 October 1999, the Army consolidated its Temporary Duty and Guest house billeting operations under the Billeting fund.

1. The AMWRF will reimburse the IMWRFs for un-depreciated value of guest houses.

2. IMWRFs will no longer receive the revenues from its guest house (MWR Category C) operations.

J. MWR during mobilization, contingency, and wartime operations. AR 215-1, Chapter 8, Section IV.

K. Public Private Ventures (PPV). See DODI 1015.13, Jun. 17, 1998, and AR 215-1, para. 10-12. Private sector built/operated facilities or services on installations in exchange for discounted fees and a return to the installation MWR fund. USACFSC is the sole Army agency authorized to award MWR PPV contracts.

L. Advertising. DOD INSTR. 1015.10, ENCL. 10; AR 215-1, para. 7-44. NAFIs (excluding exchanges) may advertise in civilian media, and may also sell space for advertising by civilian companies in their MWR media.

M. Commercial Sponsorship. DOD INSTR. 1015.10, ENCL. 9; AR 215-1, para. 7-47. 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.

N. Army 10 Miler. Installations may not use APFs to fund travel to the Army 10 Miler. They may, however, use NAFs when the installation fund manager approves such funds, and if the opportunity to use such funds is open to everyone. Memorandum, Army Deputy General Counsel (Ethics and Fiscal), to Command Judge Advocate, Army Community and Family Support Center, subject: Use of Appropriated Funds for Travel to Army 10-Miler Race (20 Mar. 2000).

O. Navy Running and Triathlon Teams. For sailors chosen to represent the Navy in certain competitions, regional MWR coordinators will supply the sailors uniforms, entry fees, ground transportation, and lodging expenses. *Navy Regional Running and Triathlon Teams Program Guidelines*, *at* http://www.navy.mil/mwrprgms/runguide00.rtf.

X. MWR INFORMATION RESOURCES.

A. Army.

1. Newsletter, ***MWR Feedback***, publishes information about Army MWR programs, funding, and other miscellaneous issues.

2. Website at <www.armymwr.com> contains a wealth of user-friendly Army MWR information, including official information such as MWR annual reports, AR 215-1 on-line, and NAF construction, and "unofficial" information about MWR sports, youth, and other programs.

B. Air Force.

1. Newsletter, ***USAF Services News & Views***, publishes information about Air Force MWR programs.

2. Website at <http://www.afsv.af.mil> contains information about Air Force MWR programs such as NAF purchasing, marketing and sponsorship, as well as information on child development centers, youth programs, outdoor recreation, food services, sports and fitness, lodging, and a wealth of other MWR services.

C. Navy.

1. Newsletter, ***Undercurrents***, includes information about MWR business activities and programs.

2. Website at <http://www.mwr.navy.mil> includes information about Navy MWR programs and policies, as well as a Headquarters Phone Book and a link to employment opportunities.

3. Navy Guidebook, ***APF Helpful Hints***, is published to assist in evaluating appropriate APF support for specific elements within an MWR operation. It is available at <http://www.mwr.navy.mil/subpages/mwrnews.htm.>

D. Marine Corps.

1. The Marine Corps Community Service (MCCS) website at <www.usmc-mccs.org> includes information regarding USMC MWR programs, personnel, and policy.

2. The MCCS Headquarters has begun publishing a quarterly newsletter called *MCCS Vision.* It is available at the MCCS website.

XI. CONCLUSION.

APPENDIX A

10 U.S.C. §2783

Nonappropriated fund instrumentalities: financial management and use of nonappropriated funds

(a) Regulation of management and use of nonappropriated funds. The Secretary of Defense shall prescribe regulations governing--

(1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and

(2) the financial management of such funds to prevent waste, loss, or unauthorized use.

(b) Penalties for violations.

(1) A civilian employee of the Department of Defense who is paid from nonappropriated funds and who commits a substantial violation of the regulations prescribed under subsection (a) shall be subject to the same penalties as are provided by law for misuse of appropriations by a civilian employee of the Department of Defense paid from appropriated funds. The Secretary of Defense shall prescribe regulations to carry out this paragraph.

(2) The Secretary shall provide in regulations that a violation of the regulations prescribed under subsection (a) by a person subject to chapter 47 of this title [10 USC § 801 et seq.] (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 8

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CHAPTER 8

INTRAGOVERNMENTAL ACQUISITIONS

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

A. The various statutory authorities that permit federal agencies to purchase goods and services from each other.

B. The obligation requirements associated with various intragovernmental acquisitions.

C. The authority for intragovernmental employee training.

D. The required sources for certain government acquisitions.

II. ECONOMY ACT.

A. General. The Economy Act provides authority for federal agencies to order goods and services from other federal agencies, and to pay the actual costs of those goods and services. Congress passed the Act in 1932 to obtain economies of scale and eliminate overlapping activities of the federal government.

B. Statutory Provisions. 31 U.S.C. § 1535.

1. The Act permits the head of an agency to place an order for goods or services with another agency, or with a major organizational unit within the same agency, if:

a. Funds are available;

b. The head of the agency decides the order is in the best interests of the government;

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c. The agency or unit filling the order can provide or get by contract the goods or services; and

d. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise. 31 U.S.C. §1535(a). See USA Info. Sys., Inc., and Dataware Techs., Inc. v. Government Printing Office, GSBCA Nos. 13535-P, 13560-P, 96-2 BCA ¶ 28,315; Dictaphone Corp., B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380.

2. Applicability.

a. Economy Act acquisitions include orders placed between military departments. See FAR 2.101 (defining executive agencies to include military departments); DFAS-IN Reg. 37-1, para. 120701; AFI 65-601, vol. I, para. 7.23; Valenzuela Eng'g, Inc., B-277979, Jan 26, 1998, 98-1 CPD ¶ 51; Obligation of Funds under Military Interdepartmental Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980).

b. The Economy Act applies only in the absence of a more specific interagency acquisition authority. FAR 17.500(b); An Interagency Agreement--Admin. Office of the U.S. Courts, B-186535, 55 Comp. Gen. 1497 (1976).

3. Actual Costs.

a. The ordering agency must pay the performing agency the actual costs of the goods or services provided. See 31 U.S.C. § 1535(b); Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, 70 Comp. Gen. 592 (1991). Cf. DOD 7000.14-R (DOD Financial Management Regulation), Vol. 11A, Chap. 4; AFI 65-601, vol. I, paras. 7.17, 7.23; DFAS-IN Reg. 37-1, para. 120706.

b. Actual costs include:

(1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased. 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.) (standard storage costs); David P. Holmes, B-250377, Jan. 28, 1993 (unpub.) (standard inventory, transportation, and labor costs); Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-1 CPD ¶ 287 (ordering activity required to use current funds to pay ten-year old obligation).

(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. 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).

c. DOD activities not funded by working capital funds normally do not charge indirect costs to other DOD activities. DOD 7000.14-R, Vol. 11A, para. 030601; DFAS-IN Reg. 37-1, para. 120706. Similarly, such activities generally do not charge indirect costs under interservice and intragovernmental support agreements. See DOD Instruction 4000.19, Interservice and Intragovernmental Support, para. D.6 (Aug. 9, 1995)(hereinafter DODI 4000.19).

d. When "contracting out" for goods or services, 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 7000.14-R, Vol. 11A, para. 030601.

4. Obligation of Funds.

a. The ordering agency obligates funds current when the performing activity accepts the reimbursable order and records the obligation upon receipt of written acceptance. 31 U.S.C. §§ 1501(a)(1), 1535(d); DFARS 208.7004-2(c); DOD 7000.14-R, Vol. 11A, para. 030404; DFAS-IN Reg. 37-1, table 8-2, paras. 120505, 120703.

b. If the performing activity has not incurred obligations to fill an order before the end of the period of fund availability, then the ordering activity must deobligate (recover) the funds. 31 U.S.C. § 1535(d); DOD 7000.14-R, Vol. 11A, para. 030404; DFAS-IN Reg. 37-1, para. 120703; The Honorable William F. Ford, B-223833, Nov. 5, 1987 (unpub.).

5. Compliance with CICA. The ordering agency may not procure from a performing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5)(B); 41 U.S.C. § 253(f)(5)(B); Valenzuela Eng'g, Inc., B-277979, Jan 26, 1998, 98-1 CPD ¶ 51.

C. FAR Requirements. FAR Subpart 17.5; Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1074, 108 Stat. 3243, 3271.

1. Determination & Finding (D&F) Requirement.

a. Interagency Economy Act orders must be supported by a D&F stating that:

(1) Use of an interagency acquisition is in the best interest of the government; and

(2) The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. FAR 17.503(a).

b. Economy Act orders requiring contract action by the performing agency also must include a statement on the D&F that:

(1) The acquisition will appropriately be made under an existing contract of the performing agency, entered into before placement of the order, to meet the requirements of the performing agency for the same or similar supplies or services;

(2) The performing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or

(3) The performing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. FAR 17.503(b).

c. Army policy is that Economy Act D&Fs are not required for transactions within DOD. See Memorandum, Deputy Assistant Secretary of the Army (Procurement), for Acquisition Community, Subject: Contract Offloading Clarification (18 March 1996) (Appendix D). See also AFARS 17.503(a). Similarly, the Air Force addresses D&Fs only in the context of orders issued outside DOD. See AFFARS 5317.503-90.

2. Approval Authorities. FAR 17.503(c); DFAS-IN Reg. 37-1, para. 120706.

a. The requesting agency's contracting officer with authority to contract for the supplies or services to be ordered (or other person designated by the agency head) must approve the D&F.

b. The Senior Procurement Executive of the ordering agency must approve the D&F if the performing agency is not covered by the FAR.

D. DOD Requirements.

1. SECDEF Memo. Memorandum, Secretary of Defense, to Secretaries of the Military Departments, Subject: Use of Orders Under the Economy Act (8 Feb 94)(Appendix C); DFAS-IN Reg. 37-1, para. 120705. As a result of DOD abuses of Economy Act transactions, the Secretary of Defense has ordered that, before issuing an Economy Act order for contract action outside of DOD, the head of the agency or designee shall determine that:

   a. The ordered supplies or services cannot be provided as conveniently and cheaply by contracting directly with a private source;

   b. The servicing agency has unique expertise or ability not available within DOD; and

   c. The supplies or services are clearly within the scope of activities of the servicing agency and that agency normally contracts for those supplies or services for itself.

2. Implementation of the SECDEF Memo. Both the Army and Air Force have directed that before Economy Act orders are released outside of DOD for contract action, the requiring activity must prepare a D&F addressing the elements in the SECDEF memo. See AFARS 17.503(a) and 53.9008 (providing D&F format); AFFARS 5317.503-90. See also DFAS-IN Reg. 37-1, para. 120705.

   a. Within the Army, the D&F must be reviewed by counsel and coordinated with the requiring activity's supporting contracting officer. DFAS-IN Reg. 37-1, para. 120704.

   b. The Air Force requires review of the D&F by a contracting officer as a "business advisor" to the approval authority. AFFARS 5317.503-90(b).

3. Delegation of Authority. Pursuant to the SECDEF memo, the Army and Air Force have delegated their authority to approve Economy Act determinations for orders to non-DOD agencies. DFAS-IN Reg. 37-1, para. 120705; AL 94-5; AFFARS 5317.503-90.

a. A SES or General Officer commander/director of the requesting activity must approve the written determination if the performing agency is required to comply with the FAR.

b. The Senior Procurement Executive of the requesting activity must approve the written determination if the performing agency is not required to comply with the FAR. See AFFARS 5317.590 (list of agencies not covered by FAR).

4. Scope of Applicability. The procedures of FAR Subpart 17.5, DFARS Subpart 217.5, and DODI 4000.19 apply to all purchases, except micro-purchases, made for DOD by another agency (unless more specific statutory authority exists). This includes orders under a task or delivery order contract entered into by the other agency. DFARS 217.500. See also Pub. L. No. 105-261 § 814, 112 Stat. 1920, 2087-88 (1998).

E. Additional Regulatory Guidance. FAR Subpart 17.5; DOD 7000.14-R, Vol. 11A, para. 0304; DODI 4000.19; DFAS-IN Reg. 37-1, paras. 120501-120706; AFFARS Subpart 5317.5; AFI 65-601, vol. I, paras. 7.19 to 7.25.

1. Ordering Procedures.

a. Orders must include all supporting data necessary to prepare the required contract documentation, including a description of the requirement, delivery terms, fund citation, payment provisions, and required determinations.

b. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself.

c. Economy Act orders citing an annual or multiyear appropriations must serve a bona fide need arising, or existing, in the fiscal year(s) for which the appropriation is available for obligation.

d. As the work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing activity, the requesting activity should ensure in advance of placing an order that such capability exists.

e. Normally, DOD ordering activities issue Economy Act orders using DD Form 448, Military Interdepartmental Purchase Request (MIPR) (Appendix A).

2. Acceptance.

a. The accepting officer must be a duly authorized employee of the performing activity.

b. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR (Appendix B). Otherwise, the terms of the interagency agreement will determine the method of acceptance.

c. If the activity issues a MIPR on a reimbursable basis, acceptance establishes fund obligation authority in the performing activity account, and the activity may incur costs in accordance with the terms of the order.

d. Acceptance must indicate whether reimbursement will be on a "fixed-price" or "cost-incurred" basis. Acceptance on a fixed-price basis is required if:

(1) Billable unfunded costs will be included on the accepted price of the order;

(2) Each item or service ordered is priced separately;

(3) The price does not include substantial contingencies;

(4) The cost estimate included consideration of expected variances;

(5) Neither activity expects many change orders; and

(6) The requirement is of the type for which a fixed-price basis is practicable.

3. Payment and Billing.

a. The performing activity may require advance payment for all or part of the estimated cost of the supplies or services. See AFI 65-601, vol. I, para. 7.25.3 (list of agencies requiring advance payment).

b. Bills or requests for advance payment are not subject to audit before payment.

c. The performing activity cannot exceed the amount of the order or direct fund cite. It must curtail or cease performance to avoid exceeding the estimated cost, and notify the ordering activity immediately.

4. Disputes.

a. No formal method for dispute resolution exists for Economy Act transactions.

b. The ordering and performing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including the use of a third party forum. FAR 17.504(c).

F. Problem Areas. See DOD Inspector General Audit Report Nos. 94-008 (Oct. 20, 1993), 93-068 (Mar. 18, 1993), 93-042 (Jan. 21, 1993), 92-069 (Apr. 3, 1992).

1. Failing to obtain proper approval. See FAR 17.503(c) (requiring contracting officer, or another person designated by the agency head, to approve Economy Act determination); DFAS-IN Reg. 37-1, para. 120704 (requiring "coordination" with ordering office's contracting officer and legal counsel).

2. Issuing orders to the Department of Energy (DOE) Tennessee Valley Authority (TVA) for common supplies and services, the acquisition of which do not require the special expertise of DOE/TVA management and operating contractors.

3. Using the intragovernmental purchase process to avoid competition requirements, or to “dump” year-end funds.

4. Failing to determine whether an intragovernmental acquisition is the most economical and efficient method to obtain goods and services.

5. Citing Operations and Maintenance (O&M) funds on an order for investment/capital end items.

6. Improperly classifying an Economy Act order as a project order to avoid the deobligation (recovery) requirements.

7. Paying more than the "actual cost" of the goods or services provided. See 31 U.S.C. § 1535(b); Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, June 28, 1991, 70 Comp. Gen. 592 (1991).

8. Ordering in excess of the maximum quantities specified in a performing activity's requirements contract. Liebert Corp., B-232234, Apr. 29, 1991, 91-1 CPD ¶ 413.

9. Ordering improperly from nonappropriated fund instrumentalities. Compare 10 U.S.C. § 2482a (authorizing contracts or other agreements between service exchanges/MWR activities and federal departments) and 10 U.S.C. § 2424 (authorizing contracts using noncompetitive procedures between DOD and service exchange stores outside the United States for supplies and services up to $50,000) with Dep’t. of Agriculture Graduate Sch.--Interagency Orders for Training, B-214810, 64 Comp. Gen. 110 (1984) and Obtaining Goods and Servs. from Nonappropriated Fund Activities through Intra-Departmental Procedures, B-148581, 58 Comp. Gen. 94 (1978).

G. Other Economy Act Applications.

1. Interagency details.

a. The Economy Act authorizes interagency details of employees. The Honorable Robert W. Houk, B-247348, June 22, 1992 (unpub.) (unauthorized detail caused Antideficiency Act violation); Nonreimbursable Transfer of Admin. Law Judges, B-221585,
65 Comp. Gen. 635 (1986). See Federal Personnel Manual, ch. 300, subch. 8. See also 5 U.S.C. § 3341 (authority for intra-agency details). Cf. 10 U.S.C. § 374 (military personnel support to law enforcement agencies).

b. Details must be on a reimbursable basis unless: a law specifically authorizes nonreimbursable details; 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 the detail is for a brief period and entails minimal cost. See Department of Health & Human Servs. Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985); The Honorable William D. Ford, B-224033, Jan. 30, 1987 (unpub.); Details to Congressional Comms., B-230960, Apr. 11, 1988 (unpub.).

2. Interservice Support Agreements. From a fiscal standpoint, the Economy Act may form the basis for interservice agreements that involve recurring support between military departments, or between a military department and another federal agency. See DOD Instruction (DODI) 4000.19, Interservice and Intragovernmental Support (9 Aug. 1995); AFI 65-601, vol. I, ch. 7 (Oct. 94).

a. Memorialize support agreements with DD Form 1144, Support Agreement, or similar format that contains all the information required on the form. See DODI 4000.19, para. D.5.

b. 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. D.6.

III. PROJECT ORDERS.

A. General. The Project Order Statute provides DOD with interdepartmental authority to order goods and services, separate and distinct from the Economy Act.

B. Statutory Provisions. 41 U.S.C. § 23 (DOD); 14 U.S.C. § 151 (Coast Guard).

1. The statute applies to transactions between military departments and DOD government-owned, government-operated (GOGO) establishments for work related to military projects. Matter of John J. Kominski, B-246773, (May 5, 1993), 72 Comp. Gen. 172 (the Economy Act, not the Project Order Statute, applies to DOD orders to non-DOD agencies).

2. Orders placed with government-owned establishments shall be treated as if placed with commercial activities.

3. Appropriations shall remain available for the payment of the obligations, as if the obligations arose under a contract with a commercial activity.

4. The statute does not require special determinations, as with Economy Act orders.

C. General Regulatory Guidance. DOD 7000.14-R (Department of Defense Financial Management Regulation) Vol. 11A, Ch. 2; AFI 65-601, vol. I, para. 7.16.5; DFAS-IN Reg. 37-1, para. 1208.

1. A project order is an order for specific types of goods or services. A project order may remain open until the work is done.

2. Activities may issue project orders only to Government-Owned/Government-Operated (GOGO) facilities within DOD. GOGO facilities include shipyards, arsenals, ordnance plants, manufacturing or processing plants or shops, equipment overhaul or maintenance shops, research and development laboratories, testing facilities, and proving grounds which are owned and operated within DOD. DOD 7000.14-R, Vol. 11A, Ch. 2, para. 020303. See Matter of John J. Kominski, supra.

3. Activities may issue project orders only for the following types of goods and services:

a. Production, maintenance, or overhaul of:

(1) Missiles and other weapons;

(2) Vehicles;

(3) Ammunition, clothing, and machinery;

(4) Other military supplies or equipment; and

(5) Component and spare parts for the above.

b. Research, development, test, and evaluation.

c. Minor construction or maintenance of real property.

4. Activities shall not issue project orders for:

a. Major construction;

b. Education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, or communications; or

c. Any requirement where a contractual relationship cannot exist.

D. Ordering Procedures.

1. Project orders require no specific form, but DOD activities often use MIPRs. The order must be specific, definite, and certain. But see DFAS-IN Reg. 37-1, para. 120803 (requiring use of MIPRs for project orders).

2. Activities issue only reimbursable orders.

3. The order must indicate whether it will be performed on a cost basis or fixed-price basis. Follow the guidance set forth above for Economy Act orders to determine whether a fixed-price basis is required. See Sec. II.E.2.d, supra.

E. Acceptance and Performance.

1. Acceptance must be in writing. If the ordering activity issues a MIPR, the performing activity accepts on a MIPR.

2. At the time of acceptance, there must be evidence that the work will commence within a reasonable time. Recently, DOD adopted the Army's standard of 90 days. DOD 7000.14-R, Vol. 11A, ch. 2, para. 020510; DFAS-IN Reg. 37-1, para. 120803.

a. Project orders must serve a bona fide need existing in the fiscal year in which issued; otherwise, a valid obligation is not accomplished.

b. Agencies may not issue project orders for the primary purpose of continuing the availability of appropriations.

3. A GOGO facility must be "substantially in a position" to meet the ordering activity's requirement. Regulations require that the project order recipient incur costs "of not less than 51 percent of the total costs attributable to rendering the work or services ordered." DOD 7000.14-R, Vol. 11A,
ch. 2, para. 020515.

F. GAO Review. Generally, the GAO does not review agency decisions to perform in-house, rather than contract out, as they regard such decisions as matters of executive branch policy. SRM Mfg. Co., B-277416, Aug. 4, 1997, 97-2 CPD ¶ 40; Boulder Scientific Co., B-225644, Mar. 20, 1987, 87-1 CPD ¶ 323.

IV. GOVERNMENT EMPLOYEES TRAINING ACT (GETA).

A. General. GETA provides guidance and specific authority for intragovernmental training of employees.

B. Statutory Provisions. 5 U.S.C. § 4104.

1. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.

2. When internal training is not possible, GETA authorizes interagency training on either a reimbursable or non-reimbursable basis. As GETA provides independent fund transfer authority, the requirements and restrictions of the Economy Act are inapplicable. Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses, B-271894, July 24, 1997 (unpub.); To Walter L. Jordan, B-241269, Feb. 28, 1991 (unpub.).

C. Regulatory Guidance. Federal Personnel Manual (FPM), Chap. 410, Subch. 4-3 (Oct. 22, 1981) (cancelled by the Office of Personnel Management (OPM) as of 31 December 1994, but still relied upon as federal personnel guidance).

1. An agency that operates an interagency training facility may accept funds from other agencies for part or all of the costs of training their employees through reimbursements or other cost-sharing arrangements.

2. An agency may not obtain reimbursement for training if funds are already provided for interagency training in its appropriation.

V. THE CLINGER-COHEN ACT OF 1996.

A. General. Section 5112(e) of the FY 1996 National Defense Authorization Act (Pub. L. No. 104-106) (permanently codified at 40 U.S.C. § 1412(e)) 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.

B. Implementation.

1. OMB has designated the General Services Administration (GSA) as the executive agent for certain government-wide acquisitions of information technology (IT).

2. 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.

3. The OMB designation, in combination with 40 U.S.C. § 757, provides separate authority for acquisition from these GSA programs. Current issues with FEDSIM and other GSA programs involve the expense of the programs and the requirement that DOD orders represent bona fide needs of the underlying DOD appropriation. DFAS-IN Reg. 37-1, para. 080609.

VI. REQUIRED SOURCES.

A. Source Priorities. 41 C.F.R. § 101-26.107; FAR 8.001. Generally, agencies shall adhere to the following orders of precedence when obtaining supplies or services:

1. Supplies.

a. Agency inventory;

b. Excess from other agencies;

c. Federal Prison Industries, Inc.;

d. Committee for Purchase from People Who are Blind or Severely Disabled;

e. Wholesale supply sources;

f. Federal supply schedules; and

g. Commercial sources.

2. Services.

a. Committee for Purchase from People Who are Blind or Severely Disabled;

b. Federal supply schedules; and

c. Federal Prison Industries, Inc., or commercial sources.

B. Federal Prison Industries, Inc. (FPI or UNICOR). 18 U.S.C. §§ 4121-4128; 28 C.F.R. §§ 301-345; FAR Subpart 8.6; <www.unicor.gov>.

1. All federal agencies and institutions shall purchase FPI products that meet their requirements and are available. 18 U.S.C. § 4124. See Battery Assemblers, Inc., B-260043, May 23, 1995, 95-1 CPD ¶ 254 (agency reasonably determined UNICOR's price did not exceed "current market price"); Hiltronics Corp., B-238142, Apr. 11, 1990, 90-1 CPD ¶ 384; Forest Serv.--Requirement to Procure from Fed. Prison Indus., Inc., A-67190, 62 Comp. Gen. 617 (1983); Minx Prods., Inc., B-175249, Apr. 11, 1972 (unpub.).

2. FPI lists its products and services in the "Schedule of Products made in Federal Penal and Correctional Institutions" (Schedule).

3. An activity must obtain clearance from FPI to acquire Schedule supplies from other sources, except when:

a. Exigent circumstances arise;

b. Used or excess supplies are available;

c. Purchases are made from GSA of less-than-carload lots of common-use items stocked by GSA;

d. Goods are acquired and used outside the United States;

e. Orders total $25 or less (for DOD, $250 or less) and the activity needs them within 10 days. FAR 8.606(e); Memorandum, Federal Bureau of Prisons, to DOD Procurement Personnel, subject: Raising the Threshold for FPI Waiver Exceptions (24 Jan. 00); or

f. Dorm and Quarters Furniture are purchased before the end of Fiscal Year 2005. Agreement Concerning Voluntary Waiver of Mandatory Source for Dormitory & Quarters Furniture—Pilot Project (January 1999).

4. FPI will not issue a clearance merely because the contracting officer obtains a lower price from an alternative source. FAR 8.605(b).

5. Disputes regarding price, quality, and suitability of supplies are subject to arbitration. FAR 8.605(c).

C. Committee for Purchase From People Who Are Blind Or Severely Disabled (Committee). 41 U.S.C. §§ 46-48c; 41 C.F.R. Part 51; FAR Subpart 8.7.

1. Like FPI, the Committee publishes a "Procurement List" of supplies and services. These products and services are available from nonprofit agencies for the blind or severely disabled. The Committee may request that a contracting activity assist in determining whether a workshop has the capability to perform a requirement. See FAR 9.107. An agency must consider acquiring services from a workshop only if the agency otherwise intends to contract for them. See Rappahannock Rehab. Facility, Inc., B-222961, Sept. 10, 1986, 86-2 CPD ¶ 280; Kings Point Mfg. Co., B-185802, Mar. 11, 1977, 77-1 CPD ¶ 184.

2. Activities must purchase listed supply requirements from applicable nonprofit agencies (workshops) at prices established by the Committee, unless the supply is available from FPI. The Committee, however, has priority over FPI for listed services. See Western States Mgmt. Servs., Inc., B-233576, Dec. 8, 1988, 88-2 CPD ¶ 575; Abel Converting Inc., B-229581, Mar. 4, 1988, 88-1 CPD ¶ 233.

3. Agencies may obtain requirements from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee. The central nonprofit agency must grant an exception if:

   a. The workshops cannot perform timely, and the commercial sources can; or

   b. The workshops cannot produce the quantities required economically.

4. Activities place orders for supplies with the GSA, Defense Logistics Agency (DLA), or the Department of Veterans Affairs (VA). In some cases, an activity may order directly from a nonprofit agency/workshop. The governing central nonprofit agency must authorize a direct purchase.

5. Activities may address complaints about the quality of supplies distributed by GSA or DLA to the pertinent agency. For supplies or services obtained directly from a workshop, activities may address complaints to the workshop, with a copy to the central nonprofit agency.

6. Workshops may compete against commercial sources on acquisitions for supplies or services not included in the Procurement List.

7. The GAO will not review an agency's decision to purchase goods or services from workshops. Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460.

D. DOD Coordinated Acquisition. 10 U.S.C. § 2309; DFARS Subpart 208.70; DOD Dir. 4140.26, Integrated Materiel Management of Consumable Items.

1. DOD agencies may obligate funds for the acquisition of supplies only under regulations prescribed by the Secretary of Defense. 10 U.S.C. § 2202(a).

2. Under coordinated acquisition procedures, a DOD component ("requiring activity") may be required to obtain commodities through another DOD component or GSA ("acquiring activity"). DFARS 208.7003-2. See Tracor, Inc., B-195736, Jan. 24, 1980, 80-1 CPD ¶ 69.

3. Assignments under the Integrated Materiel Management (IMM) Program. DFARS 208.7003-1; DOD 4140.26M. Activities must obtain assigned items from the IMM manager unless:

   a. There is an unusual and compelling urgency;

   b. The IMM manager codes an item for local purchase;

   c. Purchase by the requiring activity is in the best interest of the government. This exception does not apply to:

      (1) Items critical to the safe operation of a weapon system;

      (2) Items with special security characteristics;

      (3) Dangerous items (e.g., explosives, munitions).

4. Assignments under the Coordinated Acquisition Program. DFARS 208.7003-2. Activities must submit all contracting requirements for assigned items to the acquiring activity, unless:

   a. The activity must obtain the item from a FAR 8.001 required source;

b. The activity obtains the item from the IMM manager;

c. The requirement does not exceed the simplified acquisition threshold, and direct contracting is in the activity's interest;

d. The activity needs the item in an emergency;

e. The acquiring activity delegates authority to the requiring activity;

f. The item is part of a research and development stage (generally, this exception applies only when RDT&E funds are used);

g. National security requires limitation of sources;

h. The supplies are available only from the original source for a follow-on contract;

i. The item is directly related to a major system and is design-controlled by and acquired by the manufacturer;

j. The item is subject to rapid design changes which require continual contact between industry and the requiring activity to ensure the item meets requirements; or

k. The item is noncataloged and represents a nonrecurring requirement (i.e., a "one-time buy").

