

2018

FISCAL LAW

DESKBOOK



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

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Our Predecessors on the Faculty of the Contract and Fiscal Law Department

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CHAPTER 1:



INTRODUCTION TO FISCAL LAW

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

A. The Appropriations Process.

1. U.S. Constitution, Art. I, § 8, grants Congress the “. . . power to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence 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 Appropriations made by Law.”

B. The Supreme Court’s Fiscal Philosophy: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. MacCollom*, 426 U.S. 317 (1976).

C. Historical Perspective.

1. For many years after the adoption of the Constitution, executive departments exerted little fiscal control over the monies appropriated to them. During these years, departments commonly obligated funds in advance of appropriations, commingled funds and used funds for purposes other than those for which they were appropriated, and obligated or expended funds early in the fiscal year and then sought deficiency appropriations to continue operations.
2. Congress passed the Antideficiency Act (ADA) to curb the fiscal abuses that frequently created “coercive deficiencies” that required supplemental appropriations. The Act actually consists of several statutes that mandate administrative and criminal sanctions for the unlawful use of appropriated funds. *See* 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519.

II. KEY TERMINOLOGY.

- A. Fiscal Year. The Federal Government's fiscal year begins on 1 October and ends on 30 September.
- B. Period of Availability. The period of time in which budget authority is available for original obligation. DoD Financial Management Regulation 7000.14-R, Glossary, p. 24 [hereinafter DoD FMR]. 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 new obligations thereafter.
- C. Obligation. An obligation is any act that legally binds the government to make payment. Obligations are amounts representing orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. This includes payments for which obligations previously have not been recorded and adjustments for differences between obligations previously recorded and actual payments to liquidate those obligations. The amount of obligations incurred is segregated into undelivered orders and accrued expenditures - paid or unpaid. For purposes of matching a disbursement to its proper obligation, the term obligation refers to each separate obligation amount identified by a separate line of accounting. DoD FMR, Glossary, p. 22.
- D. Budget Authority. Budget authority means "the authority provided by Federal law to incur financial obligations . . ." 2 U.S.C. § 622(2). It is the authority provided by law to enter into obligations that will result in immediate or future outlays involving Federal Government funds. The basic forms of budget authority are appropriations authority to borrow, and contract authority. Budget authority relates to direct programs. *See also*, DoD, DoD FMR, Glossary, p. 6.
 - 1. Examples of budget authority include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. OMB Circular A-11, Preparation, Submission and Execution of the Budget (2017), § 20.4(b) [hereinafter OMB Cir. A-11].

2. “Contract Authority” is a limited form of budget authority. It is a statutory authority to incur obligations but with liquidation of obligations dependent upon future actions of the Congress. This authority permits agencies to obligate funds in advance of appropriations, but not to pay or disburse those funds absent some additional appropriations authority. DoD FMR, Glossary, p. 10. *See, e.g.*, 41 U.S.C. § 11 (Feed and Forage Act); DoD FMR, vol. 3, ch. 19, para. 190205 (Aug. 2015).

E. Authorization Act.

1. An authorization act is a statute, passed annually by Congress, which authorizes the appropriation of funds for programs and activities.
2. An authorization act does not provide budget authority. That authority stems from the appropriations act.
3. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority.
2. An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.” The Army receives the bulk of its funds from two annual appropriations acts:
 - a. The Department of Defense Appropriations Act; and
 - b. The Military Construction Appropriations Act.
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*, 4th Edition, Chapter 2, p. 2-23, GAO-16-464SP (2016).

G. Comptroller General and Government Accountability Office (GAO).

1. The Comptroller General of the United States heads the GAO, an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.
<http://www.gao.gov/about/index.html>.
2. GAO was established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.
3. GAO issues opinions and reports to federal agencies concerning the obligation and expenditure of appropriated funds.
4. Comptroller General decisions and opinions are identified by a B-number and date (e.g., B-324214, January 27, 2014). Some decisions predating 1995 were published in Decisions of the Comptroller General of the United States. Those decisions have B-numbers but are generally identified by volume, page number, and the year the decision was issued (e.g., 73 Comp. Gen. 77 (1994)).

H. Legacy Accounting Classification (Fund Cites). Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to ensure that funds are used correctly. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-18, *The Army Management Structure for Fiscal Year 2018*, provides a detailed breakdown of Army accounting classifications. The following is an example of a fund cite (the reference column reflects which DFAS Manual 37-100-18 chapter contains further explanation of the data element and code):

21 1 2020 6H-6H03 131034.W0 21T2 QDOC F3173 GRE12340109003 AMPK W6QL1A S44008

DATA ELEMENT	CODE	EXPLANATION OF CODE	REFERENCE
Treasury Symbol:			
Department Code	21	Department of Army	Chapter 21-DPT
Period of Availability (FY)	1	Fiscal Year 2011	Chapter 22-FY
Basic Symbol	2020	Operations and Maintenance, Army	Chapter 23-BS
Operating Agency	6H	Army Contracting Command	Chapter 26-OA
Allotment Serial Number	6H03	Locally Assigned	Chapter 27-ASN
AMSCO/Project Account	131034.W0	Command Support, Contracting Operations	Chapter A9-BSSPT
Element of Resource	21T2	Other TDY Charges	Chapter 2B-EOR(nonPay)
MDEP/SODP	QDOC	Directorate of Contracting/Contracting Division	Chapter 2C-MDEP2
Functional Cost Account	F3173	Typhoon Megi Response (Direct Cost)	Chapter 2D-FCA

Standard Document Number	GRE12340109003	Locally Assigned	Chapter 2F-SDN
Account Processing Code (APC) and DPI or Job Order Number	AMPK	Locally Assigned	Chapter 2G-APC
Unit Identification Code	W6QL1A		Chapter 2H-UIC
Fiscal Station Number	S44008	DFAS Rome (DAO Ft Belvoir)	Chapter 2J-FSN

1. The first two digits represent the military department. In the example above, the “**21**” denotes the Department of the Army. For the Air Force, these two digits will be **57**; for the Navy, **17**; and for the Department of Defense, **97**.

2. The third digit shows the fiscal year/period of availability of the appropriation. The “1” in the example shown indicates FY 2011 funds. Installation contracting typically uses annual appropriations. Other fiscal year designators encountered less frequently include:
 - a. Third Digit = X = No year appropriation. This appropriation is available for obligation indefinitely.

 - b. Third Digit = 8/0 = Multi-year appropriation. In this example, funds were appropriated in FY 2018 and remain available through FY 2020.

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

Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	21*2010	17*1453	17*1105	57*3500	N/A
Reserve Personnel	21*2070	17*1405	17*1108	57*3700	N/A
National Guard Personnel	21*2060	N/A	N/A	57*3850	N/A
Operations & Maintenance	21*2020	17*1804	17*1106	57*3400	97*0100
Operations & Maintenance, Reserve	21*2080	17*1806	17*1107	57*3740	N/A
Operations & Maintenance, National Guard	21*2065	N/A	N/A	57*3840	N/A
Procurement, Aircraft	21*2031	17*1506		57*3010	N/A
Procurement, Missiles	21*2032	17*1507 (not separate – the	17*1109	57*3020	N/A

Procurement, Weapons & Tracked Vehicles	21*2033	combined appropriation is entitled Weapons Procurement)	(The Marine Corps has one combined procurement code)	N/A	N/A
Procurement, Other	21*2035	17*1810		57*3080	97*0300 (Defense-Wide)
Procurement, Ammunition	21*2034	17*1508		57*3011	N/A
Shipbuilding & Conversion	N/A	17*1611		N/A	N/A
Res., Develop., Test, & Eval.	21*2040	17*1319		57*3600	97*0400
Military Construction	21*2050	17*1205		57*3300	97*0500
Family Housing Construction	21*0720	17*0703		57*0704	97*0706
Reserve Construction	21*2086	17*1235		57*3730	N/A
National Guard Construction	21*2085	N/A	N/A	57*3830	N/A

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year. For example, Operations & Maintenance, Army funds for FY2019 would be depicted as 2192020.

** A complete and updated listing of these and other fund account symbols and titles assigned by the Department of the Treasury are contained in *Federal Account Symbols and Titles: The FAST Book*, which is a supplement of the Treasury Financial Manual. The FAST Book is available online and may be downloaded in pdf format, at https://www.fiscal.treasury.gov/fsreports/ref/fastBook/fastbook_home.htm

III. LIMITATIONS ON THE USE OF APPROPRIATED FUNDS.

- A. General Limitations on Authority. The authority of executive agencies to spend appropriated funds is limited.
1. An agency may obligate and expend appropriations only for a proper **purpose**.
 2. An agency may obligate only within the **time** limits applicable to the appropriation (*e.g.*, O&M funds are available for obligation for one fiscal year).
 3. An agency must obligate funds within the **amounts** appropriated by Congress and formally distributed to or by the agency.

B. Limitations -- Purpose.

1. The “Purpose Statute” requires agencies to apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. *See* 31 U.S.C. § 1301. *See also Principles of Fed. Appropriations Law*, 4th Edition, Chapter 3, p. 3-9 – 3-14, GAO-17-797SP (2017).
2. The “Necessary Expense Doctrine.” Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The GAO applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation:
 - a. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available.
 - b. The expenditure must not be prohibited by law.
 - c. The expenditure must not be otherwise provided for; that is, it must not be something that falls within the scope of some other appropriation or statutory funding scheme.

Principles of Fed. Appropriations Law, 4th Edition, Chapter 3, GAO-17-797SP (2017).). *See Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services*, B-306424, 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006).

C. Limitations -- Time.

1. Appropriations are available for limited periods. An agency must incur a legal obligation to pay money within an appropriation’s period of availability. If an agency fails to obligate funds before they expire, they are no longer available for new obligations.
 - a. Expired funds retain their “fiscal year identity” for five years after the end of the period of availability. During this time, the funds

are available to adjust existing obligations or to liquidate prior valid obligations, but are not available for new obligations.

b. Five years after the funds have expired, they become “cancelled” and are not available for obligation or expenditure for any purpose. 31 U.S.C. § 1552(a); DoD FMR, vol. 3, ch. 10, para. 1002 (Mar. 2015).

2. Appropriations are available only for the bona fide need of an appropriation’s period of availability. 31 U.S.C. § 1502(a). *See Magnavox -- Use of Contract Underrun Funds*, B-207433, Sept. 16, 1983, 83-2 CPD ¶ 401; *To the Secretary of the Army*, B-115736, 33 Comp. Gen. 57 (1953); DoD FMR, vol. 14, ch. 2, para. 020102.B.2 (Sep. 2015).

D. Limitations -- Amount.

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

a. Obligating, expending, or authorizing an obligation or expenditure of funds in excess of the amount available in an appropriation, an apportionment, or a formal subdivision of funds. 31 U.S.C. § 1341(a)(1)(A). *See also*, DoD FMR, vol. 14, ch. 2, para. 020102.A (Sep. 2015).

b. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B). *See also*, DoD FMR, vol. 14, ch. 2, para. 020102.A (Sep. 2015).

c. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342. *See also*, DoD FMR, vol. 14, ch. 2, para. 020102.A.2 (Sep. 2015).

2. Formal subdivisions of funds are subdivisions of appropriations by the executive branch departments and agencies. These formal limits are referred to as apportionments, allocations, and allotments.

3. Informal subdivisions are subdivisions of appropriations by agencies at lower levels, *e.g.*, within an installation, without creating an absolute limitation on obligational authority. These subdivisions are considered funding targets, or “allowances.” These limits are **not** formal subdivisions of funds, and incurring obligations in excess of an allowance is not necessarily an ADA violation. If a formal subdivision is breached, however, an ADA violation occurs and the person responsible for exceeding the target may be held liable for the violation. DFAS-IN Reg. 37-1, ch. 3, para. 031403 (March 2017). For this reason, Army policy requires reporting such over obligations. DFAS-IN Reg. 37-1, ch. 4, para. 040204.L.1 (March 2017).

IV. CONCLUSION.

- A. The current fiscal law framework is a result of the appropriations process, judicial interpretation, and historical underpinnings. While the core tenants of fiscal law are founded in the base concepts of purpose, time, and amount (PTA), the remainder of this work will explore these concepts in much greater detail, as well as other more nuanced topics, thereby revealing a rather complex set of laws and guidance.
- B. This work will begin with the core concepts of PTA, explore areas ranging from operation funding authority to continuing resolution authority, and also provide practical information for areas such as performing fiscal law legal research.

CHAPTER 2:



AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

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CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. REFERENCES.

- A. [U.S. Constitution, Art. I, § 9.](#)
- B. [31 U.S.C. § 1301.](#) The Purpose Statute.
- C. Department of Defense Appropriations Acts and National Defense Authorization Acts. Annual legislation found at <http://whs.mil.campusguides.com/dodappropriationslaws>.
- D. DOD 7000.14-R, [Financial Management Regulations](#) (hereinafter “DOD FMR,” found at: <http://www.dod.mil/comptroller/fmr/>).
- E. Department of Air Force, Instr. 65-601, [Budget Guidance and Procedures](#) (16 August 2012), available at <http://www.e-publishing.af.mil>.
- F. [Principles of Fed. Appropriations Law](#), (commonly referred to as the “Red Book”) 4th ed., chapters. 1-3, GAO-16-463SP (2017), found at: <https://www.gao.gov/legal/red-book/overview>.
- G. [A Glossary of Terms Used in the Federal Budget Process](#), GAO-05-734SP (September 2005) found at: <http://www.gao.gov/products/GAO-05-734SP>.
- H. [OMB Cir. No. A-11, Preparation, Submission, and Execution of the Budget](#) (July 2017), available at: https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf.

II. CONSTITUTIONAL, STATUTORY AND OTHER BACKGROUND.

A. U.S. Constitution.

1. [Art. I, § 9](#) provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” This establishes Congress as having the “power of the purse.” As a result, Congress must annually pass, and the President must sign, appropriations acts before agencies can expend any money.
2. In applying this provision of the Constitution, the Supreme Court has said, “[t]he 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.” *US v. MacCollom*, 426 U.S. 317, 321 (1976). In other words, we must look for specific congressional authority prior to the expenditure of public funds.

B. The Purpose Statute.

1. [31 U.S.C. § 1301\(a\)](#) states: “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”
2. Congress enacted this statutory control in the Act of March 3, 1809, 2 Stat. 535, as part of a reorganization of the War, Navy, and Treasury Departments to limit the Executive Branch in spending appropriations.

C. The “Necessary Expense Doctrine” (a.k.a. The 3-part Purpose Test). The purpose statute does not require every expenditure to be specified in an appropriations act. That is not possible or feasible. “[D]efining the objects for which any particular appropriation was made recognizes an element of discretion seasoned by a statutory construction analysis and reference to the common meaning of the words”¹ Where a particular expenditure is not specifically provided for in the appropriations act, the expenditure is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The Government Accountability Office (GAO) applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation:

1. The expenditure must bear a logical relationship to the appropriation sought to be charged. Or, stated differently, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
2. The expenditure must not be prohibited by law.
3. The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other, more specific appropriation or statutory funding scheme.
 - a. What if you have two equally available appropriations to fund an acquisition? I.e., neither appropriation is more specific?
 - b. Election Doctrine: The GAO’s Election Doctrine states that if two or more appropriations are equally available, then the agency may choose which appropriation to use. *Once the agency chooses a certain appropriation for that type of acquisition, however, the agency must continue to use the same appropriation for all acquisitions of that type, unless the agency informs Congress of its intent to change for the next fiscal year – i.e., once the agency makes its choice of appropriation, they are bound by that choice. See section V.B. below for further discussion.*

Principles of Fed. Appropriations Law, ch. 3, 3-16, 3-17, 3-410, GAO-16-436SP (4th ed. 2017). See Presidio Trust—Use of Appropriated Funds for Audio

¹ See PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, FOURTH EDITION, p.3-15, GAO-16-463SP (2017).

Equipment Rental Fees and Services, [B-306424](#), 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006).

III. THE APPROPRIATIONS ACTS

- A. Overview. An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.”² Generally, an “obligation” is a legal liability that arises from a mutual exchange of promises, or consideration (usually a government promise to pay money in exchange for goods and/or services), between the U.S. Government (USG) and a contractor.³
- B. Normally, Congress passes on an annual basis, twelve appropriations acts.⁴ Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. *See generally*, [Principles of Fed. Appropriations Law](#), ch. 2, 2-16 to 2-19, GAO-16-463SP (4th ed. 2017). These annual appropriations acts are typically broken down as follows:
1. Department of Defense
 2. Military Construction and Veterans Affairs, and related agencies
 3. Agriculture, Rural Development, Food and Drug Administration and related agencies
 4. Commerce, Justice, Science, and related agencies
 5. Energy and Water Development and related agencies
 6. Department of State, Foreign Operations, and related programs

² *See* A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, p.13-14, GAO-05-734SP (September 2005).

³ *Id.* at 70; *see also* 2018 Fiscal Law Deskbook, Chapter 5: Obligations.

⁴ Occasionally, instead of thirteen separate appropriations acts, Congress enacts an “Omnibus Appropriations Act” or a “Consolidated Appropriations Act”, combining the appropriations acts into one piece of legislation. *E.g.*, Consolidated Appropriations Act, 2017, Pub. L. No. 115-31 [hereinafter *2017 CAA*].

7. Department of the Interior, Environment, and related agencies
 8. Department of Labor, Health and Human Services, and Education, and related agencies
 9. Legislative Branch
 10. Department of Transportation, Housing, and Urban Development, and related agencies
 11. Financial Services and General Government
 12. Department of Homeland Security
- C. Optimally, each appropriations act is signed by the President prior to the end of the current fiscal year. When the new fiscal year begins, if there is no Department of Defense (DOD) Appropriations Act or supplemental spending measure, then the DOD must stop (or “shutdown”) its operations because there is a “funding gap.” Congress and the President, however, normally avoid a “shutdown” by enacting a continuing resolution, which authorizes DOD to continue obligating funds for a limited period of time.⁵
- D. Researching Appropriations Acts. In addition to LexisNexis and Westlaw based research, judge advocates (JA’s) can use [congress.gov](https://www.congress.gov) to locate appropriations acts.

⁵ See 2018 Fiscal Law Deskbook, Chapter 9: Continuing Resolution Authority.

IV. EXPRESS STATUTORY PURPOSE: THE DEPARTMENT OF DEFENSE APPROPRIATIONS

- A. The Purpose Analysis Flowchart⁶ is a useful visual tool to conceptualize purpose issues.

- B. In each of the two annual appropriations acts devoted to DOD, Congress grants multiple appropriations for different types of purchases that DOD needs to make to successfully execute its mission. *See e.g., Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Division C (providing over 50 separate appropriations to DOD).*

- C. Who is the purchase for? Congress appropriates funds for DOD in the annual DOD Appropriations Act (DODAA). Congress intends funds appropriated to DOD to be used for the primary benefit of DOD. As a result, to understand whether a unit may obligate appropriated funds for a purchase, JAs must first determine the purchase's primary beneficiary.⁷ Generally, there are three possible answers to this question: (1) the agency (e.g., the JA's unit); (2) a *different* U.S. Government (USG) agency; or (3) a foreign government, military, or population.
 - 1. Interagency Acquisitions (IAs): IA fiscal law applies when the primary beneficiary of the purchase is a *different* USG agency. IA law is a specialized area of fiscal law and is explored in detail in chapter 6 of the Fiscal Law Deskbook.⁸

 - 2. Operational Funding: Operational funding fiscal law applies whenever the primary beneficiary of the purchase is a foreign government, military or population. Operational funding is a specialized area of fiscal law and is explored in detail in chapter 10 of the Fiscal Law Deskbook.⁹

⁶ *See infra*, Appendix B: Purpose Analysis Flowchart.

⁷ The answer to this question is extremely important, as it will drive the remainder of the JA's purpose analysis. If a unit is unable to answer this question, the JA cannot competently conduct a fiscal law review as to the legality of the purchase.

⁸ *See* 2018 Fiscal Law Deskbook, Chapter 6: Interagency Acquisitions.

⁹ *See* 2018 Fiscal Law Deskbook, Chapter 10: Operational Funding.

3. Basic Purpose: For most expenditures, the primary beneficiary of the purchase is the agency (e.g., the unit). The remainder of this outline will focus on purchases by DOD, when the agency is the primary beneficiary. Once the JA determines that the primary beneficiary is the agency, then the JA must determine the nature of the item or service that the unit is purchasing.

D. Classifying the Acquisition: To determine the proper appropriation, a JA must classify the acquisition. From a Purpose standpoint, there are three types of acquisitions: (1) expense items (“expenses”); (2) investment items (“investments”); and (3) construction.¹⁰

1. Expenses are “the costs incurred to operate and maintain [DOD], such as . . . services, supplies, and utilities.” Expenses are normally financed with *Operation and Maintenance (O&M)*¹¹ appropriations. See DOD FMR, vol. 2A, ch. 1, para. 010201.B.1. Common examples of expenses include:

- a. Services;
- b. Supply items that will be consumed in the *current* period;¹²
- c. Civilian employee labor;
- d. Rental charges for equipment and facilities;
- e. Fuel;

¹⁰ Note that the classification of an acquisition into expenses, investments, and construction is limited to the Purpose analysis. Under the Time portion of the fiscal analysis, the JA will classify the acquisition in a different manner to analyze the Bona Fide Need; see 2018 Fiscal Law Deskbook, Chapter 3: Time.

¹¹ Another common acronym for O&M is OMA, Operation and Maintenance, Army. OMA is more common for organizations that utilize operations and maintenance funds from multiple services (e.g., Operation and Maintenance, Air Force.)

¹² In a prior version of Vol. 2A Chapter 1, the DOD Financial Management Regulation (*hereinafter* DOD FMR) defined the “current period” as 2 years or less. Although this is no longer the rule, it may be useful for JAs to use this definition of expenses as supply items that will last 2 years or less as a “rule of thumb” to communicate the expense-investment distinction to their commanders.

- f. Maintenance, repair, overhaul, and rework of equipment; and
 - g. Utilities.
2. Investments are costs that result in the acquisition of, or an addition to, end items. These end items benefit *current and future periods* and generally are of a long-term character. Investments include the “costs to acquire capital assets such as real property and equipment” or assets which will benefit both current and future periods and generally have a long life span. DOD FMR, vol. 2A, ch. 1, para. 010201.B.2, para. 010201.D.2. ***Investments are normally financed with Procurement appropriations.*** Common examples of investments include:
- a. All items of equipment, including assemblies, ammunition and explosives, modification kits (the components of which are known at the outset of the modification). . . .
 - b. The costs of modification kits, assemblies, equipment, and material for modernization programs, ship conversions, major reactivations, major remanufacture programs, major service life extension programs, and the labor associated with incorporating these efforts into or as part of the end item are considered investments. All items included in the modification kit are considered investment even though some of the individual items may otherwise be considered as an expense. Components that were not part of the modification content at the outset and which are subsequently needed for repair are expenses. The cost of labor for the installation of modification kits and assemblies is an investment.
 - c. A major service-life extension program, financed in procurement, extends the life of a weapon system beyond its designed service life through large-scale redesign or other alteration of the weapon system.

3. Construction is the erection of a complete and usable facility, or a complete and usable improvement to an existing facility.¹³ Once a DOD unit classifies a project as a construction project, then that construction project includes all the expense and investment items necessary to erect a complete and useable facility or a complete and useable improvement to an existing facility. Construction is funded using Construction Funding rules and is a specialized area of fiscal law explored in detail in chapter 8 of the Fiscal Law Deskbook.¹⁴

E. Overview of Major Defense Appropriations. The following is a list of common defense appropriations and general descriptions of the appropriations' purposes.

1. Military Personnel (MILPER). Used for “pay, allowances, individual clothing, subsistence, interest on deposits, gratuities, permanent change of station travel (including all expenses thereof for organizational movements), and expenses of temporary duty travel between permanent duty stations”¹⁵ In effect, MILPER pays for all the allowances that servicemembers receive on their Leave and Earnings Statement (LES). Government civilian salaries, on the other hand, are paid with the service Operation and Maintenance (O&M) appropriations.
2. Operation and Maintenance (O&M). Used for “expenses, not otherwise provided for, necessary for the operation and maintenance of the [Service], as authorized by law” O&M appropriations pay for the current operations of the force, and for the maintenance of the Armed Services' equipment, including base maintenance services, vehicle maintenance services, civilian salaries, and all expenses¹⁶ required to operate the force. For most DOD units and organizations, O&M is the only type of appropriation that they can access without higher level approval.

¹³ See United States Code, Title 10 [hereinafter [10 U.S.C. §2801](#)]; see also 2018 Fiscal Law Deskbook, Chapter 8: Construction Funding.

¹⁴ See 2018 Fiscal Law Deskbook, Chapter 8: Construction Funding.

¹⁵ 2017 CAA, *supra* note 4 at Div. C., Title I.

¹⁶ 2017 CAA, *supra* note 4 at Div. C., Title II.

3. Research, Development, Test and Evaluation (RDT&E). Used for “expenses necessary for basic and applied scientific research, development, test and evaluation, including maintenance, rehabilitation, lease, and operation of facilities and equipment”¹⁷ Congress provides DOD Research and Development (R&D) organizations (e.g., Defense Advanced Research Projects Agency (DARPA)) with an appropriation to fund the scientific research and development of new technologies with military applications. Congress provides R&D organizations with this appropriation to fund not only the scientific research and military development of new technologies, but also their normal operations and maintenance. As a result, DOD R&D organizations do not receive O&M funds and must fund their O&M-type expenses with the RDT&E appropriation.

4. Procurement (Various). Congress provides various Procurement appropriations in the annual DODAA for different categories of investment items. Procurement appropriations include: Ammunition Procurement, Missile Procurement, Aircraft Procurement, Weapons and Tracked Combat Vehicle Procurement, Shipbuilding and Conversion (Navy only), and Other Procurement.¹⁸ **The Other Procurement appropriation is a “catch-all” appropriation for investment items that are not purchased with the more specific Procurement appropriations.** The Other Procurement, Army, appropriation is referred to as OPA by practitioners.
 - a. Ammunition Procurement. Used for “construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities authorized by [section 2854 of title 10](#), United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned

¹⁷ 2017 CAA, *supra* note 4 at Div. C., Title IV.

¹⁸ 2017 CAA, *supra* note 4 at Div. C., Title III.

equipment layaway; and other expenses necessary for the foregoing purposes”¹⁹

b. Missile Procurement: Used for the “construction, procurement, production, modification, and modernization of missiles, equipment, including ordnance, ground handling equipment, spare parts, and accessories therefor”²⁰

(1) Note that missiles are a type of ammunition. DOD, however, may not use the Ammunition Procurement appropriation to buy missiles because Congress provides a more specific appropriation to buy missiles – the Missile Procurement appropriation.