5. Normally, under the Coordinated Acquisition Program, requiring activities use MIPRs to place orders. DFARS 208.7004-1.

a. The acquiring activity determines whether the order will be on a reimbursable (category I) or direct citation (category II) basis. DFARS 208.7004-2(b).

b. The acquiring activity may use a reimbursable order if delivery is from existing inventories or by diversion from existing contracts of the acquiring activity; production or assembly is at government-owned plants; the requirement involves assembly of end items by the acquiring department; or the acquiring activity will make contract payments without reference to deliveries of end items. DFARS 208.7004-2(b).

c. If a direct citation MIPR cites funds that will expire after 30 September, the acquiring activity must receive the MIPR by 31 May. DFARS 208.7004-4(a).

d. The acquiring activity must accept MIPRs within 30 days. DFARS 208.7004-2(a).

VII. CONCLUSION.

APPENDIX A: DD Form 448, Military Interdepartmental Purchase Request (MIPR)

APPENDIX B

DD Form 448-2 Acceptance of MIPR

APPENDIX C

DOD Guidance on Economy Act "Offloading" Outside of DOD

APPENDIX D

Army Memorandum on Contract Offloading

CHAPTER 9

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CHAPTER 9

PAYMENT AND COLLECTION

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students should understand these concepts:

1. The various methods used by the Government to pay contractors.

2. The methods, and order of preference, for financing Government contracts.

3. The application of "The Prompt Payment Act."

4. The Government's policies and procedures for identifying and collecting contract debts.

B. Perspective. "The Department [of Defense] continues to experience an unacceptable number of contract payment problems. These problems are caused by a number of factors including systems deficiencies and contract structure."[1]

II. REFERENCES.

A. 10 U.S.C. § 2307, Contract Financing.

B. 31 U.S.C. § 3901, Prompt Payment.

C. 31 U.S.C. § 3701, Claims.

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[1] Memorandum, The Under Secretary of Defense, Acquisition and Technology, to Assistant Secretaries of the Military Departments, subject: Reducing Contract Fund Citations (30 Apr. 1999).

Major Karen White, USAF
Fiscal Law Course
February/March 2002

D. 31 U.S.C. § 3727 and 41 U.S.C. § 15, Assignment of Claims Act of 1940.

E. 41 U.S.C. § 255, Advance or other payments.

F. Federal Acquisition Regulation, Part 32, Contract Financing.

G. DoD Financial Management Regulation (DoD 7000.14-R), vol. 10, Contract Payment Policy and Procedures.

H. 5 CFR Part 1315, "Prompt Payment."

III. POLICIES AND PROCEDURES.

A. FAR Part 32. This Part prescribes policies and procedures for contract financing and other payment matters.

B. Disbursing Authority.

1. The Financial Management Service (FMS), a bureau of the U.S. Department of the Treasury, is the principle disbursing agent of the Federal government, accounting for approximately 85% of all Federal payments.

2. The Department of Defense, the United States Marshal's Office, and the Department of Transportation (with respect to public money available for the Coast Guard's expenditure when it is not operating as a service in the Navy) have statutory authority to disburse public money. 31 U.S.C. § 3321.

C. Contract Payments. All solicitations and contracts shall specify the payment procedures, payment due dates, and interest penalties for late invoice payment. FAR 32.903(a). There are two major types of government contract payments:

1. Payment of the contract price for completed work.

2. Payment in advance of work performance.

D. Advances. An advance of public money may be made only if authorized by Congress or the President. 31 U.S.C. § 3324(b).

E. Invoice Payments vs. Financing Payments. FAR Subpart 32.9.

1. Invoice payments are payments made upon delivery of goods or performance of services and acceptance by the government. Invoice payments include:

a. Final payments of the contract price, costs, or fee in accordance with the contract or as settled by the government and the contractor.

b. Payments for partial deliveries or partial performance under fixed-price contracts.

c. Progress payments:

(1) Construction contracts.

(2) Architect/Engineer contracts.

2. Financing payments are made to a contractor before acceptance of goods or services by the government. Such payments include:

a. Advance payments.

b. Progress payments based on costs.

c. Progress payments based on a percentage or stage of completion.[2]

d. Interim payments on cost-type contracts.

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[2] Progress payments under fixed-price construction and fixed-price architect-engineer contracts are treated as invoice payments under the Prompt Payment Act.

F. Order of Preference. FAR 32.106 provides the following order of preference when a contractor requests contract financing, unless an exception would be in the Government's interest in a specific case:

1. Private financing without Government guarantee (note, however, that the intent is not to require private financing at unreasonable terms or from other agencies);

2. Customary contract financing (see FAR 32.113);

3. Loan guarantees;

4. Unusual contract financing (see FAR 32.114); and

5. Advance payments (see exceptions at FAR 32.402(b)).

G. Payment Requirements. Payments are based on receipt of a proper invoice or contract financing request, and satisfactory contract performance. FAR 32.903(c).

H. Invoice Payment Due Date. The due date for making an invoice payment is prescribed in FAR 32.905. Government acceptance of supplies or services or receipt by the designated billing office of a proper invoice, whichever is later, triggers the time period for calculation of prompt payment. Failure of the Government to pay the contractor by the due date results in payment of interest.

I. Financing Payment Due Date. The due date for making a contract financing payment is prescribed in FAR 32.906. Generally, the due date for contract financing payments is 30 days from date of receipt by the designated billing office of a proper payment request. Failure of the Government to make a contract financing payment by the due date does not normally entitle the contractor to interest.3 However, late payment can be a defense to a default termination. However, see Jones Oil Company, ASBCA No. 42651, 98-1 BCA ¶ 29,691 (contractor will succeed in appealing a default termination of a contract only if the late payment rendered appellant financially incapable of continuing performance, was the primary or controlling cause of the default, or was a material rather than insubstantial or immaterial breach).

IV. CONTRACT PAYMENT METHODS. 41 U.S.C. § 255; 10 U.S.C. § 2307; FAR Part 32. FAR Part 32 draws a distinction between contract payments for commercial items and noncommercial items.

A. Definitions.

1. Commercial items are defined at FAR 2.101. For example, a computer qualifies as a commercial item because it is sold to the general public.

2. A non-commercial item is a supply or service that is not available for sale to the public, such as a major weapon system.

B. Non-Commercial Contract Payments. Payment methods for non-commercial item supplies or services include partial payments, advance payments, progress payments, loan guarantees, provisional delivery payments, and performance-based payments.

1. Partial Payments.

a. Partial payments are payments made under fixed-price contracts for supplies or services that are accepted by the government but are only part of the contract requirements. FAR 32.102(d).

3 FAR 32.904(e) establishes a due date for interim payments on cost-reimbursement contracts for services 30 days after the date of receipt of a proper invoice.

b. Although partial payments are generally treated as a method of payment and not as a method of contract financing, using partial payments can help contractors participate in government contracts without, or with minimal, contract financing. When appropriate, agencies shall use this payment method. FAR 32.102(d).

c. FAR 52.232-1 provides that unless otherwise specified in the contract, the government must make payment under fixed-price contracts when it accepts partial deliveries if:

(1) The amount due on the deliveries warrants it; or

(2) The contractor requests payment and the amount due on partial deliveries is at least $1,000 or 50% of the total contract price.

2. Advance Payments. FAR Subpart 32.4; FAR 52.232-12, Advance Payments.

a. Advance payments are advances of money by the government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. They are expected to be liquidated from payments due to the contractor incident to performance of the contract. Advance payments may be made to a prime contractor for the purpose of making advances to subcontractors.

b. This is the least preferred method of contract financing.

c. Requirements. FAR 32.402(c).

(1) The contractor must give adequate security.

(2) Advance payments cannot exceed the unpaid contract price.

(3) The agency head or designee must determine that advance payment is in the public interest or facilitates the national defense.

d. According to FAR 32.402(c)(2), the agency head or designee[4] must make written findings that:

(1) Advance payment will not exceed the contractor's interim cash needs.

(2) Advance payment is necessary to supplement other funds or credit available to a contractor.

(3) The recipient is otherwise qualified as a responsible contractor.

(4) The government will benefit.

(5) The case fits one or more of the categories described in FAR 32.403.

e. Advance payments can be authorized <u>in addition to</u> progress or partial payments on the same contract.

f. Advance payments may be appropriate for the following (FAR 32.403):

(1) Contracts for experimental, research or development projects with nonprofit education or research institutions.

(2) Contracts solely for management and operation of Government-owned plants.

(3) Contracts of such highly classified nature that assignment of claim is undesirable for national security reasons.

[4] For the Army, the designee is the Assistant Secretary of the Army (Financial Management), *see* AFARS 32.402. The Air Force designee is the Assistant for Accounting and Banking, Office of the Assistant Secretary of the Air Force (Financial Management and Comptroller) (SAF/FMPB), *see* AFFARS 5332.409.

(4) Contracts with financially weak contractors with essential technical ability. In such a case, contractor performance shall be closely monitored to reduce Government's financial risk.

(5) Contracts for which a loan by a private financial institution is not practicable.

(6) Contracts with small business concerns.

(7) Contracts where exceptional circumstances make advance payments the most advantageous contract financing method for both the contractor and the Government.

3. Progress Payments. There are two types of progress payments: those based on costs incurred and those based on the stage of completion of the contracted work.

a. Costs Incurred. Progress payments can be made on the basis of costs incurred by the contractor as work progresses under the contract. FAR Subpart 32.5; FAR 52.232-16, Progress Payments.

(1) Unless otherwise provided for in agency regulations, the contracting officer shall not provide for progress payments to a large business if the contract amount is less than $2 million or to a small business if the contract amount is less than the simplified acquisition threshold (currently $100,000). FAR 32.104(d)(2)-(3).

(2) Subject to the dollar thresholds, a contracting officer may provide for progress payments if the contractor must expend money during the predelivery period that will have a "significant impact" on its working capital, and there is a substantial time from contract inception to delivery (six months for a large business and four months for a small business). FAR 32.104(d)(1).

(3) As part of a request for progress payments, a contractor may include the full amount paid to subcontractors as progress payments under the contract and subcontracts. FAR 32.504(b).

(4) Progress payments made under indefinite-delivery contracts should be administered under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. FAR 32.503-5(c) (as amended by FAC 97-16). But see Aydin Corp. v. Widnall, 61 F.3d 1571 (Fed. Cir. 1995) (contractor entitled to administrative and production costs incurred to implement cost segregation requirements imposed by the contracting officer, where DFARS clause provided for progress payments based on cumulative total costs of the contract).

(5) Progress payments can be added to the contract after award by contract modification, but the contractor must provide adequate consideration. FAR 32.005.

(6) Customary progress payments. FAR 32.501-1 and FAR 32.502-1.

(a) The FAR provides that the customary amount is 80% for large businesses and 85% for small businesses. FAR 32.501-1(a).

(b) DFARS provides for a customary uniform progress payment rate of 80% for large business, 90% for small business, and 95% for small, disadvantaged businesses. DFARS 232.501-1(a)(i).[5]

(7) Unusual progress payments. Unusual contract financing is financing with additional approval requirements. FAR 32.001.

(a) Contracting officer may provide unusual progress payments only if (FAR 52.501-2):

[5] DoD issued a proposed rule change on August 24, 2001 increasing the customary progress payment rate for large businesses to 80%. The payment rate change is applicable only to contracts awarded on or after October 1, 2001.

(i) Contract necessitates predelivery expenditures that are large in relation to the contractor's working capital and credit;

(ii) Contractor fully documents an actual need to supplement private financing available;

(iii) Contractor's request is approved by the head of the contracting activity or designee.

(b) DoD requires advance approval of the USD(A&T)DP for any "unusual" progress payment requests. DFARS 232.501-2.

b. Percentage or Stage of Contract Completion. Progress payments also can be based on a percentage or stage of contract completion, if authorized by agency procedures. Use of this type of progress payment is subject to the following restrictions:

(1) DFARS 232.102 provides that these types of progress payments are only authorized for construction contracts, shipbuilding, and ship conversion, alteration or repair.

(2) The agency must ensure that payments are commensurate with the work accomplished. Greenhut Constr. Co., ASBCA No. 41777, 93-1 BCA ¶ 25,374 (after hurricane damaged previously completed construction work, Navy was entitled to review the work and pay only the amount representing satisfactorily completed work).

(3) Under undefinitized contract actions, such payments cannot exceed 80% of the eligible costs of work accomplished.

4. Loan Guarantees.

a. FAR Subpart 32.3 prescribes policies and procedures for designated agencies' guarantees of loans made by private financial institutions to borrowers performing contracts related to national defense.

b. The use of guaranteed loans requires the availability of certain congressional authority. DoD has not requested authority in recent years, and none is now available. DFARS 232.302.

5. Provisional Delivery Payments. DFARS 232.102-70.

a. The contracting officer may establish provisional delivery payments to pay contractors for the costs of supplies and services delivered to and accepted by the government under the following contract actions, if undefinitized:

(1) Letter contracts contemplating a fixed-price contract,

(2) Orders under basic ordering agreements,

(3) Unpriced equitable adjustments on fixed-price contracts, and

(4) Orders under indefinite delivery contracts.

b. Provisional delivery payments shall be used sparingly, priced conservatively, and reduced by liquidating previous progress payments in accordance with the Progress Payments Clause.

c. Provisional delivery payments shall not include profit, exceed funds obligated for the undefinitized contract action, or influence the definitized contract price.

6. Performance-Based Payments.[6] Performance-based payments are the preferred financing method when the contracting officer finds its use practical and the contractor agrees to its use. FAR 32.1001(a).

a. Performance-based payments may be made either on a whole contract or on a deliverable item basis, unless otherwise prescribed by agency regulations. FAR 32.1004.

(1) Financing payments made on a whole contract basis apply to the entire contract.

(2) Financing payments made on a deliverable item basis apply to a specific deliverable item.

b. Performance-based payments may not exceed 90 percent of the contract price if on a whole contract basis, or 90 percent of the delivery item price if on a delivery item basis. FAR 32.1004(b)(2).

c. The payments may be made on any of the following bases (FAR 32.1002):

(1) Performance measured by objective, quantifiable methods;

(2) Accomplishment of defined events; or

(3) Other quantifiable measures of results.

d. The contracting officer may use performance-based payments only when the contracting officer and the offeror agree on the performance-based payment terms, the contract is a definitized fixed-price type contract, and the contract does not provide for other methods of contract financing, except for advance payments or loan guarantees. FAR 32.1003.

[6] The Defense Contract Management Agency website at www.dcmc.hq.dla.mil provides guidance on the use and administration of performance-based payments (PBPs).

e. FAR 32.1000 provides that performance-based payments are not used in the following instances:

(1) Payments under cost-reimbursement contracts.

(2) Contracts for architect-engineer services or construction, or for shipbuilding or ship conversion, alteration, or repair, when the contracts provide for progress payments based on a percentage or stage of completion.

C. Commercial Item Purchase Payments. 10 U.S.C.§ 2307(f); 41 U.S.C.§ 255(f); FAR 32.2.

1. General Rule. Although financing of the contract is normally the contractor's responsibility, in some markets, the provision of financing by the buyer is a commercial practice. The contracting officer may include appropriate financing terms in contracts for commercial purchases when it is in the best interests of the government.

2. Types of Payments. FAR 32.202-2:

a. <u>Commercial advance payment</u>.

(1) Payments made before any performance of work.

(2) Limited to 15% of contract price.

(3) Not subject to Prompt Payment Act interest.

(4) Payment is made on contract specified date, or 30 days after receipt by the designated billing office of a proper request for payment, whichever is later. DFARS 232.206(f)(i).

b. <u>Commercial interim payment</u>.

(1) Not commercial advance payment or delivery payment.

(2) Payments made after some work has been done.

(3) Late payment is not subject to Prompt Payment Act interest penalty.

(4) Payment is made on entitlement date specified in the contract, or 14 days from the receipt by the designated billing office of a proper request for payment, whichever is later. DFARS 232.206(f)(ii).

c. Delivery payment.

(1) Payment for accepted supplies or services.

(2) Includes partial deliveries.

(3) Considered an invoice payment subject to Prompt Payment Act interest.

(4) The prompt payment standards for commercial delivery payments are the same as specified in FAR Subpart 32.9.

d. Installment payment financing for commercial items shall not be used for defense contracts unless market research has established that this form of contract financing is both appropriate and customary in the marketplace. DFARS 232.206(g).

3. Prerequisites. FAR 32.202-1. Commercial item purchase financing, consisting of either interim payments or advance payments, may be made under the following circumstances:

a. The item financed is a commercial supply or service.

b. The contract price exceeds the simplified acquisition threshold.

c. The contracting officer determines that it is appropriate/customary in the commercial marketplace to make financing payments for the item.

d. This form of contract financing is in the best interest of the government. To help make this determination, the FAR authorizes agencies to establish standards, such as type of procurement, type of item, or dollar level. FAR 32.202-1(e).

e. Adequate security is obtained from the contractor. FAR 32.202-4.

(1) Subject to agency regulations, the contracting officer may determine the offeror's financial condition to be adequate security provided the offeror agrees to provide additional security should that financial condition become inadequate as security. DFARS 232.202-4 states that an offeror's financial condition may be sufficient to make the contractor responsible for award purposes, but not be adequate security for commercial contract financing.

(2) Types of Security.

(a) Paramount lien.

(b) Irrevocable letters of credit.

(c) Surety bond.

(d) Guarantee of repayment from a person or corporation of demonstrated liquid net worth connected by significant ownership to the contractor.

(e) Title to identified contractor assets of adequate worth.

(3) The value of the security must be at least equal to the maximum unliquidated amount of contract financing payments to be made to the contractor. The value of security may be adjusted during contract performance as long as it is always equal to or greater than the amount of unliquidated financing. FAR 32.202-4(a)(3).

D. Progress Payments on Construction Contracts. FAR 32.103; FAR 52.232-5, Payments Under Fixed-Price Construction Contracts.

1. When a construction contract provides for progress payments and the contractor fails to achieve satisfactory performance for a period for which a progress payment is to be paid, the government may retain a percentage of the progress payment. The retainage shall not exceed 10 percent of the progress payment.

2. Entitlement to progress payments requires compliance with the contract and relevant regulations. The Davis Group, Inc., ASBCA No. 48431, 95-2 BCA ¶ 27,702.

V. THE PROMPT PAYMENT ACT. 31 U.S.C. § 3901-3907; 5 C.F.R. 1315;[7] FAR Subpart 32.9.

A. Applicability of the Prompt Payment Act (PPA).

1. Background.

a. Prior to enactment of the Prompt Payment Act of 1982, the Federal government did not have uniform criteria for establishing due dates for payments to contractors.

[7] OMB Circular A-125 has been rescinded and replaced by the Prompt Pay regulations at 5 CFR Part 1315.

b. Many invoices were paid too early or too late. The General Accounting Office (GAO) estimated that contractors were losing at least $150 million annually due to late payments, and the Federal Government could save at least $900 million annually if payments that had been paid early had instead been paid when due.[8]

c. To address these concerns, the PPA and implementing guidance and regulations issued by the Office of Management and Budget (OMB) provided for payment due dates and interest penalties for late payments.

d. The PPA provides that interest begins when the government fails to make timely payments to the contractor after receipt of a proper invoice from the contractor.

2. Coverage.

a. The PPA applies to all government contracts except for contracts where payment terms and late payment penalties have been established by other governmental authority (e.g., tariffs). FAR 32.901. See Prompt Payment Act Interest on Utility Bills, B-214479, Sept. 22, 1986, 1986 U.S. Comp. Gen. LEXIS 497. See also National Park Service—Late Payment Charges for Utility Services, B-222944, Oct. 23, 1987, 1987 U.S. Comp. Gen. LEXIS 316 (holding that elements of implied contract governed payment terms with private, unregulated utility company)

b. The PPA applies to all government agencies.

c. There are no geographical limitations to applicability of the PPA's procedural requirements. FAR 32.901. Ingenieurgesellschaft Fuer Technische Dienste, ASBCA No. 42029, 42030, 94-1 BCA ¶ 26,569.

3. In analyzing whether the contractor is entitled to PPA interest, the government must determine that:

[8] Actions to Improve Timeliness of Bill Paying by the Federal Government Could Save Hundreds of Millions of Dollars, (AFMD-82-1, Oct. 1, 1981).

a. the PPA applies to the payment,

b. the invoice is proper,

c. the government has accepted the supplies or services, and

d. the government has paid the invoice late.

4. Applicability to Types of Payments. The PPA applies to invoice payments i.e., payments made for supplies or services accepted by the government. For purposes of applying the PPA, invoice payments include (FAR 32.902):

a. Payment for supplies or services accepted by the Government.

b. Payments for partial deliveries accepted by the Government under fixed-price contracts.

c. Final cost or fee payments where the Government and the contractor have settled the amounts owed.

d. Progress payments under fixed-price architect-engineer contracts.

e. Progress payments under fixed-price construction contracts.

f. Interim payments on cost-reimbursement service contracts.[9]

5. The PPA <u>does not apply</u> to contract financing payments made prior to acceptance of supplies or services. FAR 32.902. For purposes of applying the PPA, contract financing payments include (FAR 32.902):

[9] FAR 32.907 imposes an interest penalty on interim payments on cost-reimbursement contracts for services, when such payment is made more than 30 days after the designated billing office receives a proper invoice. 66 Fed. Reg. 65,359 (Dec. 18. 2001). Section 1007 of the National Defense Appropriations Act for FY 02 also requires payment of Prompt Payment Act interest for these late payments.

a. Advance payments.

b. Progress payments based on cost.

c. Progress payments based on percentage or stage of completion (except for those made under the fixed-price construction and fixed-price architect-engineer payments clauses noted above).

6. The PPA does not require payment of interest when payment is not made because of a dispute over the amount of payment due or compliance with the contract. Active Fire Sprinkler Corp. v General Servs. Admin., 2001 GSBCA LEXIS 172 (July 11, 2001).

B. Invoice Payment Procedures.

1. Proper invoice required. The contractor must submit a proper invoice to trigger the PPA. FAR 32.903(h). Invoice means a contractor's bill or written request for payment under the contract for supplies delivered or services performed. FAR 32.902.

a. Under FAR 32.905(e), a proper invoice must include:

(1) Name and address of contractor.

(2) Invoice date.

(3) Contract number or other authorization.

(4) Description, quantity, unit of measure, and cost of supplies delivered or services performed.

(5) Shipping and payment terms.

(6) Name and address of contractor official to whom payment is to be sent.

(7) Name, telephone number, and mailing address of person to notify if the invoice is defective.

(8) Any other information or documentation required by the contract, such as evidence of shipment.

(9) Though not required, contractors are strongly encouraged to assign an identification number to each invoice.

b. Notice of defective invoice. The government must notify the contractor of any defective invoice within 7 days (3 days for meat, meat food products, and fish; 5 days for perishable agricultural commodities, dairy, and edible fats or oils) after receipt of the invoice at the designated payment office. The notice should include a statement identifying the defect in the invoice. FAR 32.905(e).

(1) If such notice is not timely, an adjusted due date for purposes of determining an interest penalty will be established in accordance with FAR 32.907-1(b).

(2) FAR 32.907-1(b)(2) provides that the due date on the corrected invoice will be adjusted by subtracting from it the number of days taken beyond the prescribed notification of defects period.

(3) The contractor will not be entitled to PPA interest for late payment, despite the agency's failure to notify the contractor of a defective invoice, if the contractor knew that its invoice was defective. Masco, Inc., HUDBCA No. 95-G-147-C16, 96-2 BCA ¶ 28364 (contractor knew that invoiced work had not yet been completed).

c. Supporting documentation is required. FAR 32.905(f).

(1) A receiving report or some other government document authorizing payment must support all invoice payments. A receiving report is evidence that the government accepted the supplies delivered or services performed by the contractor.

(2) The agency receiving official must forward supporting documentation by the 5th working day after government acceptance or approval, unless the parties have made other arrangements. This period of time does not extend the payment due date.

2. Payment due date. FAR 32.905(a) provides the payment due date for invoice payments, not including architect-engineer, construction, or food and specified item contracts, is the later of:

a. The 30th day after the designated billing office receives a proper invoice; or

b. The 30th day after government acceptance of supplies delivered or services performed by the contractor.

(1) On a final invoice where the payment amount is subject to contract settlement actions, acceptance occurs on the effective date of the settlement.

(2) For the sole purpose of computing an interest penalty, government acceptance occurs constructively on the 7th day after the contractor has delivered the supplies or performed the services, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement.

(3) Except for commercial items as defined in FAR 2.101, the contracting officer may specify a longer period for constructive acceptance. This is normally to afford the government a reasonable opportunity to inspect and test the supplies furnished or to evaluate the services performed, but cannot be used as a routine agency practice. The contract file must indicate the justification for extending the constructive acceptance period beyond 7 days.

c. Special payment periods. The payment due date on contracts for perishable agricultural commodities is shorter. (meat, 7 days; fish, 7 days; perishable agricultural commodities, 10 days; dairy, 10 days; etc.) FAR 32.905(d).

d. It is DOD policy to assist small disadvantaged businesses by paying them as quickly as possible after receipt of a proper invoice, and before normal payment due dates in the contract. This policy does not alter the payment due date for purposes of the Prompt Payment Act. DFARS 232.903.

3. Interest penalty for late payment. The government incurs an interest penalty for late invoice payment, including late payment of progress payments under fixed-price architect-engineering contracts and fixed-price construction contracts. FAR 32.907-1. Under the new interim final rule, interest penalties also accrue for late payment of interim payments on cost-reimbursement service contracts.[10]

a. Accrual. The interest penalty accrues when the government pays the contractor after the contract payment due date. Interest penalties will not accrue for more than one year. FAR 32.207-1(e).

b. Automatic payment. The interest penalty accrues automatically and must be paid by the government without request by the contractor. The government must pay any interest penalty of $1 or more.[11] FAR 32.907-1(e).

c. The interest penalty is not excused by temporary unavailability of funds. FAR 32.903(h).

d. Late payment penalty upon interest penalty.

(1) The contractor is entitled to a penalty payment if the contractor is owed an interest penalty of $1 or more, the agency fails to make a required interest penalty payment within 10 days after the date the invoice amount is paid, and the contractor makes a written demand for the penalty within 40 days after the payment. FAR 32.907-1(g)(1).

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[10] *See* 65 Fed. Reg. 78,403 (Dec. 15, 2000) for interim final rule.

[11] The Defense Finance and Accounting Service (DFAS) has expressed concern that the costs of making such small payments may not justify the payments. In FY 1996, DFAS Columbus made 10,789 interest payments—about one quarter of all interest payments--totaling $28,701. DFAS regulations require documentation of the reason for the late payment, and in one case a $1.05 payment was supported with nine pages of documentation. Financial Management: The Prompt Payment Act and DOD Problem Disbursements (GAO/AIMD-97-71, May 23, 1997).

(2) The penalty upon penalty amount is 100% of the interest penalty owed the contractor, not to exceed $5,000, nor be less than $25. FAR 32.907-1(g)(3).

4. Contract Disputes Act Interest Distinguished from Prompt Payment Act Interest.

a. Under the CDA, the government pays interest on amounts found to be due to a contractor on claims submitted to the contracting officer. Such CDA interest accrues from the date the contracting officer receives a proper claim until payment of the amount due on the claim. 41 U.S.C.§ 611. See Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349 (payment of CDA claim presumed to include interest).

b. PPA and CDA interest is based on the rate established by the Secretary of the Treasury and published in the Federal Register. 31 U.S.C. § 3902 and 41 U.S.C.§ 611.[12] Under the CDA, the government pays simple interest and adjusts the rate every six months in accordance with the current Treasury rate. In contrast, PPA interest is compounded and is not adjusted during the one year accrual period.

c. If a contractor files a claim under the CDA for PPA interest, interest will run under the PPA until government receipt of the claim, after which CDA interest will apply. Technocratica, ASBCA No. 44444, 94-1 BCA ¶ 26,584.

C. Fixed-Price Construction Contracts.

1. The government must pay interest on approved construction contract progress payments that remain unpaid for more than 14 days after the designated billing office receives a proper payment request. FAR 32.905(c)(i).

[12] Information concerning the interest rate can be obtained through the Federal Register or from the Department of the Treasury, Financial Management Service (FMS), Washington, DC 20227 (202) 874-6995. The rate applicable from 1 January 2002 to 30 June 2002 is 5.50%. The FMS website is <www.fms.treas.gov>.

2. Similarly, the contractor must pay interest on unearned progress payments, e.g., when the contractor's performance for which progress payments are made does not conform to contract terms. FAR 52.232-5(d), Payments under Fixed-Price Construction Contracts. The government must demand payment of the underlying debt in a sum certain. Electronic & Space Corp., ASBCA No. 47539, 95-2 BCA ¶ 27,768 (the government's letter which simply stated "it appears" progress payments were overpaid was ruled to be an improper demand letter).