(2) Additionally, if DOD were to obligate all the funds in the Missile Procurement appropriation, it would still be unable to use the Ammunition Procurement appropriation to buy missiles, because Congress has specified the maximum amount of money that DOD may obligate for missiles in the Missile Procurement appropriation.

c. Aircraft Procurement: Used for construction, procurement, production, modification, and modernization of missiles, equipment, including ordnance, ground handling equipment, spare parts, and accessories²¹

d. Procurement of Weapons and Tracked Combat Vehicles: Used for construction, procurement, production, and modification of weapons and tracked combat vehicles, equipment, including ordnance, spare parts, and accessories²²

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

- e. Other Procurement: There is also a residual catch-all procurement appropriation entitled “Other Procurement” which is used for “construction, procurement, production, and modification of vehicles; . . . communications and electronic equipment; other support equipment; spare parts, ordnance, and accessories therefor; specialized equipment and training devices”²³ This appropriation is used to purchase investment items that are not purchased with the more specific procurement appropriations discussed above and cost less than the expense/investment threshold discussed below at Section IV.F.
5. Military Construction (MILCON). Used for “acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property”²⁴
6. Other Appropriations. Other than the 5 base DOD appropriations (MILPER, O&M, RDT&E, Procurement, and MILCON), Congress creates additional appropriations for other purposes on an annual basis. For example, Congress annually provides a Family Housing appropriation. This is used for “expenses of family housing for the [Service] for construction, including acquisition, replacement, addition, expansion, extension and alteration, as authorized by law”²⁵ Family housing has its own separate appropriation and is not paid for with the Service MILCON used to pay for construction related to the DOD training and war-fighting missions. There are numerous additional appropriations not discussed in this outline.
- F. Expense/Investment Threshold: In each year’s DODAA, Congress provides an exception to the default fiscal law rule that dictates that investment items must be purchased with procurement appropriations. The Expense/Investment Threshold exception *allows* (not “requires” but see F.2. below) the DOD to purchase investment items, not exceeding a certain threshold, with O&M funds.²⁶

²³ *Id.*

²⁴ Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, Pub. L. No. 114-223, [hereinafter *2017 MCA*], Division A, Title I.

²⁵ *Id.*

²⁶ *2017 CAA*, *supra* note 4, at Div. C., Title VIII, Sec. 8032.

1. The current threshold is \$250,000.²⁷ (Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Div. C., Title VIII, §8032 and Title IX, § 9010 (May 5, 2017).

2. As a result of this congressional authority, two appropriations are equally available to fund investment items with a unit cost of \$250,000 or less – O&M or the respective Procurement appropriations. The Election Doctrine of GAO’s 3-part Purpose test requires DoD to choose which appropriation to use and be bound by that choice. In the DOD Financial Management Regulation (FMR), DoD elected the respective appropriation (O&M or Procurement),²⁸ but with distinctions depending on the type of investment item. The chart below summarizes DOD’s election.²⁹

Expense/Investment Cost Determination						
Is the item a	If	Then	If	Then	If	Then
Centrally Managed/ Asset Controlled Item?	Yes	Is this item purchase from DWCF?	Yes	Is the item part of a full funding effort?*	Yes	Classify as Investment
			No	Classify as Investment	No	Classify as Expense
	No	Is the unit cost more than \$250,000	Yes	Classify as Investment		
			No	Classify as Expense		
* When intended for use in weapon system outfitting, government furnished material on new procurement contracts or for installation as part of a weapon as part of a weapon system modification, major reactivation or major service life extension.						

²⁷ Since 2008, Congress has permitted an increase to \$500,000 for Combatant Commanders engaged in contingency operations overseas upon SECDEF approval. *See* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Division C, Title IX, Sec. 9010. CENTCOM has historically received approval to use the \$500,000 threshold in support of contingency operations. However, this increased threshold requires a determination by SECDEF each fiscal year and the determination does not always happen contemporaneously with the passage of the Appropriations Act. JAs must verify that SECDEF has made the determination before advising that the increased threshold is in effect.

²⁸ DOD FMR, vol. 2A, ch. 1, para. 010201. D.

²⁹ DOD FMR, vol. 2A, ch. 1, para. 010201. F., *available at*: http://comptroller.defense.gov/Portals/45/documents/fmr/Combined_Volume1-16.pdf; *see also* DFAS-IN Manual 37-100-13.

3. Centrally Managed Items/Asset Control Items. The DOD FMR makes an exception for equipment that is designated for centralized item management and asset control.³⁰ The type of funding used for centrally managed items will depend on the item and program.
 4. Defense Working Capital Funds (DWCF). A DWCF is a type of “revolving fund” that Congress authorizes DoD to finance a cycle of operations through using amounts received by the fund.³¹ A DWCF allows DoD (and subordinate units) to continually fund the DWCF from its base appropriations, and the DWCF to use those funds permanently to make purchases of certain equipment and spare parts for equipment maintenance. Generally, DoD uses a separate DWCF for each type of recurring equipment (and related spare parts). When a DoD unit orders DWCF equipment, it pays its O&M to the DWCF. The DWCF uses the unit’s O&M funds to purchase a stock level of equipment and parts.
- G. Systems and the Expense/Investment Threshold. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the expense/investment threshold. This constitutes a violation of the Purpose Statute and may result in an Antideficiency Act violation.

³⁰ The DOD FMR defines Centralized Item Management and Asset Control as:

The management in the central supply system or a DoD-wide or Service-wide acquisition and control system in which the manager has the authority for management and procurement of items of equipment. This includes such functions as requirement determination, distribution management, procurement direction, configuration control, and disposal direction. Asset control includes the authority to monitor equipment availability and take such actions as necessary to restock to approved stockage levels.

[DOD FMR, vol. 2A, ch. 1, para. 010224](#). Examples of Centrally Managed Items generally include weapon systems, vehicles, spare parts, etc. Check with your supply section to determine if an item is centrally managed.

³¹ [DOD FMR, vol. 2A, ch. 1, para. 010107.B.54](#); *see also* 2018 Fiscal Law Deskbook, Chapter 7: Revolving Funds.

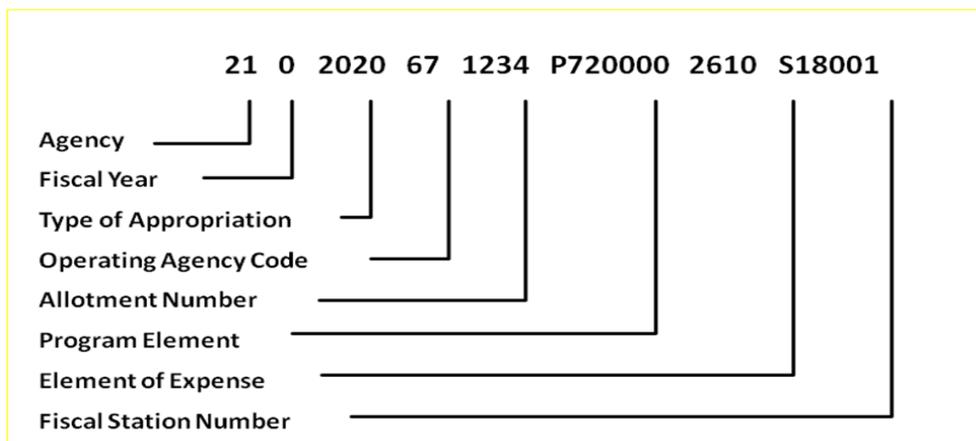
1. Agencies must consider the “system” concept when evaluating the purchase of investment items (the system concept does not apply to the purchase of expense items which are purchased with O&M regardless of cost). The determination of what constitutes a “system” is based on the *primary function* of the items to be acquired as stated in the approved requirements document.
2. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.
3. Agencies may purchase multiple investment end items (e.g., computers), and treat each end item as a separate “system” for funding purposes, only if the primary function of the end item is to operate independently.
4. Do not fragment or piecemeal the acquisition of an interconnected system of equipment merely to avoid exceeding the O&M threshold.
5. Example: An agency is acquiring 200 stand-alone computers and software at \$2,000 each (for a total of \$400,000). The appropriate color of money for the purchase of the 200 computers is determined by deciding whether the primary function of the computers is to operate as independent workstations (e.g., 200 systems) or as part of a larger system. If the computers are designed to primarily operate independently, they should be considered as separate end items and applied against the expense/investment criteria individually. If they function as a component of a larger system (e.g., interconnected and primarily designed to operate as one), then they should be considered a system with the total cost of all investment items applied against the expense/investment criteria.

H. Accounting Classifications: The DoD Financial Managers (accountants) assign accounting classifications to each appropriation type to manage DoD funds.³²

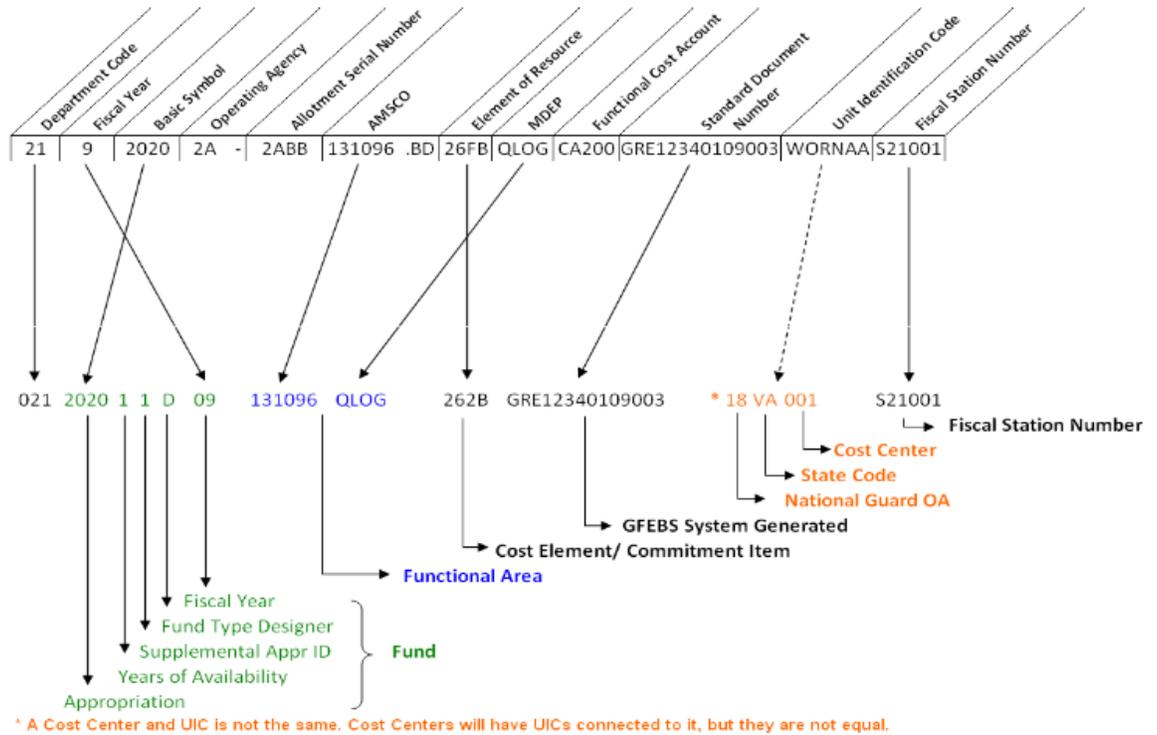
³² This chart is derived from the archived version of the DOD FMR, vol. 6B, App. A. (October 2000).

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

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year (e.g., Operations & Maintenance, Army funds for Fiscal Year 2018 would be depicted as 2182020).



- I. General Fund Enterprise Business System (GFEB). The Army has transitioned to GFEB, which will modify the way information is captured, summarized, reviewed, and presented. Among the changes is a new line of accounting (LOA). Information can be found in the FY 2016 Army Funds Management Data Reference Guide, Ch. 4, available at the website for [Office of the Assistant Secretary of the Army \(Financial Management and Comptroller\)](#). Below is a comparison of the new LOA with the legacy LOA.



- J. Earmarks. An earmark occurs when Congress designates a portion of an appropriation for a particular purpose by way of legislative language within the appropriation. See [A Glossary of Terms Used in the Federal Budget Process](#), GAO-05-734SP (September 2005).

1. Ceiling Earmarks: In the 2017 Consolidated Appropriations Act, in the Defense-Wide O&M appropriation, Congress provided the DoD \$6,476,649,000. It also told the DoD that of that amount, “not to exceed \$750,000,000 . . . shall be available to provide support and assistance to foreign security forces . . . to conduct, support or facilitate counterterrorism, crisis response, or other [DoD] security cooperation programs.”³³
2. Floor Earmarks: “not less than \$10,000,000 shall be for recruitment and retention of women in the Afghanistan National Security Forces, and the recruitment and training of female security personnel”³⁴
3. Both of these provisions are examples of earmarks. The first is a “ceiling” earmark, meaning the DoD may not spend more than \$750,000,000 for the designated purpose, but may spend less than that. The second example is a “floor” earmark, meaning the DoD must spend at least that amount on the designated purpose, but may spend more.

³³ 2017 CAA, *supra* note 4, at Div. C, Title IX.

³⁴ *Id* (Afghanistan Security Forces Fund).

V. IS THE EXPENDITURE OTHERWISE PROVIDED FOR IN A SEPARATE APPROPRIATION?

- A. If there is another, more specific appropriation available, it must be used in preference to the more general appropriation. Use of Oil Spill Liability Trust Fund for Administrative Costs of Processing Oil Pollution Act Claims, [B-289209](#), 2002 U.S. Comp. Gen. LEXIS 145 (May 31, 2002); The Honorable Bill Alexander, [B-213137](#), 63 Comp. Gen. 422 (1984) (may not use O&M funds when foreign assistance funds are available).

Example: The Air Force is planning to buy air-to-air missiles. Arguably, these missiles are a form of “ammunition” enabling it to purchase the missiles with its “Procurement, Ammunition, Air Force” appropriation. There is, however, a more specific appropriation that the Air Force receives called “Procurement, Missiles, Air Force.” The more specific appropriation must be used instead.

1. That a specific appropriation is exhausted is immaterial as to whether funds may be transferred to that appropriation. Secretary of Commerce, [B-129401](#), 36 Comp. Gen. 386 (1956).
2. General appropriations may not be used as a back-up for a more specific appropriation. Secretary of the Navy, [B-13468](#), 20 Comp. Gen. 272 (1940); Architect of the Capital – Payment for Electrical and Security Improvements, [B-306284](#), Jan. 5, 2006, 2006 U.S. Comp. Gen. LEXIS 5.
3. This limitation applies even if a specific appropriation is included in the more general appropriation or shares, in part, the same purpose as the general appropriation. Secretary of the Interior, [B-14967](#), 20 Comp. Gen. 739 (1941); Dept. of the Navy – Settling Claims on Fraudulently-Endorsed Checks, [B-2422666](#), Aug. 31, 1993, 72 Comp. Gen. 295.

- B. If there are two appropriations equally available:
1. The agency may choose either appropriation. Payment of SES Performance Awards of the R.R. Ret. Board's Office of Inspector Gen., [B-231445](#), 68 Comp. Gen. 337 (1989); Dept. of Homeland Security – Use of Management Directorate Appropriations, [B-307382](#), Sep. 5, 2006, 2006 U.S. Comp. Gen. LEXIS 138. The agency's discretion is generally not questioned. Secretary of Agric., [A-96689](#), 18 Comp. Gen. 285, 292 (1938).
 2. Once the election is made, the agency must continue to use the selected appropriation to the exclusion of any other until the end of the current fiscal year. If the agency intends on changing the election, the agency, at the start of the fiscal year, must notify Congress of the intent to change for the subsequent fiscal year. *See* Funding for Army Repair Projects, [B-272191](#), Nov. 4, 1997; Dept. of Homeland Security – Use of Management Directorate Appropriations, [B-307382](#), Sep. 5, 2006, 2006 U.S. Comp. Gen. LEXIS 138. The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, [B-139510](#), May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).
 3. If Congress specifically authorizes the use of two accounts for the same purpose, the agency is not required to make an election between the two and is free to use both appropriations for the same purpose. *See* Funding for Army Repair Projects, [B-272191](#); *See also* [10 U.S.C. § 166a](#) (Combatant Commander Initiative Funds are in addition to amounts otherwise available for an activity).

VI. LEGISLATION IMPACTING THE USE OF AN APPROPRIATION.

A. Impacts Found Within the Actual Appropriation.

1. Within the actual appropriation, Congress often provides specific direction on the uses to be made of that appropriation. For example, the language utilized in the “Ammunition Procurement, Army” appropriation, quoted on page 2-10 *supra*, narrowly defines the uses the agency can make of that appropriation. Clearly, we cannot use it to pay the salaries of military service members, even those who carry out the ammunition procurement. Likewise, we could not use those funds to buy engines for attack helicopters.
2. By contrast, the language utilized in the “Operation and Maintenance, Defense-Wide” appropriation, only broadly prescribes the uses the agency can make of that particular appropriation. Thus, we can use it to pay any expense not covered by a more specific appropriation so long as we determine that expense is necessary and authorized by law.

B. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency. [Principles of Fed. Appropriations Law](#), ch. 2, 2-54, GAO-16-463SP (4th ed. 2017). While organic legislation provides the agency with authority to conduct a program, function, or mission and to utilize appropriated funds to do so, it rarely provides any money for the agency, program, or activity it establishes.

1. Organic legislation may be found in appropriation acts, authorization acts, or “stand-alone” legislation. It may also be codified or uncodified.
2. Example: [10 U.S.C. § 111](#) establishes the Department of Defense as an executive department. Various statutes scattered mainly throughout Title 10 of the United States Code establish programs or functions that the department is to carry out. *See e.g.*, [10 U.S.C. § 1090](#) (giving the Secretary of Defense the mission to “identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol”).

C. Authorization Act.

1. An authorization act is a statute, passed annually by Congress that authorizes the appropriation of funds for programs and activities.³⁵
2. There is no general requirement to have an authorization in order for an appropriation to occur. By statute, Congress has created certain situations in which it must authorize an appropriation. For example, [10 U.S.C. § 114\(a\)](#) states that “No funds may be appropriated for any fiscal year” for certain purposes, including procurement, military construction, and/or research, development, test and evaluation “unless funds therefore have been specifically authorized by law.” However, there are no practical consequences if Congress appropriates funds without an authorization anyway, as such a statute is “essentially a congressional mandate to itself.” [Principles of Fed. Appropriations Law](#), ch. 2, 2-56, GAO-16-463SP (4th ed. 2017).
3. An authorization act does not provide budget authority. That authority stems from the appropriations act.
 - a. However, Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide.
 - b. In the alternative, Congress may also authorize the appropriation of “such sums as may be necessary” for a particular program or function.

Example: In Section 1063 of the National Defense Authorization Act for Fiscal Year 2002, Congress provided as follows:

Section 3(e) of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) is amended to read as follows: “(e) APPROPRIATION. — (1) IN GENERAL.— There are appropriated to the Fund, out of any money in the Treasury not otherwise appropriated, for fiscal year 2002 and each fiscal year thereafter through fiscal year 2011, *such sums as may be necessary*, not to exceed the applicable maximum amount

³⁵ E.g., National Defense Authorization Act for Fiscal Year 2018, Pub. L. No., 115-91.

specified in paragraph (2), to carry out the purposes of the Fund (emphasis added).

4. Resolving Conflicts Between an Appropriation Act and an Authorization Act. *See generally*, [Principles of Fed. Appropriations Law](#), ch. 2, 2-42 to 2-82, GAO-16-463SP (4th ed. 2017)
 - a. The general rule regarding statutory construction is “that statutes should be construed harmoniously so as to give maximum effect to both whenever possible.” Reduction of District of Columbia Superior Court's Appropriations, [B-258163](#), 1994 U.S. Comp. Gen. LEXIS 746 (Sept. 29, 1994).
 - b. If there is an irreconcilable conflict between two statutes or if the latter of the two statutes is clearly intended to substitute for the prior statute, the more recent statute governs. The “intention of the legislature to repeal must be clear and manifest” in either case, however. [Nat’l Assn. of Home Builders v. Defenders of Wildlife](#), 127 S.Ct. 2518 (2007); [Posadas v. National City Bank](#), 296 U.S. 497, 503 (1936).
 - c. Differences in Amount. In general, Congress enacts authorization acts before it enacts appropriation acts. Application of the above rules will therefore usually result in the agency being able to use the amount specified in the appropriation act, regardless of whether it is more or less than what is in the authorization act.

Example 1: For FY 2012, Congress authorized the appropriation of \$30,529,232 to the Army for Operations and Maintenance, but later actually appropriated \$31,072,902 to the Army. The Army may spend the entire \$31,072,902 for Operations and Maintenance.

Example 2: For FY 2002, Congress authorized the appropriation of \$2,075,372,000 to the Army for the procurement of aircraft, but later actually only appropriated \$1,984,391,000 for aircraft procurement. The Army may only spend the lower amount that was appropriated.

- d. Differences in Purpose. An authorization act provision will not expand the scope of availability of a particular appropriation beyond what is permitted by the terms utilized in the appropriation act. *See generally*, [Principles of Fed. Appropriations Law](#), ch. 2, 2-65, GAO-16-463SP (4th ed. 2017). An authorization act may decrease the scope of availability of an appropriation by placing further restrictions on the use of those funds, however.

D. Miscellaneous Statutory Provisions.

1. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds.

Example of Prohibition: [10 U.S.C. § 2491a](#) prohibits DoD from using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.

Example of Authorization: [10 U.S.C. § 2261](#) permits DoD to use its appropriated funds “to procure recognition items of nominal or modest value for the recruitment or retention purposes.”

2. These permissions and restrictions may be either codified or uncodified.
3. The permissions and restrictions may also be either temporary or permanent. If the restriction arises out of a provision in an appropriation act that does not expressly state the duration of the restriction, an agency may presume the restriction is effective only for the fiscal year covered by the act. This presumption may be overcome if the restriction uses language indicating futurity, or if the legislation clearly indicates its permanent character. *See* [Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097](#), 65 Comp. Gen. 588 (1986) (indicating that a restriction applicable to “this Act or any other Act” does not indicate futurity).
4. Locating Pertinent Statutes.

- a. The U.S. Code is broken down into titles which typically cover a given subject matter area.

Example: Statutes pertaining to DoD are typically found in [Title 10](#), so if you want to find a statute dealing only with restrictions on DoD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in [Title 5](#), so if you want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, you would probably start with Title 5.

- b. You can run a general search on either a specialized legal database, such as Westlaw, or on the U.S. Code website (located at <http://uscode.house.gov/>), or on Cornell University Law School's Legal Information Institute (located at <http://www4.law.cornell.edu/uscode/>).
- c. U.S. Code Annotated Index. This index contains a listing arranged by subject of the codified U.S. statutes.

E. Legislative History.

1. Legislative history is any Congressionally generated document related to a bill from the time the bill is introduced to the time it is passed. In addition to the text of the bill itself, it includes conference and committee reports, floor debates, and hearings.
2. Legislative history can be useful for resolving ambiguities or confirming the intent of Congress. However, Congress' "authoritative statement is the statutory text, not the legislative history." [Exxon Mobil Corp. v. Allapattah Services, Inc.](#), 545 U.S. 546, 568 (2005).
3. If the underlying statute clearly conveys Congress' intent, however, agencies will not be further restricted by what is included in legislative history. [Intertribal Bison Cooperative](#), [B-288658](#), 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); [ANGUS Chem. Co.](#), [B-227033](#), Aug. 4, 1987, 87-2 CPD ¶ 127 (stating that "there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history

for the purpose of writing into law that which is not there.”); Navy – Re-enlistment Gifts, [B-307892](#), 2006 U.S. Comp. Gen. LEXIS 165 (use of legislative history to “illuminate intent,” as opposed to “writing into the law that which is not there”); SeaBeam Instruments, Inc., [B-247853.2](#), July 20, 1992, 92-2 CPD ¶ 30 (indicating that if Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions); LTV Aerospace Corp., [B-183851](#), Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (indicating the Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force’s F-16 to enable it to be capable of carrier operations was the prerequisite for the Navy’s use of \$20 million in funds provided for a Navy fighter). See also Arlington Central School District Board of Education v. Murphy, [548 U.S. 291](#) (2006) (rejecting claims for expert fees which were based solely on legislative history and not mentioned in the statute under which the claims were brought).

4. Legislative history also may not support an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, [B-248284.2](#), Sept. 1, 1992, 1992 U.S. Comp. Gen. LEXIS 1104 (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

VII. OTHER DOCUMENTS IMPACTING THE USE OF AN APPROPRIATION.

A. Budget Request Documentation.

1. Agencies are required to justify their budget requests. [OMB Cir. No. A-11, Preparation, Submission, and Execution of the Budget \(2017\)](#).

2. Volumes [2A and 2B](#) of the DOD FMR provide guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volume 2A and 2B:
 - a. Chapter 2 deals with justification documents supporting the Military Personnel Appropriations (“M documents”) (Vol. 2A).
 - b. Chapter 3 deals with justification documents supporting the Operations and Maintenance Appropriations (“O documents”) (Vol. 2A).
 - c. Chapter 4 deals with justification documents supporting the Procurement Appropriations (“P documents”)(Vol. 2B).
 - d. Chapter 5 deals with justification documents supporting the Research, Development, Test and Evaluation Appropriations (“R documents”) (Vol. 2B).
 - e. Chapter 6 deals with justification documents supporting the Military Construction Appropriations (“C documents”) (Vol. 2B).
3. The document is prepared by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government’s overall budget request.
4. These justification documents contain a description of the proposed purpose for the requested appropriations. Unless otherwise prohibited, an agency may reasonably assume that appropriations are available for the specific requested purpose.
5. Agencies generally publish past and current year budget submissions on the web.
 - a. The President’s overall budget materials can be found at: <http://www.whitehouse.gov/omb/budget>.

- b. The Defense-wide budget materials can be found at:
<http://comptroller.defense.gov/budgetmaterials/budget2014.aspx>
- c. The Army's budget materials can be found at:
<http://asafm.army.mil/offices/BU/BudgetMat.aspx?OfficeCode=1200>.
- d. The Air Force's budget materials can be found at:
<http://www.saffm.hq.af.mil/FM-Resources/Budget/>
- e. The Navy's budget materials (overview) can be found at:
<http://www.finance.hq.navy.mil/fmb/14pres/BOOKS.htm>
- f. The National Aeronautic and Space Administration's (NASA) budget materials can be found at:
<http://www.nasa.gov/news/budget/index.html>
- g. The Federal Aviation Administration's budget can be found at:
<http://www.faa.gov/about/budget/>
- h. The Environmental Protection Agency's budget materials can be found at <https://www.epa.gov/planandbudget/budget>
- i. The Department of the Interior's budget materials can be found at:
<http://www.doi.gov/budget/>.

B. Agency Regulations. See generally, [Principles of Fed. Appropriations Law](#), ch. 1, 1-66 to 1-74, GAO-16-463SP (4th ed. 2017)).

- 1. Background. When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily-delegated authority in agency-level regulations.

2. If an agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).
3. Agency-level regulations may also place restrictions on the use of appropriated funds.

Example: Although the GAO has determined that all federal agencies may purchase commercially-prepared business cards using appropriated funds, all of the military departments have implemented policies that permit only recruiters and criminal investigators to purchase commercially-prepared business cards (everyone else within DOD must produce their business cards in-house, using their own card stock and printers). See AR 25-30, The Army Publishing Program, para. 5-7 (3 June 2015); DoD Instruction 5330.03, Defense Logistics Agency (DLA) Document Services, (Feb. 8, 2006); AFI 65-601, vol. 1, para. 4.44 (29 July 2015); and Department of the Navy (Financial Management and Comptroller) Financial Policy Manual, (Dec. 2015).