3. The government must pay interest on any retained amount that is approved for release if the government does not pay the retained amount to the contractor by the 30th day (unless specified otherwise in contract) after release. FAR 32.905(c)(ii).

4. Interest penalties are not required on payment delays due to disagreement between the parties over the payment amount or other issues involving contract compliance. Claims involving disputes and any interest thereon will be resolved in accordance with the Disputes clause. FAR 52.232-27 (a)(4)(iv).

D. Fixed-Price Architect-Engineer Contracts. The government must pay interest penalties on approved contract progress payments that remain unpaid for more than 30 days after government approval of contractor estimates of work or services accomplished. FAR 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts; FAR 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts.

E. Prompt Payment Discounts.

1. Discount for prompt payment means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at FAR 52.232-8, Discounts for Prompt Payment, if payment is made by the government prior to the due date. The due date is calculated from the date of the contractor's invoice. If the contractor has not placed a date on the invoice, the due date is calculated from the date the designated billing office receives a proper invoice, provided the agency annotates such invoice with the date of receipt at the time of receipt. When the discount date falls on a Saturday, Sunday, or legal holiday when federal government offices are closed and government business is not expected to be conducted, payment may be made on the following business day and a discount may be taken.

2. The government may take prompt payment discounts offered by a contractor only when it makes payment within the specified discount period.[13]

3. The PPA imposes an interest penalty on improperly taken discounts, and the agency must pay the penalty without request by the contractor. FAR 32.907-1(c).

4. The government policy provisions at FAR 32.903 state that the government shall not make invoice and contract financing payments earlier than 7 days prior to the dates specified in the contract unless the agency head, or designee, determines to make earlier payment on a case-by-case basis.

F. Waiver. A contractor may waive an interest penalty payment issued to it under the PPA either by an express written statement or by acts and conduct which indicate an intent to waive. Central Intelligence Agency - Waiver of Interest Under Prompt Payment Act, 62 Comp. Gen. 673 (1983) (contractor refused to accept interest check prepared by agency).

VI. ELECTRONIC FUNDS TRANSFERS (EFT). FAR Subpart 32.11.

A. Mandatory Use. Payment by EFT is the mandatory method of contract payment[14] in normal contracting situations except for the following situations listed in FAR 32.1103:

1. The office making payment under a contract requiring EFT loses the ability to release payment by EFT. In such a case, the paying office shall make all the necessary payments by check or some other mutually acceptable method of payment. FAR 32.1103(a).

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[13] For a discussion on the propriety of taking a prompt payment discount for progress payments made in the normal course of contract administration, See Prompt Payment Discounts Based on Progress Payments, ARMY LAW., Aug. 1994, at 54.

[14] 31 USC §3332 requires use of EFT in all situations except when recipients certify in writing that they do not have an account with a financial institution.

2. The payment will be received by or on behalf of a contractor outside the United States and Puerto Rico. FAR 32.1103(b). However the agency head may authorize EFT for a non-domestic transaction if the political, financial, and communications infrastructure in the foreign country supports EFT payment. FAR 32.1106(b)(1).

3. The payment will be paid in other than US currency. FAR 32.1103(c). However, the agency head may authorize EFT is such a transaction may be made safely. FAR 32.1106(b)(2).

4. Classified contracts, where EFT payments could compromise the safeguarding of classified information or national security, or where arrangements for appropriate EFT payments would be impractical due to security considerations. FAR 32.1103(d).

5. Contracts executed by deployed contracting officers in the course of military operations, including but not limited to, contingency operations as defined in 10 U.S.C. § 101(a)(13), or a contract awarded during emergency operations, such as natural disasters or national or civil emergencies.

6. The agency does not expect to make more than one payment to the same recipient within a one year period. FAR 32.1103(f).

7. The agency's need for supplies and services is of such unusual and compelling urgency that the government would be seriously injured unless payment is by a method other than EFT. FAR 32.1103(g).

8. There is only one source for supplies and services and the government would be seriously injured unless payment is by a method other than EFT. FAR 32.1103(h).

9. Payment by a method other than EFT is otherwise authorized by the Department of Treasury Regulations at 31 CFR 208. FAR 32.1103(i).

B. Specified Payment Date. FAR 32.902.

1. The date on which the funds are to be transferred to the contractor's account by the financial agent according to agency's EFT payment transaction instruction given to the Federal Reserve System.

2. If no date has been specified in the instruction, the specified payment date is 3 business days after the payment office releases the EFT payment transaction instruction.

C. Assignment of Claims. Using EFT payment methods is not a substitute for a properly executed assignment of claims. EFT information showing the ultimate recipient of the transfer to be other than the contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information. FAR 32.1105.

D. DOD's Central Contractor Registration (CCR).

1. Contractors provide EFT data to DOD by registering in the CCR. Registration is mandatory prior to award of a contract, basic agreement, basic ordering agreement, or blanket purchase agreement.

2. Exceptions to this policy: DFARS 204-7302.

a. Purchases made with the Government-wide commercial purchase card,

b. Awards made to foreign vendors for work performed outside the United States,

c. Classified contracts or purchases,

d. Contracts awarded by deployed contracting officers, and

e. Purchases to support unusual or compelling needs.

E. Incorrect EFT Information. If the contractor's EFT information is incorrect, the Government need not make payment until the contractor supplies the correct information. Any invoice submitted under the contract is deemed not to be a proper invoice for purposes of prompt payment. FAR 52.232-33(d); FAR 52.232-34(c).

F. Payment by Government Purchase Card.[15] The financial institution that issued the government credit card may make immediate payment to the contractor. The government will reimburse the financial institution. FAR 32.1108. [16]

G. FAR Clauses: Unless payment will be made exclusively through the government purchase card, other third party arrangement, or pursuant to an exception in FAR 32.1103, the contracting officer shall insert the clause at FAR 52.232-33, Payment by Electronic Funds Transfer-Central Contractor Registration, in all solicitations where the paying office uses the Central Contractor Registration database as its source of EFT information. In contracts where clause 52.232-33 is not inserted, the contracting officer will insert the clause at FAR 52.232-34, Payment by Electronic Funds Transfer-Other than Central Contractor Information.

H. Liability for Erroneous Transfer

1. If an uncompleted or erroneous transfer occurs because the government failed to use the contractor provided EFT information in the correct manner, the government remains responsible for making a correct payment, paying any prompt penalty due, and recovering any erroneously directed funds. FAR 52.232-33(f)(1).

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[15] DOD requires use of the purchase card as payment for any purchase at or below the micro-purchase threshold ($2,500). A written determination by a Senior Executive Service member, Flag Officer, or General Officer is required in certain instances where the card is not used. Memorandum, The Under Secretary of Defense, Acquisition and Technology, to Secretaries of the Military Departments, subject: Streamlined Payment Practices for Awards/Orders Valued at or below the Micro-Purchase Threshold (2 Oct. 1998).

[16] Written contracts to be paid by purchase card should include the clause at 52.232-36, Payment by Third Party, as prescribed by FAR 32.1110(d). However, payment by a purchase card also may be made under a contract that does not contain the clause if the contractor agrees to accept the card as a method of payment. FAR 32.1108(b).

2. If an uncompleted or erroneous transfer occurs because the contractor provided incorrect EFT information, and if the funds are no longer in the control of the payment office, the government is deemed to have made payment and the contractor is solely responsible for recovery of any of the erroneously directed funds. If the funds remain under the control of the payment office, the government retains the right to either make payment by mail or suspend the payment. FAR 52.232-33(f)(2).

3. Prompt Payment Act. A payment shall be deemed to have been made in a timely manner if the EFT payment transaction instructions given to the Federal Reserve System specifies the date for settlement of the payment on or before the prompt payment due date, whether or not the Federal Reserve System actually makes the payment by that date. FAR 32.903(k).

VII. ASSIGNMENT OF CLAIMS.

A. General Rule. A contractor may assign its right to be paid by the government for contract performance. FAR 32.802.

1. Under the Assignment of Claims Act (31 U.S.C. § 3727) and Assignment of Contracts Act (41 U.S.C. § 15), a contractor may assign monies due or to become due under a contract if <u>all</u> of the following conditions are met:

a. The contract specifies payments aggregating $1,000 or more.

b. The contractor makes the assignment to a bank, trust company, or other financing institution, including any federal lending agency.

c. The contract does not prohibit the assignment.

d. Unless the contract expressly permits otherwise, the assignment:

(1) Covers all unpaid amounts payable under the contract;

(2) Is made only to one party; and

(3) Is not subject to further assignment.

e. The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the:

(1) Contracting officer or agency head,

(2) Surety on any bond applicable to the contract; and

(3) Disbursing officer designated in the contract to make payment.

2. The provisions of the Assignment of Claims Act are construed strictly. See Summerfield Housing Limited Partnership v. United States, 42 Fed. Cl. 160 (1998).

B. Protection for the Assignee. 41 U.S.C. § 15; FAR 32.804.

1. Once the assignee notifies the government of the assignment, the government must pay the assignee. Payment to the contractor will not discharge the government's obligation to pay the assignee. Tuftco Corp. v. United States, 222 Ct. Cl. 277 (1980).

2. The government cannot recover payments made to the assignee based on the contractor's liability to the government. FAR 32.804.

3. DOD may include a "no-setoff" provision in its contracts upon a determination of need by the President published in the Federal Register. 41 U.S.C. § 15(e). Formerly, agencies could only use a "no-setoff" provision upon a Presidential proclamation of war or national emergency. This authority has been delegated to the Head of the Agency after such determination has been published in the Federal Register. Use of the "no-setoff" provision may be appropriate to facilitate the national defense, in the event of a national emergency or natural disaster, or when the use of a "no-setoff" provision may facilitate private financing of contract performance. If the offeror is significantly indebted to the Government, this information should be used in the determination. FAR 32.803(d).

4. If the contract contains a no-setoff commitment clause (FAR 52.232-23, Alt I), the assignee will receive contract payments free of reduction or setoff for:

   a. Any liability of the contractor arising independent of the contract. FAR 32.804(b)(1). See Bank of Amer. Nat. Trust and Sav. Ass'n v. United States, 23 F.3d 380 (Fed. Cir. 1994) (SBA loans to fund contract performance are "independent" of the contract and not subject to set-off). See also Applied Companies v. United States, 37 Fed. Cl. 749 (1997) (discussing use of no-setoff provision by assignor).

   b. Certain liabilities arising under the same contract, such as fines, penalties, and withheld taxes (FAR 32.804(b)(2)).

VIII. DEBT DETERMINATION AND COLLECTION PROCEDURES.

A. Debts Covered by Contract Collection Procedures. FAR 32.602.

1. Damages or excess costs arising from a contractor's default in performance.

2. Breaches of contract obligations by the contractor concerning progress payments, advance payments, or government-furnished property or material.

3. Expenses incurred by the government in correcting defects.

4. Government overpayment to contractors due to billing errors, such as stating an incorrect quantity, or deficiencies in quality or erroneous payments made through EFT.[17]

[17] The General Accounting Office (GAO) has issued numerous reports highlighting DOD's problems concerning overpayments to contractors. In fiscal years 1994 through 1998, defense contractors returned $4.6 billion to the Defense Finance and Accounting Center in Columbus, Ohio, due to overpayments resulting from contract administration actions and payment processing errors. See DOD Procurement: Funds Returned by Defense Contractors (GAO/NSIAD-98-46R, Oct. 28, 1997), and DOD Procurement: Millions in Overpayments Returned by DOD Contractors (GAO/NSIAD-94-106, Mar. 14, 1994).

5. Retroactive price reductions resulting from contract terms for price redetermination or for determination of prices under incentive-type contracts.

6. Delinquency in contractor payments due to the government under agreements for deferral or postponement of collections.

7. Reimbursement of costs as provided in FAR 33.102(b) and 33.104(h)(1), paid by the Government where a postaward protest is sustained as a result of an awardee's misstatement, misrepresentation, or miscertification.

B. Determination of Contractor Debt.

1. Overpayment problem. Contractor reconciliation of its billings to government accounting and payment data is a key procedure for identifying government overpayments.[18]

2. Cooperation among government officials. The FAR requires contracting officers, contract financing offices, disbursing officials, and auditors to cooperate fully with each other to properly identify and promptly collect contract debts. FAR 32.605(a).

3. Responsibility.

a. Normally, the contracting officer has primary responsibility for determining the amount of a debt and for collecting it. FAR 32.605(b).

b. For DOD agencies, the disbursing officer is responsible for determining the amount and collecting contract debts whenever the government makes overpayment or erroneous payments. DFARS 232.605(b).

[18] See DOD Contract Management: Greater Attention Needed to Identify and Recover Overpayments (GAO/NSIAD-99-131, July 19, 1997). On March 8, 2000 the Hours of Representatives passed a bill (H.R. 1827) aimed at helping federal agencies recover overpayments to contractors. The bill would mandate audits of certain accounts, and allow for recovered money to be split between the federal treasury and the agency. The Senate's version (S. 3030) would require recovery auditing to help agencies identify discrepancies between the amount owed and the actual amount paid. Both bills are awaiting final action.

4. Procedures.

a. The responsible official determines the substantive basis for the government's entitlement. FAR 32.606.

(1) Contractual. Identify the specific contract provision(s) upon which the government's claim is based. Common bases include:

(a) Defective Pricing. See FAR 15.407-1, Defective Cost or Pricing Data.

(b) Excess Costs of Reprocurement. See FAR 49.402-6, Repurchase Against Contractor's Account.

(c) Recovery of Unliquidated Progress Payments. See FAR 52.232-16(h).

(d) Recovery of Unliquidated Advance Payments. See FAR 52.232-12; Do-Well Machine Shop Inc., ASBCA Nos. 34565, 40895, 99-1 BCA ¶ 30,320 (SBA entitled to unliquidated advance payment following default termination of 8(a) contractor); Johnson Mgmt. Group CFC Inc., HUDBCA Nos. 96-C-132-C15, 97-C-109-C2, 1999 HUD BCA LEXIS 7 (HUD had paramount lien on start-up equipment purchased with advance payments).

(2) Other bases for government entitlement include common law (e.g., breach of contract, consequential damages) and debts from other contracts.

b. The responsible official must issue a demand letter notifying the contractor of the debt as soon as the responsible official has computed the amount of refund due. FAR 32.610.

C. Enforcing Government Claims-Collecting the Debt.

1. Collection methods.

a. Voluntary Payment by the Contractor. After receiving the demand letter, the contractor may pay, arrange to defer payment, or arrange to make installment payments.

b. Administrative Set-Off. If the disbursing officer is responsible for collection of a contract debt or is notified of the debt by the responsible official, and if the disbursing officer has contractor invoices on hand for payment by the government, the disbursing official shall make an appropriate set-off in the payment to the contractor. FAR 32.611.

c. Withholding. If the contractor fails to make payment within 30 days of a demand, and has failed to request deferment, the government shall immediately initiate withholding of principal and interest. FAR 32.612.

d. Tax Refund Offsets. 31 U.S.C. § 3720A authorizes the Internal Revenue Service (IRS) to collect certain past due and legally enforceable debts by offset against tax refunds. The DFAS-Denver Center is the single DOD manager and contact point for the IRS-DOD agreement for implementing and administering tax refund offsets. DOD Dir. 7000.14-R (Financial Management Regulation), vol. 10, para. 180403B.

2. Deferment of Collection. FAR 32.613.

a. If the contractor is not appealing the debt, the government and the contractor may agree to a debt deferment or installment payments if the contractor is unable to pay in full at once or if the contractor's operations under national defense contracts would be seriously impaired. FAR 32.613(f).

b. If the contractor is appealing the debt, suspension or delay of the collection action is not required. However, the responsible official shall consider whether deferment of the debt is advisable to avoid possible overcollection. FAR 32.613(d).

c. Deferment pending disposition of appeal may be granted when the contractor is a small business concern or is financially weak. FAR 32.613(e).

d. The government grants deferments pursuant to a written agreement. FAR 32.613(h) specifies the necessary terms. According to FAR 32.613(i), if the contractor's appeal of the debt determination is pending when it requests deferment, any deferment/installment agreement must provide that the contractor will:

(1) prosecute the appeal diligently; and

(2) pay the debt in full when the appeal is decided or the parties agree on the debt amount.

e. The filing of an action under the contract's Disputes clause shall not suspend or delay collection of government claims. To obtain deferment of a debt determination that has been appealed under the Disputes clause, the contractor must present a bond or other collateral in the amount of the claim to the government. FAR 32.613(l).

D. Compromise Actions.

1. For debts under $100,000 (excluding interest), if further collection is not practicable or would cost more than the amount of the recovery, the agency may compromise the debt or terminate or suspend further collection action. FAR 32.616.

2. For debts over $100,000, DFAS must forward the debt to the Department of Justice (DOJ) for further action. If DOJ determines that the debt is uncollectible, it must notify DFAS that the debt should be written off. DOD Dir. 7000.14-R (Financial Management Regulation), vol. 10, para. 180201C.

E. Funds Received from the Contractor.

1. Miscellaneous Receipts Statute (MRS). 31 U.S.C. § 3302(b). Most funds received from a source outside the appropriations process must be deposited in the general fund of the United States Treasury.

2. Exceptions. Exceptions to the MRS are scattered throughout the United States Code and public law.

3. For more on the MRS and its exceptions, see General Accounting Office, Principles of Federal Appropriations Law, vol. II, ch. 6, § E (2d Ed. 1992); 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.

IX. CONCLUSION.

CHAPTER 10

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Appendix A: Attorney General Opinion, April 25, 1980

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CHAPTER 10

CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS

I. INTRODUCTION.

II. DEFINITIONS.

A. Continuing Resolution.

1. The Congressional 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, vol. 1, Definitions.

2. [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 CRA. A CRA has a fixed life. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000), para. 080401. [hereinafter DFAS-IN 37-1] (*available at* https://dfas4dod.dfas.mil/library).

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.

III. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS.

A. Continued Operations - Potential Antideficiency Act Violations.

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Fiscal Law Course
February/March 2002

1. The Comptroller General has 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.).

2. The Attorney General has opined that absent an appropriations act or a Continuing Resolution, executive agencies must take immediate steps to cease normal operations. Opinion of the Attorney General, Apr. 25, 1980 (Appendix A).

3. 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 issued what is known as the "Dellinger Memo," which 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 (Food 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 Continuing Resolution Authority General Guidance (OASA-FMC, August 1998, found at http://www.asafm.army.mil/pubs/cra/cra0898.doc (See 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;[1]

(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;[2]

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[1] 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).

[2] 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

(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) Child care activities.

b. Activities required to be suspended during the funding gap:

(1) Basic, skill, and qualification training which will obligate current FY funds;

(2) Military Personnel Selection Boards and Administrative Boards;

(3) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel;

(4) Department of Defense Dependents Schools; and,

(5) 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.

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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.

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.").

IV. CONTINUING RESOLUTIONS.

A. 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). The first Continuing Resolution for FY 2002 began as follows:

> *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 2002, and for other purposes, namely:
>
> Sec. 101. (a)(1) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for the fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint

resolution) which were conducted in the fiscal year 2001 and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

* * *

The Military Construction Appropriations Act, 2002;

* * *

(b) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001, at a rate for operations not exceeding the current rate, and for which appropriations, funds, or other authority was made available in the following appropriations Acts:

(1) the Department of Defense Appropriations Act, 2001

* * *

H.J. Res. 65 (hereinafter referred to as the FY 2002 Continuing
added).

2. A Continuing Resolution provides budget authority:

a. Until a fixed cut-off date specified in the Continuing Resolution;

b. Until an appropriations act replaces it; or

c. For an entire fiscal year, if no appropriations act is passed:

Sec. 107. 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

(a) enactment into law of an appropriation for any project or activity provided for in this joint resolution;

(b) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity; or

(c) October 16, 2001, whichever first occurs. FY 2002 Continuing Resolution.

B. Comparison of Continuing Resolutions with Appropriation Acts.

1. Appropriation acts appropriate specified sums of money.

2. Continuing Resolutions are temporary appropriation acts that normally appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations."

C. Governmental Operations During the Life of a Continuing Resolution.

1. New Starts. Continuing Resolutions generally do not allow agencies to initiate new programs, or expand the scope of existing programs, projects, and activities. For example, the FY 2002 Continuing Resolution provided, in part:

Sec. 102. No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for new production of items not funded for production in fiscal year 2001 or prior years, for the increase in production rates above those sustained with fiscal year 2001 funds, or to initiate, resume, or continue any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during the fiscal year 2001. . . .

2. Current rate. Continuing Resolutions frequently authorize operations at the "current rate." This represents an attempt by Congress to maintain the "status quo" of existing programs and rates of operation/production during the time frame between Appropriation Acts.

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 2002 Continuing Resolution contained the following language:

> Sec. 101(a)(1). [W]henever the amount which would be made available or the authority which would be granted in these Acts . . . is different than that which would be available or granted under current operations, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate. FY 2002 Continuing Resolution.

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).

3. 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. 110. 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 herein shall be construed to waive any other provision of law governing the apportionment of funds. FY 2002 Continuing Resolution (emphasis added).

4. 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. 112. Notwithstanding any other provision of this joint resolution, except section 107, for those programs that had high initial rates of operation or complete distribution of fiscal year 2001 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 2002 shall not be made* and no grants shall be awarded for such programs funded by this resolution *that would impinge on final funding prerogatives*. FY 2002 Continuing Resolution (emphasis added).

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

> Sec. 108. 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 2002 Continuing Resolution.

6. 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).

D. 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*.[3] 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).

E. Determining 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. 106. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds are available under this joint resolution. FY 2002 Continuing Resolution.

[3] The second Continuing Resolution passed by the 104th Congress increased this decrement to 25 percent.

2. To determine if a program is a new "project or activity," the Comptroller General has looked at whether the agency had prior authority to carry out activities specifically identified in newly enacted legislation. 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).

F. Relationship of a Continuing Resolution to Other Legislation.

1. A Continuing Resolution appropriates funds that are "not otherwise appropriated." See e.g. Appendix E. 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).

V. CONCLUSION.

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 of employee of the United States to:

> involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.[1] On it's face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.[2] On

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[1]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.

[2]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).

each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although though Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of 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.[3]

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.[4] On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.[5] 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.[6] 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.[7] 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,

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[3]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).

[4]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.

[5]Act of July 15, 1952, ch. 758, §1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

[6]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, ə 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.

[7]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).

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 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,[8] 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.[9] 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

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[8]The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

[9]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).

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 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.[10]

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).

[10]See 21 Op. A.G. 288.

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

APPENDIX B

THE DELLINGER MEMO

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).

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 personnelists 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. <u>ADP and Communications</u>.

(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

FY 2002 CONTINUING RESOLUTION TEXT AND OMB APPORTIONMENT BULLETIN

[DOCID: f:publ044.107]

[[Page 115 STAT. 253]]

Public Law 107-44
107th Congress

Joint Resolution

Making continuing appropriations for the fiscal year 2002, and for other purposes. <<NOTE: Sept. 28, 2001 - [H.J. Res. 65]>>

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 fiscal year 2002, and for other purposes, namely:

Sec. 101. (a)(1) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001 and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

(A) the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2002;

(B) the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002, notwithstanding section 15 of the State Department Basic Authorities Act of 1956, section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (Public Law 103-236), and section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1));

(C) the Energy and Water Development Appropriations Act, 2002;

(D) the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2002, notwithstanding section 10 of Public Law 91-672 and section 15 of the State Department Basic Authorities Act of 1956;

(E) the Department of the Interior and Related Agencies

Appropriations Act, 2002;

(F) the Legislative Branch Appropriations Act, 2002;

(G) the Military Construction Appropriations Act, 2002;

(H) the Department of Transportation and Related Agencies Appropriations Act, 2002;

(I) the Treasury and General Government Appropriations Act, 2002; and

(J) the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002:

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Provided, That whenever the amount which would be made available or the authority which would be granted in these Acts as passed by the House and Senate as of October 1, 2001, is different than that which would be available or granted under current operations, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate: Provided further, That whenever there is no amount made available under any of these appropriations Acts as passed by the House and Senate as of October 1, 2001, for a continuing project or activity which was conducted in fiscal year 2001 and for which there is fiscal year 2002 funding included in the budget request, the pertinent project or activity shall be continued at the rate for current operations under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(2) Whenever the amount which would be made available or the authority which would be granted under an Act listed in this subsection as passed by the House as of October 1, 2001, is different from that which would be available or granted under such Act as passed by the Senate as of October 1, 2001, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(3) Whenever an Act listed in this subsection has been passed by only the House or only the Senate as of October 1, 2001, 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 and under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001: Provided, That whenever there is no amount made available under any of these appropriations Acts as passed by the House or the Senate as of October 1, 2001, for a continuing project or activity which was conducted in fiscal year 2001 and for which there is fiscal year 2002 funding included in the budget request, the pertinent project or activity shall be continued at the rate for current operations under the

authority and conditions provided in the applicable appropriations Act for fiscal year 2001.

(b) Such amounts as may be necessary under the authority and conditions provided in the applicable appropriations Act for fiscal year 2001 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in fiscal year 2001, at a rate for operations not exceeding the current rate, and for which appropriations, funds, or other authority was made available in the following appropriations Acts:

(1) the Department of Defense Appropriations Act, 2001, notwithstanding section 504(a)(1) of the National Security Act of 1947 (50 U.S.C. 414(a)(1)); and

(2) the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001; and

(3) the District of Columbia Appropriations Act, 2001.

Sec. 102. No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for new production of items not funded for production in fiscal year 2001 or prior years, for the increase in production rates above those sustained with fiscal year 2001 funds, or to initiate, resume, or continue any project, activity, operation, or

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organization which are defined as any project, subproject, activity, budget activity, program element, and subprogram within a program element and for investment items are further defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item which includes a program element and subprogram element within an appropriation account, for which appropriations, funds, or other authority were not available during fiscal year 2001: Provided, That no appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

Sec. 103. Appropriations made by section 101 shall be available to the extent and in the manner which would be provided by the pertinent appropriations Act.

Sec. 104. No appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2001.

Sec. 105. No provision which is included in an appropriations Act

listed in section 101(a) but which was not included in the applicable appropriations Act for fiscal year 2001 and which by its terms is applicable to more than one appropriation, fund, or authority shall be applicable to any appropriation, fund, or authority provided in this joint resolution.

Sec. 106. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds or authority for such project or activity are available under this joint resolution.

Sec. 107. <<NOTE: Expiration date.>> 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 (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) the enactment into law of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 16, 2001, whichever first occurs.

Sec. 108. 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.

Sec. 109. No provision in any appropriations Act for fiscal year 2002 listed in section 101(a) that makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation shall be effective before the date set forth in section 107(c) of this joint resolution.

Sec. 110. 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 herein shall be construed to waive any other provision of law governing the apportionment of funds.

Sec. 111. This joint resolution shall be implemented so that only the most limited funding action of that permitted in the joint resolution shall be taken in order to provide for continuation of projects and activities.

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Sec. 112. Notwithstanding any other provision of this joint resolution, except section 107, for those programs that had high initial rates of operation or complete distribution of fiscal year 2001 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 2002 shall not be made and no grants shall be awarded for such programs funded by this resolution that would impinge on final funding prerogatives.

Sec. 113. Activities authorized by sections 1319 and 1336(a) of the National Flood Insurance Act of 1968 (42 U.S.C. 4001 et seq.) may continue through the date specified in section 107(c) of this joint resolution.

Sec. 114. Activities authorized by title V of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998, may continue through the date specified in section 107(c) of this joint resolution.

Sec. 115. Activities authorized by section 7 of the Export-Import Bank Act of 1945 (12 U.S.C. 635f) and section 1(c) of Public Law 103-428, may continue through the date specified in section 107(c) of this joint resolution.

Sec. 116. Activities authorized by chapter 2 of title II of the Trade Act of 1974 shall continue through the date specified in section 107(c) of this joint resolution.

Sec. 117. Activities authorized by subsection (f) of section 403 of Public Law 103-356 may continue through the date specified in section 107(c) of this joint resolution.

Sec. 118. Notwithstanding any other provision of this joint resolution, except section 107, the Library of Congress may temporarily transfer to the revolving fund established under section 103 of Public Law 106-481 amounts to continue program operations at a rate not exceeding the rate under authority applicable prior to October 1, 2001.

Sec. 119. Of amounts provided by section 101 of this joint resolution, for projects and activities that would be funded under the heading ``International Organizations and Conferences, Contributions to International Organizations'' in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2001, $100,000,000 may be made available only pursuant to a certification by the Secretary of State that the United Nations has taken no action in calendar year 2001 prior to the date of enactment of this Act to increase funding for any United Nations program without identifying an offsetting decrease elsewhere in the United Nations budget and cause the United Nations to exceed the budget for the biennium 2000-2001 of $2,535,700,000.

Sec. 120. Notwithstanding any other provision of this joint resolution, in the event that H.R. 1088, the Investor and Capital Markets Fee Relief Act, or other legislation to amend section 6(b) of the Securities Act of 1933 (15 U.S.C. 77f(b)), and sections 13(e), 14(g), and 31 of the Securities Exchange Act of 1934 (15 U.S.C. 78m(e), 78n(g), and 78ee), is enacted into law during the period covered by this joint resolution, the fees, charges, and assessments authorized by such sections, as amended, shall be deposited and credited as offsetting

collections to the account that provides appropriations to the Securities and Exchange Commission.