4. By regulation, the DOD has assigned most types of expenditures to a specific appropriation. See, e.g. DOD 7000.14-R, Vol.1, Ch. 1, and DFAS-IN Manual 37-100-13, The Army Management Structure (March 2017). The manual is reissued every fiscal year.
5. Researching Defense Regulations.
 - a. The DOD and each of the services have a website containing electronic copies of most of their regulations.
 - (1) DOD Regulations: <http://www.dtic.mil/whs/directives/>.
 - (2) Army Regulations: <http://www.apd.army.mil/>
 - (3) Air Force Regulations: <http://www.e-publishing.af.mil/>.

- (4) Navy Regulations:
<https://doni.documentservices.dla.mil/navyregs.aspx>.
 - (5) Marine Corps Regulations:
[http://www.marines.mil/News/Publications/ELECTRONIC LIBRARY.aspx](http://www.marines.mil/News/Publications/ELECTRONIC_LIBRARY.aspx).
- b. JAGCNET. Those individuals with a Common Access Card may conduct a search of the text of all publications contained within the [JAGCNET library of publications](#).
 - c. There is also a key word-searchable website dedicated to the DOD Financial Management Regulation, DOD 7000.14-R (found at: <http://comptroller.defense.gov/fmr.aspx>).
- C. Case Law. Comptroller General opinions are a valuable source of guidance as to the propriety of appropriated fund obligations or expenditures for particular purposes. While not technically binding on the Executive Branch, these opinions are nonetheless deemed authoritative. <http://www.gao.gov/legal>

VIII. NECESSARY EXPENSE.

- A. The Purpose Statute, [31 U.S.C. § 1301](#), does not require Congress to specify every item of expenditure in an appropriations act. Congress, by implication, authorizes an agency to incur expenses that are necessary and incident to the accomplishment of an appropriations purpose. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. [U.S. Commodity Futures Trading Commission- Availability of the Customer Protection Fund](#), [B-321788](#), 2011 WL 3510145 (Comp. Gen.) (2011); *see also* [To The Secretary of State](#), [B-150074](#), 42 Comp. Gen. 226, 228 (1962); [Major General Anton Stephan](#), [A-17673](#), 6 Comp. Gen. 619 (1927); [Department of Homeland Security – Use of Management Directorate Appropriations](#), [B-307382](#), 2006 U.S. Comp. Gen. LEXIS 138.

- B. In some instances, Congress has specifically authorized expenditures as “necessary expenses” of an existing appropriation. *See e.g.*, [10 U.S.C. § 2241\(b\)](#) (authorizing DoD to use its appropriated funds for “all necessary expenses, at the seat of the Government and elsewhere, in connection with communication and other services and supplies that may be necessary for the national defense”); [10 U.S.C. § 1124](#) (authorizing the Secretary of Defense to “incur necessary expense for the honorary recognition of a member of the armed forces” who increases the efficiency or improves operations); [5 U.S.C. §§ 4503-4504](#) (authorizing same for civilian employees).
- C. The GAO applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation:
1. The expenditure must bear a ***logical relationship*** to the appropriation sought to be charged. In other words, it must make a ***direct contribution*** to carry out either a specific appropriation or an authorized agency function for which more general appropriations are available.
 2. The expenditure must not be prohibited by law.
 3. The expenditure must not be otherwise provided for; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.
- D. [Principles of Fed. Appropriations Law](#), ch. 3, 3-16 to 3-17, GAO-16-463SP (4th ed. 2017). *See* [Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services](#), [B-306424](#), 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006). The first prong of the “necessary expense” test has been articulated in some other, slightly different ways as well. *See* [Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine](#), [B-226065](#), 66 Comp. Gen. 356, 359 (1987) (“an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function”); [Army—Availability of Army Procurement Appropriation for Logistical Support Contractors](#), [B-303170](#), 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005) (“the expenditure must be reasonably related to the purposes that Congress intended the appropriation to fulfill”). However, the basic concept has remained the same: the important thing is the relationship between the expenditure to the appropriation sought to be charged.

- E. The concept of “necessary expense” is a relative one. The GAO has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a fact/agency/purpose/appropriation specific case-by-case basis. See Federal Executive Board – Appropriations – Employee Tax Returns – Electronic Filing, [B-259947](#), Nov. 28, 1995, 96-1 CPD ¶ 129; Use of Appropriated Funds for an Employee Electronic Tax Return Program, [B-239510](#), 71 Comp. Gen. 28 (1991).
- F. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation. Secretary of the Interior, [B-123514](#), 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, [B-225159](#), 68 Comp. Gen. 505 (1989).
- G. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See Customs and Border Protection—Relocation Expenses, [B-306748](#), 2006 U.S. Comp. Gen. LEXIS 134 (July 6, 2006). An agency’s determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO looks at “whether the expenditure falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range.” Implementation of Army Safety Program, [B-223608](#) 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

IX. TYPICAL QUESTIONABLE EXPENSES.

- A. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency's mission performance. Therefore, clothing is generally considered a personal expense unless a statute provides to the contrary. *See* IRS Purchase of T-Shirts, B-240001.2, (1992) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).
1. Statutorily-Created Exceptions. *See* 5 U.S.C. § 7903 (authorizing purchase of special clothing, for personnel, which protects them against hazards in the performance of their duties); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). *See also* Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (discussing the rules for purchasing clothing); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng's, B-289683, Oct. 7, 2002 (unpub.) (discussing all three authorities).
 2. Opinions and Regulations On-point. *See also* White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).

- B. Food. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency’s mission performance. *See* [31 U.S.C. § 1345](#) stating that except as provided by law, an appropriation may not be used for subsistence expenses at a meeting, but that this prohibition does not apply to expenses of an employee of the government carrying out an official duty. As a result, food is generally considered a personal expense. *See* Department of The Army—Claim of the Hyatt Regency Hotel, [B-230382](#), Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense).
1. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is permissible for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and competitively priced to the fees of other facilities that do not include food as part of their rental fee. *See* Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, [B-281063](#), 1999 U.S. Comp. Gen. LEXIS 249 (Dec. 1, 1999).
 2. Regulatory-based “Light Refreshments” Exception.
 - a. In a 2003 opinion, the GAO all but eliminated the “Light Refreshment” exception by prohibiting agencies from paying for refreshments given to any personnel *NOT* on travel status. *See* Use of Appropriated Funds to Purchase Light Refreshments at Conferences, [B-288266](#), 2003 U.S. Comp. Gen. LEXIS 224, (Jan. 27, 2003).
 - b. This decision was somewhat reversed two years later in National Institutes of Health - Food at Government-Sponsored Conferences, [B-300826](#), 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 03, 2005) (“NIH opinion”). In that case, the GAO authorized the use of appropriated funds for light refreshments, even for individuals *NOT* in travel status, under certain criteria.

- c. The Department of Justice, Office of Legal Counsel (OLC) prohibited the executive branch from following the NIH opinion. OLC opined that “meetings” as used in [31 U.S.C. § 1345](#) included formal conferences sponsored by government agencies and that “subsistence expenses” included meals and light refreshments.³⁶ Therefore the [31 U.S.C. § 1345](#) prohibits conference attendees, who are from the local Permanent Duty Station (PDS) area, from utilizing “light refreshment exception.” The OLC opinion controls the activities of agencies of the federal government even though it is more restrictive than the opinions given by the GAO.
3. Statutory-based Exceptions.
- a. Basic Allowance for Subsistence. Under [37 U.S.C. § 402](#), DOD may pay service members a basic allowance for subsistence.
 - b. Meetings and Conferences. Under the Government Employees Training Act, [5 U.S.C. § 4110](#), there is authority for the government to pay for “expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.”
 - (1) Conference Sponsored by Non-Federal Entities. Costs associated with meals included in a conference fee can be considered legitimate expenses of attendance under this statute if: 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. *See National Institutes of Health – Food at Government-Sponsored Conferences*, [B-300826](#), 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

³⁶ Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 32 Op. Off. Legal Counsel 1, 5 (2007).

- (a) For purposes of this exception, the conference or meeting ***must not be purely internal government business meetings/ conferences.*** National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005). Moreover, luncheons disguised as meetings or conferences cannot utilize 5 U.S.C. § 4110. See B-215702, Mar. 22, 1985, 64 Comp. Gen. 406, 408. This authority does not specifically authorize agencies to pay the expenses, including food, of non-governmental employees.

 - (b) As this authority is based on 5 U.S.C. § 4110, it does not apply to military members (it applies only to civilian employees). But see Joint Travel Regulation (JTR), ch. 2, para. 020305, which authorizes military members to be reimbursed for occasional meals within the local area of their PDS when the military member is required to procure meals at personal expense outside the physical limits of the PDS.

 - (c) The OLC opinion may impact the ability of a civilian, who is not in a travel status, to utilize this authority. See Section IX.B.2.c. above.
- (2) Government Sponsored Conference. As part of the NIH opinion, the GAO authorized agencies to pay for the expenses, including food, of conference attendees from other agencies, and even *non-governmental organizations*, at “formal conferences.” National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).
- (a) As part of the decision, the GAO applied the same 5 U.S.C. § 4110 criteria³⁷ to “formal conferences,” but also required sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and stated that the conference must

³⁷ See Section IX.B.3.b.

involve *topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants*.

- (b) The OLC opinion may impact the ability of an agency to utilize this authority. *See* Section IX.B.2.c. above.
 - (3) [Army Regulation 1-50](#) - Army Conference Policy (August 24, 2017) sets down bright line rules for conferences. Under these standards, it is much harder to pay for *any* food at an approved conference.
- c. Training. Under [5 U.S.C. § 4109](#) (applicable to civilian employees), [10 U.S.C. § 4301](#), and [10 U.S.C. § 9301](#) (applicable to service members), the government may provide meals when it is “necessary to achieve the objectives of a training program.” *See* [U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423](#) (May 9, 2009), [Coast Guard—Meals at Training Conference, B-244473](#), 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992); [Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266](#), Jan. 27, 2003, 2003 U.S. Comp. Gen. LEXIS 224 (including a discussion of providing food, in general, where it furthers the needs of the training program).
- (1) This generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. *See* [Coast Guard – Coffee Break Refreshments at Training Exercise – Non-Federal Personnel, B-247966](#), 1993 U.S. Comp. Gen. LEXIS 639 (Jun. 16, 1993). *See also* [Pension Benefit Guar. Corp. – Provision of Food to Employees, B-270199](#), 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996) (food was not needed for employee to obtain the full benefit of training because it was provided during an ice-breaker rather than during actual training). In many GAO opinions, the application of this rule appears to be indistinguishable from the 3-part test for Formal Conferences and Meetings under [5 U.S.C. § 4110](#).

- (2) This exception may even apply to non-federal employees if they are necessary to the training and taking a lunch break separately from the government employees would hurt the training. *See U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises*, [B-317423](#) (May 9, 2009) (stating that there was no objection if the Garrison Commander involved in an anti-terrorism training exercise determined that the provision of food to nonfederal participants, including host national first responders, allowed federal and nonfederal personnel to train to work in a coordinated fashion without separating for food breaks, as, most likely, they would in an actual antiterrorism response).
- (3) The Training exception requires that the event be genuine "training," rather than merely a meeting or conference. The GAO and other auditors will not merely defer to an agency's characterization of a meeting as "training." Instead, they will closely scrutinize the event to ensure it was a valid program of instruction as opposed to an internal business meeting. *See Corps of Eng'rs – Use of Appropriated Funds to Pay for Meals*, [B-249795](#), 72 Comp. Gen. 178 (1993) (determining that quarterly managers meetings of the Corps did not constitute "training").
- (4) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. *See Army – Food Served at Cultural Awareness Celebration*, [B-199387](#), 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). *See also U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program*, [B-301184](#) (January 15, 2004) ("samplings" of food cannot amount to a full buffet lunch and must be related to the culture being celebrated); [AFI 65-601](#), vol. 1, para. 4.28.1.2.

- d. Award Ceremonies (for Civilian Incentive Awards). Under 5 U.S.C. §§ 4503-4505 (civilian employees incentive awards), federal agencies may “incur necessary expenses” including purchasing food to honor an individual who is given an incentive award.
- (1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, [B-270327](#), 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending \$20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, [B-223319](#), 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies under [5 U.S.C. § 4503](#), which expressly permits agency to “incur necessary expense for the honorary recognition . . .”).
 - (2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DODI 1400.25, Volume 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (1 April 2014) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).
 - (3) Military Awards. Food may also be provided at ceremonies honoring military recipients of military cash awards under [10 U.S.C. § 1124](#) (Military Cash Awards), which also contains the “incur necessary expenses” language. However, military cash awards are very rare. Typical military awards, such as medals, badges, trophies, etc., are governed by [10 U.S.C. § 1125](#) which *does not* have the express “incur necessary expenses” language. Therefore, food may *not* be purchased with appropriated funds for a typical military awards ceremony.
4. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. *See* discussion *infra* Part XI of this chapter for an overview.

- C. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense.
1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable. See United States Agency for Int'l Dev. – Purchase of Bottled Drinking Water, [B-247871](#), 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).
 2. GAO-Sanctioned Exception Where Duty is in Remote Area with No Access to Potable Water. Agencies (specifically the Army Corps of Engineers, in this instance) have the discretion to decide between providing water in coolers or jugs for transport or by providing bottled water at remote sites without access to potable water. The agency (CoE) must administratively determine that the best way to provide the water is by using bottled water. Dept. of the Army – Use of Appropriations for Bottled Water, [B-310502](#), Feb. 4, 2008, 2008 U.S. Comp. Gen. LEXIS 38. See also Dept. of the Army, Military Surface Deployment and Distribution Command – Use of Appropriations for Bottled Water, [B-318588](#), Sept. 29, 2009 (allowing purchase of bottled water for use at temporary work sites where potable water is not available).
 3. GAO- Sanctioned Exception in Response to Legitimately Anticipated Emergencies. Aberdeen Proving Ground received permission from GAO to use appropriated funds to purchase bottled water for stockpiling in anticipation of interruptions to water service due to explosions and a water main break. Dept. of the Army – Use of Appropriated Funds for Bottled Water, [B-324781](#), Dec 17, 2013.
 4. Bottled Water as a Condition of Employment. Even if providing bottled water to union employees had become a condition of employment, once drinking water is potable, the agency does not have the authority to continue to provide bottled water. An agency cannot bargain over a matter that is inconsistent with federal law. United States Department Of The Navy, Naval Undersea Warfare Center Division Newport, Rhode Island v. Federal Labor Relations Authority, 665 F.3d 1339, 1347 (D.C. Cir. 2012)

5. Relevant Regulations. *See also* [DOD FMR, vol. 10, ch. 12, para. 120320](#) (permitting the purchase of water where the public water is unsafe or unavailable); [AFI 65-601](#), vol. 1, para. 4.58 (discussing the same); [AR 30-22](#), para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, except in the context of a deployment / contingency).

6. Water Coolers. As distinguished from the water itself, which must be purchased with personal funds unless the building has no potable water, agencies may use appropriated funds to purchase water coolers as “Food Storage Equipment” (see discussion in next paragraph below), but only under limited circumstances. There is arguably no valid purpose for water coolers in buildings that are already equipped with chilled water fountains or with refrigerators that dispense chilled water or ice. Where the facility is not so equipped, water coolers may be purchased with appropriated funds so long as the primary benefit of its use accrues to the organization. Under those circumstances, the water in the cooler must be available for use by all employees, including those who did not chip in for the water.

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

1. In June 2004 the GAO reversed its own precedent³⁸ and held that food storage/ preparation equipment reasonably relates to the efficient performance of agency activities, and thus appropriated funds could be spent for these items regardless of the availability of commercial eating facilities. *See Use of Appropriated Funds to Purchase Kitchen Appliances*, [B-302993](#) (June 25, 2004). The Comptroller General observed that food storage/ preparation equipment provided a benefit to the agency holding that they “increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment.” Further, the opinion noted that such equipment “is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies.”

³⁸ *See e.g.*, Central Intelligence Agency – Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, [B-276601](#), 97-1 CPD ¶ 230 (commercial facilities were not proximately available when the nearest one was a 15-minute commute from the federal workplace); *Purchase of Microwave Oven*, [B-210433](#), 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (commercial facilities unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

2. Bottom line: Food preparation and storage equipment may be purchased with appropriated funds, so long as the primary benefit of its use accrues to the agency and the equipment is placed in common areas where it is available for use by all personnel. (Note: agency regulations and policies should be consulted prior to applying this decision.)
3. Disposable Cups, Plates, and Cutlery. The GAO determined that these items are primarily for the convenience of agency employees and constitute a personal expense. Department of Commerce—Disposable Cups, Plates, and Cutlery, [B-326021](#) (23 Dec. 2014).

E. Personal Office Furniture and Equipment. Ordinary office equipment is reasonably necessary to carry out an agency's mission, so appropriated funds may be used to purchase such items so long as they serve the needs of the majority of that agency's employees. If the equipment serves the needs of only a single individual or a specific group of individuals, then it is considered a personal expense rather than a "necessary expense" of the agency. This is true even if the equipment is essential for a particular employee to perform his or her job. Under such a scenario, it is the needs of that particular individual that causes the item to be necessary. The item is not "essential to the transaction of official business from the Government's standpoint." Internal Revenue Service – Purchase of Air Purifier with Imprest Funds, [B-203553](#), 61 Comp. Gen. 634 (1982) (disapproving reimbursement for air purifier to be used in the office of an employee suffering from allergies); *See also* Roy C. Brooks – Cost of special equipment-automobile and sacro-ease positioner, [B-187246](#), 1977 U.S. Comp. Gen. LEXIS 221 (Jun. 15, 1977) (disapproving reimbursement of special car and chair for employee with a non-job related back injury); *Cf.* Office of Personnel Mgt. – Purchase of Air Purifiers, [B-215108](#), July 23, 1984, 84-2 CPD ¶ 194 (allowing reimbursement for air purifiers to be used in common areas, thus benefiting the needs of all building occupants).

1. Federal Supply Schedule Exception. If the desired equipment is available on the Federal Supply Schedule, the agency may use appropriated funds to purchase it even if the chair does not serve the needs of the majority of workers. *See* Purchase of Heavy Duty Office Chair, [B-215640](#), 1985 U.S. Comp. Gen. LEXIS 1805 (Jan. 14, 1985) (allowing reimbursement for a heavy-duty office chair normally used only by air traffic controllers since the chair was available on FSS).

2. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, [29 U.S.C. § 701](#) et seq., requires federal agencies to implement programs to expand employment opportunities for handicapped individuals. The regulations implementing this Act require agencies to make “reasonable accommodations” to include purchasing special equipment or devices in order to carry out these programs. *See* 29 C.F.R. 32.3 (“Definitions”). Thus, agencies may purchase equipment for its *qualified handicap employees* as a reasonable accommodation. *See Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee*, [B-240271](#), 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990) (authorizing purchase); *see also Equal Employment Opportunity Commission – Special Equipment for Handicapped Employees*, [B-203553](#), 63 Comp. Gen. 115 (1983) (agency could not purchase air purifier for person with allergies because the person did not meet the regulatory definition of a handicapped individual).
- F. Entertainment. Entertaining people generally does not materially contribute to an agency’s mission performance. As a result, entertainment expenses are generally considered to be a personal expense. *See HUD Gifts, Meals, and Entm’t Expenses*, [B-231627](#), 68 Comp. Gen. 226 (1989); *Navy Fireworks Display*, [B-205292](#), Jun. 2, 1982, 82-2 CPD ¶ 1 (determining fireworks to be unauthorized entertainment); *Liability of Alexander Tripp*, [B-304233](#), Aug. 8, 2005, 2005 U.S. Comp. Gen. LEXIS 158 (sunset dinner cruise in conjunction with staff retreat is a personal expense; official held not personally liable where he was not properly designated by the agency as a certifying officer).
1. Statutory-based Exceptions. Congress does occasionally provide authority to entertain. *See Claim of Karl Pusch*, [B-182357](#), 1975 U.S. Comp. Gen. LEXIS 1463 (Dec. 9, 1975) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club -- *twice*); *Golden Spike Nat’l Historic Site*, [B-234298](#), 68 Comp. Gen. 544 (1989) (discussing authority to conduct “interpretive demonstrations” at the 1988 Annual Golden Spike Railroader’s Festival).

2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv. – Live Entm’t and Lunch Expense of Nat’l Black History Month, [B-200017](#), 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training); U.S. International Trade Commission – Cultural Awareness, [B-278805](#), Jul. 1999, 1999 U.S. Comp. Gen. LEXIS 211 (Int’l Trade Comm’n funds were available to pay for musical performance at cultural awareness event, subject to time limits on reimbursement).
3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. *See* discussion *infra* Part XI of this chapter for an overview. *See also* The Honorable Michael Rhode, Jr., [B-250884](#), 1993 U.S. Comp. Gen. LEXIS 481 (March 18, 1993) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).

G. Decorations. Under a “necessary expense” analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. *See* Department of State & Gen. Serv. Admin – Seasonal Decorations, [B-226011](#), 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, [B-217869](#), 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But *see* The Honorable Fortney H. Stark, [B-217555](#), 64 Comp. Gen. 382 (1985) (determining that Christmas cards and holiday greetings letters were not a proper expenditure because they were for personal convenience). *See also* AFI 65-601, vol. 1, para. 4.28.2; 41 C.F.R. § 101.26.103-2 (2003) governs the purchase decorative items for federal buildings. Note: Practitioners should also consider the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, etc.).

- H. Business Cards. Under a “necessary expense” analysis, the GAO has sanctioned the purchase of business cards for agency employees. *See* Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, [B-280759](#), Nov. 5, 1998 (purchase of business cards with appropriated funds *for government employees who regularly deal with public or outside organizations* is a proper “necessary expense”).
1. This decision reversed a long history of Comptroller General decisions holding that business cards were a personal expense because they did not materially contribute to an agency’s mission accomplishment. *See, e.g., Forest Serv. – Purchase of Info. Cards*, [B-231830](#), 68 Comp. Gen. 467 (1989).
 2. *See* Section VII.B.3 for a discussion on the more restrictive agency regulations on purchasing business cards.
- I. Telephones. Even though telephones might ordinarily be considered a “necessary expense,” appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. *See* [31 U.S.C. § 1348](#); *see also Centers for Disease Control and Prevention – Use of Appropriated Funds to Install Tel. Lines in Private Residence*, [B-262013](#), Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director’s residence); *Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker*, [B-240276](#), 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).
1. Exceptions for DOD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. *See* [31 U.S.C. § 1348\(a\)\(2\)](#) and (c). *See also Timothy R. Manns – Installation of Tel. Equip. in Employee Residence*, [B-227727](#), 68 Comp. Gen. 307 (1989) (telephone in temporary quarters of National Park Service employee allowed, using same rationale). DOD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. *See* [10 U.S.C. § 1588\(f\)](#).

2. Exception for Data Transmission Lines. If the phone will be used to transmit data, the above prohibition does not apply. See Federal Commc'ns Comm'n – Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency's commissioners to agency's local area network).

3. Cell Phones. The prohibition on installing telephones in a personal residence does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse *their employees for the costs associated with any official government usage of personal* cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. See Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate, B-287524, 2001 U.S. Comp. Gen. LEXIS 202 (Oct. 22, 2001) (agency may not pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data); *see also* Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, 2003 U.S. Comp. Gen. LEXIS 240 (March 6, 2003).

4. Exception for Teleworking. In 1995, Congress authorized federal agencies to install telephones and other *necessary equipment* in personal residences for purposes of teleworking. See Pub. L. No. 104-52, § 620 (Codified at 31 U.S.C., § 1348). Congress also required the Office of Personnel Management (OPM) to develop guidance on teleworking that would be applicable to all federal agencies. That guidance may be found at: <http://www.telework.gov/>. The Air Force also has additional guidance found in AFI 65-601, vol. I, sec. 4I.

- J. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds. Alan Pacanowski - Reimbursement of Fines for Traffic Violations, [B-231981](#), 1989 U.S. Comp. Gen. LEXIS 635 (May 19, 1989); The Honorable Ralph Regula, [B-250880](#), Nov. 3, 1992, 1992 U.S. Comp. Gen. LEXIS 1279 (fines imposed on Government employees driving Government vehicles are also a personal expense). Where the fine itself is not reimbursable, related legal fees are similarly non-reimbursable. In the Matter of Attorney's Fees in Traffic Offense, [B-186857](#), Feb. 9, 1978, 57 Comp. Gen. 270.
1. Exception Based Upon "Necessary Expense" Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a "necessary expense" and payable using appropriated funds. Compare The Honorable Ralph Regula, [B-250880](#), 1992 U.S. Comp. Gen. LEXIS 1279 (Nov. 3, 1992) (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with The Acting Attorney Gen., [B-147769](#), 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).
 2. Agencies may also pay fines imposed upon the agency itself if Congress waives sovereign immunity. *See*, e.g., [10 U.S.C. § 2703\(f\)](#) (Defense Environmental Restoration Account); [31 U.S.C. § 3902](#) (interest penalty).
- K. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that employees incur to obtain licenses or certificates enabling them to carry out their duties are considered a personal expense rather than a "necessary expense" of the government. *See* A. N. Ross, Federal Trade Commission, [B-29948](#), 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable); Colonel Dempsey, [B-277033](#), Jun. 27, 1997, 1997 U.S. Comp. Gen. LEXIS 410 (fee for a state physician's license and Drug Enforcement Administration certifications are not payable, even where advantageous for the Government). But *see* AFI 65-601, vol. 1, para. 4.60. (payment for *certain* licenses and certificates, where not used to qualify individuals for employment, allowed).

1. GAO Sanctioned Exception — When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency – Request for Advance Decision, [B-257895](#), 1994 U.S. Comp. Gen. LEXIS 844 (Oct. 28, 1994) (allowing drivers’ licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations – Reimbursement for Costs of Licenses or Certificates, [B-252467](#), 73 Comp. Gen. 171 (1994) (approving payment of licenses necessary to comply with state-established environmental standards); Dept. of the Army – Availability of Funds for Security Clearance Expenses, [B-307316](#), Sep. 7, 2006, 2006 U.S. Comp. Gen. LEXIS 144 (costs associated with a servicemember renouncing foreign citizenship in order to obtain security clearance are allowable).

2. Professional Credentials. In 2001, Congress enacted legislation permitting agencies to use appropriations for “expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials.” Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at [5 U.S.C. § 5757](#). The statutory language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them. *See* AFI 65-601, vol. 1, para. 4.47. But *see* Scope of Professional Credentials Statute, [B-302548](#), 2004 U.S. Comp. Gen. LEXIS 176 (prohibiting payment for an employee’s membership in a professional association not required for licensing). In 2006, the military received similar authority at [10 U.S.C. § 2015](#).

3. On 20 June 2003, the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in [5 U.S.C. § 5757](#). This authority may be redelegated at the discretion of the MACOM Commanders. Scope of Professional Credentials Statute, [B-302548](#), 2004 U.S. Comp. Gen. LEXIS 176 (GAO analysis of the scope of [5 U.S.C. § 5757](#)).

L. Awards (Including Unit or Regimental Coins and Similar Devices). Agencies generally may not use their appropriated funds to purchase “mementos” or personal gifts. *See EPA Purchase of Buttons and Magnets*, [B-247686](#), 72 Comp. Gen. 73 (1992) (requiring a direct link between the distribution of the gift or memento and the purpose of the appropriation in order to purchase the item with appropriated funds); *See also Purchase of Baseball Caps by Dept. of Energy*, [B-260260](#), Dec. 28, 1995, 96-2 Com. Gen. Proc. Dec. ¶ 131 (disallowing the purchase of baseball caps where there was no direct link to the purpose of the appropriation established). Congress has enacted various statutory schemes permitting agencies to give awards, however. These include:

1. Awards for Servicemembers. Congress has provided specific authority for the SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions.” [10 U.S.C. § 1125](#).

a. The Army has implemented this statute in [AR 600-8-22](#), Military Awards (25 June 2015). The bulk of this regulation concerns typical medals and ribbons issued to service members (e.g., the Army Achievement Medal, the Meritorious Service Medal).

b. Chapter 11 of the regulation allows the presentation of nontraditional awards for “excellence in accomplishments or competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, for example, tank gunnery, weapons competition, and military aerial competition.”

c. While the regulation discusses contests and events of a continuing nature, awards “may be made on a one-time basis where the achievement is unique and clearly contributes to increased effectiveness.” *See* [AR 600-8-22](#), para. 11-2b.

d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other “similar devices.” ACOM, ASCC, DRU commanders, and principal officials of HQDA agencies may authorize their subordinate award authorities to use appropriated funds as required. *See* [AR 600-8-22](#), para. 11-4. *See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition*, [B-247687](#), 71 Comp. Gen. 346 (1992) (belt buckles may be purchased as awards for the annual "Peacekeeper Challenge").

- e. Specific Issues Concerning Unit or Regimental Coins.
 - (1) On 1 April 2013, the Secretary of the Army temporarily suspended the authority to purchase coins with appropriated funds. That suspension was rescinded on 10 December 2013 with instructions to reduce expenditures on coins by 25%.
 - (2) For a detailed discussion of the issues related to commanders' coins, *see* Major Kathryn R. Sommercamp, [*Commanders' Coins: Worth Their Weight in Gold?*](#), ARMY LAW., Nov. 1997, at 6.
 - f. The Air Force and Navy/Marine Corps have similar awards guidance. *See generally* [AFPD 36-28](#), Awards and Decorations Programs, (Jul 30, 2012); [SECNAVINST 3590.4A](#), Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). *See also* [AFI 65-601](#), vol. 1, para. 4.31.2.
2. Awards for Civilian Employees. Congress has provided agencies with various authorities to pay awards employees. *See* Chapter 45 of Title 5 of the U.S. Code. The most often common authority to issue an award to a civilian employee is [5 U.S.C. § 4503](#).
- a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with [5 C.F.R. Part 451](#). Awards to DOD civilians must also be done in accordance with [DoDI 1400.25, vol 451](#) as well as [DOD FMR, vol. 8](#), ch. 3, (June 2016). For Army civilians, the award must also be made in accordance with [AR 672-20](#), Incentive Awards (1 April 2014) and [DA Pam 672-20](#), Incentive Awards Handbook (1 July 1993).

- b. Non-Cash Awards. The statute technically states that the “head of an agency *may pay a cash award* to, and incur necessary expense for, the honorary recognition of one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. However, the agency regulations each expressly permit non-cash awards. The GAO has sanctioned the giving of non-cash awards to civilian employees. *See Awarding of Desk Medallion by Naval Sea Sys. Command*, [B-184306](#), 1980 U.S. Comp. Gen. LEXIS (Aug. 27, 1980) (stating that desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements); *Nat’l Security Agency – Availability of Appropriations to Purchase Food as a Non-Monetary Award*, [B-271511](#), Mar. 4, 1997, 1997 U.S. Comp. Gen. LEXIS 105 (deciding that food vouchers may be given to civilian employees as awards). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that could be necessary to honor the awardees accomplishments under [5 U.S.C. § 4503](#). In such circumstances, the award is not the food but rather it’s an incidental expense incurred to honor the awardee.
3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors. *See discussion infra* Part [XI](#) of this chapter for an overview.

M. Use of Office Equipment. Governed by the Joint Ethics Regulation, DOD 5500.07-R (Nov. 17, 2011), Standards of Conduct, DOD Directive 5500.07 (Nov. 29, 2007), 5 C.F.R. § 2635, and 5. C.F.R. Part 3601 (available at http://www.dod.mil/dodgc/defense_ethics/). The use of government property to respond to National Guard and Reserve matters is authorized with certain restrictions. Lorraine Lewis, Esq., B-277678, 1999 U.S. Comp. Gen. LEXIS 104 (Jan. 4, 1999) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See 5 C.F.R. § 251.202; see also 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. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS'N L. REV., May 2001 (providing a good overview of this authority).

N. Expenditures for New or Additional Duties.

1. If during the middle of a fiscal year, legislation or an executive order imposes new or additional duties on an agency and Congress does not provide that agency with a supplemental appropriation specifically covering the new function, may current appropriations be charged?
2. Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation? The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Director, Nat'l Sci. Found., B-158371, 46 Comp. Gen. 604 (1967).

X. AUGMENTATION OF APPROPRIATIONS & MISCELLANEOUS RECEIPTS.

A. General Rule - Augmentation of Appropriations Is Not Permitted.

1. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress.
2. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:
 - a. U.S. Constitution, Article I, section 9, clause 7: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."
 - b. [31 U.S.C. § 1301\(a\)](#) (Purpose Statute): "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."
 - c. [31 U.S.C. § 3302\(b\)](#) (Miscellaneous Receipts Statute): "Except as [otherwise provided], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without any deduction for any charge or claim."

3. Types of Augmentation.

- a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, [31 U.S.C. § 1301\(a\)](#). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, [B-245330](#), 71 Comp. Gen. 120 (1991) (noting prohibition against using appropriations to finance interagency boards, commissions, committees, etc.); Nonreimbursable Transfer of Admin. Law Judges, [B-221585](#), 65 Comp. Gen. 635 (1986); Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, [B-211373](#), 64 Comp. Gen. 370 (1985).

Example: If the Air Force were to buy air-to-air missiles using its “Procurement, Ammunition, Air Force” appropriation instead of its more specific “Procurement, Missiles, Air Force” appropriation, this would enable it to purchase a greater overall quantity of missiles (some using the missile appropriation and some using the ammunition appropriation) than Congress desired.

- b. Augmenting an appropriation by retaining government funds received from another source.
- (1) This violates the Miscellaneous Receipts Statute, [31 U.S.C. § 3302\(b\)](#). *See* Scheduled Airlines Traffic Offices, Inc. v. Dep’t. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at [10 U.S.C. § 2646](#) – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); Interest Earned on Unauthorized Loans of Fed. Grant Funds, [B-246502](#), 71 Comp. Gen. 387 (1992); But *see* Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, [B-226004](#), 67 Comp. Gen. 510 (1988) (noting that [31 U.S.C. § 3302](#) *only applies to monies received*, not to other property or services).

- (2) Expending the retained funds generally violates the constitutional requirement for an appropriation. *See Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees*, [B-222989](#), 67 Comp. Gen. 443 (1988).

B. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:

1. Economy Act. [31 U.S.C. § 1535](#) authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. [31 U.S.C. § 1536](#) specifically indicates that the servicing agency should credit monies received from the ordering agency to the “appropriation or fund against which charges were made to fill the order.” *See also* [41 U.S.C. § 6307](#) (providing similar intra-DOD project order authority, and DOD FMR, Vol. 11A, Ch.3 (providing policies and procedures for Economy Act orders). Also, there are several statutes other than the Economy Act which provide specific statutory authority for interagency acquisitions which are also exceptions to the Miscellaneous Receipts Statute. *See* [DOD FMR, Vol. 11A](#), Ch.18 for policies and procedures applicable to non-Economy Act orders. These differences are explained in further detail in the Interagency Acquisitions chapter of this deskbook.
2. Foreign Assistance Act. [22 U.S.C. § 2392](#) authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act. *See* [DOD FMR, Vol. 15](#), Ch. 1 for policies and procedures.
3. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. *See* [10 U.S.C. § 2208](#); [National Technical Info. Serv., B-243710](#), 71 Comp. Gen. 224 (1992); [Administrator, Veterans Admin., B-116651](#), 40 Comp. Gen. 356 (1960). *See also* [DOD FMR, Vol. 3](#), Ch. 19 for policies and procedures.

4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. [16 U.S.C. § 579c](#); [USDA Forest Serv. – Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132](#), 67 Comp. Gen. 276 (1988); [National Park Serv. – Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688](#), 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).
5. Defense Gifts. [10 U.S.C. § 2608](#). The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress. See DOD FMR, Vol. 12, Ch. 3 for policies and procedures. (Additional gift authorities found at [10 U.S.C. § 2601\(a\)](#) and [§ 2601\(b\)](#), are implemented in [DOD FMR, Vol. 12](#), Ch. 30)
6. Health Care Recoveries. [10 U.S.C. § 1095\(g\)](#). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.
7. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of Soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned.” [42 U.S.C. § 2651](#). The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation’s operation and maintenance account. See [Affirmative Claims Note, Lost Wages under the Federal Medical Care Recovery Act](#), ARMY LAW., Dec, 1996, at 38.
8. Military Leases of Real or Personal Property. [10 U.S.C. § 2667\(e\)\(1\)](#). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the military department and used for facility maintenance, repair, or environmental restoration. See DOD FMR, Vol. 12, Ch. 14, para. 140102 for policies and procedures.
9. Damage to Real Property. [10 U.S.C. § 2782](#). Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.

10. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. [10 U.S.C. § 2575](#). Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities. See [DOD FMR, Vol. 12](#), Ch. 25, para. 250202 for policies and procedures.
11. Host nation contributions to relocate armed forces within a host country. [10 U.S.C. § 2350k](#). These contributions may only be used for costs incurred in connection with the relocation.
12. Government Credit Card and Travel Refunds. Section 8067 of the FY 2008 Defense Appropriations Act (Pub. Law 110-116) granted permanent authority (“in the current fiscal year and hereafter”) to credit refunds attributable to the use of the Government travel card, the Government Purchase Card, and Government travel arranged by Government Contracted Travel Management Centers, to the O&M and RDT&E accounts of the Department of Defense “which are current when the refunds are received.” See [DOD FMR, Vol. 10](#), Ch. 2, para.020302.C for policies and procedures.
13. Conference Fees. [10 U.S.C. § 2262](#). In response to a GAO decision that prohibited the retention of conference fees without specific statutory authority,³⁹ Congress granted the Department of Defense the authority to collect fees from conference participants and to use those collected fees to pay the costs of the conference. Any amounts collected in excess of the actual costs of the conference must still be deposited into the Treasury as miscellaneous receipts.⁴⁰

³⁹ See [National Institutes of Health – Food at Government-Sponsored Conferences, B-300826](#), 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005)

⁴⁰ This statutory authority has been implemented in [DoD FMR vol. 12](#) ch. 32 (change 2009).

14. Authority to Retain Funds in Environmental Restoration Accounts. [10 U.S.C., § 2703](#), “Environmental Restoration Accounts,” provides that DOD components are allowed to credit certain amounts to Environmental Restoration Accounts. These funds include those: 1) recovered under Comprehensive Environmental Response, Compensation, and Liability Act and 2) any other amounts recovered from a contractor, insurer, surety, or other person to reimburse the DOD or a military department for any expenditure for environmental response activities. See [DOD FMR, Vol. 2B](#), Ch. 13.

C. GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the GAO recognizes other exceptions to the Miscellaneous Receipts Statute, including:

1. Replacement Contracts. An agency may retain recovered excess re-procurement costs to fund replacement contracts. [Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160](#), 62 Comp. Gen. 678 (1983).
 - a. This rule applies regardless of whether the government terminates for default or simply claims damages due to defective workmanship.
 - b. The replacement contract must be coextensive with the original contract, i.e., the agency may re-procure only those goods and services that would have been provided under the original contract.
 - c. Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

2. Refunds.

- a. Refunds for erroneous payments, overpayments, or adjustments for previous amounts disbursed may be credited to the appropriation or fund charged by the original obligation. DOD FMR, Vol. 3, Ch. 15, para. 150204.A.1. Refunds of prior year obligations are not available for obligation until collected and reapportioned by OMB. DOD FMR, Vol. 4, Ch. 2, para. 020408.B. *See also* Department of Justice – Deposit of Amounts Received from Third Parties, [B-205508](#), 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/ insurers for damage to employee’s property for which agency has paid employee’s claim); International Natural Rubber Org. – Return of United States Contribution, [B-207994](#), 62 Comp. Gen. 70 (1982); Appropriation Accounting Refunds and Uncollectibles, [B-257905](#), Dec. 27, 1995, 96-1 Comp. Gen. Proc. Dec. ¶ 130 (recoveries of amounts under fraudulent contract may be deposited to the appropriation originally charged).

- b. Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency – Disposition of Monetary Award Under False Claims Act, [B-230250](#), 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts). *See also* National Science Foundation- Disposition of False Claims Act Recoveries, [B-310725](#), May 20, 2008 (the Inspector General (IG) of the National Science Foundation may not credit to its appropriation amounts recovered by the Justice Department under the False Claims Act to reimburse investigative costs incurred by the IG’s office that are specifically provided for in its appropriation).

- c. Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency – Disposition of Funds Paid in Settlement of Contract Action, [B-226553](#), 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government’s claim for damages must be deposited as miscellaneous receipts).

- d. Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr. Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); To The Sec’y of War, B-40355, 23 Comp. Gen. 648 (1944). This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-174, GAO-06-382SP (3d ed. 2006); Appropriation Accounting—Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).
3. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).
4. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).
5. Non-reimbursable Personnel Details.
 - a. The Comptroller General has held that non-reimbursable 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); The Hon. Robert W. Houk, B-247348, Jun. 22, 1992, 1992 U.S. Comp. Gen. LEXIS 837.

b. Exceptions.

- (1) A law authorizes nonreimbursable details. *See, e.g.,* [3 U.S.C. § 112](#) (non-reimbursable details to White House); [The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033](#), 1987 U.S. Comp. Gen. LEXIS 1695 (Jan. 30, 1987).
- (2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. [Details to Congressional Comm'ns., B-230960](#), 1988 U.S. Comp. Gen. LEXIS 334 (Apr. 11, 1988).
- (3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. [Dept. of Health and Human Servs. Detail of Office of Cmty. Servs. Employees, B-211373](#), 64 Comp. Gen. 370 (1985).

XI. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS.

- A. Definition. Emergency and extraordinary expense funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.
- B. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. *See* Act of March 3, 1795, 1 Stat. 438.
- C. Appropriations Language.
 1. For DoD, Congress provides emergency and extraordinary funds as a separate item in the applicable operation and maintenance appropriation.

Example: In FY 2016, Congress provided the following Operation and Maintenance appropriation to the Army: "For expenses, not otherwise

provided for, necessary for the operation and maintenance of the Army, as authorized by law, \$32,399,440,000: *Provided*, That not to exceed \$12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes.”

2. Not all agencies receive emergency and extraordinary funds. If Congress does not specifically grant an agency emergency and extraordinary funds, that agency may not use other appropriations for such purposes. See HUD Gifts, Meals, and Entm’t Expenses, [B-231627](#), 68 Comp. Gen. 226 (1989).

D. Statutory Background.

1. [10 U.S.C. § 127](#). Emergency and extraordinary expenses.
 - a. Authorizes the Secretary of Defense and the Secretary of a military department to spend emergency and extraordinary expenses funds for "any purpose he determines to be proper, and such a determination is final and conclusive."
 - b. Requires a quarterly report of such expenditures to the Congress.
 - c. Congressional notice requirement. In response to a \$5 million payment to North Korea in the mid-90s using DOD emergency and extraordinary expense funds, Congress amended [10 U.S.C. § 127](#), imposing the following additional restrictions on our use of these funds:
 - (1) If the amount to be expended exceeds \$1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.
 - (2) If the amount exceeds \$500,000 (but is less than \$1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.

2. Other executive agencies may have similar authority. *See, e.g.,* [22 U.S.C. § 2671](#) (authorizing the State Department to pay for "unforeseen emergencies").
- E. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DoD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:
1. Official Representation (Protocol). This subset of emergency and extraordinary expense funds are available to extend official courtesies to authorized guests, including dignitaries and officials of foreign governments, senior U.S. Government officials, senior officials of state and local governments, and certain other distinguished and prominent citizens. *See* [DOD FMR, Vol. 10](#), Ch. 12.
 - a. DOD Publications: [DOD Instruction 7250.13](#), Use of Appropriated Funds for Official Representation Purposes (30 June 2009).
 - b. Army Regulation: [AR 37-47](#), Representation Funds of the Secretary of the Army (18 Sept. 2012).
 - c. Air Force Regulation: [AFI 65-603](#), Official Representation Funds: Guidance and Procedures (24 Aug. 2011).
 - d. Navy Regulation: [SECNAVINST 7042.7K](#), Guidelines for Use of Official Representation Funds (14 Mar 2006).
 2. Criminal Investigation Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during criminal investigations or crime prevention.
 - a. Army Regulation: [AR 195-4](#), Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities (30 Aug. 2011).
 - b. Air Force Regulation: [AFI 71-101](#), vol. 1, Criminal Investigations Program (8 Oct. 2015).

3. Intelligence Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during intelligence investigations.
 - a. Army Regulation: [AR 381-141\(C\)](#), Intelligence Contingency Funds (16 Jan 2004).
 - b. Air Force Regulation: [AFI 71-101, vol. 4](#), Counterintelligence (26 Jan. 2015).
4. Other Miscellaneous Expenses (other than official representation). This subset of emergency and extraordinary expense funds is available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. [AR 37-47](#), para. 1-5b.
5. Procedures for Use of Official Representation Funds.
 - a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests (“fancy people”). See, e.g., [DODI 7250.13](#), Enc. 3; [AR 37-47](#), paras. 2-1 and 2-2. Official courtesies are defined as:
 - (1) Hosting of authorized guests to maintain the standing and prestige of the United States;
 - (2) Luncheons, dinners, and receptions at DOD events held in honor of authorized guests;
 - (3) Luncheons, dinners, and receptions for local authorized guests to maintain civic or community relations;
 - (4) Receptions for local authorized guests to meet with newly assigned commanders or appropriate senior officials;
 - (5) Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and visits by foreign vessels to U.S. ports;

- (6) Official functions in observance of foreign national holidays and similar occasions in foreign countries; and
 - (7) Dedication of facilities.
- b. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.
- (1) Gifts to non-DOD authorized guests may cost no more than \$335.00. *See* DODI 7250.13, Enc. 3 (which cross references [22 U.S.C. § 2694](#) which, in turn, cross references [5 U.S.C. § 7342](#); the amount established in the latter statute is revised by GSA).
 - (2) If the guest is from within DOD and is one of the specified individuals listed in Enclosure 1 to DODI 7250.13, then the command may present him or her with only a memento valued at no more than \$50.00. Enclosure 2 to [DOD Directive 7250.13](#).
- c. Levels of expenditures. Levels of expenditures are to be “modest.” DODI 7250.13, para. Enc. 2; Army Regulation prohibits spending in excess of \$20,000 per event (an entire visit by an authorized guest constitutes one event for purposes of this threshold). [AR 37-47](#), para. 2-4b.
- d. Prohibitions on Using Representational Funds. [DODI 7250.13](#), Enc. 3; [AR 37-47](#), para. 2-10; [AFI 65-603](#), para. 7.2; [SECNAVINST 7042.7K](#), para. 9.
- (1) Any use not specifically authorized by regulation requires Service Secretary approval as an exception to policy. [AR 37-47](#), para. 2-10; [AFI 65-603](#), para. 7.2.
 - (2) Some examples that require the Secretarial approval are:
 - (a) Food for interagency working meetings;

- (b) Entertainment of DOD personnel, except as specifically authorized by regulation;
- (c) Membership fees and dues;
- (d) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);
- (e) Gifts and mementos an authorized guest wishes to present to another;
- (f) Personal items (clothing, cigarettes, souvenirs);
- (g) Guest telephone bills;
- (h) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and
- (i) Repair, maintenance, and renovation of DOD facilities.

See [AR 37-47](#), para. 2-10.

- e. Approval and accounting procedures. [AR 37-47](#), Chapter 3; [AFI 65-603](#), para 8; [SECNAVINST 7042.7K](#), para 12.
 - (1) Fiscal year letters of authority.
 - (2) Written appointment of certifying and approving officer.
 - (3) Written appointment of representation fund custodian.

- (4) Requests to expend ORFs must be submitted to the representation funds custodian in advance of an event. Any requests for an event that did receive prior approval must be submitted to the Secretary of the Army or his or her designee for retroactive approval. AR 37-47, para. 3-1e(1).
 - (5) Legal review.
- 6. Community Relations and Public Affairs Funds. [AR 360-1](#), para. 4-5. Do not use public affairs funds to supplement official representation funds. Doing so violates [31 U.S.C. § 1301](#).

APPENDIX A: ANALYZING A PURPOSE ISSUE

ANALYZING A PURPOSE ISSUE.

- A. Determine Whether Congress Has Enacted any Statute on Point.
1. Your primary concern should be whether there is a statute or legislation that addresses your intended purchase.
 2. Locating Codified Statutory Authority.
 - a. The U.S. Code is broken down into titles which typically cover a given subject matter area. You may be able to scan through appropriate volumes/chapters to see if there is something on point.

Example: Statutes pertaining to DoD are typically found in Title 10, so if you want to find a statute dealing only with a restriction on DoD's use of its appropriations, it will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5, so if you want to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, you would probably start with Title 5.

- b. You can run a general search on either a specialized legal database, such as Westlaw, or on the U.S. Code website. Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether "T-shirts" may be purchased, you may have to look under "Clothing," "Uniforms," etc).

- c. U.S. Code Annotated Index. This index contains a listing arranged by subject of the codified U.S. statutes.

Example: I need to know whether I can use appropriated funds to operate golf courses. I would go to the latest index of the U.S. Code Annotated and look under the key word “Golf Courses” to find the cross-reference to [10 U.S.C. § 2491a](#). Note: once again you may have to run alternate searches utilizing synonyms for your topic.

- d. Agency Regulations. Agencies will often (but not always) list the statutory authority(ies) upon which the regulation is based. If you can find a regulation dealing with your issue (*see* Part XI.C. *infra.*), you may be able to then locate the underlying statutory authority.

Example: I need to know when I can use appropriated funds to support my post chaplain. AR 165-1, para. 1-7 Chaplain Activities in the United States Army (23 June. 2015) contains cross-references to 10 U.S.C. §§ 3073, 3547, and 3581. 10 U.S.C. § 3547 contains some minimal guidance on resourcing chaplains.

- e. GAO Opinions. You could go onto a legal database such as Westlaw to find GAO Opinions related to a given topic which often cross-reference the underlying statutory authority. The GAO Website allows for searches of the most recent decisions.
- f. GAO Redbook. The GAO has issued a 3-volume treatise on fiscal issues called “Principles of Federal Appropriations Law.” This set is commonly referred to as the “GAO Redbook.” It contains examples and cross-references to underlying statutory authority throughout each of the topical discussions. The treatise can be found at: <http://www.gao.gov/legal/red-book/current-edition>. The main volumes are supplement with annual updates.

3. Locating Legislation/Uncodified Authority.
 - a. Appropriation Acts. Congress typically passes 12 appropriations acts each year. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. In addition to Westlaw -based research, one can use <https://www.congress.gov/> to conduct research on legislation.
 - b. Authorization Acts. Although there is no general requirement to have an authorization act, Congress has enacted a statutory requirement for DoD to have an authorization act each year. As with appropriations acts above, one can use Westlaw or [Congress.gov](https://www.congress.gov/) to conduct research.
 - c. Other Legislation. Outside of the appropriation/ authorization process, Congress will often place statutory restrictions on our actions.
 - d. Issues in Researching Legislation. If Congress does not subsequently codify the legislation, it is often difficult to locate any legislation that restricts our ability to spend appropriated funds. Hopefully, at the head of the agency level, there has been some sort of regulatory or other policy guidance that has been promulgated covering the uncodified restriction.
4. Even assuming you find statutory/ legislative authority to conduct your intended acquisition, you must still determine whether there is a regulatory prohibition or other restriction covering that purchase. To do so, *see* Part VII. *supra*.

Example: Congress has given us express authorities to carry out procurements of various weapons programs, construction projects, and research projects. We still have various regulations that give us guidance on how we will carry out those programs and projects. For example, Army regulation and policy permits the installation commander to approve repair and/or maintenance projects amounting to no more than \$3 million. Congress permits us to carry out projects above this threshold, but by regulation, the agency has withheld the approval authority on such projects.

B. Necessary Expense Test.

1. If there is no statute that authorizes your intended purchase, you will have to apply the necessary expense test to determine if you have authority to carry out your intended purchase. *See* Part VIII *supra* for an overview of this test.
2. If your research uncovers an agency level regulation that addresses your intended purchase (*see* Part VII. *supra*), the proponents of that regulation are likely to have used a necessary expense analysis in drafting the regulation. In such a circumstance, you are probably safe relying upon the regulation to make the intended purchase. If after reviewing a regulation, you feel there is a conflict between what the regulation permits and what should be permitted under a necessary expense analysis, you should consult your next higher legal counsel.

Example: For several years, AR 165-1 has permitted the use of appropriated funds to conduct religious retreats and workshops. These events, which included lodging and food, were open to Servicemembers and their families. Prior to enactment of the 2003 DOD Appropriations Act, there had been no express authority given to DOD to carry out these sorts of programs for family members (This authority is now codified in [10 U.S.C. § 1789](#)). Using a necessary expense analysis, it would be hard to come up with justification for using appropriated funds to pay for lodging and food for participants, especially for the non-service member participants. Various installations eventually raised their concerns – that the regulation did not mesh with the fiscal rules – to DA-level. This high-level attention resulted in a solution being worked out (express authorization from Congress in the form of legislation).

3. It is probably a good idea to have a written document that you retain in your files that addresses the underlying facts as well as your analysis that led to your conclusion that the purchase satisfied the necessary expense test. It would also probably be advisable to have a written document from the requester of the intended items/ services that indicates what the underlying facts are.

4. Even assuming you conduct a necessary expense test which leads you to believe you should have the authority to purchase the intended items or services, you still need to determine whether there is a regulatory prohibition or restriction covering that purchase. To do so, *see* Part VII.B. *infra*.

Example: I need to know whether I can buy bottled water for distribution to troops at remote locations in Southwest Asia. I determine there is no statute dealing specifically with this issue. I perform a “necessary expense” analysis and determine that having bottled water for these remotely located troops will definitely contribute materially towards their mission accomplishment (they need water to survive and if the troops are not located near a potable water supply, such as a water buffalo, then bottled water is probably going to be the most effective way to get their water needs replenished). Unfortunately, there are a variety of Army Regulations that place restrictions on the purchase of bottled water, including the approval authority. As a result, looking at just the statutes and doing a necessary expense analysis will not be sufficient.