[[Page 115 STAT. 257]]

Sec. 121. Collection and use of maintenance fees as authorized by section 4(i) and 4(k) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136a-1(i) and (k)) may continue through the date specified in section 107(c) of this joint resolution. Prohibitions against collecting ``other fees'' as described in section 4(i)(6) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136a-1(i)(6)) shall continue in effect through the date specified in section 107(c) of this joint resolution.

Sec. 122. Notwithstanding section 106 of this joint resolution, funds made available in Public Law 107-38 are not limited by the terms and conditions of this joint resolution.

Approved September 28, 2001.

LEGISLATIVE HISTORY--H.J. Res. 65:

CONGRESSIONAL RECORD, Vol. 147 (2001):
Sept. 24, considered and passed House.
Sept. 25, considered and passed Senate.

<all>

Office of Management and Budget (Text Only)
OMB Home
September 27, 2001

BULLETIN NO. 01-10

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Apportionment of the Continuing Resolution(s) for Fiscal Year 2002

1. **Purpose and Background**. H. J. Res 65 will provide continuing appropriations for the period October 1 through October 16, 2001. I am providing an automatic apportionment for amounts provided by this continuing resolution (CR), and any extensions of this CR, as specified in section 2. This Bulletin supplements instructions for apportionment of CRs in OMB Circular No. A-34.

Further, I am providing an automatic apportionment of any unobligated balances available on October 1, 2001, from the amounts transferred from the Emergency Response Fund to individual agency accounts pursuant to the determination of the President on **September 21, 2001.**

2. **Automatic Apportionments**. Calculate the amount automatically apportioned through the period ending October 16, 2001 (and any extensions of that period) by multiplying the rate (amount) provided by the CR by the lower of:

- the percentage of the year covered by the CR, or
- the historical seasonal rate of obligations for the period of the year covered by the CR.

See the Attachment to this Bulletin for more detailed instructions on calculating the amount automatically apportioned.

Under an automatic apportionment, all of the footnotes and conditions placed on the prior year apportionment remain in effect.

The CR expires at midnight on Tuesday, October 16, 2001.

3. **Written Apportionments**. If a program requires an amount different from the total amount automatically apportioned, you must request a written apportionment

/s/
Mitchell E. Daniels, Jr.
Director

Attachment

Calculating the Automatic Apportionment

Calculate the amount automatically apportioned through the period ending October 16, 2001 (and any extensions of that period) by multiplying the **rate (amount) provided by the CR** by the lower of:

- the **percentage of the year** covered by the CR (rounded to the nearest tenth), or
- the **historical seasonal rate** of obligations for the period of the year covered by the CR.

1. **What is the rate (amount) provided by the CR?** The rate (amount) provided by the CR could be one of the following *annual* amounts:

- the *current rate*, calculated as follows:
    - take the net amount enacted in FY 2001, i.e., add any supplemental appropriations and subtract any rescissions; and
    - add the unobligated balance carried forward to FY 2001 (if any); or
- the rate of operations *not exceeding the current rate*, calculated as follows:
    - take the net amount enacted in FY 2001, i.e., add any supplemental appropriations and subtract any rescissions;
    - add the unobligated balance carried forward to FY 2001 (if any), and
    - subtract the unobligated balance at the end of FY 2001 (if any).

2. **Which of the annual amounts do I use?**

If	**Then use**
The project or activity meets all the following criteria: • zero funded in the Act passed by both houses by October 1 or is zero funded in the Act passed by the one house by October 1; • included in the President's budget request; • was conducted in FY 2001; and • is included in an act other than the Department of Defense Appropriations Act, 2001, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2001, or the District of Columbia Appropriations Act, 2001.	FY 2001 (the *current rate*)
All other cases	The rate of operations *not exceeding the current rate.*

3. **Does the continuing resolution affect the availability of funds that would be available if H. J. Res. 65 had not been enacted?**

No. The availability of any part of the budgetary resources for an account that is not determined by current action of the Congress (such as permanent appropriations, public enterprise and other revolving funds, reimbursements and other income, and balances of prior year budget authority) are not affected by H. J. Res. 65.

Most of these budgetary resources must be apportioned by OMB before obligation. This Bulletin does not apportion those budgetary resources, except unobligated balances on October 1, 2001, from amounts transferred from the Emergency Response Fund to individual agency accounts pursuant to the determination of the President on **September 21, 2001.**

CHAPTER 11

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CHAPTER 11

REPROGRAMMING

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. Department of Defense Appropriations Act (Annually).

B. DOD 7000.14-R, Financial Management Regulations (hereinafter "DOD FMR").

C. DFAS-IN 37-1, Finance and Accounting Policy and Implementation, ch. 3, para. 0306 (Jan. 2000).

D. Department of Air Force, Instr. 65-601, Volume I, ch. 2, para. 2.3, Budget Guidance and Procedures (17 Nov. 2000)[hereinafter AFI 65-601, vol. I], available at http:\\afpubs.hq.af.mil/pubfiles/af/65/afi65-601v1.

E. GAO, Principles of Fed. Appropriations Law, 2-25 to 2-28 (2d ed., vol. I, 1992), available www.gao.gov/special.pubs/og92013.pdf.

LTC Tim Pendolino
Fiscal Law Course
February/March 2002

III. DEFINITIONS.

A. Reprogramming. Reprogramming is the use of funds in an appropriations account for purposes other than those contemplated by the agency at the time of the appropriation. DOD FMR, vol. 2A, ch. 1 (June 2000).

B. Transfer. A transfer of budget authority from one appropriation or fund account to another. DOD FMR, vol. 2A, ch. 1 (June 2000).

IV. TRANSFERS DISTINGUISHED FROM REPROGRAMMING.

A. Transfers. GAO, Principles of Fed. Appropriations Law, 2-20 (2d ed., vol. 1, 1992).

1. Transfers shift money between appropriations accounts.

2. There are 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 within accounts, e.g., when Congress has enacted legal subdivisions of funds (line items) within an account. 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.

b. There are generally 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.

(a) Congress provides general transfer authority to DOD in each of its appropriations acts. See, e.g., Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, § 8005, 114 Stat. 674 (2001).

(b) Permanent Legislation.

(2) Specific Transfer Authority. Congress authorizes or directs the movement of funds between specific programs. See, e.g., Overseas Contingency Operations Transfer Fund, Department of Defense Appropriations Act, 2001, Pub. L. No. 106-259, Title II, 114 Stat. 661 (2000). See also id. at § 8082, 114 Stat. 703 (authorizing transfers within Navy's Shipbuilding and Conversion accounts).

c. The statutory prohibition 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 violates the purpose statute, 31 U.S.C. § 1301(a), and constitutes an unauthorized augmentation of the receiving appropriation.

e. 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).

B. Reprogrammings. GAO, Principles of Fed. Appropriations Law, p. 2-25 (2d ed., vol. 1, July 1992).

1. Reprogramming shifts money within an appropriations account.

   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.

2. 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.

3. Subdivisions of an appropriation contained in the agency's budget request or in 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).

4. Reprogramming is an informal process.

   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.

5. 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, 2001, Public Law No. 106-259, § 8005, 114 Stat. 674 (2000).

6. Items ineligible for reprogramming. Department of Defense Appropriations Act, 2001, Public Law No. 106-259, § 8005, 114 Stat. 674 (2000).

V. REPROGRAMMING TYPES.

A. Reprogramming Actions Requiring Prior Congressional Approval. DOD FMR vol. 3, ch. 6, para. 060401 (Jan 2001).

1. Most shifting of funds that makes use of general transfer authority. See DOD FMR, vol. 3, ch. 6, para. 060401.A.3., for exceptions.

2. Any reprogramming that involves an item designated as a Congressional interest item.

3. Any increase in the procurement quantity of a major item, such as an individual aircraft, missile, naval vessel, tracked combat vehicle, and other weapon or torpedo and related support equipment.

B. Reprogramming Actions That Require Congressional Notification. DOD FMR vol 3, ch 6, para. 060401 (December 1996). Any reprogramming that involves moving funds within an appropriation above the thresholds listed below requires Congressional notification.

1. Military Personnel or Operations & Maintenance: cumulative increases in a budget activity[1] of $10 million or more (Military Personnel) or cumulative increases in a budget activity of $15 million or more (Operations & Maintenance) (e.g., moving funds out of the permanent change of station account into the pay account).

[1]Budget activities are defined as categories within each appropriation and fund account which identify the purposes, projects, or types of activities financed by the appropriation or fund. DOD FMR, vol. 2A, ch. 1 (July 1998).

2. Procurement: cumulative increase of $10 million in a procurement line item; addition to the procurement line item data base of a procurement line item of $2 million or more; or creation of a new program[2] with a cost of at least $10 million over its first three years (e.g., increasing the funding level for the Aircraft Carrier Replacement Program).

3. Cumulative increase of $4 million in an RDT&E program, or creation of a new RDT&E program with an annual cost of at least $2 million, or with a cost of at least $10 million over its first three years (e.g., increases in the Warfighter Advanced Technology Program).

C. "Internal" Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 060402 (Jan. 2001).

1. Internal reprogrammings are actions involving a reclassification or realignment of funds within budget activities or within budget line items/program elements.

2. Funding changes within program elements are not regarded as "reprogramming." The Honorable Roy Dyson, House of Representatives, B-220113, 65 Comp. Gen. 360 (1986).

3. Internal reprogrammings are not subject to dollar thresholds.

4. Internal reprogrammings do not require prior congressional approval or notification, but are approved by the Office of the Undersecretary of Defense, Comptroller.

[2]A new program is defined as any new program which the agency has not justified previously to Congress. DOD FMR, vol. 3, ch. 6, para. 060401E (August 2000).

D. Below Threshold Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 0608 (Jan. 2001).

1. Below threshold reprogrammings are those reprogrammings that do not exceed the thresholds identified above, in paragraph V.B., individually or when combined with other below-threshold reprogrammings.

2. Congress performs oversight through the DOD's semiannual submission of its DD 1416, Report of Programs.

E. Letter Notifications. DOD FMR, vol. 3, ch. 6, para. 060905 (Jan. 2001).

1. Letter notifications apply to below threshold reprogramming for new programs or line items not otherwise requiring prior approval or notification.

2. The comptroller or budget officer of the component notifies the appropriate House and Senate Committees on Appropriations.

F. Intelligence Related Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 0606 (Jan. 2001).

1. Generally, the same rules apply as for other reprogramming actions.

2. Some special rules do apply:

a. The Intelligence Program Support Group (ISG), Office of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence (OASD C3I), must be made aware of all adjustments to intelligence programs, to include below-threshold actions, prior to initiation.

b. The agency must obtain prior approval for:

(1) any action that is an item of special congressional interest;

(2) any proposed action that has not been specifically authorized;

(3) any action which could have significant international implications; and

(4) any proposed action that transfers funds between appropriations.

3. Congressional notification is required for actions that exceed established thresholds, or represent new starts that exceed thresholds.

VI. MILITARY CONSTRUCTION REPROGRAMMING. DOD FMR, vol. 3, ch. 7 (Jan. 2001).

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:

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. Authority.

1. 10 U.S.C. § 2853. Authorizes a reprogramming request when the cost of an approved project must be increased over certain thresholds, or in certain circumstances.

2. 10 U.S.C. § 2803. Provides permanent authority to obligate and reprogram up to $30 million annually for emergency construction if a project is:

   a. Not otherwise authorized by law;

   b. Vital to national security; and

   c. So urgent that waiting until the next budget submission would be inconsistent with national security.

3. 10 U.S.C. § 2854. Provides permanent authorization for the restoration or replacement of facilities due to natural disasters.

4. 10 U.S.C. § 2672a. Provides permanent authority to acquire interest in land that:

   a. Is needed in the interest of national defense;

   b. Is required to maintain the operational integrity of military installations; and

   c. Urgency does not permit the time necessary to include the required acquisition in an annual Military Construction Authorization Act.

5. 10 U.S.C. § 2827. Provides permanent authority to relocate existing military family housing units from any location where the number of such units exceeds requirements for military family housing to any military installation where there is a housing shortage.

C. Restrictions on Reprogrammings.

1. DOD will not submit a request for reprogramming:

a. For any project or effort that has not been authorized;

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. MILCON reprogrammings are sent to the House and Senate Armed Services Committees and the House and Senate Appropriations Committees for approval.

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 (2d ed., vol. I, 1992).

VII. CONCLUSION.

CHAPTER 12

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CHAPTER 12

ENVIRONMENTAL FUNDING ISSUES

I. INTRODUCTION.

A. Cost Issues. Cost issues involve the "allowability" of a contractor's environmental costs. The government reimburses contractors for "allowable" costs but does not reimburse contractors for "unallowable" costs.

B. Funding Issues. Funding issues involve the means by which a federal agency will pay its environmental costs. These issues raise various fiscal law questions, such as whether an appropriation is being used for a proper purpose to satisfy a bona fide need of its period of availability.

II. COST ISSUES IN ENVIRONMENTAL CONTRACTING.

A. Overview. Department of Defense (DOD) contractors annually spend millions of dollars to comply with Federal and State environmental laws, and these costs are likely to increase. Contractors will often attempt to charge these costs to their government contracts. This section will focus on the allowability of contractors' environmental costs.

1. Indirect Costs.

a. Costs not directly identified with any particular contract but instead included in the contractor's overhead or general and administrative (G & A) pools will often be charged to government contracts as indirect costs. FAR 31.203. Cleanup costs will generally be treated as indirect costs.

b. To be allocable to a government contract, indirect environmental cleanup costs must either benefit that contract and other contracts or must be necessary to the overall operation of the contractor's business. FAR 31.201-4.

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c. Remediation of environmental problems created under prior contracts generally will not confer any benefit on current contracts and would, therefore, only be allocable if necessary to "the overall operation" of the contractor's business. FAR 31.201-4.

d. Costs incurred in one accounting period are not allocable to contracts in a different accounting period. Thus, contractors cannot allocate their environmental cleanup costs to government contracts in the current accounting period if those costs were incurred in a prior accounting period. Cost Accounting Standard (CAS) 410.40(b)(1).

2. Direct Costs. Costs (allowable and reasonable) arising under a government contract may be charged completely to that contract. If the costs of compliance, or pollution avoidance, relate only to the requirements of one contract, those costs will generally be charged directly to the contract under which the costs arose.

B. Reasonableness and Allocability Generally. An incurred cost, either direct or indirect, must be reasonable, allocable to the contract, measured in accordance with accounting standards, and not specifically disallowed by the contract or the FAR.

1. Reasonable Costs. FAR 31.201-3. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of a competitive business. FAR 31.201-3. The mere fact that a contractor incurs a cost does not create a presumption of reasonableness. FAR 31.201-3(a). <u>But</u> <u>see</u> <u>Bruce Constr. Corp. v. United States</u>, 324 F.2d 516 (Ct.Cl. 1963).

a. Factors affecting reasonableness.

(1) Generally recognized as ordinary and necessary.

(2) Generally accepted sound business practices, arms length bargaining, Federal, State, and local regulations.

(3) The contractor's responsibilities to the government, its other customers, its owners, and the public.

(4) Significant deviations from established practices.

2. Allocable To The Contract.

a. A cost is allocable if incurred specifically for the contract; or

b. The cost benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or

c. Is necessary for the overall operation of the business.

3. Proper Accounting Standards. Contractors must measure their costs by any generally accepted cost accounting method that is equitably and consistently applied, FAR 31.201-1, and in accordance with the CAS (if applicable). For example, treat costs of a "similar" nature in the same manner. CAS 401; CAS 402; FAR 31.202; FMC v. United States, 853 F.2d 882 (Fed. Cir. 1988).

4. Contract or regulation must not specifically disallow the cost. FAR 31.205 sets forth the cost principles applicable to government contracts.

C. Environmental Costs. There are essentially two types of environmental costs that a contractor may incur: compliance costs and cleanup costs. Compliance costs are costs incurred to avoid harm to the environment and comply with environmental statutes and regulations. Cleanup costs are costs incurred to remedy past environmental contamination.

D. Allowability of a Contractor's Environmental Compliance Costs. The contractor's costs of complying with environmental laws in its current operations, if reasonable, will generally be allowable, either as direct or indirect costs.

E. Allowability of a Contractor's Environmental Cleanup Costs.

1. Contractors may incur cleanup costs in response to an environmental agency's determination that the contractor's operations have violated Federal or State environmental laws or as the result of an independent management decision to investigate and correct environmental problems to forestall an agency finding of non-compliance.

2. Determining allowability of these costs is complicated but cleanup costs will generally be unallowable if contractor wrongdoing resulted in the contamination requiring cleanup.

3. Since a contractor's cleanup obligations may be based on strict liability, e.g., 42 U.S.C. § 9607(a), a contractor may be responsible for remediation costs as a principally responsible party (PRP) and yet still be entitled to reimbursement for these costs if such costs are otherwise reasonable.

4. Waiver. If a contracting officer knows that the contractor is incurring environmental cleanup costs, the contracting officer should ensure that the contractor is not led to believe that the agency considers these costs allowable. Generally, the government cannot retroactively disallow costs that the government acquiesced in or approved. General Dynamics Corp., ASBCA No. 31359, 92-1 BCA ¶ 24,698; Litton Sys., Inc. v. United States, 449 F.2d 392 (Ct.Cl. 1971).

F. Guidance.

1. On 14 October 1992, the Defense Contract Audit Agency (DCAA) issued guidance that states "environmental costs are normal costs of doing business and are generally allowable if reasonable and allocable." DCAA Letter, "*Audit Guidance on the Allowability of Environmental Costs*," (14 October 1992).

   a. The DCAA Guidance provides for the disallowance of "unreasonable" costs and explains that environmental costs are unreasonable if the contractor could have avoided the contamination that is generating the costs.

b. In order to be allowable under the Guidance, the contamination must have occurred despite the contractor's due care to avoid the contamination, and despite the contractor's compliance with applicable law.

c. Since it is unreasonable for a contractor to allow contamination to continue once it becomes aware of the problem, increased costs due to contractor delay in taking action after discovery of the contamination are not allowable.

2. On 13 April 1994, the DCAA and the Defense Contract Management Command (DCMC) jointly addressed questions arising from guidance issued by DCAA on 14 October 1992. The DCAA/DCMC Guidance states, *inter alia*, that:

a. An environmental violation (which would render associated costs unallowable), may be established without a formal citation by a government agency.

b. Contractors should "expense" costs to remediate property which was not contaminated when acquired by the contractor, but costs to remediate property that was contaminated when acquired by the contractor should be capitalized as an improvement, rather than expensed in a single accounting period. Applying the guidance provided by CAS 404, environmental cleanup costs that increase the value of the contractor's real property should be capitalized and should not be directly charged to one contract.

c. If a contractor incurs costs as a PRP and cannot collect from another PRP because that PRP no longer exists, such costs are not "bad debts," and therefore allowable under FAR 32.205-3.

G. Fines and Penalties. Fines and penalties resulting from violations of, or failure of the contractor to comply with federal, state, local, or foreign laws and regulations, are unallowable except when incurred as a result of compliance with specific terms and conditions of the contract or the written instructions of the contracting officer. 10 U.S.C. § 2324(e); FAR 31.205-15.

H. Effects of Reimbursement. Government reimbursement of a contractor's cleanup costs has several undesirable effects:

1. Cleanup obligations imposed by one government agency (e.g., the EPA) upon a private concern (the contractor) are, at least, partially paid for by another government agency (the contracting agency);

2. The contracting agency will generally pay the contractor a profit on its cleanup costs since these costs are types of indirect costs on which the government pays a profit or fee;

3. After the government has subsidized at least part of the contractor's cleanup effort, the contractor may sell its environmentally sound property at a profit with no obligation to repay the government for its contribution to the cleanup effort.

I. Specifically Allowable Costs. Independent research and development (IR&D) and bid and proposal (B&P) costs are allowable to the extent they are incurred for "projects that are of potential interest to DOD." DFARS 231.205-18. This includes IR&D/B&P costs incurred to develop efficient technologies for environmental data gathering, environmental cleanup and restoration, pollution reduction in manufacturing, environmental conservation, and environmentally safe management of facilities. DFARS 231.205-18.

J. DOD Reporting Requirement. The Secretary of Defense must submit a report to Congress each year, not later than 30 days after the date on which the President submits the budget to Congress summarizing the payments made to DOD contractors for the costs of environmental response actions. 10 U.S.C. § 2706.

III. FUNDING ISSUES.

A. General Sources of Funding. Compliance with mandated environmental standards is integral to the operation and maintenance of military installations. Consequently, an installation will use Operations and Maintenance (O&M) funds to dispose of and treat wastes generated by the installation. AR 200-1, para. 6-15; AFI 32-7001

B. Environmental Restoration Accounts.

1. Generally. In FY 1984, Congress established the Defense Environmental Restoration Account (DERA) by consolidating funds from various military service accounts into one DOD account. The DERA fund manager transferred funds from the central DOD account to any appropriations account, e.g., O&M, Procurement, MILCON, or RDT&E. Once transferred to a particular appropriation, the funds were merged with the receiving account and were available for the same purposes and for the same time period as the receiving account. 10 U.S.C. § 2703(b); AFI 32-7001, para. 2.2.4.; DFAS-IN 37-1. On 23 September 1996, Congress abolished DERA and reestablished individual accounts for the Army, Navy, Air Force, and DOD.[1]

2. Each year Congress appropriates an amount to each environmental restoration account.

3. Funds transferred from the individual environmental restoration accounts may only be used for environmental restoration. Use of these funds for an unauthorized purpose violates the "purpose statute." 31 U.S.C. § 1301.

4. These funds are available for a variety of restoration projects and are available until expended (see 10 U.S.C. § 2703(b)).

5. Amounts Credited to the Account. Certain funds may be credited to the appropriate environmental restoration account:

   a. Amounts recovered under CERCLA[2] for response actions.

   b. Any other amounts recovered from a contractor, insurer, surety, or other person to reimburse DOD or military department for any expenditure for environmental response activities.

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[1] National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, §322, 110 Stat. 2422 (1996)(amending 10 U.S.C. § 2703; any reference to DERA in any Federal law, Executive Order, regulation, delegation of authority, or document shall be deemed to refer to the appropriate (military service or DOD) environmental restoration account).

[2] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 to 9675.

6. None of the funds appropriated to DERA for FYs 1995 - 1999 or to any individual restoration account for FY 1997 - 1999 may be used for the payment of a fine or penalty imposed against DOD, unless the act or omission for which the fine or penalty is imposed arises out of activities funded by the account. 10 U.S.C. § 2703(e).

C. Paying Environmental Judgments. The permanent indefinite Judgment Fund may be used to pay "litigative" awards obtained against federal agencies to reimburse claimants for the agencies' share of response costs and natural resource damages paid or payable by CERCLA claimants. Matter of the Judgment Fund, B-253179, 73 Comp. Gen. 46 (1993). Before an agency may use this fund to pay an award, GAO must certify:

1. The award is final;

2. The award provides monetary instead of injunctive relief;

3. The award is made under one of the authorities specified in 31 U.S.C. § 1304(a)(3) (e.g., judgments of district courts and the Court of Federal Claims, and compromise settlements made by DOJ); and

4. Payment of the award is not otherwise provided for.

D. Specific Statutory Spending Authority. Congress will often fund environmental initiatives with specific sums.

1. To implement the requirements of the Noise Control Act of 1972, 42 U.S.C. § 4901, Congress funded the additional cost of low-noise products through supplemental appropriations until the end of fiscal year 1977.

2. The obligation to purchase alternative fueled vehicles is subject to the availability of funds and life-cycle cost considerations. Exec. Order 12844, sec. 2. However, the Order also requires the Secretary of Energy to provide assistance to other agencies that acquire alternative fuel vehicles, including payment of the incremental cost of acquiring such vehicles and the incremental costs associated with their acquisition and disposal. Exec. Order 12844, sec. 3.

3. DOD installations with qualifying recycling programs may retain a share of the proceeds from the sale of materials recovered through recycling or waste prevention programs. Exec. Order 12873, sec. 703; AR 200-1, para. 6-14.

E. Specific Funding Limitations.

1. Each agency must implement paper conservation techniques so that total annual expenditures for recycled content printing and writing paper do not exceed current annual budgets for paper products. Exec. Order 12873, sec. 504(2).

2. The FY 1995 DOD MILCON Appropriations Act prohibits expenditure of MILCON funds under cost plus fixed fee (CPFF) construction contracts over $25,000 without "the specific approval in writing of the Secretary of Defense." Pub. L. 103-307, § 101, 108 Stat. 1659 (1994).[3] Although the BRAC account is under the MILCON Appropriations Act, agencies were using CPFF contracts for BRAC contracts without obtaining the required approval. The DOD Principal Deputy Comptroller considers this practice a violation of the Antideficiency Act. Memorandum, Principal Deputy Comptroller, Dept of Defense, subject: Cost-Plus-A-Fixed-Fee (CPFF) Contracts Funded With BRAC Appropriations (Apr. 7, 1994).

a. The Secretary of the Army has delegated the authority to approve MILCON funded BRAC contracts to Heads of Contracting Activities. Secretary of the Army Letter, SARDA 94-5, subject: Delegation of Authority to Approve Certain Cost Contracts Funded With Military Construction Appropriations (June 30, 1994). This authority may be redelegated to a level no lower than the chief of the contracting office.

b. The Secretary of the Air Force has granted blanket authority to obligate and expend BRAC appropriations through CPFF contracts awarded to support Air Force environmental and compliance actions. Secretary of the Air Force Letter, subject: Expenditure of Base Realignment and Closure (BRAC) Funds Under Cost Plus Fixed Fee (CPFF) Contracts for Environmental Remediation Projects (May 26, 1994).

[3] Prior MILCON Acts included substantially the same restriction. See, e.g., Military Construction Appropriations Act of 1994, Pub. L. 103-110, § 101, 107 Stat. 1037, 1041 (1993).

c. On 8 January 1997, DFARS 216.306 was amended to implement Section 101 of Fiscal Year 1997 Military Construction Appropriations Act (Public Law 104-196). Section 101 continues to restrict the use of CPFF contracts for military construction, but provides an exception for contracts for environmental restoration at installations that are being closed or realigned where payments are made from a BRAC Account.

F. Funding Requirements Unique to Federal Agencies. The House Report preceding the National Defense Authorization Act for Fiscal Years 1990-1991 stated:

1. The statutory enforcement strategy does not take into account the national security mission of the DOD installation being regulated. Attempting to treat a major military installation without considering its missions and mode of operation could result in regulatory decisions that are not in the national interest.

2. A cost-is-no-object criterion may make sense for private parties that generally operate in one state or region, but is unrealistic for an agency that operates in every state and depends entirely on federal funding. H.R. 2461, 101st Cong., 1st Sess., p. 863 (1989).

G. Fines and Penalties.

1. Operation and Maintenance Funds.

2. Judgment Fund.

3. ERA Accounts.

4. FY 2000 Defense Appropriations Act, § 8149 places limits on using appropriated funds to pay fines or penalties:

a. None of the funds appropriated in the Act may be used for the payment of a fine or penalty that is imposed against DoD or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law. For purposes of this section, expenditures of funds to carry out a supplemental environmental project that is required to be carried out as part of such a penalty shall be considered to be a payment of the penalty.[4]

b. To date, this prohibition only applies to funds appropriated during FY 2000.

IV. CONCLUSION.

[4] Department of Defense Appropriations Act, 2000. Pub. L. No. 106-70, 113 Stat. 1212 (1999).

CHAPTER 13

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CHAPTER 13

REVOLVING FUNDS

I. INTRODUCTION.

A. Objectives. Following this block of instruction, students will:

1. Understand the statutes and regulations governing revolving funds.

2. Understand how cash flows into and out of revolving funds.

B. Background. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090102; OGC Fiscal Law Outline, Section Q (last updated July 9, 2000) http://www.hqda.army.mil/ogc.

1. Revolving funds satisfy the DOD's recurring requirements using a business-like buyer-and-seller approach.

a. The revolving fund structure creates a customer-provider relationship between military operating units and their support organizations.

b. 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.

a. The goal of a revolving fund is to break even over the long term.

b. Revolving funds stabilize or fix their selling prices to protect customers from unforeseen fluctuations.

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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). The DBOF combined the DOD's existing stock and industrial funds 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.[1]

6. In 1998, Congress repealed the statutory authority for the DBOF.

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

[1] 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.

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. Operating Expenses. 10 U.S.C. §§ 2208(c)-(d), (g)-(h). Working-capital funds pay for their own operations.

a. Congress normally appropriates funds to capitalize working-capital funds initially; however, the Secretary of Defense may also provide capitalizing inventories.

b. Working-capital funds pay the cost of:

(1) Supplies acquired, manufactured, repaired, issued, or used;

(2) Services or work performed; and

(3) Applicable administrative expenses.

c. Customers then reimburse working-capital funds from:

(1) Available appropriations; or

(2) Funds otherwise credited for those costs.[2]

[2] 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. 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:

   a. Unspecified minor military construction projects costing more than $100,000;

   b. Automatic data processing equipment or software costing more than $100,000;

   c. Other equipment costing more than $100,000; and

   d. Other capital improvements costing more than $100,000.

5. Advance Billing. 10 U.S.C. § 2208(l). The Secretary of a military department may bill a customer before it delivers the goods or services.[3]

   a. 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.[4]

   b. The notification must include:

      (1) The reason(s) for the advance billing;

      (2) An analysis of the effects of the advance billing on military readiness; and

      (3) An analysis of the effects of the advance billing on the customer.

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[3] But see National Technical Information Service – Use of Customer Advance Deposits for Operating Expenses, B-243710, 71 Comp. Gen. 224, 226 (1992) (concluding that NTIS had no authority to use customer advances that were not directly related to a firm order to pay its operating expenses).

[4] The Secretary of Defense may waive the notification requirement during a war, national emergency, or contingency operation. 10 U.S.C. 2208(l)(2).

6. 10 U.S.C. § 2208(l). Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, §§ 1007-1008, 112 Stat. 1921, 2114 (1998).

a. The DOD may not impose advance billings totaling more than $1 billion per year.

b. The Secretary of Defense must account for, report, and audit the funds and activities managed through working-capital funds separately.

c. Charges for the goods and services provided through a working-capital fund must include amounts necessary to recover:

(1) The full costs of the goods and services provided; and

(2) The depreciation of the fund's capital assets.

d. Charges for the goods and services provided through a working-capital fund may not include amounts necessary to recover:

(1) The costs of military construction projects other than minor military construction projects financed under 10 U.S.C. § 2805(c)(1);

(2) The costs incurred to close or realign military installations; or

(3) The costs associated with mission critical functions.

e. 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.

B. Management Funds. 10 U.S.C. § 2209.

1. The DOD uses management funds to conduct operations:

a. Financed by at least two appropriations;

b. Whose costs may not be distributed and charged to those appropriations immediately.

2. There is an Army Management Fund, a Navy Management Fund, and an Air Force Management Fund.

3. Each fund consists of:

a. A corpus of $1 million; and

b. Any additional funds appropriated to the fund.

4. 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.

C. Defense Business Operations Fund (DBOF). 10 U.S.C. § 2216a.

1. Background.

a. Congress established the DBOF as a revolving fund in 1991 and authorized its indefinite continuation in 1994. National Defense Authorization Act, 1995, Pub. L. No. 103-337, § 311, 108 Stat. 2663, 2708-09 (1994).

b. The DBOF consolidated:

(1) Nine stock and industrial funds; and

(2) Five defense business functions.

2. Current Status. The DBOF is **DEAD**. Congress **REPEALED** 10 U.S.C. § 2216a in October 1998. See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, § 1008(b), 112 Stat. 1921, 2114 (1998).

III. GENERAL CONCEPT OF A REVOLVING (OR WORKING CAPITAL) FUND.

See Appendix A.

A. Definition. "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 Financial Management Reg., DoD Reg. 7000.14-R, Definitions, www.dtic/comptroller/fmr/01/index.html (visited 21 Sep 2000).

B. Revolving funds are designed to give management personnel the financial authority and flexibility necessary to adjust their operations.

1. Funding is not tied to a particular fiscal year.

2. 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. See DOD Reg. 7000.14-R, vol. 3, ch. 19, para. 1902; see also DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090102.

1. Congress normally provides appropriations to start, increase, or restore a revolving fund.

a. Working capital and assets may also be transferred from existing appropriations and fund accounts.

b. These resources are commonly referred to as "the corpus" of the fund.

2. Customer orders provide the budgetary resources necessary to finance the revolving fund's continued operations.

a. The fund sells inventory and/or services to authorized customers.

b. The fund then deposits the proceeds of the sales back into the fund to pay for the resources required to operate the fund.

IV. DEFENSE WORKING CAPITAL FUNDS.

A. Types of Funds. DOD Reg. 7000.14-R, vol. 2B, ch. 9.

1. Supply Management Activity Groups.[5]

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.

[5] These types of funds were previously known as Supply Management Business Areas or Stock Funds.

(2) Examples of the types of materials and supplies that supply management activity groups typically acquire include:

(a) Nonstandard end items of equipment that are not centrally managed and have a standard unit price of less than $25,000;

(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.[6]

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.

[6] These types of funds were previously known as Depot Maintenance Business Areas or Industrial Funds.

B. The Charter. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090102.B.

1. The Secretary or Assistant Secretary of the Military Department (or the Director of the Defense Agency) must prepare and sign a charter that details the scope of the potential activity group.

2. The Military Department (or Defense Agency) must submit the charter to the DOD Comptroller for approval.

3. The DOD Comptroller will evaluate the potential activity group based on the following criteria:

a. The products or services the potential activity group will provide to its customers;

b. The potential activity group's ability to establish a cost accounting system to collect its costs;

c. The potential customer base;[7] and

d. Any buyer-seller advantages and disadvantages (e.g., the customers' ability to influence cost by changing demand).

C. Policy. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103.

1. Cash Management. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103A. See Memorandum, DOD Comptroller, subject: Working Capital Funds Cash Management Responsibility (5 Jan. 95).

a. Military Departments (and Defense Agencies) are responsible for the cash management of their working-capital funds.

[7] The DOD Comptroller's goal is to align resources with requirements.

b. Working-capital funds should maintain the minimum cash balance necessary to meet their operational (7-10 days) and disbursement (6 months) requirements.

c. Working-capital funds should strive to eliminate the need to use advance billings to maintain their cash solvency. See para. II.A.5, above.

2. Capital Investments. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103C.

a. Working-capital funds must finance the acquisition of most of their capital assets through the fund.[8]

b. Capital assets include depreciable property, plant, equipment, and software that:

(1) Costs $100,000 or more; and

(2) Has a useful life of 2 years or more.

3. Construction. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103E.

a. Working-capital funds must finance minor construction projects costing more than $500,000 through the annual Military Construction Appropriations Act.[9]

b. Working-capital funds may finance project planning and design costs through the fund.

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[8] This requirement does not apply to construction or the capital assets listed in DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103D (e.g., Major Range and Test Facility Activities Items). DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103C.

[9] Projects costing more than $500,000 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 Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103E.

4. The Full Recovery of Costs and the Setting of Prices. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103. See DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090104A.

a. 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).

(1) Supply management activity groups establish customer rates by applying a surcharge to the commodity costs.

(2) 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.).

b. Prices normally remain fixed during the budget year.[10]

(1) This is known as the stabilized rate policy.[11]

(2) This policy protects customers from unforeseen inflationary increases and other cost uncertainties.

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[10] This provision does not apply to depot maintenance activity groups. DOD Reg. 7000.14-R, 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 Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103H.4.

[11] 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 Reg. 7000.14-R, vol. 2B, ch. 9, para. 090104B.

5. Revenue Recognition. DOD Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103O.

a. Working-capital funds must recognize revenue and associated costs in the same accounting period.

b. Beginning in FY 2000, non-supply management activity groups must use the "Percentage of Completion Method" of recognizing revenue.

c. Working-capital funds may not recognize an amount of revenue that exceeds the amount specified in the order.

D. Apportionments and Budgetary Resources.[12] DOD Reg. 7000.14-R, 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 a DD Form 1105.

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.

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.

[12] 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 Reg. 7000.14-R, vol. 3, ch. 19, paras. 190203 and 190205.

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. Absent specific statutory authority, a revolving fund must deposit money received as a result of the fund's operation in the Treasury. Comptroller Gen. Warren to the Sec'y of the Interior, B-8434, 23 Comp. Gen. 986, 989 (1944). See Army Corps of Engineers – Disposition of Fees Received from Private Sector Participants in Training Courses, B-271894, 1997 WL 413163 (C.G. July 24, 1997) (unpub.) (stating that the Corps of Engineers must deposit fees received from private sector employees in the Treasury as miscellaneous receipts); Walter L. Jordan, Finance Division, Dep't of the Treasury, Financial Management Service, B-241269, 1991 WL 71648 (C.G. Feb. 28, 1991) (unpub.) (stating that the FMS must deposit fees received from private sector participants in the Treasury as miscellaneous receipts); see also Army Corps Of Engineers – Disposition of Funds Collected in Settlement of Faulty Design Dispute, 65 Comp Gen. 838 (1986) (concluding that the Corps of Engineers must deposit damages collected from an architect-engineer firm in excess of its 5.5% flat rate for supervision and administration (S&A) in the Treasury as miscellaneous receipts); cf. Army Corps of Engineers – Propriety of Depositing Liquidated Damages in Supervision and Administration Account, B-237421, 1991 WL 202598 (C.G. Sep. 11, 1991) (unpub.) (permitting the Corps of Engineers to use the portion of liquidated damages attributable to increased S&A expenses to reimburse its S&A revolving fund).

2. Statutory Authorization. See 10 U.S.C. §§ 2208, 2210; see also 31 U.S.C. § 322(d) ("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.").

B. The Purpose Statute. 31 U.S.C. § 1301. The 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.) (concluding that Federal Prison Industries, Inc., could 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.) (concluding that GSA could not 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) (concluding that 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 Reg. 7000.14-R, vol. 11B, ch. 50.

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). The 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, the GAO believes that it is 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 Reg. 7000.14-R, vol. 11B, ch. 50.

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. REVOLVING FUNDS AND THE RULES OF OBLIGATION.

A. Customer Orders.

1. Supply Management Activity Groups. DOD Reg. 7000.14-R, vol. 3.

a. If the obligation is for a project order under 41 U.S.C. § 23, an Economy Act order under 31 U.S.C. § 1535, or a reimbursable procurement order to another military department, obligate the amount of the order using funds current when the revolving fund accepts the order.

b. If the obligation is for a direct citation procurement order to another military department, obligate the amount of the order using funds current when the parties sign the contract (or other obligating document).

c. If the obligation is for an order issued to another government agency as required or authorized by law, obligate the amount of the order using funds current when the customer places the order.

2. Non-Supply Management Activity Groups. DOD Reg. 7000.14-R, vol. 3.

a. If the obligation is for an order placed with an industrially funded activity, obligate the amount of the order using funds current when the revolving fund accepts the order.

b. An order may not be accepted unless the revolving fund may:

(1) Begin work within 90 days; and

(2) Complete work within the projected period.

c. Start of work is defined as:

(1) Cost incurred; or

(2) Other action that the revolving fund may not legally perform without an accepted order.

d. These steps do not qualify as a valid start of work if the revolving fund takes them earlier than necessary to support the completion of the work.

B. Obligations of Revolving Funds.

1. The requirements of 31 U.S.C. § 1501 apply to revolving funds. U.S. Army, Corps of Engineers Civil Works Revolving Fund, B-242974.8, Dec. 11, 1992, 72 Comp. Gen. 59, 61 (concluding that the legislative mandate to operate a revolving fund "within its own resources" does not relieve the Corps of Engineers of requirement to recognize and record obligations IAW 31 U.S.C. § 1501).

2. Revolving funds should generally recognize and record obligations at the time the parties sign the contract (or other obligating document).

VII. VIOLATIONS OF THE ANTIDEFICIENCY ACT.

A. Types of Violations. 10 U.S.C. §§ 1341-1342; DOD Reg. 7000.14-R, vol. 3B, ch. 19. 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 (stating that 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) (concluding that 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 Reg. 7000.14-R, vol. 2B, ch. 9, para. 090103E. Activities financed by working capital funds may only use $500,000 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).[13]

VIII. CONCLUSION.

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

APPENDIX A

REVOLVING FUND CYCLE

CHAPTER 14

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CHAPTER 14

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

I. INTRODUCTION.

A. Different rules apply to the funding of settlements, awards, and judgments.

B. Those involved in contract administration and contract litigation need to understand these rules in order to serve their clients.

II. 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"]. Go to http://www.fms.treas.gov/tfm/vol1/v1p6c310.pdf.

D. General Accounting Office, Principles of Fed. Appropriations Law, vol. III, ch. 14, GAO/OGC 94-33 (2d ed. 1994).

E. DOD Regulation 7000.14-R, Financial Management Regulation, vols. 3 (Jan. 2001) and 10 (Dec. 2001) [hereinafter "DOD 7000.14-R"]. Go to 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"]. Go to https://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1/index.htm.

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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. Air Force Instr. 65-601, vol I, Budget Guidance And Procedures (Nov. 2000) [hereinafter "AFI 65-601"].

III. 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." General Accounting Office, Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-8, GAO/OGC 94-33 (2d ed. 1994) (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 Appropriations (current funds). An appropriation account available for obligation during the current fiscal year. DFAS-IN 37-1, Glossary, p. 11; AFI 65-601, vol I, Glossary, p. 328.

G. Expired Appropriations. Appropriations whose availability for new obligations has expired, but which retain their fiscal identity and are available to adjust and liquidate previous obligations. 31 U.S.C. § 1553(a); DFAS-IN 37-1, Glossary, p. 11; AFI 65-601, vol I, Glossary, p. 331.

H. Closed (or Canceled) Appropriations. Appropriations that are no longer available for any purpose. An appropriation is closed/canceled five years after the end of its period of availability as defined by the applicable appropriations act. 31 U.S.C. § 1552(a); DFAS-IN 37-1, Glossary, p.11; AFI 65-601, vol I, Glossary, p. 324.

IV. RULES FOR 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 7000.14-R, vol. 3, ch. 8, para. 080304.C–E; 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 7000.14-R, vol. 10, ch. 12, para. 120106.B; 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 7000.14-R, vol. 10, ch. 12, para. 120106.A; AFARS 5133.212.90-9(b) and (c)(2)(ii) (indicating the 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 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). No more than 1% of the current appropriations account may be utilized to fund such adjustment, however. 31 U.S.C. § 1553(b)(2); see also 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 7000.14-R, vol. 3, ch. 8, para. 080304.C – E; AFI 65-601, vol. I, para. 6.3.8 and Figure 6.1.

V. RULES FOR OBLIGATION OF FUNDS FOLLOWING A JUDGMENT OR AWARD.

A. If the agency has current funds available, pay the judgment/award using these funds. See AFARS 5133.212.90-9(d)(i).

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)(ii). The Contract Disputes Act requires the agency to reimburse the Judgment Fund. See 41 U.S.C. § 612(c); see also DOD 7000.14-R, 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.

VI. BACKGROUND BEHIND THE NEED FOR AND CREATION OF THE JUDGMENT FUND.

A. The Appropriations Clause (Article I, § 9, cl. 7) prohibits the withdrawal of money from the Treasury absent an appropriation. This Constitutional requirement applies to both the executive branch and the judiciary. See Collins v. United States, 15 Ct. C1. 22, 36 (1879) (holding that the Appropriations Clause does not prohibit the incurrence of legal liabilities - through issuance of a judgment - but likewise does not authorize the withdrawal of money to satisfy that judgment).

B. Judgments can be satisfied through one of the following methods:

1. A specific appropriation covering a specific judgment;

2. A general appropriation covering multiple or a class of judgments; or

3. An authorization from Congress to use existing appropriations.

C. How Much Paid Historically. No one knows, but the largest single source of judgment payments is the Judgment Fund. Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-4, GAO/OGC 94-33 (2d ed. 1994).

D. 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).

E. Initially, the Judgment Fund applied only to federal court judgments that did not exceed $100,000. See Supplemental Appropriation Act of 1957, ch. 748, § 1302, 70 Stat. 678, 694 (1956). In 1977, Congress removed this ceiling. See Pub. L. No. 95-26, §101, 91 Stat. 61, 96 (1977).

VII. 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 Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-12, fn. 12, GAO/OGC 94-33 (2d ed. 1994). 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 1961, 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.) (finding that since 10 U.S.C. §§ 2733(d) and 2734(d) otherwise provide funding source for the first $100,000 on a Military Claims Act administrative settlement, the Judgment Fund may only be used to pay that portion of any settlement in excess of $100,000); The Honorable Strom Thurmond, B-224653, 66 Comp. Gen. 157, 160 (1986); S.S. Silberblatt, Inc. v. East Harlem Pilot Block--Payment of Judgment, B-202083, 62 Comp. Gen. 12, 14 (1982) (finding that since the HUD's Special Risk Insurance Fund - a revolving 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) (stating the Judgment Fund can pay settlements only to extent that agency appropriations are not otherwise available); 31 U.S.C. § l304(a)(3)(D) (specifying that the Judgment Fund may be utilized to make payment only on that portion of any claim settlements in excess of the amount the agency is capable of paying from its appropriations when the claim arises under the Military Claims Act, the Foreign Claims Act, the National Guard Claims Act, or the National Aeronautics and Space Act of 1958).

a. The issue of whether funds are "otherwise provided for" centers on whether, as a matter of law, a specific appropriation exists to cover the judgment and not on whether the there are sufficient funds to in the account to cover payment of the judgment. The Honorable Strom Thurmond, B-224653, 66 Comp. Gen. 157, 160 (1986); Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, Dec. 18, 1989. See also Principles of Fed. Appropriations Law, vol. III, ch. 14, 14-26, GAO/OGC 94-33 (2d ed. 1994) (indicating that where another more specific appropriation exists but contains insufficient funds to pay the judgment, the agency's recourse is to seek funds from Congress).

b. Source-of-Funds Determination. In every case, only one funding source will be available to make payment; an agency will never have an opportunity to elect between which funds to utilize. If a judgment is payable from agency funds, the Judgment Fund may not be used. 31 U.S.C. § 1304(a)(1). Similarly, if a judgment is payable from the Judgment Fund, agency funds may not be utilized to make payment. See 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made); see also 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) (indicating the Air Force erred by charging agency appropriations rather than Judgment Fund in paying a court judgment resulting from the Back Pay Act).

VIII. ACCESS TO THE 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 7000.14-R, vol. 10, ch. 12, para. 120107.

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 7000.14-R, 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.

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. Principles of Fed. Appropriations Law, vol. III, ch. 12, 12-78, GAO/OGC 94-33 (2d ed. 1994); Casson Constr. Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010; DoD 7000.14-R, vol. 10, ch. 12, paras. 120106 and 120108. 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 Message, 201432Z FEB 01, DFAS-IN, Subject: Contract Disputes Act Settlements and the Judgment Fund, para 6.

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 7000.14-R, vol. 10, ch. 12, para. 120108.

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 7000.14-R, vol. 3, para. 080304.F (indicating that 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); and 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 7000.14-R, vol. 3, 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. C1. 845 (1982). See also A.T. Kearney. Inc., 86-1 BCA ¶ 18,613 at 93,509 (interest tolled by contractor's unreasonable delay in processing claim).

2. Claims that exceed $100,000 must be accompanied by a CDA certification to be considered a valid claim. FAR 33.201; FAR 52.233-1.

3. Claims accompanied by defective CDA certifications accrue interest from the date of receipt by the contracting officer or 29 October 1992, whichever is later. FAR 33.208(c); DoD 7000.14-R, vol. 10, ch. 12, para. 120109.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 7000.14-R, vol. 10, ch. 12, para. 120103.C; DFAS-IN 37-1, Table 8-6, para. 16.

IX. 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.

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:

   a. The agency responsible for defending the United States in federal courts, typically the DOJ; or

   b. 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, § 3120.

2. Prescribed forms. See TFM 6-3100, § 3125.

   a. For litigative awards, the FMS requires use of FMS Form 194 to submit this request. This form specifically provides that the United States will seek no further judicial review of the award.

   b. For administrative awards, the FMS requires use of FMS Form 195 to submit this request.

   c. All payment requests also require submission of a data sheet (FMS Forms 196) and pay voucher (FMS Form 197 or 197A).

   d. Some payment requests require submission of additional information as well (e.g., payment requests for awards under the Federal Tort Claims Act require submission of a copy of the Standard Form 95: Claim for Damage, Injury, or Death). See TFM 6-3100, § 3130.40.

3. Upon review of the request, the Judgment Fund Section will certify for payment those awards that meet the Fund criteria. See TFM 6-3100, § 3145.20. If the request does not meet the Fund criteria, the Judgment Fund Section will provide the responsible agency with an explanation for any request denials. See TFM 6-3100, § 3145.30.

4. The Judgment Fund Section is also available to provide "responsible parties" with advice regarding the submission, review, and certification criteria. See TFM 6-3100, § 3145.10.

X. 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. See 31 U.S.C. § 3302(b) (also known as the Miscellaneous Receipts Statute).

B. Exceptions. Congress has given federal agencies several exceptions to the Miscellaneous Receipts Statute (MRS), 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 MRS 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. Some of the more common exceptions in the contracting arena are:

1. Replacement Contracts. One of the GAO recognized exceptions to the MRS allows an agency "to retain recovered excess reprocurement costs to fund replacement contracts." See Bureau of Prisons -- Dispositions of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678, (1983). Thus, if an agency obtains funds from an original contractor through a judgment, award, or settlement based upon defective workmanship or due to a default termination, the agency may "retain the amount of funds necessary to reprocure the goods or services that would have been provided under the original contract" but any "excess money will be considered miscellaneous receipts and must be deposited into the Treasury." Id.

2. Refunds. If an agency is entitled to a refund from a contractor due to a payment made in error, an overpayment, or an adjustment for previous amounts disbursed, the general rule is that agency must credit such refund to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired. See Secretary of War, B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944).

3. False Claims Act (FCA) Recoveries. If an agency obtains a damage award or settlement pursuant to the FCA, it may "retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses." See Federal Emergency Management Agency 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.

XI. CONCLUSION.

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February, 2002

FUNDING U.S. MILITARY OPERATIONS

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FUNDING U.S. MILITARY OPERATIONS

I. INTRODUCTION.

II. CONSTITUTIONAL PREDICATE.

A. President's Power.

1. "The President shall be the Commander in Chief of the Army and Navy of the United States . . . . " U.S. Const. Art. II, § 2, cl. 1.

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; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . . " U.S. Const. Art. II, § 2, cl. 2.

3. "[H]e shall receive Ambassadors and other public Ministers . . . . " U.S. Const. Art. II, § 3.

B. Congress' Power.

1. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law . . . ." U.S. Const. Art. I, § 9, cl. 7.

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 . . . ." U.S. Const. Art. IV, § 3, cl 2.

> "An effective foreign policy requires more than ideas and pronouncements. It requires institutions, agencies, people and money, and Congress controls them all. Through the authorization and appropriation process, Congress sets the terms of commerce; it provides military forces and intelligence capabilities; and it establishes the conditions for development assistance, security support programs and U.S. participation in international organizations. . . . Hardly any important executive branch decision is taken without consideration of the reaction in Congress."

Trimble, *The President's Foreign Affairs Power,* 83 AM. J. INT'L. LAW 750 (1989)

III. THE NEED FOR EXPRESS LEGAL AUTHORITY.

A. General.

"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).

B. "Article II Operations": Inherent Authority? *See, e.g.,* R. Rosen, Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1 (1998) and W. Banks & P. Raven-Hansen, NATIONAL SECURITY LAW & THE POWER OF THE PURSE 166 (1994).

Traditional vs. Non-Traditional Missions

IV. SUPPORTING MULTILATERAL PEACE & HUMANITARIAN OPERATIONS.

A. Policy. Presidential Decision Directive (PDD) 25 (May 3, 1994).

1. ***General.*** PDD 25 addresses the following areas:

   a. Choosing which operations to support.

   b. Defining U.S. policy regarding command and control. *See also* H.R. 1530, § 1301, 104th Cong., 1st Sess. (1995); 31 Pres. Doc. 2234 (Dec. 28, 1995) (Presidential veto of Defense Authorization Bill prevented additional Congressional restrictions on C2 policy in UN operations.)

   c. Reducing U.S. costs for UN peace operations.

   d. Reforming/improving UN management of peace operations.

   e. Improving U.S. management and funding of peace operations.

f. Creating better cooperation between the Executive & Legislative branches.

2. ***Funding Provisions.***

a. *Reimbursement.* U.S. will generally seek either direct reimbursement for provision of goods and services or credit against UN assessment. In rare circumstances, U.S. may contribute goods, services, and funds on a voluntary basis. *But see*, paragraph B.1.b., *infra.*

b. *Oversight & Management.*

(1) Department of State has responsibility for oversight and management of Chapter VI peace operations in which U.S. combat units are not participating.

(2) Department of Defense has responsibility for oversight and management of Chapter VI operations in which U.S. forces are participating and for all Chapter VII operations.

c. *UN Assessments.* No DoD funds may be expended, directly or indirectly, to make a financial contribution to the UN for the cost of a UN peacekeeping activity or for payment of U.S. arrearages to the UN. 10 U.S.C. § 405.

B. **Authorities.**

1. ***UN Participation Act (UNPA) § 7, 22 U.S.C. § 287d-1.***

a. *Scope.* Upon UN's request, President may authorize the following support specifically directed to the peaceful settlement of disputes and not involving employment of the armed forces under Chapter VII of the UN Charter --

(1) Details of Personnel. Up to 1,000 military personnel as observers, guards, or any non-combatant capacity.

(2) Supplies, Services, & Equipment. Furnishing of facilities, services, or other assistance, and the loan of the U.S.'s fair share of supplies and equipment.

b. *Delegation of Authority.* The President has delegated authority to direct support to the Secretary of State (SecState). Executive Order 10206, ¶ 1, 16 Fed. Reg. 529 (1951). He has delegated the authority to waive (in national interest) reimbursement to SecState, in consultation with the Secretary of Defense (SecDef). *Id.* ¶ 2.

c. *Reimbursement.* Section 723 of the FY 00-01 Foreign Relations Authorization Act (as enacted in Pub. L. No. 106-113) amended the UNPA to add a new Section 10. Section 10 requires the United States to obtain reimbursement from the UN for DoD assistance that is provided to or for an assessed UN peacekeeping operation, or to facilitate or assist the participation of another country in such an operation. The statute provides for several exemptions and grounds for waiver. **This requirement to receive reimbursement is not limited to assistance provided under the UNPA, but applies to any authority under which assistance may be provided to an assessed peacekeeping operation.**

2. ***Drawdowns.***

a. *Foreign Assistance Act (FAA) § 506(a)(1), 22 U.S.C. § 2318(a)(1)* - Authorizes the President to direct the drawdown of defense articles and services having an aggregate value of up to $100,000,000 in any fiscal year for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (increase from $75M to $100M).

b. *FAA § 506(a)(2), 22 U.S.C. § 2318(a)(2)* - Authorizes the President to direct the drawdown of articles and services having an aggregate value of up to $200,000,000 from any agency of the U.S. in any fiscal year for (among other things) counterdrug activities, disaster relief, non-proliferation, anti-terrorism, and migrant and refugee assistance. Of that amount, not more than $75M may come from DoD resources; not more than $75M may be provided for counternarcotics; and not more than $15M to Vietnam, Cambodia and Laos for POW accounting. Drawdowns supporting counternarcotics and refugee or migration assistance require 15 days notice to Congress. *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).

c. *FAA § 552(c)(2), 22 U.S.C. § 2348a(c)(2)* - Authorizes the President to direct the drawdown of up to $25,000,000 in any fiscal year of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.

3. ***Details of Personnel.***

a. *FAA § 627, 22 U.S.C. § 2387.* When the President determines it furthers the FAA's purposes, statute permits a federal agency head to detail officers or employees to foreign governments or foreign government agencies, where the detail does not entail an oath of allegiance to or compensation from the foreign countries. Details may be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

b. *FAA § 628, 22 U.S.C. § 2388.* When the President determines it furthers the FAA's purposes, statute permits federal agency heads to detail, assign, or otherwise make their officers and employees available to serve with international organizations, or serve as members of the international staff of such organizations, or to render any technical, scientific, or

professional advice or service to the organizations. May be with or without reimbursement. FAA § 630, 22 U.S.C. § 2390.

c. *22 U.S.C. § 1451.* Authorizes the Director, USIA, to assign U.S. employees to provide scientific, technical, or professional advice to other countries. Details may be on reimbursable or nonreimbursable basis. Does not authorize details related to the organization, training, operation, development, or combat equipment of a country's armed forces.

d. *10 U.S.C. § 712.* Authorizes President to detail members of the armed forces to assist in military matters in any republic in North, Central, or South America; the Republics of Cuba, Haiti, or Santo Domingo; or -- during a war or a declared national emergency -- in any other country. Details may be on a reimbursable or nonreimbursable basis.

4. ***Excess Defense Articles (EDA).*** Defense articles no longer needed by the U.S. may be made available on a grant basis.

a. *FAA § 516, 22 U.S.C. § 2321j.* Authorizes both lethal and nonlethal EDA (including Coast Guard equipment) support to any country for which receipt was justified in the annual Congressional Presentation Document (CPD). It continues to accord priority of delivery to NATO and non-NATO Southern-flank allies, as well as continuing the 7:10 EDA grant split between Greece & Turkey. *See* Defense and Security Assistance Improvements Act, Pub. L. 104-164 (1996) (consolidation of EDA authorities into §516 and repeal of §§ 518- 520); Security Assistance Act of 1999, Pub. L. 106-113, § 1211(b) (1999)(extending legislation four years).

b. Amount - An aggregate ceiling of $350M per year. Cost is determined using the depreciated value of the article.

c. *Transportation:* No-cost space available transportation is authorized for countries receiving less than $10M

FMF or IMET in any FY if a determination is made that it is in the national interest of the United States to do so.