C. Determine Whether the Agency Has Promulgated any Regulation on Point.

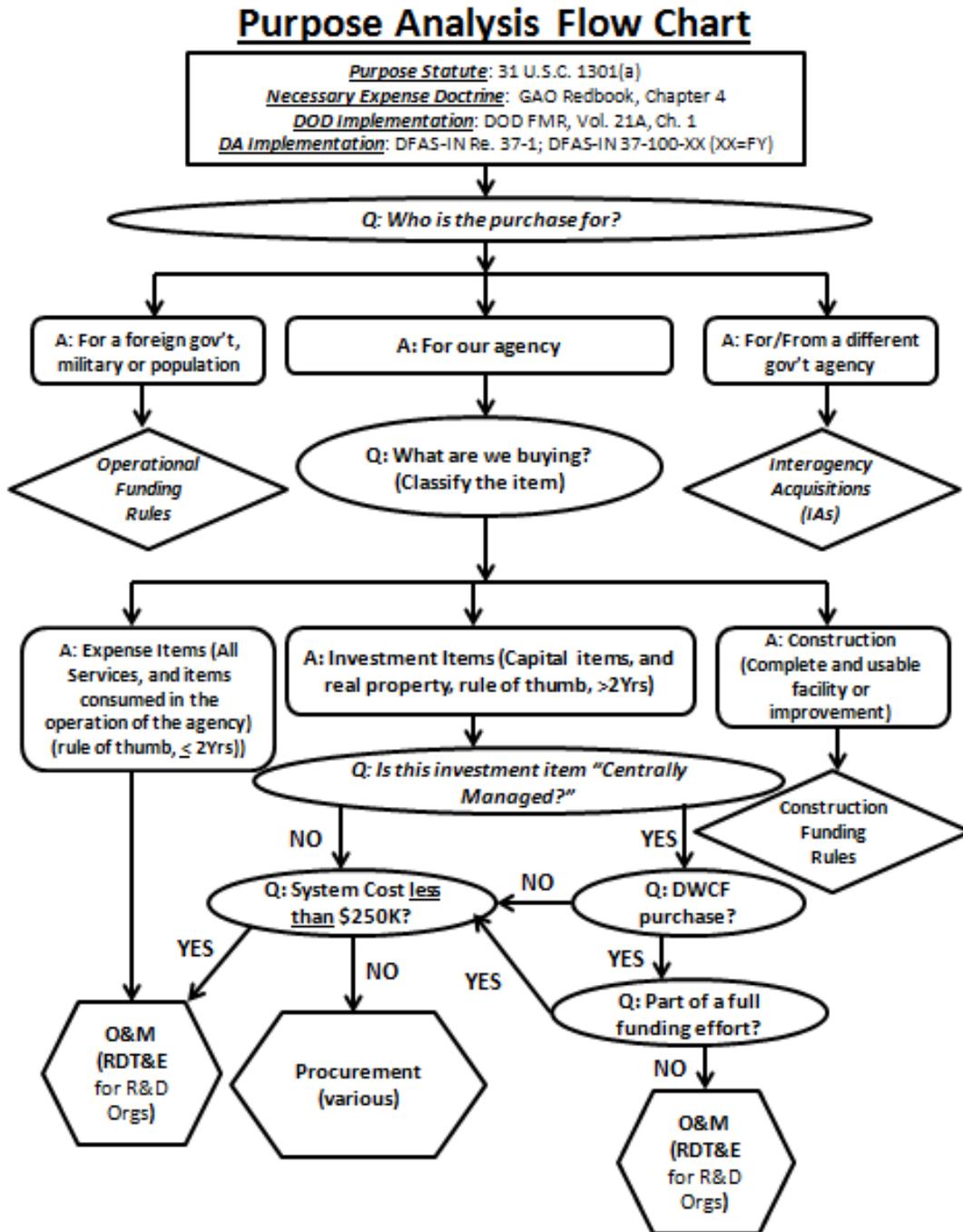
1. Agency Publication Websites. The DOD and many of the civilian agencies have websites containing electronic copies of most of their regulations. Most agency publication websites allow you to perform a search of the text of the regulations. Note: you may have to run alternate searches utilizing synonyms for your topic (i.e. if someone wants to know whether “T-shirts” may be purchased, you may have to look under “Clothing,” “Uniforms,” etc. If you know the underlying statutory authority, you can also use it as your keyword (i.e. plug in “10 U.S.C. § 2246” or “10 U.S.C. 2246” or “10 USC 2246” as your search term).
 - a. DOD Regulations (<http://www.dtic.mil/whs/directives/>).
 - b. Army Regulations (<http://www.apd.army.mil/>). Unfortunately, the Army website only permits a search of the titles (not the text) of the regulations
 - c. Air Force Regulations (<http://www.e-publishing.af.mil>).

- d. Navy Regulations (<http://doni.daps.dla.mil/>).
 - e. Marine Corps Regulations (<http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx>).
 - f. Joint Publications (<http://www.dtic.mil/doctrine/>).
2. Specialized Websites. In addition to the above websites that compile all agency regulations into one location, there are various other websites that contain regulations specific to the fiscal arena. These include:
- a. DOD Financial Management Regulation (<http://comptroller.defense.gov/FMR.aspx>). The DOD Financial Management Regulation, DOD 7000.14-R establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the Department of Defense. This 15 volume set of regulations contains a very user-friendly, key word-searchable function.
 - b. Defense Finance and Accounting Service (DFAS) Regulations <https://dfas4dod.dfas.mil/library/>. DFAS handles the finance and accounting services for DOD. It is organized into geographic regions which are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army).

D. Emergency & Extraordinary (E&E) Expenses.

- 1. As a matter of last resort, if you cannot find a statute or legislation that permits your intended purchase *and* you do not believe the item / service is necessary, you could request to use E&E funds to make the purchase.
- 2. The service regulations already contain guidance on the items/ services for which the service secretaries have issued “blanket approvals.” Your purchase probably will not fit into this category, but each of the regulations permit an exception or waiver provided there is adequate justification.

APPENDIX B: PURPOSE ANALYSIS FLOWCHART



CHAPTER 3:



AVAILABILITY OF APPROPRIATIONS AS TO TIME

CHAPTER 3
AVAILABILITY OF APPROPRIATIONS AS TO TIME

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CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO TIME

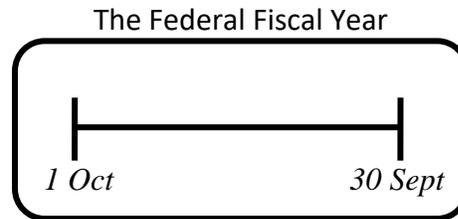
I. INTRODUCTION. Following this instruction, the student will understand:

- A. The various time limits on availability of appropriated funds;
- B. The *Bona Fide* Needs Rule and some common exceptions to that rule;
- C. The rules concerning availability of funds for funding replacement contracts; and
- D. The general rules concerning use of expired appropriations.

II. KEY DEFINITIONS.

- A. **Appropriation or Appropriations Act.** An appropriations act is the most common form of budget authority. It is a statutory authorization to incur obligations and make payments out of the U.S. Treasury for specified purposes. An appropriations act fulfills the requirement of Article I, Section 9, of the U.S. Constitution, which provides that “no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” [Government Accountability Office \(GAO\), A Glossary of Terms Used in the Budget Process, GAO-05-734SP, 13 \(Fifth Edition, September 2005\) \[hereinafter GAO Glossary\]](#). An appropriations act may include many separate provisions of budget authority. Each provision within an act may also be referred to as a “fund” or “pot of money.”
- B. **Authorizing Legislation.** Authorizing Legislation (called “authorization acts”) provides the legal basis for actual appropriations that are passed later. It establishes and continues the operation of federal programs or agencies either indefinitely or for a specific period, or sanctions a particular type of obligation or expenditure within a program. Authorizing legislation does not provide budget authority, which stems only from the appropriations act itself. [GAO Glossary, at 15.](#)

- C. **Fiscal Year.** The Federal Government’s fiscal year runs from 1 October through 30 September. This fiscal year governs the use of appropriated funds and is referenced throughout this chapter.



1. The fiscal year has changed throughout history. Prior to 1842, all accounting was based on a calendar year. From 1842 to 1976, the fiscal year ran from 1 July to the following 30 June. In 1974, Congress mandated the fiscal year run from 1 October to 30 September beginning in 1977. [31 U.S.C. § 1102](#).
 2. A fiscal year is indispensable to the orderly administration of the budget given the “vast and complicated nature of the Treasury.” [Bachelor v. United States, 8 Ct. Cl. 235, 238 \(1872\)](#); [Sweet v. United States, 34 Ct. Cl. 377, 386 \(1899\)](#) (stating that it is a necessity that “the Government have a fixed time in the form of a fiscal year; whether it be with the commencement of the calendar year or at some other fixed period is not material, but that there should be a limit to accounts and expenses into distinct sections of time is an absolute necessity.”)
- 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 new obligations. [GAO Glossary, at 23](#).
1. Default Rule: Most funds are available for obligation only for a specific period of time, presumed to be only during the fiscal year in which they are appropriated. [31 U.S.C. § 1502](#); DoD FMR Vol. 14, Ch. 2, para. 020102.B. 2.; [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 [Consolidated Appropriations Act, 2015, Pub. L. No. 113-235, § 8003, 128 Stat. 5 \(2015\)](#).

3. Periods of Availability for Various Appropriations. Below are examples of the standard periods of availability for some of the more common appropriations.

Appropriation	Period of Availability
Operations and Maintenance (O&M)	1 Year
Personnel	1 Year
Research, Development, Test, and Evaluation (RDT&E)	2 Years
Overseas Humanitarian, Disaster, and Civic Aid (10 U.S.C. § 401)	2 Years
Procurement	3 Years
Military Construction	5 Years
Shipbuilding and Conversion, Navy	5 Years (with some exceptions)
“Available until expended” or “X-year” funds	No expiration date

- a. The appropriations act language supersedes other general statutory provisions. [National Endowment for the Arts-Time Availability for Appropriations](#), B-244241, 71 Comp. Gen. 39 (1991) (holding that general statutory language making funds available until expended is subordinate to appropriations act language stating that funds are available until a date certain).
- b. Multiple year appropriations expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. [Office of Management and Budget Circular A-11, Instructions on Budget Execution](#), § 20.4(c) (2012). See Section VII, *infra*.
- c. Service regulations may limit the use of funds. See *e.g.* U.S. Dep’t of Army, Reg. 70-6, [Management of the Research, Development, Test and Evaluation, Army Appropriation](#), 16 Jun. 1986 (AR 70-6) (restricting Research, Development, Test and Evaluation (RDT&E) funds to one-year unless exception granted). *Note:* AR 70-6 expired on 27 December 2011 and is referenced here only for its value as an example of what types of regulations services may place on the use of funds.

E. Commitment.

1. Definition. An administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. [GAO Glossary, at 32](#). Commitments are usually based upon firm procurement requests, unaccepted customer orders, directives,

and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying officer. DOD FMR, Vol. 3, Ch. 15, para. 150203.

2. Purpose. A commitment document is an order form used to ensure that funds are available prior to incurring an obligation. Commitment accounting helps to ensure that the subsequent entry of an obligation will not exceed available funds. DOD FMR, Vol. 3, Ch.15, para 1502023. Commitments in the Army may be accomplished using [DA Form 3953 \(Purchase Request and Commitment\)](#) or similar documents having the effect of a firm order or authorization to enter into an obligation. [DFAS-IN 37-1, Ch. 7, para. 070601](#). The Air Force uses [AF Form 9](#) as a fund cite authorization document.
3. Who: The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment document. [DOD FMR, Vol. 3, Ch. 15, para. 150203A](#).
 - a. Army. Serviced activities or fund managers will maintain commitment registers, and are responsible for processing, recording, and performing the oversight function for commitment accounting. Fund control responsibilities may be delegated, in writing, to the Director of Resource Management (DRM)/ Comptroller or other appropriate official(s) IAW regulation. Designated officials will perform commitment accounting as required. [DFAS-IN 37-1, Ch. 3, para. 030209, and Ch. 7, para. 0703](#).
 - 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 of Appropriations and Funds Made Available to the Department of the Air Force, p. 1-7](#).
4. What: Activities may commit funds only to acquire goods, supplies, and services that meet the bona-fide needs of the period for which Congress appropriated funds, or to replace stock used during that period. In general, agencies record as a commitment the cost estimate set forth in the commitment document. [DFAS-IN 37-1, para. 070501](#); [DOD FMR, Vol.3, Ch.8, para. 080201](#).

F. **Obligation.**

1. Definition: A definite act that creates a legal liability on the part of the government for the payment of goods and services ordered or received, or a legal

duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. Payment may be made immediately or in the future. An agency incurs an obligation, for example, when it places an order, signs a contract, awards a grant, purchases a service, or takes other actions that require the government to make payments to the public or from one government account to another. [GAO Glossary, at 70.](#)

2. General Rules.

- a. An obligation must be definite and certain. GAO Redbook, Vol. II, pg. 7-3. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it. Always obtain documentary evidence of the transaction before recording an obligation. [31 U.S.C. § 1501](#); [DOD FMR, Vol. 3, Ch.8, para. 080302](#); [DFAS-IN 37-1, chapter 8.](#)
- b. Obligate funds only for the purposes for which they were appropriated. [31 U.S.C. § 1301\(a\).](#)
- c. Obligate funds only to satisfy the *bona fide* needs of the period for which funds are appropriated. [31 U.S.C. § 1502\(a\)](#); [DOD FMR, Vol. 3, Ch. 8, para. 080304A.](#)
- d. Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. DOD FMR, Vol. 3, Ch. 8, para. 080304A. 1..
- e. Generally, obligate current funds when the government incurs an obligation (incurs a liability). DOD FMR, Vol. 3, Ch. 8, para. 0803024. Some exceptions, discussed in the obligations outline and in the “Time” outline, include: Protests (see section VIII A of this outline); Replacement contracts for contracts that have been terminated for default (see section VI of this outline) and “in-scope” contract changes (see section VI B of this outline).
- f. An improper recording of funds does not create a contractual right, [Integral Systems v. Dept. of Commerce, GSBKA 16321-COM, 05-1 BCA ¶ 32,946](#) (Board rejected a constructive option argument based on the recording of an option exercise which failed to occur).

- g. Do not obligate funds in excess of (or in advance of) an appropriation, or in excess of an apportionment or a formal subdivision of funds. [31 U.S.C. §§ 1341, 1517](#); [DOD FMR, Vol. 3, Ch. 8, para. 080301](#).
- (1) Government agencies may not obligate funds prior to signature of the appropriations act **and** receipt of the funds from the Office of Management and Budget through higher headquarters. [DoD FMR, Vol. 3, Ch. 8, para. 080301](#). But see [Cessna Aircraft, Co. v. Dalton, 126 F.3d 1442 \(Fed. Cir. 1997\)](#) *aff'g* [Cessna Aircraft Co., ASBCA No. 43196, 93-3 BCA ¶ 25,912](#) (holding that an option exercised after Presidential signature of appropriations act but before OMB apportionment did not violate the Anti-Deficiency Act.) See Chapter 4, Antideficiency Act, for more detailed information regarding the apportionment process.
 - (2) Agencies must avoid situations that require "coercive deficiency" appropriations. A coercive deficiency is an instance in which an agency legally or morally commits the United States to make good on a promise without an appropriation to do so. This act then "coerces" Congress into appropriating funds to cover the commitment. [Project Stormfury - Australia - Indemnification of Damages, B-198206, 59 Comp. Gen. 369 \(1980\)](#).

G. **Subject to the Availability of Funds.** If the agency needs to enter into a contract before the proper funds become available, usually to ensure timely delivery of goods or services, they must execute contracts "subject to the availability of funds" (SAF). If a SAF clause is used, the Government shall not accept supplies or services until the contracting officer has given the contractor written notice that funds are available. [FAR 32.703-2](#).

1. [FAR 52.232-18](#), Availability of Funds, may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) (1) necessary for normal operations and (2) for which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements. [FAR 32.703-2 \(a\)](#).
2. [FAR 52.232-19](#), Availability of Funds for the Next Fiscal Year, is used for one-year indefinite-quantity or requirements contracts for services that are funded by annual appropriations that extend beyond the fiscal year in which they begin, provided any specified minimum quantities are certain to be ordered in the initial fiscal year. [FAR 32.703-2 \(b\)](#).

III. THE *BONA FIDE* NEEDS RULE.

A. **The *Bona Fide* Need.** Government agencies may not purchase goods or services they do not require. However, they may use appropriated funds to fill actual requirements as specified by the purpose of an appropriation, or for purposes necessary and incident to that appropriation. *See* Fiscal Law Deskbook, Ch. 2 (Purpose). Because appropriations are generally only available for limited periods of time, it becomes important to understand when an agency actually requires a good or service. [31 U.S.C. § 1552](#). Until that requirement (need) accrues, no authorization exists to obligate appropriated funds. Once the need accrues, an agency may only obligate appropriated funds that are current at that time.¹ [31 U.S.C. § 1502\(a\)](#).

1. **The *bona fide* need is the point in time recognized as the moment when a government agency becomes authorized to obligate funds to acquire a particular good or service based on a currently existing requirement.** Once present, the *bona fide* need may persist unfilled for an extended length of time, or may end based on changing priorities and requirements. Nevertheless, **agencies may only obligate funds to fill a requirement once the *bona fide* need exists, and may only use funds current while the *bona fide* need exists.**
2. The *bona fide* need must be determined by each agency before it obligates funds. This process should involve resource managers, judge advocates or other legal counsel, and requiring activities (units, offices, etc.). If agencies do not take the time to ensure a proper *bona fide* need exists, they run the risk of improperly obligating funds. This could lead to a *per se* violation of the Antideficiency Act (ADA) which cannot be corrected, and may carry criminal, civil, or administrative penalties. *See* Fiscal Law Deskbook, Ch. 4 (Antideficiency Act).
3. 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.

¹ Agencies may have a *bona fide* need for a good or service, but not act on that need due to budget constraints or priorities. Not acting on a *bona fide* need does not obviate or undermine that need. The need may be filled at any time as long as the *bona fide* need continues to exist by obligating currently available funds.

- B. **The *Bona Fide* Needs Rule.** Essentially, the *bona fide* needs rule is a timing rule that requires **both the timing of the obligation and the *bona fide* need to be within the fund’s period of availability.** [DoD FMR, Vol. 3, Ch. 8, para. 080304.A](#); [DFAS-IN Reg. 37-1, para. 070501](#).
1. **Current year money for current year needs.** The basic principle is that “payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year....” [GAO Redbook, Appropriations Law, Volume I, page 5-14](#). “An agency’s compliance with the *bona fide* needs rule is measured at the time the agency incurs an obligation, and whether there is a *bona fide* need at the point of obligation depends on the purpose of the transaction and the nature of the obligation entered into.” [National Labor Relations Board – Funding of Subscription Contracts, B-309530, 17 Sept 2007, pg5](#).
 2. The *Bona Fide* Needs Rule applies only to appropriations with limited periods of availability for obligation.
 3. Appropriated funds may only be used for a requirement that represents the *bona fide* need of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. [Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 \(April 18, 1995\)](#); [To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 \(1953\)](#); DoD FMR Vol. 14, Ch. 2, para. 020102 B. 2..E; [DFAS-IN 37-1, para. 080302](#).
 4. **History:** “The *bona fide* need rule initially appeared in 1789. From what can be gleaned from the sparse legislative history, the intent of Congress was to instill a sense of fiscal responsibility in the newly formed United States departments and agencies. The Congress wanted the balance of appropriations not needed for a particular year’s operations to be returned to the Treasury so that it could be re-appropriated the following year in accordance with the Congress’s current priorities. Of even more importance to the Congress today, a limited period of availability means that after that period has expired an agency has to return to the Congress to justify continuing the program or discuss how much is needed to carry on the program at the same or a different level.” [Hon. Beverly Byron, B-235678, Comp. Gen. \(Jul 30, 1990\)](#).

5. **Determining the *Bona Fide* Need.** Generally speaking, an agency has a need to acquire goods and services when it requires the use or benefit of those goods or services. However, based on legislation and GAO case law, the *bona fide* need does not always arise at this time. The *bona fide* need may be earlier or later than the date the agency requires the use of goods or the benefit of services. Each main type of acquisition – supplies, services, and construction – has specific rules to help agencies determine the *bona fide* need. These are discussed at length in the discussion of the *Bona Fide* Needs Rule below.

6. Practical Considerations.
 - a. Generally, the time limitations apply to the obligation of funds, not the disbursement, or payment, of them. [Secretary of Commerce, B-136383, 37 Comp. Gen. 861, 863 \(1958\)](#). See [DoD FMR, Vol. 3, Ch. 8, para. 080301](#).

 - b. Absent express statutory authority in the appropriations act, agencies may not obligate funds after their period of availability expires. [National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 \(1991\)](#). In this case, the authorizing legislation stated that money provided for the National Endowment of the Arts would remain available until expended. However, the appropriations act stated that the funds would expire on a date certain. The GAO held that the **appropriations act trumps the authorization act** if the two conflict.

 - c. Any indefinite delivery/indefinite quantity (ID/IQ) contract must include a guaranteed minimum order of goods or services under that contract. The government is required to order at least that minimum quantity from the contractor (or contractors). Because the government must pay for at least the guaranteed minimum, that amount must reflect a valid *bona fide* need at the time the contract is executed. [B-321640, U.S. Small Business Administration—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum \(2011\)](#).

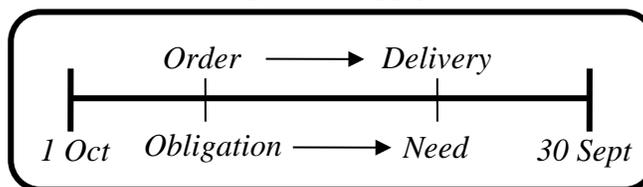
C. **Bona Fide Needs Methodology.** Generally speaking, an agency has a need to acquire goods and services when it requires the use or benefit of those goods or services. However, based on legislation and GAO case law, the *bona fide* need does not always arise at this time. The *bona fide* need may be earlier or later than the date the agency requires the use of goods or the benefit of services. Each main type of acquisition – supplies, services, and construction – has specific rules to help agencies determine the *bona fide* need. In each case however, determining the *bona fide* need for an acquisition requires the exercise of judgment. Because a *bona fide* needs analysis requires close examination of the facts, the following methodology may assist in a legal sufficiency review. See Appendix A.

1. Classify what is being acquired (i.e. Are we acquiring a supply, service, or construction?). Application of the *Bona Fide* Needs Rule differs depending on the subject of the acquisition.
2. Analyze the *Bona Fide* Need (i.e. When does the *Bona Fide* Need accrue for this acquisition?). If application of the general rule results in a finding that the *Bona Fide* Need exists in the current Fiscal Year, and current fiscal year funds are being used, the *Bona Fide* Needs Rule is satisfied.
3. Consider any Exceptions. Congress and the GAO have, for different types of acquisitions, provided various exceptions that may allow the agency to treat the acquisition as a *bona fide* need of the current year.

D. **Supplies.**

1. Generally, the *bona fide* need for a supply is determined by when the government actually requires (will be able to use or consume a requirement) the supplies being acquired. Accordingly, agencies generally must **obligate funds from the fiscal year in which the supplies will be used.** [Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 \(1965\); To Administrator, Small Business Admin., B-155876, 44 Comp. Gen. 399 \(1965\); Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen. 155 \(1957\).](#)
2. In most cases, the need to use supplies, and the obligation of funds for the acquisition to meet the need, take place during the same FY. In such cases, the *bona fide* needs rule is satisfied as in the example below:

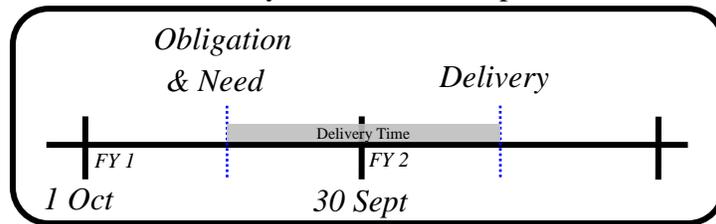
Normal Single FY Supply Contracts



3. Supply needs of a future fiscal year are the *bona fide* need of the subsequent fiscal year, unless an exception applies. As demonstrated in the graphic above, this requirement does not usually create problems for agencies using annual funds. However, towards the end of the fiscal year, requiring activities must pay particular attention to adhering to the *Bona Fide* Needs Rule. Orders of supplies often cannot be delivered until the next FY, cannot be produced in time, or perhaps won't be used entirely during current FY. Two GAO recognized exceptions to the *Bona Fide* Needs Rule, **specific to supplies**, are the lead-time exception (for both delivery and production) and the stock-level exception. See DOD FMR, Vol. 3, Ch.8, para. 080304.
4. *Lead-Time Exceptions to the Bona Fide Needs Rule.* There are two variants that comprise the lead-time exception.
 - a. Delivery Lead-Time: Current Year Requirement – Future Year Use. This aspect of the exception permits the agency to consider delivery lead-time in determining the *bona fide* need for a supply. Under the *Bona Fide* Needs rule, supplies delivered in the next fiscal year are a *Bona Fide* Need of the next fiscal year because they are not used until the next fiscal year. The delivery lead-time exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency currently requires the supply and (2) the delay is due to delivery lead-time. If an agency cannot obtain supplies in the same FY in which they are required and contracted for, delivery in the next FY does not violate the *Bona Fide* Needs Rule as long as the purchase meets the following:
 - (1) **Current Requirement.** If the agency could get the item in the current fiscal year, the agency would use the item in the current fiscal year. Practitioners should contrast “requirement” from “need.” In this situation the agency has a current year requirement (i.e. if I had it now I would use it now) for a future year *Bona Fide* need (i.e. future year use of the supply).

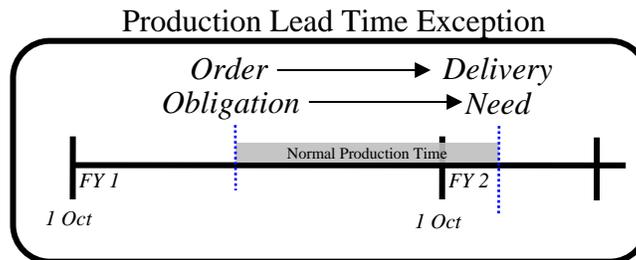
- (2) Delivery Lead-Time Delay. The agency cannot obtain supply in the current FY due to delivery lead-time.
- (a) The time between contracting and delivery must not be excessive.
 - (b) The government may not set a delivery date beyond the normal delivery lead-time and beyond the end of the fiscal year. The supplier must require the delivery lead-time.
 - (c) If the government directs the contractor to withhold delivery until after the next fiscal year, the DoD FMR states there is not a *bona fide* need for the item until next fiscal year, so next year's fiscal funds must be used. [DoD FMR Vol. 3, Ch. 8, para.080304 A. 3.](#)
 - (d) There is no requirement that the government pay increased delivery charges to ensure delivery before the end of the FY.
- (3) Example: If the normal lead-time for delivery of an item is 45 days, an obligation of FY 2016 funds is appropriate for a delivery on or before a required delivery date of 14 November 2016. (Remember 1 October 2016 is the beginning of FY 17). This represents the *Bona Fide* Need of FY 2016. However, if the government directs the contractor to withhold delivery until after 14 November 2016, there is not a *Bona Fide* Need for the item in FY 2016 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2017.

Delivery Lead Time Exception



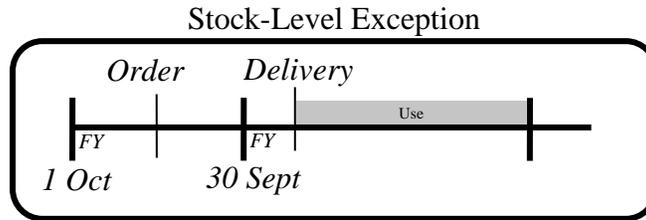
b. Production Lead-Time: Future Year Requirement – Future Year Use. This aspect of the exception permits the agency to consider the normal production lead-time in determining the *bona fide* needs for an acquisition. Under the *Bona Fide* Needs rule, supplies produced in the next fiscal year are a *Bona Fide* Need of the next fiscal year because they are not used until the next fiscal year. The production lead-time exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency requires the supply in the next fiscal year and (2) in order to use the supply when required, the agency must fund production now. An agency may use current FY funds to start production of a supply required for and used in the next FY. Agencies may contract in the current FY for production of a supply delivery in the next FY if the supply contracted for cannot otherwise 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) The procurement must not be for standard, commercial items readily available from other sources. [Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 \(1959\).](#) If the item is a standard, commercial item readily available from other sources, the DoD FMR prohibits use of the delivery and production lead time exception to the *bona fide* needs rule to procure the item. [DoD FMR Vol. 3, Ch. 8, para.080304 A. 2.](#)



- (2) **NOTE:** The above descriptions of the Lead-Time exceptions come from the GAO Principles of Federal Appropriations Law (“Redbook”). These discussions, in turn, are based on a limited number of dated GAO opinions. The Production Lead-Time variant appears well settled in allowing the obligation in FY1 for a supply not required until FY2 if the above criteria are met. The Delivery Lead-Time variant is not as well settled in allowing this “back-dating” of the *Bona Fide* Need into FY1; because the case-law is sparse, sound legal analysis, considering the Fiscal Law Philosophy, will be necessary if faced with a Delivery Lead-Time issue.

- c. Stock-Level Exception. The stock level exception permits agencies to purchase sufficient readily available common-use standard type supplies to maintain adequate and normal (reasonable) stock levels. The government may use current year funds to replace stock consumed in the current fiscal year, even though the government will not use the replacement stock until the following fiscal year. The purpose of this exception is to prevent interruption of on-going operations between the fiscal years.



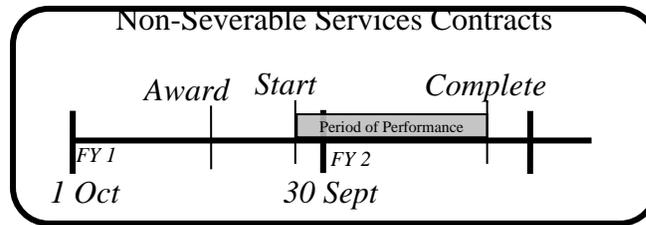
- (1) **Example:** The Department of Commerce produced a large number of “small business aids” that it distributed free to the public. During the fourth quarter of FY01, field offices were asked to inventory their stock of “aids” on hand to determine which aids were rapidly being exhausted so that stock could be replenished. It was determined that 263 titles should be retained and reprinted to replenish stock used during that fiscal year. The order for printing was placed with the government printing office (GPO) before the end of FY01, annual FY01 funds were obligated, but many of the aids were not distributed and used until FY02. Is the *bona fide* needs rule violated?
- (2) **Answer:** No. GAO stated that the facts clearly established the aids were a replacement of materials used in FY01, so FY01 funds could be obligated even though the aids were not used until FY02. GAO did note that the order for the aids must be firm and complete. If the Department of Commerce had edited the order or provided the manuscripts after FY01 ended, then FY02 funds would have to be used. Replacement stock does NOT include materials that must be especially created for a particular purpose and which require a lengthy period for creation. [Mr. Abraham Starr, Dept. of Commerce Letter, B-95380, Jun 1, 1950, 29 Comp. Gen. 489.](#) See also, [Printing & Binding Requisition Seeking to Obligate Expiring Current Appropriations, A-44006, Sept. 3, 1941, 21 Comp. Gen. 1159,](#) and [Mr. Betty Leatherman, Dept. of Commerce, B-156161, May 11, 1965, 44 Comp. Gen 695.](#)
- d. STOCKPILING. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

- (1) **EXCESS OF NORMAL USAGE.** Agencies may only fund the replenishment of stock items (common-use standard type supplies) up to their “normal usage.”
- (a) **Example:** The Veterans Administration stocked a quantity of chemicals that went bad before they were used. The label stated the chemicals were good for two years. In reviewing a government claim, GAO questioned whether VA complied with the *bona fide* needs rule when it stocked chemicals that would not be used within one fiscal year of their purchase. See [Mr. H. V. Higley, B-134277, Dec. 18, 1957.](#)
- (b) **Example:** Under the stock level exception, the Forest Service budgeted for 1000 slide rules but bought 5,800 at the end of FY84 by obligating FY84 money. They only used 1500 of them during FY85. GAO stated the Forest Service improperly obligating FY84 funds because they did not have a reasonable expectation that 5,800 replaced stock used during the fiscal year. [Mr. Hartgraves, Forest Service, B-235086, Apr. 24, 1991.](#)
- (2) **CREATION OF STOCK.** Given the goal of the stock-level exception is to prevent interruption of on-going operations between the fiscal years, agencies may not “create stock” under this exception. However, Agencies may not create a new stock of supplies - one not needed in FY1. An agency may not obligate funds when it is apparent from the outset that there will be no requirement until FY2.
- (a) **Example:** The Army created the new Common Access Cards (CACs, special plastic cards with an embedded chip) to be implemented on 1 Nov 2002. At that time, the Army maintained no stock level of blank cards. Can the Army use the stock level exception to justify obligating FY 2001 O&M to purchase enough stock for to cover making cards from 1 Nov 2002 thru 2 Feb 2003?
- (b) **Answer:** No. The general rule states that a supply is not a need until it is used. Here the cards will not be imprinted until 1 Nov 02. Viewed narrowly, this is a FY2002 need that should be funded with FY2002 funds. The stock level exception cannot be used to justify spending FY2001 O&M to create “stock” that will sit in a supply room.

- (c) **Nuance:** However, if the Army must receive the cards before the end of FY01 in order to prepare the cards and forward them to the field units (i.e. use the supply), the cards are a *Bona Fide* need of FY2001 and may be funded with FY2001 O&M. Additionally, if the cards are a BFN of FY 2002, the production lead time exception may allow the Army to order the cards in FY2001 if the contractor needs the intervening time for production of the cards.

E. Services.

1. General Rule: The *Bona Fide* Need for services does not arise until the services are rendered. [Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64](#); [EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 \(1985\)](#). Thus, in general, services must be funded with funds current as of the date the service is performed.
2. 2 Categories: The *bona fide* needs rule is applied differently depending on the nature of the service. There are two categories of service contracts: (1) Non-severable service contracts; and (2) Severable service contracts.
3. Non-severable Services:
 - a. A service is non-severable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years. Whether the subdivision is feasible or not is a matter of judgment that includes as a minimum a determination of whether the government has received value from the service rendered. [Funding for Air Force Cost Plus Fixed Fee level of Effort Contract, B-277165, Comp. Gen. \(Jan. 10, 2000\)](#).
 - b. The government must fund non-severable services contracts with dollars available for obligation at the time the contract is executed. Contract performance may cross fiscal years. [DFAS-IN 37-1, tbl. 8-1](#); [Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 \(1994\)](#) (fish and wildlife research projects); [Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 \(1986\)](#) (study on psychological problems of Vietnam veterans); [Comptroller General to W.B. Herms, Department of Agriculture, B-37929, 23 Comp. Gen. 370 \(1943\)](#) (cultivation and protection of rubber-bearing plants).



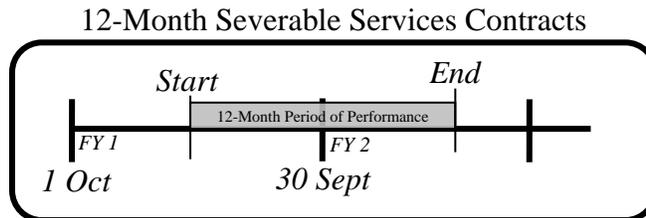
(1) **Example:** The Fish & Wildlife Service issues a research work order for a 4 year research study on the effects of harvesting frogs. The study is to produce a publishable report. The work order is non-severable because it contemplates a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year. The work order should be funded entirely out of the appropriation current at the time of award. Incremental funding or SAF clauses are inappropriate. [Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 \(1994\).](#)

(2) **Example:** The Financial Crimes Enforcement Network (FINCEN) wanted to improve web-based retrieval of financial intelligence by law enforcement. So, in June 2004, FINCEN awarded a contract to design, develop and deploy a web-based access system where law enforcement could securely log-onto the database from their computer and query the database for information. The system was to be complete by Sept. 2005 at an estimated cost of \$8.9 million. Instead of obligating the entire \$8.9 million at contract award, FINCEN incrementally funded the contract across multiple fiscal years. **Result:** GAO found this to be a non-severable service contract because FINCEN contracted for a result (the retrieval system) and the work could not be separated out by fiscal year. As a result, FINCEN should have obligated the entire \$8.9 estimated cost ceiling with funds current at the time of contract award. [Financial Crimes Enforcement Network – Obligations under a Cost Reimbursement, Nonseverable Services Contract, Comp. Gen. B-317139, 2009 CPD ¶158, 2009 WL 1621304, Jun. 1, 2009.](#)

4. Severable Services:

- a. A service is severable if it can be separated into components that independently meet a need of the government. The services are continuing and recurring in nature.

- b. Severable services thus follow the general service contract *Bona Fide Needs Rule*, and are the *bona fide* need of the fiscal year in which performed. [Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 \(1992\)](#); [EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 \(1985\)](#). Funding of severable service contracts generally may not cross fiscal years, and agencies must fund severable service contracts with dollars available for obligation on the date the contractor performs the services. [DFAS-IN 37-1, para. 080603, tbl. 9-1](#).
- c. Absent an exception, the default rule for severable services is to fund them with Current Year funds from date of award to 30 Sept and Next Year funds from 1 Oct until the end of contract.
- d. **10 U.S.C. § 2410a Statutory Exception.** DOD agencies (and the Coast Guard) may obligate funds current at the time of contract award to finance a severable service contract with a period of performance that does not exceed one year. [10 U.S.C. § 2410a](#). Similar authority exists for non-DOD agencies. [41 U.S.C. § 253l](#).



- (1) This authority allows an agency to fund severable service contracts that cross fiscal years with funds current at the time of award. [Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD ¶ 247](#) (Kelly AFB lawfully used FY 94 funds for an option period from 1 OCT 93 through 31 AUG 94, and a subsequent option for the period from 1 SEP 94 through 31 DEC 94).
- (2) This statutory exception is meant to give flexibility to annual funds so that all contracts do not have to end on 30 September. The exception only applies to annual year funds. It does not prohibit agencies with access to multiple year funds from entering into severable service contracts that exceed one year. However, it cannot be used to extend the period of availability of an expiring multiple year appropriation. [Severable Services Contracts, Comp. Gen. B-317636, 2009 CPD ¶ 89, 2009 WL 1140240, Apr. 21, 2009](#).

- e. **Note on Research & Development Contracts:** GAO has opined that a service contract structured as a cost reimbursement level of effort term contract (CPFF term contract) is presumptively by its nature a severable service contract, unless the actual nature of the work warrants a different conclusion (ex: clearly calls for an end product). This is because a CPFF *term contract* typically requires performance of a certain number of hours within a specified period of time rather than requiring completion of a series of work objectives. A CPFF *completion contract*, however, may very well be non-severable. See [Funding for Air Force Cost Plus Fixed Fee level of Effort Contract, B-277165, Comp. Gen. \(Jan. 10, 2000\)](#) (launch vehicle integration analysis and support services for deployed infrared technology satellites was a severable service); See [The Hon. Bev. Bryon, 65 Comp. Gen. 154, B-214597, \(1985\)](#) (finding that research and development level of effort contracts may be either severable or non-severable depending on the nature of the work and the government's ability to define the needed work in advance).
- (1) **Example:** A lifecycle management contract may be a severable services contract that must be funded with appropriations current at the time the contract is entered into. [Chem. Safety & Hazard Investig. Bd – Interagency agreement with GSA, B-318425, 2009 WL 5184705 \(Dec 8, 2009\)](#). In this case, the Chemical Safety Board (CSB) proposed to enter an interagency agreement (IA) with the general services administration (GSA) for both the provision of ID cards and the lifecycle management of the cards to include card request, registration, maintenance, renewal and termination for five years. GAO opined that the lifecycle management portion consisted of repetitive recurring tasks such that the IA was for a severable service.
- (2) **Example:** Near the end of FY10, the National Labor Relations Board (NLRB) entered into 37 indefinite quantity/indefinite delivery (ID/IQ) contracts for court reporting services to be executed primarily during FY11. GAO found that the services were properly identified as severable services and could be funded entirely up-front at the time the contracts were awarded. [National Labor Relations Board – Recording Obligations for Training and Court Reporting, B-321296 \(2011\)](#). GAO also concluded that NLRB's obligation of an estimated amount based on an estimate of the services it would need in the coming FY was proper.

F. **Training.**

1. Contracts for single training courses are considered similar to non-severable service contracts. In general, the training represents a single undertaking where the government receives the benefit of the training only when the employee has completed the training in full.
2. Training contracts may be obligated in full with fiscal year money current at the time performance begins even though the course extends into the next fiscal year. [Matter of: EEOC - Payment for Training of Management Interns, B-257977, 1995 U.S. Comp. Gen. LEXIS 739, 745.](#)
 - a. Training courses that begin on or after 1 October may constitute a *bona fide* need of the prior year if:
 - (1) The agency has an immediate need for the training in the prior year,
 - (2) Scheduling is beyond the agency's control, and
 - (3) The time between award of the contract and performance is not excessive.
 - (4) References: [Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course](#), B-238940, 70 Comp. Gen. 296 (1991) ("Leadership for a Democratic Society" 4-week course); [Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course](#), B-233243, Aug. 3, 1989. See [DFAS-IN 37-1. tbl. 8-1](#), Jan. 2008 (limiting the time for performance of training from civilian institutions to the first 90 days of the next FY).
 - b. Some multiple course training may be considered a severable service. For example, an advanced degree from an accredited university may include many separate courses. In that situation, the government employee receives the benefit of the training after each single course is completed. [Matter of: EEOC - Payment for Training of Management Interns](#), B-257977, 1995 U.S. Comp. Gen. LEXIS 739, 746; [Comptroller General to Secretary of the Interior](#), B-122928, 34 Comp. Gen. 432 (March 8, 1955).

- c. **Example:** In FY10, National Labor Relations Board (NLRB) coordinated for executive training for some senior officials. However, the training was not scheduled to begin until January 2011, well into FY11. NLRB obligated FY10 funds for the training, but the Office of Personnel Management (OPM), which manages the Federal Executive Institute that would provide the training, did not require the NLRB to send funds until 15 October 2010, two weeks after FY10 ended. GAO found that OPM's requirement did not mandate the use of FY11 funds, and since the training was not scheduled until January 2011, it was not a *bona fide* need of FY10. [National Labor Relations Board – Recording Obligations for Training and Court Reporting](#), B-321296 (2011).

G. Construction.

1. Contracts for construction are considered as similar to non-severable service contracts. **Construction contracts may constitute a *bona fide* need of the fiscal year in which the contract is awarded even though performance is not completed until the following fiscal year.** However, the requirement to enter into the contract must exist during the funds' period of availability. The contracting agency must intend for the contractor to begin work without delay.
2. A determination of what constitutes a *bona fide* need of a particular year depends upon the facts and circumstances of a particular year (e.g. weather). [Associate General Counsel Kepplinger](#), B-235086, Apr. 24, 1991. In analyzing *bona fide* needs for construction contracts, the agency should consider the following factors:
 - a. Normal weather conditions. A project that cannot reasonably be expected to commence on-site performance before the onset of winter weather is not the *bona fide* need of the prior fiscal year.
 - b. The required delivery date.
 - c. The date the government intends to make facilities, sites, or tools available to the contractor for construction work.
 - d. The degree of actual control the government has over when the contractor may begin work.

- (1) For example, suppose a barracks will not be available for renovation until 27 December 2016 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 2017 and the contract should be awarded in FY 2017 using FY 2017 funds. Accordingly, use of FY 2016 funds under these facts violates the *Bona Fide* Needs Rule.
3. The DoD FMR allows **agencies to obligate current year appropriations for maintenance and repair projects even though contractor performance may not begin until the next fiscal year**. The contract shall satisfy a *bona fide* need of the current year. DoD FMR, Vol. 3, Ch. 8, para. 080305.
 - a. Work must begin before January 1 of the following calendar year.
 - b. To determine the commencement of work, the contracting officer should visually inspect the site or obtain documentary evidence that costs have been incurred or material ordered to allow performance of the contract.
- H. **Leases**. Identical to the severable services exception, 10 U.S.C. 2410a provides statutory authority to lease real or personal property, including the maintenance of such property (when contracted as part of the lease agreement) for up to 12 months with funds current at the time of contract award.
 1. **Example:** The Securities and Exchange Commission (SEC) entered into a 10-year lease contract for the Constitution Center building in Washington, D.C., which it planned to use as its headquarters. The entire lease was estimated to cost between \$371.7 million and \$454.4 million (based on the amount of space ultimately leased). This cost was between one third and one half of the SEC's entire annual appropriation for Salaries and Expenses (which included leases) of \$1.1 billion. Thus, the SEC intended to incrementally fund the lease over multiple years. GAO found that because this was a 10-year firm term lease, it was non-severable and should have been funded entirely at the time the lease was entered into. [Securities and Exchange Commission – Recording of Obligation for Multiple-Year Contract, B-322160 \(2011\)](#).

IV. MULTIPLE YEAR APPROPRIATIONS

A. Introduction.

1. There is a clear distinction between multiple year appropriations and multi-year contracts. Proper analysis requires consideration of fiscal law issues independently from the type of contract use.
2. Multiple year appropriations are those appropriations that expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. [Office of Management and Budget Circular A-11, Instructions on Budget Execution](#), § 20.4(c) (2012). See also [DOD FMR, Vol. 3, Ch. 13, para. 130202.A.1.b.](#)
3. The multiple year appropriations usually provided to DOD include:
 - (1) Overseas, Humanitarian, Disaster, and Civic Aid: 2 years.
 - (2) Research, Development, Test, and Evaluation (RDT&E): 2 years.
 - (3) Procurement: 3 years.
 - (4) Military Construction: 5 years.
 - (5) Shipbuilding and Conversion, Navy: 5 years, except that certain obligations may be incurred for longer periods.
4. Agencies must have all of the funds necessary for an entire given procurement to ensure stable production runs and lower costs. This policy is referred to as "full funding." [DOD FMR, Vol. 2A, para. 010202.](#)
5. The *Bona Fide* Needs Rule and most of its exceptions apply to multiple year appropriations. [Honorable Byron](#), B-235678, 30 Jul 1990; [Defense Technical Information Center-Availability of Two Year Appropriations](#), B-232024, 68 Comp. Gen. 170 (1989); [Chairman, Committee on Appropriations, House of Representatives](#), B-132900, 55 Comp. Gen. 768 (1976).
 - a. A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 2015 RDT&E Army Appropriation ([Pub. L. 113-76](#)), which is available for obligation until 30 September 2016, may be obligated for the needs of FY 2015 and 2016; it is not available for the needs of FY 2017.

- b. The statutory severable services exception, 10 U.S.C. 2410a, does NOT apply to severable services contracts funded with multiple-year appropriations. [Severable Services Contracts](#), Comp. Gen. B-317636, 2009 CPD ¶ 89, 2009 WL 1140240, Apr. 21, 2009.
6. Administrative controls, including regulations, may impose independent restrictions on the use of multi-year funds. See, e.g., [DOD FMR, Vol. 2A, Budget Formulation and Presentation](#).

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

1. As a general rule, revolving funds are “no-year” funds that do not depend on annual appropriations. [10 U.S.C. § 2210\(b\)](#). The GAO has ruled that the *bona fide* needs rule does not apply to “no-year” funds. [Small Business Administration](#), 43 Comp. Gen. 657, 661 (1964); [Education and the Workforce](#), B-279886 (1998).
2. Parking Funds through Interagency Acquisitions. The GAO has ruled that the *Bona Fide* Needs Rule does apply to funds placed by an agency into a revolving fund and an agency may not “bank” funds to meet future needs. [Implementation of the Library of Congress FEDLINK Revolving Fund](#), Comp. Gen. B-288142, Sep. 6, 2001; [Continued Availability of Expired Appropriation for Additional Project Phases](#), Comp. Gen. B-286929, Apr. 25, 2001. “Parking” or “banking” funds involves the transfer of appropriated funds to a revolving fund through an interagency agreement to improperly keep the parked funds available for new obligations once the appropriated funds expire. GAO has repeatedly admonished agencies for attempting to park funds in violation of an appropriation’s period of availability.
 - a. Elements of the General Services Administration (GSA), e.g., The Federal Systems Integration and Management Center (FEDSIM) and the Federal Computer Acquisition Center (FEDCAC), provide services under separate authority (a designation by the Office of Management and Budget) as an executive agent for government wide acquisitions, and the Information Technology Fund ([40 U.S.C. § 757](#)).

b. Parking funds in the GSA Information Technology Fund was a possible violation of the Antideficiency Act when the United States Army Claims Service (USARCS) provided the GSA fund with \$11.6 million of FY 1997 through FY 2000 Operation and Maintenance Funds for procurement of support services and information technology. [See Office of the Inspector General of the Department of Defense, Army Claims Service Military Interdepartmental Purchase Requests](#), Report No. D-2002-109 (June 19, 2002) (hereinafter DOD REPORT NO. 02-109).

- (1) Of the \$11.6 million, \$3.8 million were obligated without defining USARCS' needs and without establishing a *bona fide* need for tasks relating to the personnel claims software development project, the torts and affirmative claims software development project, and the acquisitions of hardware and software. \$2.8 million of these funds were "banked" in the GSA IT Fund to meet "future" requirements.
- (2) The report also found that \$8.5 million of the funds were obligated within the last three days of the applicable FY. Although USARCS could technically obligate funds at the end of a fiscal year, the obligation should be based on a valid need in the fiscal year of the appropriation in order to comply with the *bona fide* need rule.²

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

- (1) **Facts:** GSA is the single government wide provider of vehicles in the federal government. In 2009, GSA had a Summer AutoChoice Program to provide agencies with an efficient method for buying new cars. In the summer, the car manufacturers were switching to the next year's model cars so GSA could not order them. Instead, GSA allowed agencies to go on-line during the 4th quarter of the FY and place orders for next year's car models based on an estimate of what was likely to be available. A percentage was added to the price to approximate next year's price increases. At the time of the order, agencies obligated FY1 funds. GSA did not do anything with the order at that time. After 1 October, new model information was available. Agencies then went online again, re-selected all the model information, got a finalized price quote and re-submitted their order. GSA took the finalized order and processed it in

² The report also found that USARCS had violated the "purpose" *bona fide* need rules, in addition to "time" *bona fide* need rules. Specifically, USARCS incorrectly obligated \$3.3 million of O & M funds for the development of personnel claims software and the torts and affirmative claims software instead of research, development, test and evaluation, and/or procurement funds. [See DOD REPORT NO. 02-109](#), pp. 16-18. Last, the report found that USARCS may have exercised better control over administrative costs by partnering with larger Army contracting offices. *Id.* at pp. 10-11.

FY2 with the obligated FY1 funds. Once the manufacturer received the order, the vehicles would arrive about three months later (in FY2).

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

(3) **Answer:** Yes. From a fiscal standpoint, the vehicles are classified as a “supply” so they are a *bona fide* need when they can be used. Here, the vehicles arrived in FY2 so the agencies *bona fide* need did not arise until the next fiscal year. GSA cited to a statute for intra-agency acquisitions, 31 USC 1501(a)(3). This statute provides that an agency “incurs an obligation when it places an order required by law to be made from another agency.” GSA believed that this statute allowed the agency to place the order in the summer and obligate FY1 funds, even though the order wasn’t going anywhere until FY2. GAO disagreed. Although the agency was required to order from GSA, the 4th quarter FY1 “order” was “inchoate” or incomplete. GAO stated that agencies may not incur obligations against current appropriations based on inchoate or incomplete orders. In this case, the agencies had to resubmit all the order information in October when actual information was available. Only in October was the agencies order firm enough to justify obligation of funds. [Natural Resources Conservation Service – Obligating Orders with GSA’s AutoChoice Summer Program](#), Comp. Gen. B-317249, 2009 WL 2004210, July 1, 2009.

(4) **Note:** Why wouldn’t the production lead-time exception apply to this scenario? First, GSA did not raise this exception as a defense to GAO. Second, even if it had raised it, the exception would still only apply to a firm order that funds could be obligated to. So, until the firm order was submitted in October, use of the production lead-time exception could not be considered. In theory, if GSA had transmitted a firm and complete order to the car manufacturer during the 4th quarter with FY1 funds obligated to the order, a production lead time exception would apply because it took the car manufacturer three months to produce and deliver the vehicles. Thus, it would allow delivery of the vehicles in FY2. (Of course, this is assuming that the needed vehicles are custom enough that they could not be procured elsewhere right off the lot.)

VI. BONA FIDE NEEDS RULE APPLIED TO INTERAGENCY ACQUISITIONS.

A. See the Chapter on Interagency Acquisitions for a more complete fiscal analysis.

- B. The Economy Act ([31 U.S.C. § 1535](#)) provides general authority for one agency (requesting agency) to transfer funds to another agency (servicing agency) to enter into a contract under certain conditions. The DOD FMR provides that the *bona fide* need determination is made by the requesting activity and not by the servicing activity. A servicing activity should, however, refuse to accept an Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. [DOD FMR, Vol. 11A, Ch. 3, para. 030403](#).

- C. If the servicing agency does not award the contract before the end of the fiscal year, the funds expire as provided by [§ 1535\(d\)](#) and the funds must be de-obligated and returned to the requesting agency. Neither the servicing agency nor the requesting agency can use these funds for new obligations. Memorandum, Under Secretary of Defense Dov S. Zakheim, to Chairman of the Joint Chiefs of Staff, et. al, subject: Fiscal Principles and Interagency Agreements (24 Sep. 2003). See [Interagency Agreement with the Department of Energy for Online Research and Education Information Service](#), Comp. Gen. B-301561 (Jun. 14, 2004).