5. ***Reimbursable Support.***

a. *FAA § 607, 22 U.S.C. § 2357* - Authorizes any federal agency to furnish commodities and services to friendly countries and international organizations on an advance-of-funds or reimbursable basis.

b. *FAA § 632, 22 U.S.C. 2392* - Authorizes the State Department to use its funds to obtain DoD's support under the FAA or Title 10 authorities.

c. *Economy Act, 31 U.S.C. § 1535* - Authorizes the provision of defense articles and services *indirectly* to third countries, the UN, and international organizations on a *reimbursable* basis for another federal agency (*e.g.*, Department of State).

d. *Foreign Military Sales (FMS) - Arms Export Control Act (AECA) §§ 21-22, 22 U.S.C. 2761-62* - Third countries and the UN may enter standard FMS contracts with DoD for the sale of defense articles and services.

e. *Leases - AECA §§ 61-62, 22 U.S.C. § 2796-2796a* - Authorizes leases of Defense articles to foreign countries or international organizations, generally on a reimbursable basis.

f. *Acquisition & Cross-Servicing Agreements (ACSA) - 10 U.S.C. §§ 2341-2350* - DoD authority to acquire logistic support without resort to commercial contracting procedures and to transfer support outside of the AECA. Under the statutes, after consulting with the State Department, DoD may enter into agreements with NATO countries, NATO subsidiary bodies, other eligible countries, the UN, and international regional organizations of which the U.S. is a member for the reciprocal provision of logistic support, supplies, and services. Acquisitions

and transfers are on a cash reimbursement or replacement-in-kind or exchange of equal value basis.

V. DoD Humanitarian & Disaster Relief Operations.

A. **Appropriations**. $49.7M in FY 2002 for Overseas Humanitarian, Disaster and Civic Aid (OHDACA) programs of the Department of Defense under §§401 [only for humanitarian demining], 402, 404, 2557, and 2561 of Title 10 (decrease of approx. $5M from FY 2001).

B. **Humanitarian & Civic Assistance (HCA) - 10 U.S.C. § 401**

1. ***Need for Express Authority.***

   a. *41 U.S.C. § 12:* "No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury *appropriated for the specific purpose.*

   b. *63 Comp. Gen. 422 (1984):* "[I]t is our conclusion that DoD's use of O&M funds to finance civic/humanitarian activities during combined exercises in Honduras, in the absence of an interagency order or agreement under the Economy Act, was an improper use of funds, in violation of 31 U.S.C. § 1301(a)."

2. ***Scope of Authority.*** Secretary concerned may carry out HCA in conjunction with authorized military operations of the armed forces in a country if the Secretary determines the activities will promote -

   a. the security interests of the U.S. and the country where the activities will be carried out; and

   b. the specific operational readiness skills of the servicemembers who will participate in the activities.

3. ***Limits.***

a. May not duplicate other forms of U.S. economic assistance.

b. May not be provided (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

c. SecState must specifically approve assistance.

d. Must be paid out of funds appropriated for HCA.

e. U.S. personnel may not engage in the physical detection, lifting, or destroying of landmines (except concurrent with U.S. military operation), or provide such assistance as part of a military operation not involving U.S. forces.

f. Expenses funded as HCA shall include the costs of consumable materials, supplies, and services reasonably necessary to provide the HCA. They shall not include costs associated with the military operation (e.g. transportation, personnel expenses, POL) that likely would have been incurred whether or not the HCA was provided. DoD Directive 2205.2, "Humanitarian and Civic Assistance (HCA) Provided in Conjunction with Military Operations" 6 October 1994, para. D.9.

4. ***Definition.*** HCA means --

a. medical, dental, veterinary care in rural or underserved areas;

b. construction of rudimentary surface transportation systems;

c. well drilling and construction of rudimentary sanitation facilities;

d. rudimentary construction and repair of public facilities; and

e. detection and clearance of landmines, including education, training, and technical assistance.

5. *De minimis* HCA. 10 U.S.C. § 401(c)(4) and DOD Dir. 2205.2, para. E1.1.1.

a. Provides authority for commanders to react to HCA "targets of opportunity" during the course of a military operation. Such activities must be modest in scope and involve only "minimal expenditures for incidental costs."

b. All costs incurred in executing a *De minimis* HCA action are funded from the unit's O&M account.

c. Rule of Thumb: A few soldiers, a few dollars, for a few hours. CINC's may have promulgated specific guidance regarding the level of effort/funding that falls under the definition of *De Minimus* HCA in their AORs.

d. Examples:

1. A unit's doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purposes of providing mass inoculations to the local populace.

2. The opening of an access road through the trees and underbrush for several hundred yards, but not the asphalting of a roadway.

e. Appropriations. *De minimis* HCA is funded from the unit's O&M account.

6. ***Exercise-Related Construction (ERC) distinguished***. 10 U.S.C. § 2805(a)(2).

"[F]unds from this account may only support construction activities necessary for the conduct of U.S. military exercises. *The account is not a foreign assistance program*."

-- S. Rep. 355, 102d Cong., 2d Sess. 10 (1992) (emphasis added).

7. ***Appropriations*** Specifically fenced O&M for HCA. Demining, however, uses OHDACA. *De minimis* HCA is funded from the unit's O&M account.

C. Transportation of Humanitarian Relief Supplies for NGOs - 10 U.S.C. § 402.

1. ***Scope of Authority.*** SecDef may transport to any country, *without charge*, supplies furnished by NGOs intended for humanitarian assistance. Transport permitted only on a *space-available* basis. Supplies may be distributed by U.S. agencies, foreign governments, international organizations, or non-profit relief organizations.

2. ***Preconditions.*** Before transporting supplies, SecDef must determine --

a. the transportation of the supplies is consistent with U.S. foreign policy;

b. the supplies to be transported are suitable for humanitarian purposes and are in usable condition;

c. a legitimate humanitarian need exists for the supplies by the people for whom the supplies are intended;

d. the 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.

3. ***Limits.*** Supplies transported may not be distributed (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activities.

D. Foreign Disaster Assistance - 10 U.S.C. § 404.

1. ***Scope of Authority.***

   a. *General.* President may direct SecDef to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Amounts appropriated to DoD for Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) are available for organizing general policies and programs for disaster relief programs.

   b. *Delegation of Authority.* President delegated to SecDef authority to provide disaster relief with SecState's concurrence and in emergencies when insufficient time to seek SecState concurrence (provided SecDef seeks SecState concurrence as soon as practicable thereafter). Executive Order 12966, 60 Fed. Reg. 36949 (July 14, 1995).

2. ***Types of Assistance.*** Transportation, supplies, services, and equipment.

3. ***Notice to Congress.*** Within 48 hours of commencing relief activities, President must transmit a report to Congress.

4. ***Appropriations.*** Funded from the OHDACA appropriation.

E. Excess Nonlethal Supplies for Humanitarian Relief - 10 U.S.C. § 2557.

1. ***Scope of Authority.*** SecDef may make available for humanitarian relief purposes any DoD nonlethal excess supplies. Excess supplies furnished under statute transferred to DoS, which is responsible for the distribution of the supplies.

2. ***Limits.*** Statute does not constitute authority to conduct any activity that, if carried out as a DoD intelligence activity, would require notice to the intelligence committees under 50 U.S.C. §§ 413 et seq.

3. ***Definition.*** "Nonlethal excess supplies" means property that is excess under DoD regulations and is not a weapon, ammunition, or other equipment or material designed to inflict serious bodily harm or death.

F. Humanitarian Assistance - 10 U.S.C. § 2561.

1. ***Scope.***

a. *General.* To the extent provided in authorization acts, funds appropriated to DoD for humanitarian assistance shall be used for providing transportation of humanitarian relief and **other humanitarian purposes worldwide**.

b. *Availability of Funds.* To the extent provided in the appropriations acts, funds appropriated for humanitarian assistance remain available until expended.

2. ***Reports.*** Statute contains detailed annual reporting requirements.

3. ***Appropriations.*** Funded from the OHDACA appropriation.

4. ***§2561/401 Distinguished***. If it fits 401 in each and every particular, it's 401 HCA. If not (but humanitarian purpose) it's 2561 HA.

VI. CONTACTS AND EXERCISES WITH FOREIGN MILITARIES.

A. **Bilateral & Multilateral Conferences, Seminars, & Meetings.**

1. ***The Need for Express Authority.***

a. 31 U.S.C. § 1345: "Except as specifically provided by law, an appropriation may not be used for travel,

transportation, and subsistence expenses for a meeting."

b. 62 Comp. Gen. 531 (1983): "[T]here is a statutory prohibition against paying the travel, transportation, and subsistence expenses of non-Government attendees at a meeting. . . . By using the word 'specifically' Congress indicated that authority to pay travel and lodging expenses of non-Government employees should not be inferred but rather that there should be a definite indication in the enactment that the payment of such expenses was contemplated." *See also* B-251921 (April 14, 1993); 55 Comp. Gen. 750 (1976).

2. ***Authorities.***

a. *U.S. Civilian Employees & Military Personnel. See, e.g.,* 5 U.S.C. §§ 4109-4110; 31 U.S.C. § 1345(1); 37 U.S.C. § 412.

b. *Individuals Performing Direct Services for the Government.* GAO, I Principals of Federal Appropriations Law 4-40 to 4-42 (2d ed. 1991); *see also* B-242880 (March 27, 1991); 8 Comp. Gen. 465 (1929); Joint Travel Regulations ¶ C.6000.3.

c. *Latin American Cooperation (LATAM COOP) - 10 U.S.C. § 1050.* Authorizes the service secretaries to pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses the secretaries consider necessary for Latin American cooperation.

d. *Bilateral or Regional Cooperation Programs - 10 U.S.C. § 1051.*

(1) <u>Scope</u>.

(a) *Travel Expenses.* SecDef may pay travel, subsistence, and similar personal expenses of defense personnel of developing countries in connection with

attendance at bilateral or regional conferences, seminars, or similar meetings if SecDef deems attendance in U.S. national security interest.

(b) *Other Expenses.* SecDef may pay such other expenses in connection with the conference, seminar, or meeting as he considers in the national interest.

(c) *Additional Funding Authority.* The authority to pay expenses under section 1051 is in addition to the authority under LATAM COOP, 10 U.S.C. § 1050. *See* DoD Authorization Act for FY 97, Pub. L. 104-201 §1065 (1996) (10 U.S.C. § 113 note) for Marshall Center Participants.

(d) *Asia-Pacific Center for Security Studies*. SecDef may waive reimbursement of the cost of conferences, seminars, courses of instruction, or similar educational activities of APC for foreign military officers and civilian officials if in US national security interest. *See* § 8081 of the DoD Appropriations Act for FY 2002, Pub. L. 107-117 (2001). *See* § 1306 of the FY 95 NDAA for similar authority to waive costs for participation of personnel from PfP and EAPC countries in activities of the George C. Marshall European Center for Security Studies.

(2) Limits. Payments under section 1051 are limited to travel within the combatant commander's AOR in which the developing country is located or in connection with travel to Canada or Mexico, but when the combatant command headquarters is in the U.S., expenses may be paid for travel to the U.S.

B. **Bilateral & Multilateral Exercise Programs.**

1. ***Developing Countries Combined Exercise Program (DCCEP) - 10 U.S.C. § 2010.***

a. *Scope.* After consulting with SecState, SecDef may pay the incremental expenses of a developing country incurred by the country's participation in a bilateral or multilateral exercise, if --

(1) the exercise is undertaken primarily to enhance U.S. security interests; and

(2) SecDef determines the participation of the participating country is necessary to achieve the "fundamental objectives of the exercise and those objectives cannot be achieved unless the U.S. pays the incremental expenses . . . ."

b. *Definition.* "Incremental expenses" are reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in exercises, including rations, fuel, training, ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

2. ***Special Operations Force (SOF) Training - 10 U.S.C. § 2011.***

a. *Scope.* CINCSOCOM and the commander of any other combatant command may pay any of the following expenses relating to the training of SOF of the combatant command --

(1) Expenses of training the SOF assigned to the command in conjunction with training with the armed forces and other security forces of a friendly foreign country.

(2) Expenses of deploying SOF for the training.

(3) The incremental expenses incurred by the friendly foreign country incurred as the result of the training.

b. *Definitions.*

(1) SOF. Includes civil affairs and psychological operations forces.

(2) Incremental Expenses. The reasonable and proper cost of goods and services consumed by a developing country as a direct result of the country's participation in a bilateral or multilateral exercise, including rations, fuel, training ammunition, and transportation. The term does *not* include pay, allowances, and other normal costs of the country's personnel.

C. **Regional Cooperation Programs.**

1. ***Partnership for Peace (PFP) - DoD Authorization Act for FY 1995, Pub. L. No. 103-337, § 1307, 108 Stat. 2893 (1994)*** (*See also* H.R. Conf. Rep. No. 747, 103d Cong., 2d Sess. 63 (1994); S. Rep. No. 321, 103d Cong., 2d Sess. 42 (1994).) $30 million appropriated in FY 1995 to Joint Staff to "use existing authorities to the greatest extent possible" to provide assistance to and cooperate with PFP countries. $40 million in FY 96 and again in FY97. $44 million appropriated in FY 1998, but to OSD, not Joint Staff.

2. ***Cooperative Threat Reduction (CTR) with States of Former Soviet Union (FSU) ("Nunn-Lugar") - DoD Authorization Act for FY 2002, Pub. L. No. 107-107 §§ 1301-1309 (2001).*** (*See also* DoD Authorization Act for FY 1997, Pub. L. No. 104-201, 110 Stat. 2731(1996) (50 U.S.C. § 2362 note) (specifies activities that make up the CTR program). $400 million of "no-year" money provided for FY 1994 and FY 1995 for various programs to dismantle FSU's arsenal of weapons of mass destruction. $300 million appropriated in FY 1996. $327.9M appropriated in FY 97. $440.4M for FY 1999, $460.5M for FY 2000, $443.4M for FY 2001, and $403M for FY 2002; all "three-year" money. §§ 1303-1309 of the DoD Authorization Act for FY 2002 retain various limitations

including reporting requirements and prohibitions against the use of the funds.

D. **Military-to-Military Contact Program - 10 U.S.C. § 168.** Authorizes SecDef to conduct military-to-military contacts and comparable activities that are designed to encourage democratic orientation of defense establishments and military forces of other countries.

E. **International Military Education & Training (IMET) - FAA §§ 541-545 (22 U.S.C. §§ 2347-2347d).** Security assistance program to provide training to foreign militaries, including the proper role of the military in civilian-led democratic governments and human rights.

VII. SPECIAL AUTHORITIES.

A. **CinC Initiative Funds (CIF) - 10 U.S.C. § 166a.** *See* DoD Appropriations Act for FY 2002, Pub. L. 107-117 (2000) ($25M for CIF in FY 2002 in Defense-wide O&M); Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01A, "CINC Initiatives Fund," 30 January 1999.

1. ***Scope.*** CJCS may provide to CinCs (including NORAD) sums appropriated for the following activities --

a. Force training.

b. Contingencies.

c. Selected operations.

d. Command and control.

e. Joint exercises (including the participating expenses of foreign countries).

f. Humanitarian and Civil Assistance.

g. Military education and training to military and related civilian personnel of foreign countries

(including transportation, translation, and administrative expenses).

h. Personnel expenses of defense personnel for bilateral or regional cooperation programs.

i. Force protection.

2. ***Priorities.*** CJCS should give priority consideration to requests for funds that would (1) enhance warfighting capability, readiness, and sustainability of forces assigned to the commander requesting the funds; (2) be used for activities in a CinC's AOR that would reduce threats to, or enhance, U.S. national security.

3. ***Relationship to Other Funding.*** Any amount provided as CinC initiatives funds for an authorized activity are "in addition to amounts otherwise available for that activity during the fiscal year."

4. ***Limits.*** Of funds made available --

a. No more than $7 million may be used to buy end items with a cost greater than $15,000;

b. No more than $1 million may be used to pay the expenses of foreign countries participating in joint exercises;

c. No more than $2 million may be used for education and training to military and related civilian personnel of foreign countries; and

d. No funds may be used for any activity for which Congress has denied authorization.

B. **Emergency & Extraordinary (E&E) Expenses - 10 U.S.C. § 127.**

1. ***General.*** Within appropriations made for this purpose, SecDef may pay for any emergency or extraordinary expenses that cannot be anticipated or classified. SecDef may spend the funds appropriated for such purposes as deemed proper; and such determination is final and

conclusive upon the accounting officers of the U.S. This authority may be delegated (and redelegated).

2. ***Congressional Notification.*** DoD Authorization Act for FY 1996 revised § 127 to require that SecDef give congressional defense and appropriations committees 15 days advance notice before expending or obligating funds in excess of $1 million and five days advance notice for expenditures or obligations between $500,000 and $1 million. Pub. L. No. 104-106, § 915, 110 Stat. 413 (1996).

3. ***Appropriations.*** $10.8M for Army; $6M for Navy and Marine Corps; $8M for Air Force; and $33.5M for SecDef. DoD Appropriations Act for FY 2002, Pub. L. No. 107-117 (2001).

C. **Contingency Operations Funding Authority. 10 U.S.C. § 127a** (amended by DoD Authorization Act for FY 1996, Pub. L. No. 104-106, § 1003, 110 Stat. 415 (1996))

1. ***Applicability.*** Deployments (other than for training) and humanitarian assistance, disaster relief, or support to law enforcement operations (including immigration control) for which funds have not been provided, which are expected to exceed $50 million, or the incremental costs of which, when added to other operations currently ongoing, are expected to result in a cumulative incremental cost in excess of $100 million. Does *not* apply to operations with incremental costs not expected to exceed $10 million.

2. ***Consequences.***

a. *Waiver of Working Capital Fund (WCF) Reimbursement.* Units participating in applicable operations receiving services from WCF activities may not be required to reimburse for the incremental costs incurred in providing such services. Statute restricts SecDef authority to reimburse WCF activities from O&M accounts. (In addition, if an activity director determines that absorbing these costs could cause an Anti-Deficiency Act violation, reimbursement is required.)

b. *Transfer Authority.* Authorizes SecDef to transfer up to $200 million in any fiscal year to reimburse accounts used to fund operation for incremental expenses incurred.

3. ***Congressional Notification & GAO Compliance Reviews.*** Statute contains provisions for both.

4. ***Overseas Contingency Operations Transfer Fund.*** DoD Appropriations Act for FY 2002, Pub. L. No. 107- 117 (2001). Appropriates $50M of "no-year" funds "for expenses directly relating to Overseas Contingency Operations by United States military forces." None of the funds appropriated to this account may be obligated for DoD expenses not directly related to the conduct of overseas contingencies. The Conference Report accompanying the Appropriations Act (H.R. 107-353) states these funds are to provide the SecDef a central response fund from which the Secretary may address unknown and unexpected overseas contingency costs. This is significant change from previous appropriations to the OCOTF, which were limited to expenses for certain named contingencies.

VIII. SECTION 8072 NOTIFICATION. DoD Appropriations Act for FY 2002, Pub. L. No. 107-117, § 8072 (2001).

A. **General.** Requires DoD to notify the congressional appropriations, defense, and international relations committees 15 days *before* transferring to another nation or international organization any defense articles or services (other than intelligence services) in connection with (a) peace operations under chapters VI or VII of the UN charter or (b) any other international peacekeeping, peace-enforcement, or humanitarian assistance operation. See also DoD Appropriations Act for FY 96, Pub. L. 104-61, § 8117 (1995).

B. **Notice Requirement.** The notice required includes:

1. A description of the articles or services to be transferred;

2. The value of the equipment, supplies, or services; and

3. With respect to a proposed transfer of supplies and equipment, a statement of

   a. whether the inventory requirements of all elements of the armed forces (including the Reserve Components) for the types of articles and supplies to be transferred have been met; and

   b. whether the items to be provided will have to be replaced and how the President proposes to pay for such replacement.

C. Congress' Intent. Section 8117 of the DoD Appropriations Act for FY 1996 was originally part of the House DoD Appropriations Bill (H.R. 2126), which was adopted in the first Conference without comment. The House Appropriations Committee expressed concern about *the diversion of DoD resources to non-traditional operations*, such as Haiti, Guantanamo, Rwanda, and the former Yugoslavia. The Committee stated that Congress must be kept fully aware of the use and involvement of defense assets in "essentially non-defense activities in support of foreign policy." H.R. Rep. No. 208, 104th Cong., 1st Sess. 12 (1995).

D. President's Interpretation. In "acquiescing" in Appropriations Act, President expressed concern about section 8117 and pledged to interpret it consistent with constitutional authority to conduct foreign relations and as Commander in Chief. Statement by the President (Nov. 30, 1995).

E. Scope.

1. ***Included Activities.*** Section 8072 affects DoD's use of any statutory authority to furnish articles and services to other countries and international organizations during peace, humanitarian, and disaster relief operations. Examples include --

   a. *Acquisition & cross-servicing agreements* during peace and humanitarian assistance operations (10 U.S.C. §§ 2341-2350).

b. *Drawdowns* for peace and humanitarian assistance operations (Foreign Assistance Act (FAA) §§ 506, 552).

c. *Humanitarian & Civic Assistance* (HCA) (10 U.S.C. §§ 166a(b)(6), 401).

d. H*umanitarian Assistance* to the extent the assistance is provided to another nation or an international organization (10 U.S.C. § 2561).

e. *Excess nonlethal supplies* for humanitarian relief (10 U.S.C. § 2557).

f. *Reimbursable support* to other nations and international organizations in connection with peace and humanitarian assistance operations (FAA § 607; UNPA § 7), and reimbursable support to other federal agencies for peace and humanitarian assistance operations to the extent that the transfer results in DoD transferring articles or services to another nation or international organization (31 U.S.C. § 1535; FAA § 632).

g. Landmine clearance activities (FY 1995 DoD Authorization Act, Pub. L. 103-337, §1413 (1994)).

2. ***Excluded Activities.*** Section 8072 does not affect all DoD activities with other countries and international organizations. Examples of excluded activities include --

a. *Exercises* in which the DoD pays the incremental expenses of participating developing countries -- including Partnership for Peace (PFP) exercises (10 U.S.C. § 2010).

b. *SOF training* (10 U.S.C. § 2011).

c. *Bilateral/regional conferences* and seminars unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1051).

d. *LATAM Coop* unconnected with peace and humanitarian assistance operations (10 U.S.C. § 1050).

e. *Military-to-military contacts* (10 U.S.C. § 168).

f. *EDA authorities* (FAA §§ 516), which already have congressional notice requirements equal to or in excess of 15 days.

g. Support for other nations and international organizations in operations *unrelated* to peacekeeping, peace enforcement and humanitarian assistance (*e.g.*, coalition operations in time of war).

F. Compliance. DoD complies with section 8072 by --

1. Notifying Congress before DoD transfers supplies or services in connection with peace or humanitarian assistance operations; or

2. Transferring supplies and services in such operations without congressional notification when --

a. Providing disaster relief;

b. Providing support *without* using funds appropriated to DoD (*e.g.*, "advance-of-funds" basis); or

c. Providing support under an FMS case.

IX. DOMESTIC OPERATIONS.

A. Stafford Disaster Relief & Emergency Assistance Act of 1974, 42 U.S.C. §§ 5121-5204c.

1. Federal Emergency Management Agency (FEMA) has lead. Executive Order 12673, 54 Fed. Reg. 12573 (March 23, 1989).

2. State Governor must request assistance to trigger Act. 42 U.S.C. § 5191.

3. DoD *may* receive reimbursement for assistance provided. 42 U.S.C. §§ 5147-5192(a)(1).

4. DoD may give emergency aid to preserve life and property. 42 U.S.C. § 5170b(c).

B. **DoD Directive 3025.1.**

1. Currently, Secretary of the Army is SecDef's executive agent for managing and executing DoD's response. *Id.* ¶ D.3.a.

2. The Secretary of Defense must approve the deployment and employment of any combatant command forces. DoD Directive 3025.15, February 1997.

3. The Secretary of the Army, acting through the Directorate of Military Support (DOMS), manages responses. *Id.* ¶ E.7.b.

4. USJFCOM and PACOM are the "DoD Planning Agents." *Id.* ¶ D.3.c.(3).

5. Responsibilities are currently under review and modification.

X. CONCLUSION.

CHAPTER 16

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CHAPTER 16

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES.

A. 31 U.S.C. § 3325 (requiring certifying officers within DOD).

B. 31 U.S.C. § 3528 (specifying responsibilities and relief from liability of certifying officers).

C. 31 U.S.C. § 3527 (relief of accountable officers other than certifying officers).

D. Dep't of Defense Reg. 7000.14-R, Financial Management Regulation, Volume 5, Disbursing Policies and Procedures [hereinafter DOD 7000.14-R, vol. 5]. Go to http://www.dtic.mil/comptroller/fmr.

E. DFAS-IN (Defense Finance and Accounting Service-Indianapolis) Reg. 37-1, Finance and Accounting Policy Implementation (Jan. 2000). Go to http://dfas4dod.dfas.mil/centers/dfasin/library/ar37-1.

F. DFAS-DE (Defense Finance and Accounting Service-Denver) 7010.1-R, General Accounting and Finance Systems at Base Level (15 Feb. 1991), ch. 11. Go to http://info-de.dfas.mil.

II. TYPES OF ACCOUNTABLE OFFICERS.

A. Definitions.

1. An accountable officer is any government employee who is responsible for or has custody of government funds. See Lieutenant Commander Michael S. Schwartz, USN, B-245773, May 14, 1992 (unpub.); Mr. Charles R. Hartgraves, B-234242, Feb. 6, 1990 (unpub.). The DOD refers to this broad universe of persons as "accountable individuals." DOD 7000.14-R, vol. 5, Definitions.

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2. 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 and Naturalization Service's Decision on Responsibility of Accountable Officer for Physical Losses of Funds, B-195227, 59 Comp. Gen. 113 (1979).

3. Absent statutory authority, agency officials who are not designated "certifying official" are not personally liable for illegal, improper, or incorrect payments. Department of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280764, May 4, 2000 (unpub.)

B. Certifying Officers and Other Accountable Officers Distinguished.

1. Certifying Officer. One who certifies that payment vouchers are correct and ready for payment. Certifying officers do not "hold" public funds. DOD 7000.14-R, vol. 5, Definitions, p. xxv; vol. 5, ch. 33, para. 331007.

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. One who disburses funds and renders accounts in accordance with laws and regulations governing disbursement of public funds. DOD 7000.14-R, vol. 5, Definitions, p. xxix. See generally 31 U.S.C. § 3325.

b. Cashier. One 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. DOD 7000.14-R, vol. 5, ch. 2, para. 020603.B. See Mr. David J. Bechtol, B-272615, May 19, 1997 (unpub.) (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 7000.14-R, 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 7000.14-R, 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 7000.14-R, vol. 5, ch. 2, para. 020905.A.

3. Accountable Officials. In DOD, the term "accountable official" has a special meaning. An accountable official is any person, not otherwise accountable under applicable law, who provides information, data, or services to a certifying or disbursing officer in support of the payment process. See DOD 7000.14-R, vol. 5, ch. 33, paras. 330302 and 331001. An accountable official now includes certain persons involved with, *e.g.*,

a. Purchase card program;

b. Temporary duty (TDY) travel authorizations;

c. Contract and vendor payments;

d. Military and civilian payments; and

e. Permanent changes of station (PCS).

III. LIABILITY OF ACCOUNTABLE OFFICERS.

A. Certifying Officers. 31 U.S.C. § 3528; DOD 7000.14-R, vol. 5, ch. 33.

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 the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certification.

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. In the Matter of Responsibilities and Liabilities of Certifying Officers, B-184145, 55 Comp. Gen. 297 (1975).

B. Disbursing Officers. 31 U.S.C. § 3325; DOD 7000.14-R, vol. 5, ch. 1, para. 0104.

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.

c. Not liable for losses due to improperly calculated vouchers.

2. Generally, disbursing officers are accountable for illegal, improper, or incorrect payments, as well as account errors, even though they relied on other persons, and those persons actually caused the error. Mr. David L. Gagermeier, B-274364, Apr. 23, 1997 (unpub.). See DOD 7000.14-R, vol. 5, ch. 1, para. 010501.C.

3. DOD disbursing officers, however, are not liable for payments made in reliance upon properly certified vouchers. See DOD 7000.14-R, vol. 5, ch. 1, para. 010501.C.

C. DOD Accountable Officials. DOD 7000.14-R, vol. 5, ch. 33, para. 330701. Although DOD imposed pecuniary liability on "accountable officials" in DOD 7000.14-R, GAO held that such an administrative extension of pecuniary liability was improper and that agencies may impose pecuniary liability only with a statutory basis. See Department of Defense—Authority to Impose Pecuniary Liability by Regulation, B-280764, May 4, 2000.

D. "Possessory" Accountable Officers. Those entrusted with funds are liable for any and all losses. There is no liability limitation for these accountable officers. Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (1990).

E. The Nature of Accountable Officer Liability.

1. Accountable officers 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 acts of God or acts of the public enemy. DOD 7000.14-R, vol. 5, app. C, para. D. See United States v. Prescott, 44 U.S. 578 (1845); Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (1974).

2. Lack of fault or negligence, however, may provide a basis for relief from the obligation to repay the loss. DOD 7000.14-R, vol. 5, app. C, para. G. See Mr. David J. Bechtol, B-271608, June 21, 1996 (unpub.); Department of the Navy, B-238123, 70 Comp. Gen. 298 (1991); State Department, B-238898, 70 Comp. Gen. 389 (1991); Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (1990); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (1974).

3. DOD "accountable officials" are not strictly liable; no presumption of negligence applies. DOD 7000.14-R, vol. 5, ch. 33, para. 3309 and app. C., para. G.

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 7000.14-R, vol. 5, para. 250102; DFAS-DE 7010.1-R, ch. 11, para. 11-9.

2. For DOD, the Comptroller General issues advance decisions on the use of appropriated funds, except in those instances set forth in paragraph B, below. DOD 7000.14-R, vol. 5, ch. 25, para. 250102.C and ch. 25, app. E.

a. If a claim is $100 or less, the GAO has delegated authority to agencies to issue binding opinions. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.3. For DOD, the Secretary of Defense has delegated to the heads of DFAS Centers authority to render conclusive opinions concerning the propriety of a disbursement. DOD 7000.14-R, vol. 5, para. 250103.

b. If the claim exceeds $100, DFAS may render an advisory opinion. Only a Comptroller General opinion, however, will shield a disbursing officer from liability. DOD 7000.14-R, vol. 5, ch. 25, para. 250103.

3. 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.

B. Agency Advance Decisions. See DOD 7000.14-R, vol. 5, ch. 25, app. E. Per the General Accounting Office Act of 1996, Pub. L. 104-316, § 204, 110 Stat. 3826, 3845-46, the following are authorized to issue advance decisions for designated claims categories:

1. DOD (DOD General Counsel): military member pay, allowances, travel, transportation costs; survivor benefits; and retired pay.

2. Office of Personnel Management (OPM): civilian compensation and leave.

3. General Services Administration Board of Contract Appeals (GSBCA): civilian employee travel, transportation, and relocation allowances.

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;

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 Environmental Protection Agency, B-262110, Mar. 19, 1997, 97-1 CPD ¶ 131 (certifying officials not required to second-guess discretionary decisions of senior agency officials); Ms. Trudy Huskamp Peterson, B-257893 June 1, 1995 (unpub.).

2. The Comptroller General will deny relief if the agency did not attempt diligently to collect an erroneous payment.

D. Relief of DOD Certifying Officers. DOD 7000.14-R, vol. 5, ch. 6, para. 060903. Cf. 31 U.S.C. § 3528.

1. The DOD Financial Management Regulation, as amended in August 1999, authorizes Directors of the DFAS Centers to grant or deny certifying officers relief for illegal, incorrect, or improper payments.

2. Directors must adhere to the same criteria the Comptroller General would consider in reviewing certifying officer cases. See para. C., above.

E. Relief of Other Non-DOD Accountable Officers. 31 U.S.C. § 3527(a).

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 (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.

2. The Comptroller General has delegated to agency heads the authority to resolve irregularities when a loss is less than $3,000. See GAO, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.9.C; Mr. Frank Palmer, B-252809, Apr. 7, 1993 (unpub.); Mr. Thomas M. Vapniarek, B-249796, Feb. 9, 1993 (unpub.); Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (1992).

3. Alternatively, the Comptroller General may authorize reimbursement of amounts paid by the responsible official as restitution.

F. Relief of DOD Disbursing Officers for Physical Losses. 31 U.S.C. § 3527(b)(1)(A); DOD 7000.14-R, ch. 6, para. 060902.

1. 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.

2. 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. GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.10; Mr. William Duff, B-271859, Sep. 26, 1996 (unpub.).

3. The SECDEF has delegated authority to certain DFAS officials (usually the directors of DFAS Centers). DOD 7000.14-R, vol. 5, ch. 6, para. 060902.

4. Disbursing officials include: deputy disbursing officers, disbursing agents, cashiers, agent cashiers, collection agents, paying agents, imprest fund cashiers, and change fund custodians. DOD 7000.14-R, ch. 6, para. 060902.

G. Relief of DOD Disbursing Officers for Illegal, Incorrect, or Improper Payments. 31 U.S.C. § 3527(b)(1)(B); DOD 7000.14-R, ch. 6, para. 060903.A. See generally Mr. David J. Bechtol, B-272615, May 19, 1997 (unpub.).

1. Per the statute, the Comptroller General shall relieve an accountable officer of the armed forces who makes an improper, illegal, or incorrect payment, if the Secretary of Defense finds that:

a. The payment was based on official records and the disbursing officer could not have known the information was incorrect;

OR

b. The payment was not made in bad faith.

2. Diligent collection action is required.

3. The DOD FMR doesn't include the first prong of the disbursing officer relief statute apparently because DOD has decided that disbursing officers who rely on certifications aren't liable. See DOD 7000.14-R, vol. 5, ch. 1, para. 010502.B.2.

4. DFAS Center Directors grant or deny relief.

H. Relief of Non-DOD Disbursing Officers for Illegal, Improper, or Incorrect Payments. 31 U.S.C. 3527(c).

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.

2. The Comptroller General may deny relief if the agency did not pursue collection action diligently.

I. 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. Whenever the court finds that a loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount. The General Accounting Office shall allow the officer such amount in settlement of his accounts. See 28 U.S.C. § 2512.

2. Any individual. If an agency withholds the pay of any individual, that person may request that the General Accounting Office report the balance due to the Attorney General. The Attorney General shall then initiate a suit against the individual. See 5 U.S.C. § 5512(b).

J. Legislative Relief. Private and collective relief legislation.

V. ESTABLISHING LIABILITY.

A. Required Action. Department of the Air Force, B-239483.2, 70 Comp. Gen. 616, 622 (1991).

1. Before initiating collection for a loss, the appropriate agency must establish the accountable officer's liability "permanently." DOD 7000.14-R, vol. 5, app. C.

2. Permanently establish means that the officer has agreed to repay the loss or the appropriate authority has denied relief.

1. DOD 7000.14-R 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 7000.14-R, vol. 5, ch. 6, paras. 060301.C and 060503. See also DOD 7000.14-R, vol. 5, ch. 6, sec. 0607 (investigation requirements and procedures).

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 Department of the Air Force, B-239483.2, 70 Comp. Gen. 616 (1991); Department of the Air Force, B-239483, 70 Comp. Gen. 420 (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, Dec. 15, 1994 (unpub.).

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, Sept. 24, 1993 (unpub.). DOD 7000.14-R includes detailed examples of when the three-year period begins. See DOD 7000.14-R, vol. 5, ch. 6, para. 060802.

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, Feb. 12, 1996 (unpub.) DOD 7000.14-R, vol. 5, ch. 6, para. 060801.

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. To qualify for relief from liability for a loss or deficiency under the statutes, an accountable officer generally must prove that he was acting in an official capacity and was either not negligent or that his negligence did not cause the loss. 31 U.S.C. § 3527. Mr. S.M. Helmrich, B-26586, Nov. 9. 1995 (unpub.). See also DOD 7000.14-R, vol. 5, app. C, para. G.

B. The "Reasonable Care" Standard.

1. In determining whether an officer was negligent, the Comptroller General applies a "reasonable care" standard. In the Matter of Personal Accountability of Accountable Officers, B-161457, Aug. 1, 1969 (unpub.).

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. Mr. Frank D. Derville, B-241478, Apr. 5, 1991 (unpub.).

d. Failure to follow regulations is negligence. Hence, accountable officers must familiarize themselves with applicable regulations. See DOD 7000.14-R, vol. 5, ch.1, para. 010501.B.

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); Darold D. Foxworthy, B-258357, Jan. 3, 1996 (unpub.) (loss of vouchers and receipts by imprest fund cashier); Mr. Gerald Murphy, B-249742.2, Nov. 24, 1993 (unpub.); Melvin L. Hines, B-243685, July 1, 1991 (unpub.); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (1969). See DOD 7000.14-R, vol. 5, app. C, para. G.

3. A presumption of negligence does not apply to acts of DOD "accountable officials." See DOD 7000.14-R, vol. 5, ch. 33, para. 3309; vol. 5, app. C, para. E.4.

C. Proximate Cause. If the accountable officer was negligent, the Comptroller General will consider whether the negligence was the proximate cause of the loss or deficiency.

1. 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).

2. 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. DOD 7000.14-R, vol. 5, app. C, para. C108. See Department of the Navy, B-238123, 70 Comp. Gen. 298 (1991).

VII. DEBT COLLECTION.

A. Collection is pursuant to 31 U.S.C. §§ 3701-11 (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 7000.14-R, vol. 5, chs. 28-32.

VIII. CONCLUSION.

Materials will be provided during the class session.

CHAPTER 18

FISCAL LAW RESEARCH

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Chapter 18

FISCAL LAW RESEARCH

I. ROLE OF THE GENERAL ACCOUNTING OFFICE (GAO).

A. The Budget and Accounting Act of 1921 established the GAO. The Comptroller General issues legal opinions to agencies concerning the availability and use of appropriated funds. 31 U.S.C. § 702.

B. Disbursing officials, certifying officials, and agency heads are entitled to advance decisions. 31 U.S.C. § 3529.

C. GAO has discretionary authority to render opinions to other individuals or organizations.

II. PUBLICATIONS.

A. Decisions of the Comptroller General of the United States (Comp. Gen.).

1. Published by the Government Printing Office.

2. Hardbound volumes 1-73; latest volume No. 73 covers 1993-1994.

3. Separate topical indices & Digests from 1894 to the present. Current volumes are three to six years behind.

4. Contains only 10% of total decisions.

5. No legal distinction between published and unpublished decisions.

MAJ Thomas C. Modeszto
Mr. Dan Lavering, TJAGSA Librarian
Fiscal Law Course
February/March 2002

6. Example of citation:

Department of the Army - - Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 48 (1983)

B. Comptroller General's Procurement Decisions (CPD).

1. Published by West Publishing Group.

2. Contains every government bid protest decision.

3. Loose-leaf reporter updated monthly.

4. A separate index volume with three indices.

a. B-Number Index.

b. Government Volume Index.

c. Subject-Matter Index.

5. Example of citation:

Matter of Prohibition on Use of Appropriated Funds for Defense Golf Courses, B-277905, Mar. 17, 1998, 98-1 CPD ¶ 135

C. Principles of Federal Appropriations Law (a.k.a. "The Red Book").

1. Published in 1991 by the General Accounting Office, Office of General Counsel.

2. Volume IV – published March, 2001.

3. No updates.

4. No index, but comprehensive table of contents.

5. Example of citation:

Principles of Fed. Appropriations Law, 2d ed., vol. I, ch. 2, 2-33, GAO/OGC 91-5 (July 1995)

6. Electronic versions of the Redbook are available. (Electronic versions are text searchable.)

a. Online: http://www.gao.gov.

b. CD-ROM versions:

(1) CLAMO: Deployed Judge Advocate Resource Library.

(2) LAAWS CD-ROM, Release 7 – September 1997.

c. LEXIS

III. ELECTRONIC RESEARCH.

A. LEXIS.

1. Library = "GENFED." File = "COMGEN."

2. Contains "unpublished" opinions.

B. WESTLAW

1. Database identifier = "CG."

2. Contains "unpublished" opinions.

3. Federal Legal Information Through Electronics: "FLITE." http://aflsa.jag.af.mil.

a. Air Force is DoD Executive Agent.

b. Password required.

C. Internet - GAO Homepage: http://www.gao.gov. This website contains GAO opinions issued within the past 60 days.

1. Updated daily.

2. Search list of opinions.

3. Topic search.

4. Principles of Federal Appropriations Law, Volumes I – IV (a.k.a. "The Red Book")

5. NOTE: Practitioners may request unpublished opinions not otherwise available. Contact GAO through the website and request a copy of the unpublished opinion by citing the B number. (Only use as a resource of last resort.)

D. CCH Government Contracts Reporter.

1. Internet Based. http://business.cch.com/network.

2. CD-ROM version.

IV. STATUTES.

A. Authorization Acts.

B. Appropriations Acts.

C. Other statutes.

V. DEPARTMENT OF DEFENSE GUIDANCE

A. DoD Directives.

1. Issued by the Secretary of Defense.

2. Examples:

a. DoDD 1348.19, Award of Trophies and Similar Devices in Recognition of Accomplishments.

b. DoDD 7280.4, Commander in Chief's (CINC's) Initiative Funds (CIF).

B. Chairman of the Joint Chief's of Staff Instructions.

1. Issued by the Chairman of the Joint Chiefs. Provides administrative policy and guidance.

2. Examples:

a. CJCSI 1100.01A, Award of Trophies and Similar Devices in Recognition of Accomplishments.

b. CJCSI 7401.01A, Commander in Chief's (CINC's) Initiative Funds (CIF).

c. CJCSI 7201.01, Combatant Commander's Official Representation Funds (ORF).

d. CJCSI 5261.01A, Combating Terrorism Readiness Initiatives Funds.

C. Joint Publications.

1. Joint Doctrine and procedures for the employment of forces in joint operations.

2. Examples.

a. Joint Pub. 1-06. Joint Tactics, Techniques, and Procedures for Financial Management During Joint Operations, 22 Dec 1999.

b. Joint Pub. 3-07.3. Joint Tactics, Techniques, and Procedures for Peace Operations, 12 Feb 1999

VI. REGULATIONS.

A. DoD 7000.14-R, DoD Financial Management Regulation.

1. An incomplete 15 volume set. (All Volumes have been published, but not all Chapters.)

2. Much of this regulation deals with accounting practices, but also contains some fiscal policies. For example:

a. Volume 10, Contract Payment Policy and Procedures.

b. Volume 11B, Reimbursable Operations, Policy and Procedures -- Defense Business Operations Fund.

c. Volume 13, Nonappropriated Funds Policy and Procedures.

d. Volume 14, Administrative Control of Funds and Antideficiency Act Violations.

e. Volume 15, Security Assistance Policy and Procedures.

B. DFAS-IN Reg. 37-1.

1. Replaced AR 37-1, Army Accounting and Fund Control.

2. Much of this regulation deals with accounting practices, but also contains some fiscal policies. For example:

a. Chapter 35, U.S. Army Security Assistance Programs.

b. Chapter 36, Enemy Prisoners of War.

c. Chapter 37.

(1) Sec. III, Economy Act Sales to Other DoD Components, Other Federal Agencies, and to Private Parties.

(2) Sec. IV, Support to the International Narcotics Control Program.

(3) Sec. VI, Specialized or Technical Services to State and Local Governments.

d. Chapter 40.

(1) Sec. VIII, Cashiers.

(2) Sec. IX. Certifying Officers.

(3) Sec. X, Keeping and Safeguarding Public Funds.

(4) Sec. XXII, Contingency Funds of the Secretary of the Army.

C. Other regulations. Agency regulations dealing with specific issues should be consulted also.

1. Examples of regulations which deal with fiscal issues include:

a. AR 37-47, Representation Funds of the Secretary of the Army.

b. AR 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities.

c. AR 415-15, Military Construction, Army (MCA) Program Development; AFI 32-1021, Planning and Programming of Facility Construction Projects.

d. AR 165-1, Chaplain Activities in the United States Army.

2. Regulations that do not deal directly with fiscal law issues should not be overlooked. They may indicate agency policy on the use of government money or assets.

3. DoD 5500.7-R, The DoD Joint Ethics Regulation, may be helpful in determining the appropriateness of some proposed expenditures.

VII. CONCLUSION.

APPENDIX

CONTRACT & FISCAL LAW WEBSITES

[S] = Search Engine Available

CONTENT	ADDRESS

Meta-sites

Professor Steve Schooner's site	http://www.law.gwu.edu/facweb/sschooner
Where in Federal Contracting?	http://www.wifcon.com/
FedBizOps [S]	http://www.fedbizops.gov/
About	http://government.about.com/es/ecommerce
Army Single Face to Industry (ASFI)	http://acquisition.army.mil/default.htm
Defense Acquisition Deskbook [S]	http://www.deskbook.osd.mil
DoD Busops [S]	http://www.dodbusopps.com/
DoD E-Mall [S]	https://www.emall.dla.mil/
FindLaw [S]	http://www.findlaw.com
FirstGov [S]	http://www.firstgov.gov/
MEGALAW [S]	http://www.megalaw.com
SearchMil (search engine for .mil websites) [S]	http://www.searchmil.com/

A

ABA LawLink Legal Research Jumpstation [S]	http://www.lawtechnology.org/lawlink/home.html
ABA Network [S]	http://www.abanet.org/
ABA/GWU Public Contract Law Journal	http://www.abanet.org/contract/operations/lawjournal/journal.html
ABA Public Contract Law Section (Agency Level Bid Protests)	http://www.abanet.org/contract/federal/bidpro/agen_bid.html
Acquisition Reform	http://tecnet0.jcte.jcs.mil:9000/htdocs/teinfo/acqreform.html
Acquisition Reform Network [S]	http://www.arnet.gov
ACQWeb - Office of Undersecretary of	http://www.acq.osd.mil

Defense for Acquisition & Technology [S]	
Agency for International Development [S]	http://www.info.usaid.gov
Air Force Acquisition Reform [S]	http://www.safaq.hq.af.mil/
Air Force ADR (includes guide to Federal procurement ADR) [S]	http://www.adr.af.mil
Air Force Contract Augmentation Program [S]	http://www.afcesa.af.mil/Directorate/CEX/AFCAP/afcap.html
Air Force FAR Supplement [S]	http://farsite.hill.af.mil
Air Force Home Page	http://www.af.mil/
Air Force Legal Services and Research Division	http://aflsa.jag.af.mil
Air Force Materiel Command Web Page [S]	https://www.afmc-mil.wpafb.af.mil/
Air Force Materiel Command SJA Web Page	https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/JA/
Air Force Publications	http://afpubs.hq.af.mil/orgs.asp?type=pubs
Air Force Site, FAR, DFARS, Fed. Reg. [S]	http://farsite.hill.af.mil/
Army Acquisition Corps Website	http://dacm.rdaisa.army.mil
Army Corps of Engineers Home Page [S]	http://www.usace.army.mil/
Army Electronic Commerce Home Page [S]	http://www.armyec.army.mil/
Army Home Page [S]	http://www.army.mil/
Army Financial Management Home Page [S]	http://www.asafm.army.mil/
Army Materiel Command Web Page [S]	http://www.amc.army.mil/
Army Portal [S]	http://www.us.army.mil/
Army Publications [S]	http://www.usapa.army.mil
Army Single Face to Industry (ASFI) Acquisition Web Site	http://acquisition.army.mil/
Army STRICOM (Simulation, Training, and Instrumentation Command) Home Page [S]	http://www.stricom.army.mil/
ASBCA	http://www.law.gwu.edu/asbca

[S]	
ASSIST (Acquisition Streamlining and Standardization Information System)	http://astimage.daps.dla.mil/online/new

C

CASCOM Home Page [S]	http://www.cascom.army.mil/
CECOM	http://www.monmouth.army.mil/cecom/cecom.html
Code of Federal Regulations [S]	http://www.access.gpo.gov/nara/cfr/cfr-table-search.html
eCFR [S]	http://www.access.gpo.gov/ecfr
Coast Guard Home Page [S]	http://www.uscg.mil
Central Contractor Registration (DOD) [S]	http://www.ccr2000.com
Commerce Business Daily (CBD) [S]	http://cbdnet.access.gpo.gov
Commerce Clearing House [S]	http://business.cch.com/government_contracts
Comptroller General Decisions [S]	http://www.gao.gov/decisions/decison.htm
Congress on the Net-Legislative Info [S]	http://thomas.loc.gov/
Contract Pricing Reference Guides	http://www.hydra.gsa.gov/staff/v/guides/volumes.htm
Cornell University Law School – Extensive list of links to legal research sites (USC, CFR, etc.) [S]	www.law.cornell.edu
Cost Accounting Standards (see 48 CFR, Ch 99)	http://www.fedmarket.com/vtools/links/cas.html

D

DCAA Web Page	http://www.dcaa.mil
Debarred List	http://epls.arnet.gov
Defense Acquisition Deskbook [S]	http://www.deskbook.osd.mil
Defense Acquisition University [S]	http://www.dau.mil/
Defense Electronic Business Program Office (formerly JECPO) [S]	http://www.defenselink.mil/acq/ebusiness/

DoD Busops [S]	http://www.dodbusopps.com/
DoD Contract Pricing Reference Guide [S]	http://www.acq.osd.mil/dp/cpf/pgv1_0/index.html
DoD E-Mall [S]	/https://www.emallmom01.dla.mil/scripts/default.asp
DoD Inspector General (Audit Reports) [S]	http://www.dodig.osd.mil
Defense Logistics Agency Electronic Commerce Home Page [S]	http://www.supply.dla.mil/
Defense Tech. Info. Ctr. Home Page (use jumper Defenselink and other sites) [S]	http://www.dtic.mil
Department of Commerce, Office of General Counsel, Contract Law Division	http://www.contracts.ogc.doc.gov/cld/cld.html
Department of Justice (jumpers to other Federal Agencies and Criminal Justice) [S]	http://www.usdoj.gov
Department of Veterans Affairs Web Page [S]	http://www.va.gov
Department of Veterans Affairs Board of Contract Appeals [S]	http://www.va.gov/bca/index.htm
Defense Acquisition Regulations Directorate (DARD) – FAR, DFARS, Deskbook, etc. [S]	http://www.acq.osd.mil/dp/dars/dfars.html
DFAS [S]	http://www.dfas.mil/
DFAS Electronic Commerce Home Page [S]	http://www.dfas.mil/ecedi/
DIOR Home Page - Procurement Coding Manual/FIPS/CIN	http://web1.whs.osd.mil/diorhome.htm
DOD Claiment Program Number (Procurement Coding Manual)	http://web1.whs.osd.mil/peidhome/guide/mn02/mn02.htm
DOD Home Page [S]	http://www.defenselink.mil
DOD Instructions and Directives	http://web7.whs.osd.mil/corres.htm
DOD SOCO Web Page [S]	http://www.defenselink.mil/dodgc/defense_ethics
DOL Wage Determinations	http://www.ceals.usace.army.mil/netahtml/srvc.html

F

FAR (GSA) [S]	http://www.arnet.gov/far/
Federal Acquisition Virtual Library (FAR/DFARS, CBD, Debarred list, SIC) [S]	http://www.arnet.gov/Library/
FedBizOps [S]	http://www.fedbizops.gov/
Federal Marketplace [S]	http://www.fedmarket.com/
Federal Register [S]	http://www.access.gpo.gov/nara
FFRDC - Federally Funded R&D Centers [S]	http://www.nsf.gov/sbe/srs/nsf99334/start.htm
Financial Management Regulations [S]	http://www.dtic.mil/comptroller/fmr/
FORSCOM: Army Atlanta Contracting Command	http://www.forscom.army.mil/aacc/

G

GAO Home Page [S]	http://www.gao.gov
GAO Comptroller General Decisions (Allows Westlaw/Lexis like searches) [S]	http:/www.access.gpo.gov/su_docs/aces/aces170.shtml
GPO [S]	http://www.gpo.gov
Decisions of GPO Board of Contract Appeals [S]	http://www.contracts.ogc.doc.gov/gpobca
GovCon (Government Contracting Industry Website) [S]	http://www.govcon.com/content/homepage
GSA Advantage (MyGSA) [S]	www.fss.gsa.gov
GSA Legal Web Page (FedLaw)	http://www.legal.gsa.gov

J

JAGCNET (Army JAG Corps homepage) [S]	http://www.jagcnet.army.mil/
JAGCNET (Contract & Fiscal Law publications) [S]	http://www.jagcnet.army.mil/ContractLaw
JAGCNET (The Army JAG School Homepage)	http://www.jagcnet.army.mil/TJAGSA
Joint Publications	http://www.dtic.mil/doctrine/jel/jointpub.htm
Joint Travel Regulations (JFTR/JTR) [S]	http://www.dtic.mil/perdiem/trvlregs.html
JWOD (Javits-Wagner-O'Day Act)	www.jwod.gov

L

Library of Congress Web Page [S]	http://lcweb.loc.gov
LOGJAMMS: Logistics Joint Administrative Management Support Services	http://www.forscom.army.mil/aacc/LOGJAMSS/default.htm
LOGCAP Homepage (Army AMC) [S]	http://www.amc.army.mil/dcs_logistics/lg-ol/infopage.html

M

Marine Corps Home Page	http://www.usmc.mil
Mil Standards (DoD Single Stock Point for Military Specifications, Standards and Related Publications	http://www.dodssp.daps.mil/
MWR (Army) Home Page	http://www.ArmyMWR.com

N

NAF Financial (MWR) [S]	http://www.asafm.army.mil/fo/fod/naf/naf.asp
National Partnership for Reinventing Government (aka National Performance Review or NPR) Library – now closed, maintained in archive [S]	http://www.govinfo.library.unit.edu/npr/default.html
National Industries for the Blind	www.nib.org
NISH	www.nish.org
NARDIC (Navy Acquisition, Research and Development Information Center)	http://nardic.nrl.navy.mil
NAVSUP Home Page [S]	http://www.navsup.navy.mil/

Navy Acquisition Reform [S]	http://www.acq-ref.navy.mil/
Navy Electronic Commerce On-line	http://www.neco.navy.mil/
Navy Home Page [S]	http://www.navy.mil

O

OGE Web Page (Ethics Advisory Opinions, Publications, and Training Materials) [S]	http://www.usoge.gov
Office of Acquisition Policy	http://www.gsa.gov/staff/ap.htm
Office of Deputy ASA (Financial Ops) Information on ADA violations/NAF Links/Army Pubs/and Various other sites [S]	http://www.asafm.army.mil/fo/fo.asp
Office of Management and Budget (OMB) [S]	http://www.whitehouse.gov/omb
OFPP (Best Practices Guides)	http://www.arnet.gov/BestP/BestP.html

P

Policy Works - Per Diem Tables	http://www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/perd97.htm
Producer Price Index	http://stats.bls.gov/ppihome.htm

S

SBA Government Contracting Home Page	http://www.sba.gov/GC/
Steve Schooner's homepage	http://www.law.gwu.edu/facweb/sschooner
Service Contract Act Directory of Occupations	http://www.dol.gov//dol/esa/public/regs/compliance/whd/wage/main.htm
SIC [S]	http://www.osha.gov/oshstats/sicser.html

T

Training and Doctrine Command (TRADOC) Acquisition Center	http//www.tac.eustis.army.mil

U

U.S. Business Advisor (sponsored by SBA) [S]	http://www.business.gov
U.S. Congress on the Net-Legislative Info [S]	http://thomas.loc.gov
U.S. Code [S]	http://uscode.house.gov
U.S. Court of Federal Claims	http://www.contracts.ogc.doc.gov/fedcl
UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov

APPENDIX A

PURPOSE, TIME, OBLIGATIONS, AND ANTIDEFICIENCY ACT PROBLEMS

NOTES **FACTS**

1. THE DOALL CONTRACT.

You are pouring yourself a cup of coffee on 27 September 2002 at Fort Outpost, when the phone rings. Brigadier General (BG) Combat, the commanding general, is calling to say that he was delighted to hear on CNN that Congress had passed the FY 2003 DoD Authorization Act.

The installation base support services contract (for security, recreation activities, vehicle maintenance, janitorial services, and the like) currently held by Doall, Inc. is of utmost concern to the commander. BG Combat wonders why we have not exercised Doall's options for services beginning 1 October 2002 through 30 September 2003. BG Combat remarks that Mr. Einstein, Director of the U.S. Special Operations Test and Evaluation Command (USSOTEC), a tenant activity on Fort Outpost, has $250,000 of unobligated FY 2002 Research, Development, Test, and Evaluation (RDT&E) funds available because of delays in the Submersible Helicopter Program (SUBHELP). Doall services USSOTEC under a separate line item in the contract. There were two options in the contract: one for installation services and one for the USSOTEC services. BG Combat wants the FY 2003 options exercised and the $250,000 obligated by tomorrow.

Just before hanging up, BG Combat remarks that Mrs. Combat and other members of the Women's Club need a sedan to attend their weekly luncheon at Dirty Nellie's on 2 October 2002, and Doall's vehicle dispatcher has refused to schedule sedans for October until the government exercises the option.

How do you respond to the general?

NOTES **FACTS**

2. MR. PENNEY'S O&M LEDGER.

Mr. Link N. Penney, a budget analyst, attacks his in-box on his first day back from the TJAGSA Fiscal Law Course. Mr. Penney is trying to fill out his O + M Ledger. He comes into your office with "obligation" questions about five transactions.

For each transaction, Mr. Penney tells you the type of transaction and the amount previously certified (i.e. the amount **committed**). He asks you to help him figure out:

- the amounts he should record as obligations and;
- the amount and type of any adjustment currently needed or that he should anticipate (i.e. additional commitments needed, decommitments or future obligations).

Explain the rationale for the accounting entries you recommend.