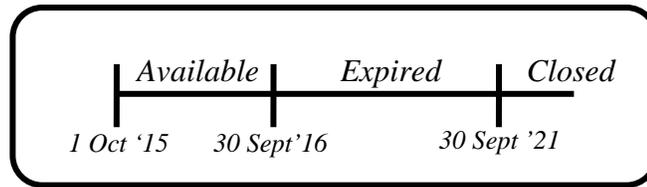
- D. When an authority other than the Economy Act is used for an interagency agreement, the de-obligation provisions of 31 U.S.C. § 1535 may not apply. If funds were properly obligated, they remain obligated and can continue to be used by the other agency. See [Transfer of Fiscal Year 2003 Funds from the Library of Congress to the Office of the Architect of the Capitol](#), Comp. Gen. B- 302760 (May 17, 2004). Generally, funds are properly obligated if you have a legitimate separate authority, a written agreement with the other agency, and a *Bona Fide* Need of the current fiscal year. (GAO provides an excellent explanation of Economy Act and non- Economy Act transactions in [National Park Service Soil Surveys](#), Comp. Gen B-282601 (September 27, 1999)).

VII. USE OF EXPIRED/CLOSED APPROPRIATIONS.

- A. Definitions.
 - 1. **Current Appropriation.** An appropriation that is still available for new obligations under the terms of the applicable appropriations act. [31 U.S.C. § 1502](#).

 - 2. **Expired Appropriation.** An appropriation whose period of availability has ended and is no longer available for new obligations. It retains its fiscal identity and is available to adjust and liquidate previously incurred obligations for five years. [31 U.S.C. § 1553\(a\)](#).

Appropriation Life-Cycle (1 Year Money.)



3. **Closed Appropriation.** An appropriation that is no longer available for any purpose. An appropriation becomes "closed" five years after the end of its period of availability as defined by the applicable appropriations act. [31 U.S.C. § 1552\(a\)](#).

B. Expired Appropriations.

- a. Some adjustments are possible after the end of the period of availability, but before an account closes. [31 U.S.C. § 1553\(a\)](#).
- b. Appropriations retain their complete accounting classification identifiers throughout the entire five-year "expired" period. See [DOD FMR, Vol. 3, Ch. 13, para. 130208.B](#).
- c. Appropriations remain available for recording, adjusting, and liquidating prior obligations properly chargeable to the account. [31 U.S.C. § 1553\(a\)](#). See also [DOD FMR, Vol. 3, Ch. 10, para. 1002.C](#). However, amounts remaining in expired accounts cannot be used to satisfy an obligation more appropriate to charge to a current appropriation. See [Expired Funds and Interagency Agreements Between GovWorks and the Department of Defense](#), B-308944, July 17, 2007 (agency improperly charged current needs in 2005 to an expired 2004 appropriation).
- d. 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:
 - (1) For the Department of Defense, the Under Secretary of Defense (Comptroller) may approve applicable obligations in excess of \$4 million. [31 U.S.C. § 1553 \(c\)\(1\)](#). See also [DOD FMR, Vol. 3, Ch. 10, para. 1002306](#).

- (2) For all changes exceeding \$25 million, the Under Secretary of Defense (Comptroller) must take the following actions: notify Congress of an intent to obligate funds and wait 30 days before obligating the funds. [31 U.S.C. § 1553\(c\)\(2\)](#); See also DOD FMR, Vol. 3, Ch. 10, para. 1002307.

- e. For purposes of the notice requirements discussed in the preceding paragraph, a "contract change" is defined as a change to a contract that requires the contractor to perform additional work. The definition specifically excludes adjustments necessary to pay claims or increases in contract price due to the operation of an escalation clause in the contract. [31 U.S.C. § 1553\(c\)\(3\)](#). See also DOD FMR, Vol. 3, Ch. 10, para. 100304.

- f. The heads of the defense agencies are required to submit annual reports on the impact of these revisions to the procedures for accounting for expired funds and for closing accounts.

C. Closed Appropriations.

- 1. On 30 September of the fifth year after the period of availability of a fixed appropriation ends:
 - a. The account is closed;

 - b. All remaining balances in the account, obligated and unobligated, are canceled; and

 - c. No funds from the closed account are available thereafter for obligation or expenditure for any purpose. 31 U.S.C. § 1552. See also DOD FMR, Vol. 3, Ch. 10, para. 100303. and [DOD FMR, Vol. 3, Ch. 15, para. 150308](#)

- 2. Agencies will deposit collections authorized or required to be credited to an account, but received after an account is closed, in the Treasury as miscellaneous receipts. [31 U.S.C. § 1552\(b\)](#); [Appropriation Accounting - Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130](#). See also DOD FMR, Vol. 3, Ch. 10, para. 100311 B.

- a. After an account is closed, agencies may charge obligations (and adjustments to obligations) formerly chargeable to the closed account and not otherwise chargeable to another current agency appropriation to any current agency account available for the same general purpose. [31 U.S.C. § 1553\(b\)](#). See also DOD FMR, Vol. 3, Ch. 10, para. 100310.

- b. Charges may not exceed the lesser of:
 - (1) The unexpended balance of the canceled appropriation (the unexpended balance is the sum of the unobligated balance plus the unpaid obligations of an appropriation at the time of cancellation, adjusted for obligations and payments which are incurred or made subsequent to cancellation, and which would otherwise have been properly charged to the appropriation except for the cancellation of the appropriation); or
 - (2) The unobligated expired balance of the original appropriation available for the same purpose; or
 - (3) One percent (1%) of the current appropriation available for the same purpose. [31 U.S.C. § 1553\(b\)\(2\)](#); DOD FMR, Vol. 3, Ch. 10, para. 100310 B..

- c. Under an equity theory, if a suit is filed prior to funds' expiration, a federal court can enjoin the expiration of funds to allow for the payment of a judgment. [National Ass'n of Regional Councils v. Costle](#), 564 F.2d 583 (D.C. Cir. 1977).

VIII. USE OF EXPIRED FUNDS: FUNDING REPLACEMENT CONTRACTS / CONTRACT MODIFICATIONS.

- A. **General.** There are four important exceptions to the general prohibition on obligating funds after the period of availability:
 - 1. Contract Modifications;
 - 2. Bid Protests
 - 3. Terminations for Default; and

4. Terminations for Convenience (only in limited circumstances).

B. Contract Modifications Affecting Price. Contract performance often extends over several fiscal years, and modifications to the contract occur for a variety of reasons. If a contract modification results in an increase in contract price, and the modification occurs after the original funds' period of availability has expired, then proper funding of the modification is subject to the *bona fide* needs rule. See also [DOD FMR, Vol. 3, Ch. 8, para. 080304.B](#). Certain adjustments for contract modification can be made to expired funds, if the rules below are met. Once the expired funds close, however, they are no longer available for adjustment.

1. General Rule:

a. When a contract modification does not represent a new requirement or liability, but instead only modifies the amount of the government's pre-existing liability, then such a price adjustment is a *bona fide* need of the same year in which funds were obligated for the original contract.

(1) To determine if an adjustment is modifying a pre-existing liability, one must ask if "the government's liability arises and is enforceable under a provision in the original contract." **If yes, then the adjustment is attributable to an antecedent liability and original funds are available for obligation for the modification.** [GAO Redbook, Appropriations Law – Volume I](#), Page 5-35.

(2) Provisions in the contract that may result in such "antecedent liability" include most clauses granting equitable adjustments to the contract price. Thus if modifications are within the scope of the changes clause, within the scope of a government property clause or within the scope of a negotiated overhead rates clause, then the change is essentially "within the contract's statement of work" and it is considered a *bona fide* need of the same year in which funds were obligated for the original contract. [GAO Redbook, Appropriations Law, Vol. I](#), page 5-34; [Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase](#), B-219829, 65 Comp. Gen. 741 (1986); [Obligations and Charges Under Small Business Administration Service Contracts](#), B-198574, 60 Comp. Gen. 219 (1981).

- (3) The determination of whether a contract change is “in-scope” is highly fact specific and depends on the application of multiple factors. For a more complete discussion, please refer to the Contract Changes Outline in the Contract Attorneys Deskbook.
- (a) As a shortened discussion, GAO, courts and boards look to the materiality of the change to see to what extent the product or service, as changed, differs from the requirements of the original contract. They may examine (1) changes to the function/type of work, (2) changes in quantity; (3) the number and cost of changes; and (4) changes to the time of performance. These factors and their application are discussed at length in the Contract Changes outline.
- (b) As a shortened discussion, a contract change is generally within the scope of a contract’s changes clause if either test is met below:
- (i) Offerors (prior to award) should have reasonably anticipated this type of contract change based upon what was in the solicitation. In other words, the field of competition for this contract, as modified, is not significantly different from that obtained for the original contract. [Krykowski Const. Co., Inc. v. U.S.](#), 94 Fed.3d 1537 (Fed. Cir. 1996); [H.G. Properties A. LP v. U.S.](#), 68 Fed. Appx. 192 (Fed. Cir. 2003).

OR

- (ii) The contract, as modified, is for essentially the same work as the parties originally bargained for. The contract, as modified could “be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into.” See [Freund v. United States](#), 260 U.S. 60 (1922); [Shank- Artukovich v. U.S.](#), 13 Cl. Ct. 346 (1986); [Air-A-Plane Corp. v. United States](#), 408 F.2d 1030 (Ct. Cl. 1969); [GAP Instrument Corp.](#), ASBCA No. 51658, 01-1 BCA ¶ 31,358; [Gassman Corp.](#), ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.
- (4) Limitations. For an expired, fixed appropriations account, obligations for contract changes to a program, project, or activity, may not exceed:

- (a) \$4 million in one FY without the approval of the head of the agency. 31 U.S.C. § 1553 (c)(1). Within DoD, the action is submitted to the USD(C) for approval. [DOD FMR, Vol. 3, Ch. 10, paras. 100204 and 100206.E.](#)
 - (b) \$25 million in one FY without notice to Congress and a 30 days waiting period. [31 U.S.C. § 1553 \(c\)\(1\).](#) [31 U.S.C. § 1553 \(c\)\(2\).](#) See also [DOD FMR, Vol. 3, Ch. 10, para. 100205.](#)
- b. Increases to Quantity: The Government Accountability Office and [Volume 3](#), Chapter 8 of the DoD Financial Management Regulation offer quite a bit of guidance on how to determine the funding source for contract modifications that add a quantity of supplies or additional services. The DoD FMR should be consulted on fact specific questions.
 - (1) In general, increases to the quantity of items to be delivered on a contract are viewed as outside the scope of most changes clauses. Thus, a modification to increase quantity will amount to a new obligation chargeable to funds current at the time the modification is made. See [Request Concerning Funding of Contract Modification After Expiration of Appropriations](#), B-207433 (1983); But see [Caltech Service Corporation, B-240726 \(1983\)](#)(Contract modification which involves increase in estimated cargo tonnage under one line item of consolidation and containerization requirements contract, which does not affect unit price or contractor's responsibilities under the contract, does not constitute a cardinal change since the nature and purpose of the original contract remains unchanged).
 - (2) Example: The IRS issued a task order with FY1 funds for a specific amount of computer equipment under an ID/IQ contract. There was a cost underrun (it cost less money), so the IRS proposed to modify to the task order in FY2 to use the FY1 money it “saved” to purchase additional computers. GAO opined that a modification of a contract to increase the quantity constitutes a new obligation and is chargeable only to funds current at the time of the modification, even though it was an ID/IQ contract and the IRS argued it “needed” the computers in FY1 but had limited funds available. [Modification to Contract Involving Cost Underrun](#), B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995);

- (3) Example: In FY7, The Army had a *bona fide* need for 557 thermal viewers. Due to a limitation of funds, the Army was only able to enter into a fixed price contract for 509 viewers. The Army obligated \$8.2 million for the viewers. In FY8, Army modified the contract to purchase an additional 285 viewers, obligating FY8 funds. In FY9, there was a cost underrun (it cost less than 8.2 million to produce 509 viewers). The Army wanted to use the remaining FY7 funds to purchase 48 viewers. GAO opined that the Army could not use surplus FY7 funds in a succeeding fiscal year. Even though the Army had a *bona fide* need for 557 viewers in FY7, the Army chose not to obligate for 557 viewers. Any increased quantities in FY9 are a *bona fide* need of FY9. The funds do not relate back. [Magnavox—Use of Contract Underrun Funds](#), B-207433, 83-2 CPD ¶ 401 (1983).
- (4) DoD FMR Guidance on Increases in Quantity. “Changes in the quantity of the major items called for by a contract generally are not authorized under the “Changes” clause. Therefore, a change that increases the number of end items ordered on a contract is a change in the scope of the contract and would have to be funded from funds available at the time the change is made.”
- (a) “For example, if the original contract provided for delivery of 50 items and a modification was issued to provide for the delivery of 70 items, the additional 20 items would represent a change in the scope of the contract. . . .However, changes in the quantity of subsidiary items under a contract, such as spare parts, generally are considered to be within the scope of a contract unless they are so significant that they alter the basic contractual undertaking. See also [DOD FMR, Vol.3, Ch. 8, para. 080304.C](#).
- (5) Severable Services: A modification providing for increased additional deliverable services must be charged to the fiscal year or years in which the services are rendered. [Dept. of Health & Human Servs.—Multiyear Contracting & the Bona Fide Needs Rule](#), B-322455, Aug. 16, 2013; [Hartgraves](#), B-235086, 1991 WL 122260 (Comp. Gen)(Apr 24, 1991); [Dept. of the Interior, FY Approp. Chargeable for Contract Modifications](#), B-202222, 61 Comp. Gen. 184 (1981), aff’d upon reconsideration, Aug. 2, 1983; [Acumenics Research & Tech.](#), B-224702, 87-2 CPD ¶128 (Aug 5, 1987). Note: In dicta, GAO has suggested that an increased services modification to a contract awarded for 12 months under 2410a would relate back to the funds initially placed on the contract. See [GAO Redbook](#), Volume I, Appropriations Law, page 5-34 (2008).

2. General Rule for Cost –Reimbursement Contracts. Contract modifications that increase the original estimated cost ceiling of a contract are funded with an appropriation current at the time the modification is signed by the contracting officer. The reason is that the agency cannot anticipate the need for or the amount of cost increases at the time of award and ultimately, this type of modification is viewed as discretionary in nature. Therefore, GAO considers it a *bona fide* need at the time of modification. [FINCEN – Obligations Under a Cost Reimbursement Nonseverable Services Contract](#), Comp. Gen. B-317139, 2009 CPD ¶158, 2009 WL 1621304, June 1, 2009.
3. Cost Plus Fixed Fee - Level of Effort Contracts. See also Contract Types and Contract Changes outlines.
 - a. A term level of effort contract is by presumption, a severable services contract. This is because it requires the performance of a certain number of hours of work within a specified time period, rather than requiring the completion of a series of work objectives. [FAR 16.306\(d\)\(2\)](#); [EPA Level of Effort Contracts](#), B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216. GAO has held that in some cases, this presumption can be overcome because it is always the nature of the work being performed, not the contract type, that drives the analysis. [Honorable Byron](#), B-235678, 30 July 1990; [Funding for Air Force CPMF Level of Effort Contract](#), B-277165, 10 Jan. 2000.
 - b. A completion contract, in contrast, is generally a non-severable services contract because it requires the contractor to complete and deliver a specified end product. [FAR 16.306\(d\)\(1\)](#).
 - c. A severable term level of effort contract cannot be converted by modification into a non-severable completion-type level of effort contract. [EPA Level of Effort Contracts](#), B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216.
- C. Bid Protests. Funds available for obligation on a contract at the time a protest is filed shall remain available for obligation for 100 calendar days after the date on which the final ruling is made on the protest. This authority applies to protests filed with the agency, at the Government Accountability Office (GAO), or in the Court of Federal Claims. [31 U.S.C. § 1558](#); [FAR 33.102\(c\)](#); [DFAS-IN 37-1](#), para. 080606.
- D. Terminations for Default (T4D).

1. Replacement Contract: A new contract the agency enters into to satisfy a continuing *bona fide* need for a good or service covered by the original contract that was terminated. [Lawrence W. Rosine Co.](#), B-185405, 55 Comp. Gen. 1351 (1976).
2. If a contract or order is terminated for default, and the *bona fide* need still exists, then the originally obligated funds remain available for obligation for a re-procurement, even if they otherwise would have expired. The agency must award the re-procurement contract on the same basis. The contract must be substantially similar in scope and size as the original contract and awarded without delay. [DOD FMR, Vol. 3, paragraph 080303.D](#); [Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action](#), B-210160, Sept. 28, 1983, 84-1 CPD ¶91; [Lawrence W. Rosine Co.](#), B-185405, 55 Comp. Gen. 1351 (1976). The policy reasons for allowing the use of original funds is to facilitate contract administration.
3. If additional funds are required for the replacement contract, and the funds have otherwise expired, then under certain circumstances, the original year's funds may be used to fund the additional cost (and if listed conditions are not met or funds are unavailable, then current funds may be used). See DoD FMR, Vol. 3, Ch. 10, para. 1002308; [DFAS-IN 37-1, tbl. 8-7](#).
4. As a remedy for the government, the agency may retain all re-procurement or completion costs, liquidated damages and performance bond money from the contractor as “refunds” to be applied to the replacement contract’s specific appropriation in order to make the appropriation “whole.” [Settlement of Faulty Design Dispute](#), B-220210, 65 Comp. Gen. 838 at *4-7 (Sept. 8, 1986); [Department of the Interior—Disposition of Liquidated Damages Collected for Delayed Performance](#).

E. Terminations for Convenience of the Government (T4C).

1. General Rule: A termination for the convenience of the government generally extinguishes the availability of prior year funds remaining on the contract. In most instances, such funds are not available to fund a replacement contract in a subsequent year. DOD FMR, Vol. 3, Ch. 10, para. 100308.
2. Exceptions. Funds originally obligated may be used in a subsequent fiscal year to fund a replacement contract if the original contract was terminated as a result of:

- a. Court Order;
 - b. Determination by a contracting officer that the contract award was improper due to explicit evidence the award was erroneous; or
 - c. Determination by other competent authority (e.g. a Board of Contract Appeals) that the contract award was improper. DOD FMR, Vol. 3, para. 100308; [Funding of Replacement Contracts](#), B-232616 (1988). If the contracting officer decides contract award was improper, the agency must document its determination with appropriate findings of fact and law. [Dept. of Labor – Replacement Grants](#), B-322628, Aug. 3, 2012.
3. If the original award was improper and the contract is terminated for convenience, either by the contracting officer or by judicial order, then the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:
- a. The original award was made in good faith;
 - b. The agency has a continuing *bona fide* need for the goods or services involved;
 - c. The replacement contract is of the same size and scope as the original contract; and
 - d. The replacement contract is executed without undue delay after the original contract is terminated for convenience. [Funding of Replacement Contracts](#), B-232616, 68 Comp. Gen. 158, 162 (Dec. 19, 1988), DOD FMR, Vol. 3, para. 100308; [DFAS-IN 37-1, tbl. 8-7](#).
 - e. If all of the conditions above cannot be met, then current year funds shall be used to fund the requested action. DoD FMR, Vol. 3, Ch.10 para. 100308.

- f. Example: The U.S. Mint contracted for an asbestos abatement contract in FY1. Subsequently, a federal district court ordered the Mint to terminate the award and re-solicit. The Mint T4C'd the contract. If the FY1 funds have expired, may the Mint still obligate those funds on a replacement contract? Yes, provided the original award was made in good faith, the Mint has a continuing *bona fide* need for the services, the replacement contract is of the same size and scope as the original contract and the replacement contract was executed without delay. [Funding of Replacement Contracts](#), B-232616, 68 Comp. Gen. 158 (Dec. 19, 1988).

IX. MULTI-YEAR CONTRACTS AND FULL FUNDING POLICY

A. Full Funding Policy.

1. It is the policy of the Department of Defense to fully fund procurements of military useable end items in the fiscal year in which the item is procured. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.A](#). The full funding policy is intended to prevent the use of incremental funding, under which the cost of a weapon system is divided into two or more annual portions or increments. Thus, full funding provides disciplined approach for program managers to execute their programs within cost and available funding.
2. The total estimated cost of a complete, military useable end item or construction project must be fully funded in the year it is procured. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B](#).
3. There are two basic policies concerning full funding:
 - a. The policy rationale is to provide funds in the budget for the total estimated cost of a complete, military usable end item to document the dimensions and cost of a program. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.1](#).
 - b. Exceptions to this policy are advance procurement for long lead-time items and advance economic order quantity (EOQ) procurement. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.2](#).

4. The DOD full funding policy is not statutory. Violations of the full funding policy do not necessarily violate the Anti-Deficiency Act. [Newport News Shipbl'dg and Drydock Co.](#), B-184830, Feb. 27, 1976, 76-1 CPD ¶ 136 (holding option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).
- B. Incremental Funding of Major Defense Systems. The efficient production of major defense systems has necessitated two general exceptions to the full funding policy. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.2](#); [DFARS 217.172](#).
1. Advance Procurement (Long Lead-time Items). Advance procurement for long lead-time items allows acquisition of components, material, parts, and effort in an earlier fiscal year than the year the government acquires the related end item.
 - a. To be eligible for advance procurement, long lead-time items must have a significantly longer lead-time than other items. The cost of the advanced procurement items must be relatively small when compared to the remaining costs of the end item.
 - b. An annual budget request must include at least the estimated termination liability for long lead-time item procurements. The advanced procurement is for one fiscal year's program increment. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.C.3](#); [DFARS 217.172](#).
 2. Economic Order Quantity (EOQ) Procurement. Advance EOQ procurement for multi-year procurement allows the agency to acquire components, materials, and parts for up to five fiscal-year program increments to obtain the economic advantage of multi-year procurements. The advance procurement may obligate the termination costs, or, if cheaper, the entire cost. The government may also include EOQ costs in an unfunded cancellation clause. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.C.4](#); [DFARS 217.172](#).
- C. Incremental Funding of RDT&E Programs.
1. The government executes the RDT&E Program through the incremental funding of contracts and other obligations. [DOD FMR, Vol. 2A, Ch. 1, para. 010213](#).

2. Program managers using RDT&E usually prefer to incrementally distribute funding among various programs, giving more to those programs showing progress and withholding from other programs.
 3. The incremental funding policy budgets an amount for each fiscal year sufficient to cover the obligations expected during that fiscal year. Each contract awarded limits the government's obligation to the costs estimated to be incurred during the fiscal year. The government obligates funds for succeeding years during later years. Through the incremental funding policy, the government maintains very close control over R&D programs by limiting their funding.
 4. Contract Provisions.
 - a. An incrementally funded cost-reimbursement contract contains [FAR 52.232-22](#), Limitation of Funds. This provision limits the government's obligation to pay for performance under the contract to the funds allotted to the contract. The contract also contains a schedule for providing funding. Typically, the contractor promises to manage its costs and to perform the contract until the government provides the next increment.
 - b. Incrementally funded fixed-price contracts contain a similar clause, Limitation of Government's Obligation. See [DFARS Part 232.704-70](#) and [DFARS 252.232-7007](#).
 - c. The government allots funds to the contract by an administrative modification identifying the funds.
 - d. To prevent funding gaps associated with late appropriations, the contracting officer may use current research and development funds to fund contract performance for 90 days into the next fiscal year.
 5. Incremental funding transforms two-year RDT&E appropriations into one-year funds. However, the government may obligate RDT&E funds during their second year of availability. Frequently, agencies receive permission from the appropriation manager to obligate funds during the second year where problems prevent obligating an annual increment during the first year. [Defense Technical Information Center--Availability of Two Year Appropriations](#), B-232024, 68 Comp. Gen. 170 (1989).
- D. Multi-year Contracts. [10 U.S.C. 2306b](#); [10 U.S.C. 2306c](#).

1. Multi-year contracts is a generic term describing the process under which the government may contract for the purchase of supplies or services for more than one year, but not more than five program years. Such contracts may provide that performance during the subsequent years of the contract is contingent upon the appropriation of funds, and generally provide for a cancellation of payments to be made to the contractor if such appropriations are not made. [DOD FMR, Vol. 2A, Ch.1 , para. 010203.A.](#)
 2. Title 10, U.S.C. § 2306b provides that the head of a contracting agency may enter into a multi-year contract for the acquisition of “property” (i.e., major end items). This authority is subject to a significant number of statutory limitations and approval criteria. [10 U.S.C. § 2306b](#); [DFARS 217.172](#); [DOD FMR, Vol. 2A, Ch.1 , para. 010203.B.](#)
 3. Similar authority at 10 U.S.C. § 2306c provides that the head of a contracting agency may enter into a multi-year contract for the acquisition of services, to include environmental remediation services. This statute is also subject to a significant number of limitations and approval criteria. [10 U.S.C. § 2306c](#); [DFARS 217.171.](#)
 4. The DFARS restricts the use of multi-year contracts for supplies to only those for complete and usable end items. [DFARS 217.172 \(e\)\(5\)](#). In addition, the DFARS restricts the use of advanced procurement to only those long-lead items necessary in order to meet a planned delivery schedule for complete major end items. [DFARS 217.172 \(e\)\(6\)](#).
- E. Incremental Funding of Fixed-Price Contracts. [DFARS 232.703-1](#) and [252.232-7007](#).
1. Department of Defense policy is to fully fund fixed price contracts, as opposed to incremental funding. Incremental funding is the partial funding of a contract or an exercised option with the anticipation that additional funds will be provided at a later time.
 2. Exception #1: DoD permits incremental funding of service contracts if:
 - a. The contract (excluding any options) or any exercised option does not exceed one year in length, and
 - b. Is incrementally funded using funds available (unexpired) as of the date the funds are obligated.

3. Exception #2: DoD permits incremental funding on contracts funded with research and development appropriations as long as the funds are multiple year funds.
4. Exception #3: Congress has otherwise authorized incremental funding.

X. MISCELLANEOUS

A. Options.

1. Contracts with options are one means of ensuring continuity of a contractual relationship for services from fiscal year to fiscal year. The contract continues to exist, but performance must be subject to the availability of funds. [Contel Page Servs., Inc.](#), ASBCA No. 32100, 87-1 BCA ¶ 19,540.
2. There are restrictions on the use and exercise of options. [FAR Subpart 17.2](#).
 - a. The government must have synopsisized the contract with the option(s) in the Government-wide Point of Entry (GPE) and must have priced and evaluated the option at the time of contract award. [FAR 5.003](#), [FAR 17.206](#). If the government did not evaluate the option at the time of the award, or if the option is unpriced, then the government must justify the exercise of the option IAW FAR Part 6 (the contracting activity must obtain approval for other than full and open competition through the justification and approval (J&A) process).
 - b. The government cannot exercise the option automatically. The government must determine that the option is the most advantageous means of filling a requirement.
 - c. The government must have funds available.
 - d. The contract must contain the Availability of Funds clause. [FAR 32.703-2](#). Cf. [Blackhawk Heating, Inc. v. United States](#), 622 F.2d 539 (Ct. Cl. 1980).

- e. The government must obligate funds for each option period when proper funds become available. After it exercises the option, the government may fund the option period incrementally; for example, during continuing resolution (CR) periods, the government may provide funding for the period of the CR. [United Food Servs., Inc.](#), ASBCA No. 43711, 93-1 BCA ¶ 25,462 (holding that if the original contract contains the Availability of Funds clause and the government exercises the option properly, funding the option period in multiple increments does not void the option).
- f. The government must obligate funds consistent with all normal limitations on the obligation of appropriated funds, e.g., *Bona Fide* Needs Rule, period of availability, type of funds.