He addresses the following contract actions eagerly:

a. Type: Award of $295,000 firm fixed-price contract with economic price adjustment (+/-10%).
Previously Certified (i.e. committed): $324,500.
Amount to Record as an Obligation: _____
Adjustment (amount and type): _____

b. Type: Award of $160,000 cost-plus-fixed-fee contract ($150,000 estimated cost, $10,000 fixed fee).
Previously Certified (i.e. committed): $150,000.
Amount to Record as an Obligation: _____
Adjustment (amount and type): _____

c. Type: Contract award of letter contract with a ceiling price not to exceed $100,000 and a maximum government liability prior to definitization of $50,000. (Assume all necessary prior approvals granted).
Previously Certified (i.e. committed): $100,000.
Amount to Record as an Obligation: _____
Adjustment (amount and type): _____

NOTES **FACTS**

d. Type: Definitization of a letter contract with definitized firm fixed-price of $237,621.
Previously Obligated (when Letter Contract was awarded): $100,000.
Amount to Obligate upon Definitization: _____
Adjustment (amount and type): _____

e. Type: Award of an indefinite quantity/indefinite delivery contract with a minimum quantity of 100 widgets and a maximum quantity of 1000 widgets. The unit price is $10 per widget.
Previously Certified (i.e. committed): $5,000.
Amount to Record as an Obligation: _____
Adjustment (amount and type): _____

f. Type: Delivery Order D00001 under the previous contract for 47 widgets.
Additional Amount to Record as an Obligation: _____
Adjustment: _____

g. Type: Termination for convenience of a $2.1M firm fixed-price contract.
Previously Recorded as an Obligation: $2.1M
Amount already Disbursed (i.e. paid to the contractor): $680,000
Amount to Obligate upon T4C (not a precise number, but explain how to determine): _____
Adjustment: _____

h. Type: Default termination of a $375,000 construction contract that was 60% complete.
Previously Obligated: $375,000.
Amount already Disbursed (i.e. paid to the contractor): $180,000
Amount to Obligate upon T4D: _____
Adjustment:_____

NOTES **FACTS**

3. THE NEVER ENDING STORY — A TALE OF TWO AUDITS.

On 5 September 2001, Art Dodger, an experienced contract attorney with the National Guard Bureau (NGB), finished reviewing the default termination notice for the 5-ton truck replacement engine contract with the contracting officer and the item manager. The defaulted contract cited FY 1999 National Guard and Reserve Procurement, Army funds. It was lucky that the contractor had defaulted since the Army had decided to replace the entire truck instead of only the engines. As the contracting officer put the letter in the mail, Art asked: "What are you going to do with the $5 million left over from this defaulted contract? You have less than a month to spend it!" The item manager remarked that she would need many spare parts to keep the old engines running. The contracting officer chimed in that there was a basic ordering agreement for spares with the old engine manufacturer and he could obligate all of the funds tomorrow. After a quick decision briefing to the Chief, NGB, the contracting officer obligated the $5 million for spare parts by issuing orders to the truck manufacturer.

In January 2002, as the new spare parts poured into the depot, a DoD IG audit team arrived to perform a long overdue review of inventory management practices. The team was struck immediately by the pallets of truck engine parts dumped in an open field. The team seized all of the paperwork related to the acquisition and, in due course, sent a draft audit report citing the NGB for an Antideficiency Act (ADA) violation for buying spare parts with procurement funds rather than operations and maintenance funds (O&M).

Art wrote a response to the draft audit report for his commander, noting that there was no ADA violation since the activity made the allegedly improper transaction in good faith and it could easily correct the error. The Commander, on Art's advice, directed the Resource Manager to replace the funds with FY 2001 O&M funds that the NGB had not obligated before the end of the fiscal year. The Resource Manager acted swiftly to replace the funds.

The audit team, smelling blood, revised its report to note that by late August 2001, NGB had obligated all the FY 2001 O&M funds allotted to it. To make up the shortfall, DoD allotted an additional $7 million in O&M funds to the NGB in mid-September for its use during the rest of the fiscal year.

NOTES **FACTS**

Undeterred, Art noted that the spares ordered far exceeded authorized inventory levels. Hence, Art concluded that the spare parts were a bona fide need of FY 2002. In addition, Art pointed out that the NGB training budget contained plenty of FY 2002 O&M appropriations. Luckily, the DoD IG accepted this theory. Unfortunately, the GAO picked up on the spare parts inventory investigation and scheduled an investigation of its own.

Discuss all of the potential ADA violations arising from these facts.

4. THE COMMANDER'S TQM CONFERENCE.

As your plane cruises over beautiful Diamond Head, you think how lucky you are to have secured a three-year, all-expense-paid tour at Schofield Barracks, in beautiful Hawaii — home of the 25th Infantry Division ("Tropic Lightning"). No sooner had you unpacked and reported in for your first day on the job when the Deputy Staff Judge Advocate (DSJA) asks you to step into his office.

It seems that the DSJA is wrestling with a request from the division commander and, because of the "visibility" associated with this request, seeks your help. The division commander wants to conduct a two-day "Total Quality Management" (TQM) session with the top military commanders and civilian supervisors under his command.

To minimize the potential for "outside disruption," the commander wants to conduct the TQM session in a conference room at a nearby hotel. The general hopes that by moving the TQM session off-post, the participants will be away from the day-to-day distractions of their offices—particularly the telephone.

The general not only wants to rent the conference room at the hotel, he wants to secure the services of a civilian consultant who specializes in TQM matters. The commander would also like the hotel to provide all TQM participants a "working lunch." He anticipates that during the lunch, the outside consultant will make a presentation to the participants. The commander proposes to use Operation and Maintenance funds to pay for the food.

NOTES **FACTS**

Finally, the commander would like to buy the participants commemorative T-shirts, in acknowledgment of this "first of many" TQM sessions. In fact, he wants to style the shirt after the one he saw the DSJA wearing during a recent "Island Iron Man" road race.

The DSJA looks at you expectantly and asks: "So, what do you think?"

5. COMMANDER'S COINS.

Several days later, the DSJA returns to your office. He tells you that the commander was displeased with your advice about the TQM conference. Now the commander has another question, which the DSJA hopes you can answer in the affirmative. The commander wants to use Operation and Maintenance funds to purchase 1,000 custom-minted "Tropic Lightning" commander's coins. The total price will be $2000 to $4000 for the die (a one-time expense) and then $2 per coin.

The commander wants to place the order right away, because he would like to present a coin to the new mayor on the occasion of his first visit. He also wants to have a large supply for an upcoming training exercise. He plans to make some unplanned appearances at the training site, where he will hand out coins as on-the-spot awards to those soldiers who epitomize the "Tropic Lightning" standard of excellence. He will use them for civilian on-the-spot awards as well. The civilian workforce has been under a lot of stress with all the talk about outsourcing several of the large directorates. The commander was quite excited about this idea for such a cheap and versatile training tool. He thinks handing out some coins to local residents at community relations events will also help maintain the good will his division has always enjoyed in the local community. He has no doubt that he will easily use 500 coins within this fiscal year.

The DSJA again looks at you expectantly (because you are still new and he is withholding judgment) and asks, "What do you think? I know Special Forces units have been buying these things for years. This isn't a problem, is it?"

APPENDIX A

PURPOSE, TIME, OBLIGATIONS, AND ANTIDEFICIENCY ACT DISCUSSION QUESTIONS

1. THE DOALL CONTRACT

A. Are FY 2003 funds available for the Doall contract options?

B. May the contracting officer use FY 2002 RDT&E funds to exercise the FY 2003 Doall contract option?

C. Assuming sufficient FY 2002 O&M Funds are available, may the contracting officer use FY 2002 O&M Funds to exercise the FY 2003 Doall contract option?

D. May the contracting officer take advantage of 10 U.S.C. § 2410a or 41 U.S.C. § 253*l*? Why or why not?

E. How can the contracting officer avoid this situation in follow-on contracts?

F. May the Women's Club use a government vehicle?

2. MR. LINK N. PENNEY'S LEDGER (See problem for questions.)

3. THE NEVER ENDING STORY, OR A TALE OF TWO AUDITS

A. What did the National Guard Bureau (NGB) do wrong when it bought the spare parts?

B. Did the NGB avoid an ADA violation by obligating FY 2001 O&M, ANG funds?

C. Did the NGB avoid an ADA violation by obligating FY 2002 O&M, ANG funds?

4. THE COMMANDER'S TQM CONFERENCE

A. May we use appropriated funds to pay for the lunch?

B. May we use appropriated funds to pay for the T-shirts?

5. COMMANDER'S COINS

A. May the commander use appropriated funds to buy coins for distribution to others? Where does your analysis begin?

B. May appropriated funds be used to fund commander's coins as awards for soldiers?

C. How should the commander draw the distinction between gifts and awards?

D. May appropriated funds be used to fund commander's coins as awards for civilian employees? What about giving the coins as morale boosters?

E. May the commander give a coin to the local mayor on the occasion of his visit?

F. May the commander give coins to members of the local community as tokens of goodwill?

G. Does the commander's remark that he "will easily use 500 coins within this fiscal year" raise any bona fide needs issues?

APPENDIX B

ASSORTED FISCAL LAW PROBLEMS

NOTES **FACTS**

1. THE SLINGSHOT

You are a legal advisor for the Army Materiel Command. On December 23, 2001, the Budget Officer for the Army's SLINGSHOT program comes to you and explains the following:

> "As a result of our experiences in the Persian Gulf War, Congress became concerned about our missile defense capabilities. In FY 2001, Congress began appropriating money for the research and development of a low altitude, line-of-sight air defense weapon dubbed SLINGSHOT. We awarded an incrementally funded, cost-plus-fixed-fee contract to Scudbusters, Inc., for the work in November 2000. Army budget requests included $100 million per year in FY 2001, FY 2002, and FY 2003 for this program.
>
> The SLINGSHOT program has progressed smoothly, with few wrinkles, until this week. Due to veiled threats by the Chinese to launch a missile attack against Los Angeles, the Program Manager has directed that we substantially increase our missile defense effort. In fact, he wants us to turn the program into the development of a high altitude, long-range interceptor. The Program Manager has held extensive discussions with Scudbusters, Inc., and it has agreed to perform the additional work for an estimated additional cost not to exceed $25 million.
>
> I've got four funding options I need you to review. Please advise on the legality of each one. Also, I need to know the approval and notification requirements for each option in order to get the money I need to complete the modified SLINGSHOT contract.
>
> (a) Option 1: Move $25 million from the FY 1999 Blackhawk Helicopter procurement account into the SLINGSHOT program. The Blackhawk money is left over from cost underruns.

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(b) Option 2: Move funds from the Army's Armor Modernization program element. This advanced development program hit a few snags, and we terminated the contract for convenience, freeing up the needed $25 million.

(c) Option 3: Move $25 million from the Army's Patriot Missile program into the SLINGSHOT program. The Patriot Missile program is in the Army Missile Defense Systems Integration program element (PE), the same PE as the SLINGSHOT.

(d) Option 4: Move $25 million from the B-2 Bomber R&D account. The Air Force owes me a favor, and has agreed to MIPR the money ASAP, "no strings attached!"

2. "AIM HIGH" & OTHER AERO-SPACE CONCERNS

You are the local counsel for McChord Air Force Base, located in Tacoma, Washington. It's September 2002, and you are reviewing a number of contract actions. In your "in-basket" is a $200,000 pre-award contract file to remove and inspect air traffic control (ATC) radar relay stations at three remote sites and to repair them as necessary. ATC radars assist aircraft in making ILS (instrument landing system) approaches and departures at the air base. These devices have experienced frequent voltage generation problems during the past several months and routine maintenance has not corrected them. The contract file does not contain a fund certification document and does not identify the funds proposed for obligation. You dash off a quick memo, then call the contracting officer, who responds to your concerns about the money with, "Well, what do you think I should do?"

After telling the contracting officer exactly what you think he should do, you go to the next file in the "in-basket." It is the routine maintenance contract for 27 remote solar monitor sites. The solar devices at these sites are used to monitor and detect atmospheric anomalies that might interfere with the ability of the Air Force to conduct distance-learning training (e.g., sun spots, meteoric activity, and other conditions that might cause interference). The back-up documentation indicates that the original manufacturer's warranty expires on 15 November 2002. The new contract is for 12 months of services, with service beginning on 16 November 2002 and ending on 15 November 2003. The contract file

indicates that award will not occur until the FY 2003 appropriation is enacted. Again, you reach for the phone to say . . ..

3. CORAL REEF AFB SUPPORT CONTRACT

You are a contracting officer at Coral Reef Air Force Base, Florida. You are responsible for the contract with Acme Services, under which Acme provides base support services for $1,000,000 per month during the current fiscal year (FY 2002). A separate contract line item is for janitorial services for a tenant activity, the Federal Marine Fisheries Agency, which funds that portion of the contract through an Economy Act order. The contract expires on 30 September 2002.

Colonel Felicia Flyer, the Base Commander, calls you on 30 September 2002. Colonel Flyer asks you how the base will fund its support services tomorrow because Congress has not passed an appropriations act or a continuing resolution authority statute to fund DoD during FY 2003. She reminds you that there are one-year, priced options (one option for services at Coral Reef AFB and a separate option for services for the tenant activity) for FY 2003 services in the Acme contract. The option clause in the contract requires the government to give the contractor a nonbinding notice of intent to exercise options 60 days prior to the expiration of the term of the contract. The contracting officer gave this notice on 15 July 2002. The option clause also provides that the government must exercise the options within 30 days of the receipt of appropriations for each new fiscal year. What do you tell Colonel Flyer?

A few days later, in a midnight session on 3 October 2002, Congress passes a joint resolution funding DoD for 30 days, from 1 through 30 October 2002. The phone is ringing as you arrive at work the next day. Colonel Flyer again asks about funding for Acme's contract. Colonel Flyer would like to renew the base services contract for FY 2003 immediately while DoD has funding. She would also like to exercise the additional option in Acme's contract for maintenance, clubhouse services, and operation of the pro shop at the newly opened Coral Reef Golf Course.

While reviewing the contract file, you discover that there is a FY 2003 option for base services at $1,100,000 per month and a FY 2003 option for the Federal Marine Fisheries Activity. You also discover that

the contract includes a separate one-year option for the Golf Course for FY 2003, priced at $234,000.

You provide the Base Commander with the following advice . . . .

4. GETTING MIPR'D AT FORT TJAGSA

You are the command counsel at beautiful Fort TJAGSA, an installation that never met a MIPR it didn't like. You have just returned from a long deserved two-week vacation at the Outer Banks, in North Carolina. As you go through the piles of documents and taskings in your in-box, you come across two MIPR issues requiring your legal opinion.

The 43d Area Support Group (ASG) is a tenant activity at Fort TJAGSA. The 43d ASG includes a Corps Support Battalion, whose primary mission is DS/GS-level maintenance and supply. While the ASG is constantly busy providing support and service support to combat units on post, it also performs a significant amount of reimbursable work. The 43d ASG recently processed a project order MIPR from the Air Force for one-time overhaul of a firefighting vehicle. The Air Force issued the MIPR on 19 September 2001, citing one-year FY 2001 O&M (AF) funds and, one week later, the 43d ASG accepted this MIPR in writing. Due to the late submission of the MIPR, however, the ASG performed no work on this order in FY 2001. In fact, due to an extensive backlog of work orders and other mission tasks, the 43d ASG did not begin work under this MIPR until March 2002, at which time the Air Force "extended" the MIPR expiration date so that it could still use the FY 2001 O&M funds.

The United States Special Operations Test and Evaluation Center (USSOTEC) is another installation tenant activity. This organization wants to purchase research work from the Department of Energy (DOE) on the development of innovative methods for disposing radioactive waste associated with an SF ammunition storage site. The Director, USSOTEC, states that the research work will be performed at a DOE government-owned, government-operated (GOGO) research laboratory. USSOTEC has submitted for legal review a MIPR requesting the above research work. As authority for this request, USSOTEC cites the Project Order Statute (41 U.S.C. § 23), which means that none of those bothersome "special determinations" otherwise required for Economy Act orders apply in this case.

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5. URBAN RENEWAL -- ARMY STYLE

It is July, 2005 and you are just settling in to your new job as legal advisor in the Administrative Law Division, Office of the Staff Judge Advocate, Fort Jackson, when your new boss gives you your first project.

Three years ago (i.e. during FY 2002), the Army Inspector General (IG) noted several deficiencies in barracks number one (B1) and barracks number two (B2) on Fort Jackson. The barracks were not air-conditioned, there was no carpeting in certain common areas of the barracks, and senior non-commissioned officers (NCOs) lived in open bays. The IG stated that the command had to correct these three discrepancies to comply with current Army barracks standards. At the time of the IG report, the barracks were not in need of repair. Based on this IG report, the Commanding General (CG) of Fort Jackson directed the Garrison Commander to remedy all of the discrepancies identified by the IG.

Colonel Smithe, the Garrison Commander, immediately began to remedy the situation. In FY 2003, after a fire destroyed three-fourths of an installation training center, Colonel Smithe ordered the Director of Public Works (DPW) to remove the year-old air conditioning unit from the training center and install it in B1. The DPW removed and installed the air conditioner at a total cost of $75,000. [The air conditioning unit had a depreciated value of $300,000]. Using Operation and Maintenance (O&M) funds, the command also purchased and installed a new air conditioning system and installed it in B2 at a total cost of $600,000.

Colonel Smithe attacked the carpeting problem during FY 2004. The job was more expensive than expected, however, because workmen had to replace some floorboards and moldings before they could install the carpeting. Colonel Smithe also decided to have the reception area carpeted, even though this was not required by the IG's report. The total cost to carpet B1 and B2 was $700,000.

Finally, Colonel Smithe corrected the last IG deficiency in FY 2005 by creating 10 separate rooms for senior NCOs in each barracks building. This was the most challenging project of all due to a scarcity of funds. Due to congressional concerns over ballooning deficits, Department of Defense (DoD) budgets had been cut to the bone. Consequently, Colonel Smithe had only $300,000 in O&M funds to perform this work, yet the lowest quote from a construction contractor was $800,000. Colonel Smithe determined that the solution to this shortage of

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funds was to do part of the work "in house," so he arranged for a company of engineer reservists to do the required carpentry work during their two weeks of active duty at Fort Jackson. As a result, COL Smithe was able to fully fund the project with the $300,000 of available O&M funds and $27,000 of Military Construction, Army (MCA) dollars. The latter funds had been left over from a recently completed mess hall construction project. The entire $327,000 was enough to fund the purchase of building materials for the senior NCO room upgrade.

The culmination of the project was a stroke of genius. During the annual organizational day, soldiers, their spouses, and their children all chipped in to paint the rooms and clean-up the barracks.

The Army Audit Agency (AAA) has recently cited the command for possible violations of the Antideficiency Act in the funding of these projects. The Staff Judge Advocate tasks you to assess whether such violations occurred, and to determine what action, if any, the command can take to remedy any funding errors that occurred.

APPENDIX B

SEMINAR QUESTIONS

1. THE SLINGSHOT

See problem for discussion questions.

2. "AIM HIGH" & OTHER AEROSPACE CONCERNS

A. Assuming O&M funds will be used, what year funds should the contracting officer obligate when awarding the ATC Radar Relay Stations contract?

B. What year funds should the contracting officer obligate when awarding the 12-month Solar Monitor Site contract?

C. Is there an exception that would allow the Air Force to use current year funds to award a 12-month maintenance contract that crosses fiscal years?

3. CORAL REEF AFB SUPPORT CONTRACT

A. Does the bona fide needs rule affect service contracts?

B. Distinguish between severable and nonseverable services.

C. What type of services are provided here?

D. When may agencies incur or record obligations against appropriations?

E. What happens if there is a funding gap (no appropriation or continuing resolution)?

F. Which services must be shut down if there is a funding gap? What type of obligations can be made?

G. Can the options be exercised from 1-3 October ?

H. What about the Availability of Funds Clause?

I. Must the contractor perform if the above clause is used?

J. Does the passage of the continuing resolution change the Contracting Officer's options?

K. Are there any restrictions on procurement during a continuing resolution period?

L. What about the golf course?

M. What about the increase in services cost?

4. GETTING MIPR'D AT FORT TJAGSA

A. Did the Air Force fund this MIPR properly?

B. What difference would it make if the authority for this intragovernmental acquisition was the Economy Act and not the Project Order statute?

C. Can the Air Force rely upon 10 U.S.C. § 2410a as authority to obligate FY 2001 O&M funds even though work on the firefighting vehicle did not commence until FY 2002?

D. What remedy do you suggest to the Air Force regarding its MIPR?

E. Did USSOTEC cite the proper authority for its MIPR?

F. If the Project Order statute provides USSOTEC with the requisite authority, what special determinations are required?

G. If USSOTEC must treat this request as an Economy Act order, what special determinations are required?

H. If USSOTEC must treat this request as an Economy Act order, who is the approval authority here?

5. URBAN RENEWAL -- ARMY STYLE

A. What funds should be used for military construction projects with a funded cost of $750,000 or less? What funds should be used for military construction projects with a funded cost over $750,000, but less than or equal to $1.5 million? What funds should be used for military construction projects with a funded cost over $1.5 million?

B. What is the scope of the project? What additional facts should you know when determining the scope of the project?

C. Was there any improper project splitting involved here?

D. Should the work involved be classified as maintenance, repair, or construction? Explain.

E. What are the funded and unfunded costs of the work done in Barracks 1? Barracks 2?

F. What funds should have been used for this work? What are the appropriate approval levels?

G. Has there been an Antideficiency Act violation?

H. Does the use of spouses and children for cleaning and painting create any issues?

I. What steps, if any, should be taken to correct problems related to the work done in the barracks?

APPENDIX C

OPERATIONAL FUNDING PROBLEMS

NOTES **FACTS**

I. Adventures in Central Europe.

You are the Chief of Administrative and Civil Law, Office of the Staff Judge Advocate, for an Army division. You deploy with the division to Bosnia-Herzegovina as part of a short-lived stabilization force (a contingency operation). Shortly after your arrival, a subordinate captain comes to you for help. Among his many duties, he has the task of providing contract advice (he apparently saw a contract once before the unit's deployment). He tells you that the command has now inundated him with requests for opinions on a variety of issues that he has never seen before. Even matters that would be routine in a garrison environment become difficult because he's not sure how much the rules change when a unit deploys. He asks for your help with several issues.

a. Upon its arrival, the division headquarters moved onto a base occupied for the past year by another U.S. division. The G-1 wants to convert a multi-story building on the base, which the previous division had used as a barracks, to an administrative facility. The division engineer (DIVENG) advises that the work will include: (1) the replacement of the roof, the flooring, and some interior walls; (2) the repair of other failing components of the building; (3) the installation of new Heating, Ventilating, and Air Conditioning (HVAC) equipment; and (4) the construction of new walls to accommodate the new configuration. The engineer proposes classifying the project as mostly repair, with a small amount as construction work. He estimates the cost of all work at $1.8 million. Because the construction work will only cost $457,000, the division engineer contends that the entire project can be funded with O&M funds. Is the division engineer right?

MAJ Kevin M. Walker
Fiscal Law Course
February/March 2002

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b. The JTF Commander is concerned about the farmers in the local area. Many members of local militia groups on both sides of the conflict are farmers. There is no diesel fuel available on the local economy to run farm equipment to collect the harvest for the coming winter. The farmers are idle and the Commander wants to keep the farmers busy and reduce the need for relief supplies. The JTF Commander wants to conduct refueling missions and provide 10 gallons of diesel fuel per week to each farmer. The commander intends to send HEMMT tankers into the countryside to set up temporary "gas stations." Can we give fuel to the farmers? How?

c. The G-4 wants to build (or procure) several storage facilities to ease the space crunch the division is facing. Lumber and other construction materials are difficult to come by locally. The division engineer assets could construct the facilities, but the raw materials would cost an estimated $275,000. As an alternative solution, the G-4 is considering purchasing three portable, prefabricated storage facilities from an American manufacturer at a cost of $65,000 each. He is inclined to go this route because he could move the prefab buildings and reuse them later on other missions. The G-4 has about $400,000 in O&M funds available for this effort. What do you advise?

d. A brigade supply officer was swamped with requests for blankets when the weather turned unseasonably cold. He located a blanket factory with 1500 blankets in stock, and arranged delivery after agreeing that the U.S. Government would pay the wholesale price of $12 per blanket. What should the division finance officer do when the factory owner shows up with an invoice for $18,000 worth of blankets and asks to be paid? Does it matter who the blankets are for?

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e. The G-1 comes to you for advice on one of her current projects. The Chief of Staff has tasked her to come up with alternative MWR opportunities for the JTF troops. She advises you that soldiers are generally restricted to the confines of their basecamps unless on a mission, are not authorized to wear civilian clothes, and have very limited morale, welfare, and recreation (MWR) activities available within the basecamps. Due to the hardships of the operation, she would like to transport soldiers to secure recreational sites.
One of her ideas is to renovate an old ski resort that is nearly adjacent to the base camp. She wants to know if the JTF could use CONOPS funds to hire a contractor to perform the renovation? In addition, she asks whether, once the renovation is complete, the JTF could use CONOPS funds to bus troops to the resort and to pay for lift tickets so they can ski? How do you analyze these issues? What additional facts do you need before you can even start preparing your legal opinion?

II. Adventures in Haiti.

As the newly assigned Staff Judge Advocate for the Joint Logistics Support Element, you have just deployed to Haiti in support of a United Nations (UN)-authorized peacekeeping operation. Although one of your primary missions is to advise the command on procurement law issues, you haven't been too worried about that since we have a Logistics Civil Augmentation Program (LOGCAP) contract to take care of our support requirements. Shortly after your arrival in country, however, you find yourself grappling with the following issues:

a. Your JTF is the U.S. component of the United Nations force in Haiti. As part of their responsibilities for the U.N. Force, the U-4 provides Class I (Subsistence) items to the member components of the force. Your J-4 comes to you with the following problem. "Judge, the U-4 has given us 10,000 pounds of frozen beef to feed our troops. The Preventative Medicine (PVNTMED) detachment has conducted their normal food checks and determined the meat is unsuitable for consumption by U.S. personnel, but the meat is fit for human consumption and is not a danger. The U.N. will not take it back and I need to get it out of the freezer to make room for incoming food. The Commander has accepted the PVNTMED section's recommendation not to feed this meat to our troops. Can I give it to the Haitians to feed their people." As your career flashes before your eyes, you think quick and say?

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b. The Chief of Staff wants to know whether we can provide supplies and equipment free of charge to the Department of Justice (DOJ) in support of their training of the Haitian police force. If we can't provide the supplies for free, is there a legal way that DOJ can buy them from us?

c. You are still assigned to the U.S. component of the United Nations force in Haiti. The JTF Surgeon comes to you one day with the following concern.

> As you know, we are in the process of rehabilitating the University Hospital as part of an approved HCA project. Our assigned RED HORSE engineer flight is working very hard, under my office's supervision, to get the hospital back into a useable shape. I'm very concerned about the working conditions in the hospital. My engineers and my medical personnel must work directly across the hall from the morgue. As you know, there is a moratorium on burials in Port-au-Prince. The bodies are literally stacking up in the morgue and I am concerned with the physical and mental well being of the troops working in the hospital. Can we give the Haitians 400 body-bag liners? Judge, they're only $1.78 a piece, but they would help prevent the spread of disease and would make sure our troops don't have to see the bodies every day. What do you say judge? Can we also build a door on the morgue?

III. Adventures in Washington, D.C.

Your adroit legal opinions have resulted in your assignment to the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff. You now receive a tasker from the Director of the Joint Staff to review a request from the Commander, Joint Forces Command regarding HCA activities in Haiti. Attached is a copy of the CINC's request. How do you respond?

COMMANDER IN CHIEF
U.S. JOINT FORCES COMMAND

MEMORANDUM FOR THE CHAIRMAN, JOINT CHIEFS OF STAFF

Sir, as you know we are in the process of deploying Air Force engineers to Haiti to renovate and repair several schools and the University Hospital. While they definitely provide great training opportunities for our engineers and will improve the life of some of the Haitian people, we need to do something that will make a difference for a larger part of the population. The infrastructure projects we originally proposed to do would make a significant impact on the general population.

I understand the legal implications associated with the infrastructure projects but I would propose that we need to revisit the issue and try to do some of the infrastructure projects we previously forwarded, especially the road and water repair projects. Several of the roadways are major military supply routes in Haiti for U.S. and UN forces, such as National Route 1 and Delmas Road, which could be repaired for $660,000 and $200,000 respectively. For the Air Force engineers, the repair and overlay of the roadway is rudimentary construction and good training for their mission tasking. The repair of these MSR's would greatly assist and benefit the mobility and sustainment of our forces in Haiti, and I believe should be done if possible. A scaled down repair project to supply water to City Soleil, which meets rudimentary construction standards, should also be considered. There would also be an ancillary benefit to the Government of Haiti, since this work would dramatically improve the lives of many Haitian people.

In lieu of using scarce DOD O&M funding, we are continuing to pursue other possible sources of funding in Haiti, such as USAID, Inter-American Development Bank, the Haitian Development Fund and the Central Implementation Unit (CIU). Any assistance you can provide in freeing DOS/AID money or facilitating international donor support would be appreciated.

Request your support in having your legal and fiscal offices quickly review the options available in supporting the use of U.S. Military engineers and material in the reconstruction of these vital roads and waterworks projects before we run out of time while these projects are being staffed to death.

J. J. SHEEHAN
General, U.S. Marine Corps