B. Requirements or Indefinite Quantity Contracts.

- 1. Requirements contracts and indefinite quantity contracts also allow the contractual relationship to cross fiscal years. [FAR Subpart 16.5](#).
- 2. Use of the Availability of Funds clause is mandatory. [FAR 32.705-1](#).
- 3. The government obligates funds for each delivery order using funds available for obligation at the time the government issues the order.

XI. CONCLUSION – SHORT OUTLINE

- A. Most appropriations, or funds, have a period of availability during which an agency may obligate funds for needs that arise, or continue to exist, during that period. Only *bona fide* needs of that FY may be met by obligating funds current at that time.
 - 1. **Supplies** are a *bona fide* need of the fiscal year in which the supplies will be **used**. However, FY1 funds may be used for supplies that won't arrive until FY2 if the delivery or production lead-time exceptions apply. Also, stock items may be ordered and used into the next FY if the stock level exception applies.
 - 2. **Services** are the *bona fide* need of the year they are **performed**. Services are either severable (repeatable) or non-severable (singular).
 - a. Non-severable services are funded with money current at the time of **contract award**.

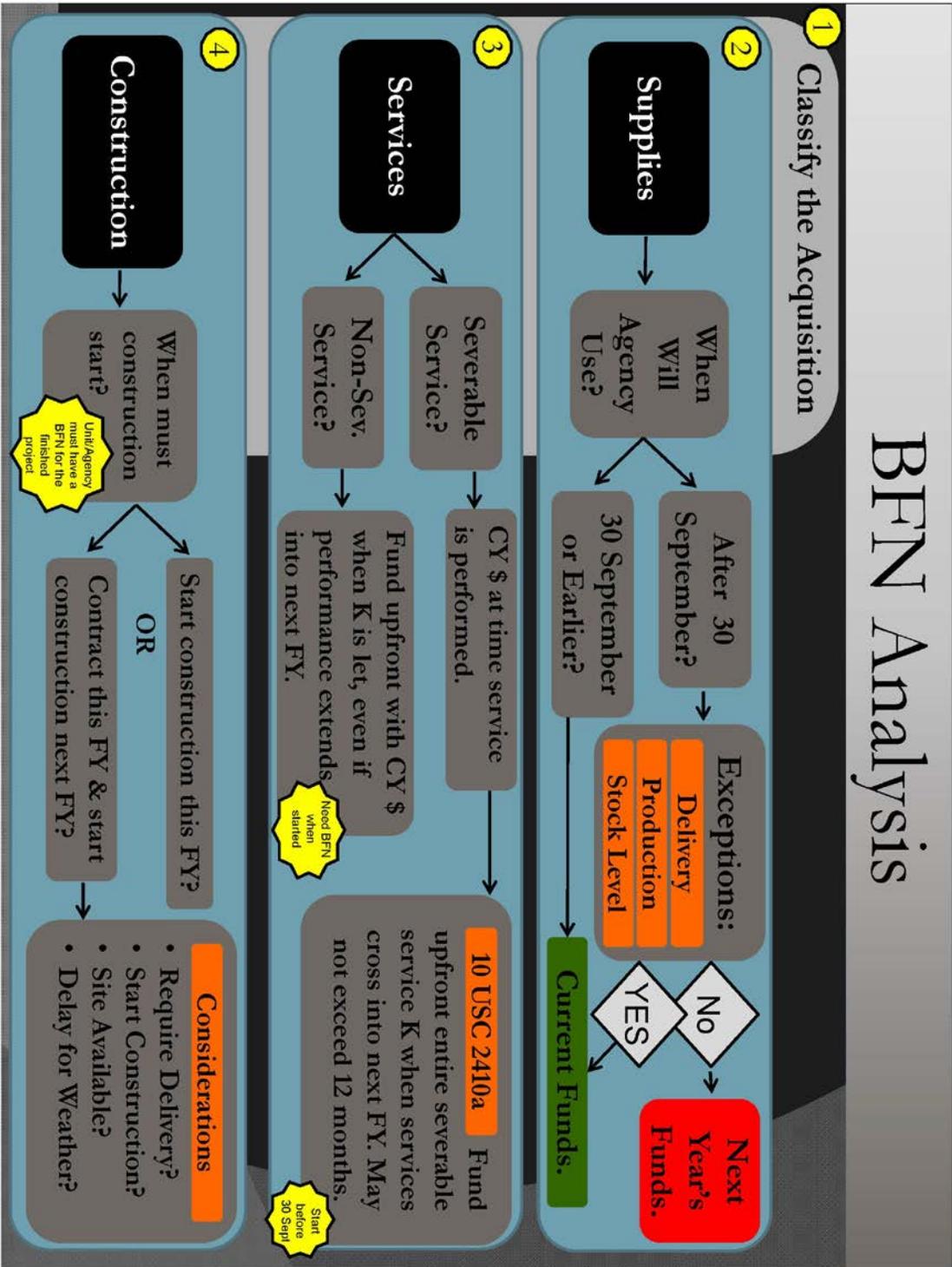
- b. Severable services are funded in the FY during which they are **performed**, unless 10 U.S.C. 2410a applies.

- 3. **Construction** is a *bona fide* need of the year in which the construction must be **contracted** for in order to have the building completed when required. However, considerations like site availability and weather could push the *bona fide* need into the next FY.

- 4. **Training** is a *bona fide* need at the time the training is **received**. Individual courses are non-severable services; multiple repeated courses are severable from each other. Some training courses can be funded with FY1 funds even though they don't start until FY2 under some circumstances.

- 5. Upon expiration of an appropriation, the remaining funds are not available for new obligations. However, they may be reached to adjust old obligations. Contract modifications that are within the scope of the original contract relate back to the original contract date and may be funded with expired funds.

**APPENDIX A –
BONA FIDE NEEDS ANALYSIS**



CHAPTER 4:



THE ANTIDEFICIENCY ACT

CHAPTER 4

THE ANTIDEFICIENCY ACT

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CHAPTER 4

THE ANTIDEFICIENCY ACT

I. INTRODUCTION

II. REFERENCES

- A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).
- B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).
- C. 31 U.S.C. §§ 1511-1517 (requiring apportionment/administrative subdivision of funds and prohibiting obligations or expenditures in excess of apportionment or administrative subdivision of funds).
- D. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).
- E. OMB Circular A-11, Preparation, Submission, and Execution of the Budget (July 2017) [hereinafter OMB Cir. A-11], available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf.
- F. DoD Regulation 7000.14-R, Financial Management Regulation, [hereinafter DoD FMR] available at <http://comptroller.defense.gov/fmr/>.
- G. Defense Finance and Accounting Service - Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation (December 27, 2017) [hereinafter DFAS-IN 37-1], available at <https://www.asafm.army.mil/dfas.aspx?doc=37-1>.
- H. Department of the Army, Antideficiency Act (ADA) Investigation Manual (October 2010) available at <http://asafm.army.mil/Documents/OfficeDocuments/FinancialOps/Guidances/ada/ada-im.pdf>.
- I. Air Force Instruction 65-608, Antideficiency Act Violations (29 Dec 2015) [hereinafter AFI 65-608] available at http://static.e-publishing.af.mil/production/1/saf_fm/publication/afi65-608/afi65-608.pdf.

- J. Department of Navy, NAVSO P-1000, Financial Management Policy Manual (December 2015) [hereinafter DON FMPM], available at [http://www.secnav.navy.mil/fmc/Documents/Financial%20Management%20Policy%20Manual%20\(FMPM\).pdf](http://www.secnav.navy.mil/fmc/Documents/Financial%20Management%20Policy%20Manual%20(FMPM).pdf).
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- M. Principles of Federal Appropriations Law Annual Update, U.S. Government Accountability Office [hereinafter Red Book Annual Update], Volume II, Third Edition, Chapter 6, (March 2015), available at <https://www.gao.gov/assets/670/668991.pdf>.
- N. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978).
- O. Department of Army, Antideficiency Act (ADA) Investigation Manual (October 2010) available at <http://asafm.army.mil/Documents/OfficeDocuments/FinancialOps/Guidances/ada/ada-im.pdf>.

III. BACKGROUND

A. History

1. The original Anti-Deficiency Act (ADA) was enacted in 1870 (16 Stat. 251) for the purpose of preventing the federal government from making expenditures in excess of the amounts that Congress appropriated. *See* Red Book, vol. II, 6-34 to 6-35.

2. The ADA was amended in 1905 (33 Stat. 1257) and in 1906 (34 Stat. 48) for the purpose of preventing expenditures in excess of apportionments (divisions within an appropriation). These amendments required that certain appropriations be apportioned over a fiscal year to obviate the need for a deficiency appropriation. Originally, the authority to make, waive, or modify apportionments was the head of the agency. Today, that authority rests with the Office of Management and Budget (OMB). *See Red Book, vol. II, 6-35. See Executive Order 6166 (June 10, 1933) (transferring apportionment to OMB).*

3. The ADA was amended again in 1951 (64 Stat. 765), in 1956 (70 Stat. 783), and in 1957 (71 Stat. 44) for the purpose of strengthening the apportionment procedures and the agency control procedures. *See Red Book, vol. I, 6-35 to 6-36.*

B. Summary of ADA Prohibitions

1. In its current form, the ADA states that an “officer or employee of the U.S. government” **may not**:
 - a. “Make or authorize an expenditure or obligation *exceeding an amount available* in an appropriation” unless authorized by law (emphasis added). *See 31 U.S.C. § 1341(a)(1)(A);*

 - b. Involve the government “in a contract or obligation for the payment of money *before* an appropriation is made unless authorized by law” (emphasis added). *See 31 U.S.C. § 1341(a)(1)(B);*

 - c. “[M]ake or authorize an expenditure or obligation *exceeding* -- (1) an apportionment; or (2) the amount permitted by regulations prescribed under section 1514(a) of this title” [i.e., a formal subdivision] (emphasis added). *See 31 U.S.C. § 1517(a); or*

 - d. “[A]ccept voluntary services [for the United States] or employ personal services. . .except for emergencies involving the safety of human life or the protection of property,” or unless authorized by law. *See 31 U.S.C. § 1342.*

2. The ADA imposes prohibitions (or fiscal controls) at three levels: (1) at the **appropriations** level, (2) at the **apportionment** level, and (3) at the **formal subdivision** level. The fiscal controls at the appropriations level are derived from 31 U.S.C. § 1341(a)(1)(A) and (B). The fiscal controls at the apportionment level and at the formal subdivision level are derived from 31 U.S.C. § 1517(a). Thus, if an officer or employee of the United States violates the prohibitions (or fiscal controls) at any of these three levels, he/she thereby violates the ADA.
3. The Comptroller General summarized the intent and effect of the ADA in an often-quoted 1962 decision.

These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditure or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriations under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, *within the limits and purposes of appropriations* annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, *in advance of appropriations made* for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made (emphasis added).

To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

4. To whom does the ADA apply?
 - a. The ADA applies to “any officer or employee of the United States Government” and thus, it applies to all branches of the federal government—executive, legislative, and judicial. Nevertheless, whether a federal judge is an “officer or employee” of the U.S. Government remains an open question, in some cases. *See Red Book*, vol. II, 6-39.

- b. By the plain wording of the statute, 31 U.S.C. § 1341 specifically applies to any officer or employee who makes or authorizes an expenditure or obligation. Additionally, DoD applies the ADA by regulation to “commanding officers, budget officers, or fiscal officers . . . because of their overall responsibility or position.” *See* DoD FMR, vol. 14, Ch.5, para. 050302.

IV. THE ANTIDEFICIENCY ACT’S FISCAL CONTROLS

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

1. The ADA imposes two fiscal controls at the **appropriations** level. These controls prohibit obligating and expending appropriations “*in excess of*” the amount available in an appropriation or “*in advance of*” an appropriation being made. 31 U.S.C. § 1341(A)(1)(A) and (B). The provisions located in 31 U.S.C. § 1341(A)(1)(A) and (B) are often considered the key provisions of the ADA; in fact, the original ADA contained only these provisions. *See* Red Book, vol. II, 6-38.
2. The “**In Excess Of**” Prohibition
 - a. An officer or employee may not make or authorize an obligation or expenditure that **exceeds** an amount available in an appropriation or fund. 31 U.S.C. § 1341(a)(1)(A).
 - b. DoD Examples
 - (1) The Navy over-obligated its Military Personnel, Navy appropriation from 1969-1972 by nearly \$110 million. This is an example of how the Navy violated the ADA by obligating an appropriation *in excess* of the amount available in that appropriation, and has been called the “granddaddy of all violations.” *See* Red Book, vol. II, 6-43.
 - (2) The Navy lost its “place of honor” for committing the “granddaddy of all violations” when the Army over-obligated four procurement appropriations from 1971 to 1975 by more than \$160 million involving approximately 900 contractors and 1,200 contracts. Once the Army

realized it had over-obligated these appropriations, it ceased payments to the contractors and requested GAO's *recommendations*. In a December 1975 letter, the Army requested the GAO's advice regarding some potential courses of action. In response, initially, the GAO opined that "obviously these contracts violate the 'Antideficiency Act.'" Additionally, the GAO stated that the Army had a duty to mitigate the Antideficiency Act violations. The GAO endorsed one of the Army's proposals whereby the Army would terminate "contracts for which no critical requirement exists." This option, however, would only mitigate the violation; it would not make funds available to the unpaid contractors. The GAO further commented that the Army could request Congress to appropriate additional funds (i.e. a deficiency appropriation) for the purpose of satisfying these outstanding obligations. The GAO specifically *disapproved* an Army proposal to use current year funds to cover the obligations.¹ *To the Chairman, Committee on Appropriations, House of Representatives, B-132900, Feb. 19, 1976. See also Red Book, vol. II, 6-43.*

- (3) Not to be outdone, in fiscal 2002 the Air Force embarked upon an obligation of over \$300 million against its Missile Procurement appropriation, for replacement of Minuteman guidance systems. Unfortunately, the funds weren't

¹ The GAO rejected the Army's proposal to use current year funds (i.e. 1976 annual appropriations) to satisfy these outstanding prior years' obligations by stating:

The proposal to apply current funds (either directly or through reprogramming) to payments on continuing contracts is apparently designed to achieve full performance of such contracts and also provide some immediate relief to contractors by cash payments. *In our opinion, this action would be precluded by 31 U.S.C. § 712a (1970) [now located at 31 U.S.C. § 1502, the "Bona Fide Needs Statute"]*. . . Under these circumstances, 31 U.S.C. § 712a would preclude the use of *current* appropriations to fund these *prior* year contracts since such transactions would constitute neither "the payment of expenses properly incurred" nor "the fulfillment of contracts properly made" in fiscal year 1976 (emphasis added).

Chairman, Committee on Appropriations, B-132900, Feb. 19, 1976.

Thus, the GAO reasoned that obligating and expending current year 1976 funds to pay for contracts the Army awarded in previous years would violate the Bona Fide Needs Rule. This rule prohibits the government from obligating and expending current year funds for prior year needs. *Id.*

available at the time of obligation, resulting in an ADA violation.²

c. Other Examples

- (1) USEC Portsmouth Gaseous Diffusion Plant “Cold Standby” Plan, B-286661, Jan. 19, 2001; Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int’l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992) (stating that where the agency expended “training and employment services” funds for an unauthorized purpose, the agency violated the Antideficiency Act’s “in excess of” prong because no funds were available for that unauthorized purpose).³
- (2) As far as amounts go, it could be some time before the Department of Housing and Urban Development is unseated from their position of prominence with an ADA violation in excess of \$1.5 billion in FY 2004.⁴

d. What is the “amount available” under 31 U.S.C. § 1341(a)(1)(A)?

- (1) “Amount available” means the unobligated balance of a particular appropriation.⁵

² See US Government Accountability Office, Antideficiency Act Report Information, FY 2006, available at <http://www.gao.gov/ada/adarptinfofy06.pdf>. In this case, funds were obligated in excess of amounts apportioned under a continuing resolution for missile procurement. *Id.*

³ The GAO was somewhat less decisive in their language, stating that the violation “could be viewed as either in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose.” *Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int’l Labor Affairs*, B-245541, 71 Comp. Gen. 402 (1992).

⁴ See US Government Accountability Office, Antideficiency Act Report Information, FY 09, available at <http://www.gao.gov/ada/adarptinfofy09.pdf>. In this case, Congress had set a FY 2004 commitment level of \$3.8B for various loan guarantee commitments, and by December 2003, HUD had made commitments exceeding the cap by \$1,529,229,523. *Id.*

⁵ See Red Book, vol. II, 6-84.

- (2) Thus, if the DoD Appropriations Act provides \$31B in the Army O&M appropriation, then the “amount available” for obligation is \$31B.⁶ As obligations are made against this appropriation, the amount available for new obligations declines.
- (3) Earmarks⁷ may also limit the “amount available” in a particular appropriation. Thus, if an earmark establishes a maximum amount that may be obligated, once that amount has been obligated, no further obligations may occur. Any obligation in excess of the earmark would violate 31 U.S.C. § 1341(a)(1)(A) (the *in excess* of prong). For example, if the DoD Appropriations Act provides that as part of the Army’s O&M appropriation, the Army receives “not to exceed \$12,478,000 . . . for emergencies and extraordinary expenses,” then \$12,478,000 is an earmark. If the Army obligates in excess of \$12,478,000 for emergencies and extraordinary expenses, then the Army has violated 31 U.S.C. § 1341(a)(1)(A) by obligating *in excess* of the amount available. *See* Red Book, vol. II, 6-41.

- e. The GAO has opined that this statute prohibits obligations in excess of appropriated or authorized amounts and obligations that violate specific statutory restrictions on obligations or spending.

⁶ For example, the FY 2012 DoD Appropriations Act, Div. A, Title II (Operation and Maintenance, Army) states in relevant part:

For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; and not to exceed **\$12,478,000** can be used for *emergencies and extraordinary expenses*, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes, **\$31,072,902,000**. (emphasis added)

⁷ An “earmark” is a portion of a lump-sum appropriation (i.e. an O&M appropriation which is made to fund at least two programs, projects, or items) where Congress designates a certain amount of appropriation as “either a maximum or a minimum or both.” *See* Red Book, vol. II, 6-26, 6-41. Note that under a “not to exceed” earmark, “the agency is not required to spend the entire amount on the object specified.” *Id.* If within the Army’s O&M appropriation, \$12.5M is earmarked for emergencies and extraordinary expenses and the Army does not obligate the full \$12.5M, then the unobligated balance “may—within the time limits for obligation—be applied to other unrestricted objects of the [lump sum] appropriation [in this case, the Army O&M appropriation].” *Id.*

- (1) Regarding statutory restrictions, if Congress states that no funds appropriated shall be available for a particular purpose, and an agency expends funds for the prohibited purpose, then the agency violates the Antideficiency Act. *Reconsideration of B-214172*, B-214172, 64 Comp. Gen. 282 (1985); *Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act*, B-201260, 60 Comp. Gen. 440 (1981) (stating that where an appropriation limits the payment of overtime to an individual employee to \$20,000 in one year, if an agency exceeds this \$20,000 limit, it has violated both the Antideficiency Act’s “in excess of” prong and its “in advance of” prong).

- (2) Examples of recurring statutory restrictions:
 - (a) “Prohibition on use of funds for transfer or release of individuals detained at United States Naval Station, Guantanamo Bay, Cuba, to the United States.”⁸

 - (b) “None of the funds made available by this Act may be used to support any training program involving a unit of the security forces or police of a foreign country if the Secretary of Defense has received credible information from the Department of State that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken.”⁹

- f. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations. *Matter of Adjustment of Expired and Closed Accounts*, B-253623, 73 Comp. Gen. 338 (1994); *The Honorable Andy Ireland, House of Representatives*, B-245856.7, 71 Comp. Gen. 502 (1992).

⁸ National Defense Authorization Act for Fiscal Year 2016, Sec. 1031. See *Department of Defense-Compliance with Statutory Notification Requirement*, B-326013 (August 21, 2014).

⁹ FY 2012 DoD Appropriations Act, Div. A, Title VII, Sec. 7006.

3. The **“In Advance Of”** Prohibition. An officer or employee may not involve the government in a contract or obligation for the payment of money **before** an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); *Propriety of Continuing Payments under Licensing Agreement*, B-225039, 66 Comp. Gen. 556 (1987) (20-year agreement violated this provision because the agency had only a one-year appropriation); *To the Secretary of the Air Force*, B-144641, 42 Comp. Gen. 272 (1962).
 - a. So, for example, if on 15 September 2017 (FY 2017), an Army contracting officer awarded a contract obligating FY 2018 Army O&M funds for an FY 2018 need, that contracting officer would have violated the ADA by obligating funds “before an appropriation is made.” 31 U.S.C. § 1341(a)(1)(B). Such a violation is also referred to as obligating funds *in advance* of their availability.
 - b. What does “before an appropriation is made” mean? An “appropriation is made” when *all the following have occurred*: (1) Congress has passed the appropriation act, (2) the President has signed the appropriation act, and (3) the date is 1 October (or later) of the fiscal year in which the appropriation becomes available.¹⁰
 - (1) So, if Congress passes the FY 2018 DoD Appropriations Act on 29 September 2017, then as of 30 September 2017 the funds contained in this appropriation are still not available because it is not yet 1 October 2017 (and the President has not yet signed the act). If an Air Force contracting officer awarded a contract on 30 September 2017 obligating FY 2018 Air Force O&M funds for a FY 2018 need, then the contracting officer would have violated the ADA by obligating funds “before the appropriation was made.” This is a violation of the *in advance* of prohibition.

¹⁰ See Red Book, vol. I, 5-9. See generally Red Book, vol. II, 6-146.

- (2) Likewise, if Congress passes the FY 2018 DoD Appropriations Act on 1 October 2017 (FY 2018) but the President has not yet signed the act, then the appropriations subject to this act are still not yet available. Under these circumstances, if an Army contracting officer awarded a contract on 1 October 2017 obligating FY 2018 Army O&M funds, then the contracting officer would have violated the ADA by obligating funds “before the appropriation.”
 - c. Funding gaps. A funding gap “refers to the period of time between the expiration of an appropriation and the enactment of a new one.” *See Red Book*, vol. II, 6-146. Obligating funds during a funding gap violates the ADA by obligating funds *in advance* of their availability, unless an exception applies. *See Red Book*, vol. II, 6-146. *See also* Chapter on Continuing Resolution Authority of Fiscal Law Deskbook for discussion of exceptions during a funding gap.
4. Exceptions to 31 U.S.C. § 1341(a)(1)(A) and (B). Government officials may obligate or expend *in excess of* an amount available in an appropriation or involve the Government in a contract *in advance of* an appropriation being made if authorized by law.
 - a. The statute must specifically authorize entering into a contract *in excess of* or *in advance of* an appropriation. *The Army Corps of Eng’rs’ Continuing Contracts*, B-187278, 56 Comp. Gen. 437 (1977); *To the Secretary of the Air Force*, B-144641, 42 Comp. Gen. 272 (1962).
 - b. The existence of a law creates an exception to the statutory prohibition regarding entering into a contract *in excess of* or *in advance of* an appropriation.

- (1) The Feed and Forage Act (aka The Adequacy of Appropriations Act) (41 U.S.C. § 6301) (*in excess of exception*).
 - (a) This statute permits the DoD and the Coast Guard to contract *in excess of* an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies but cannot exceed the needs for the current fiscal year (FY). In DoD, this authority is limited by regulation to “emergency circumstances . . . [where] action cannot be delayed long enough to obtain sufficient funds.” See DoD FMR, vol. 3, ch. 12, para. 1201 and 1202. Report use of this authority to the next higher level of command. See DoD FMR, vol. 3, ch. 12, para. 120207 (July 2010); DFAS-IN 37-1, ch. 8, para. 082102 (February 2017) (requiring local commanders to forward reports through command channels).
 - (b) The authority conferred by the Feed and Forage Act is “contract” authority, and does not authorize disbursements. See, DoD FMR, vol. 3, ch. 1201; AF Procedures for Administrative Control of Appropriations, § 4, para. E. So, if the Air Force exercised its “contract authority” under 41 U.S.C. § 6301 to incur obligations for F-16 fighter fuel exceeding its available O&M appropriation, then the Air Force could only obligate its O&M funds by awarding a contract; the Air Force could not disburse those funds unless and until Congress granted additional funds.
- (2) Multi-year Contract Authority (*in advance of exception*). See, e.g., 10 U.S.C. §§ 2306b, 2306c, 2829; 41 U.S.C. § 254c. See also FAR 17.104; DFARS 217.170; DLA *Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream*, B-224081, 67 Comp. Gen. 190 (1988) (DLA lacked authority to execute multiyear contract).

- (a) Multi-year contract authority permits an agency to award contracts for terms in excess of one year obligating one-year funds.
- (b) DoD is authorized under 10 U.S.C. §§ 2306b and 2306c to award contracts for goods and services for terms not exceeding five years so long as certain administrative determinations are met. 10 U.S.C. § 2306c was enacted specifically in response to a request from the Air Force following the GAO's "Wake Island" decision.¹¹ 10 U.S.C. §§ 2306b and 2306c pertain to contracts for installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. These statutes permit DoD to obligate the entire amount of a five-year contract to an annual fiscal year appropriation current at the time the contract is awarded (i.e. an O&M appropriation) even though some of the goods or services procured do not constitute the needs of that fiscal year. *See Red Book, vol. II, 6-49 and Red Book vol. I, 5-45.*

- 5. Contracts Conditioned Upon the Availability of Funds. *See FAR 32.703-2; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).*

¹¹ *To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).* In this case, the Air Force awarded a three-year contract for aircraft maintenance services for aircraft landing at Wake Island (a remote island in the Pacific Ocean) obligating one-year funds. The GAO concluded that this contract violated the ADA's *in advance* of prohibition because it obligated the Air Force to pay the contractor in future fiscal years using only one-year funds. Following this GAO decision, the Air Force requested that Congress enact a statute which would have authorized such a contract. Congress responded by enacting 10 U.S.C. § 2306c. *See Red Book, vol. I, 6-49 and Red Book vol. I, 5-45.*

- a. Agencies may award certain types of contracts (i.e. contracts for “operations and maintenance and continuing services”) prior to an appropriation becoming available if the solicitation and contract include the “subject to the availability of funds” clause, FAR 52.232-18, Availability of Funds. *See* FAR 32-703-2(a). *See also To Charles R. Hartgraves*, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485 (award without clause violated the ADA’s “in advance” of prong).
 - b. The government may not accept supplies or services under these contracts (containing the “subject to the availability of funds” clause) until the contracting officer has given written notice to the contractor that funds are available. *See* FAR 32.703-2(c).
 - c. The “subject to the availability of funds” clause will not be read into a contract pursuant to the “Christian Doctrine.” *See To Charles R. Hartgraves*, B-235086, Apr. 24, 1991, 1991 US Comp. Gen. LEXIS 1485. So, if a contracting officer awards a contract near the end of one fiscal year citing funds of the next fiscal year and neglects to insert the “subject to the availability of funds” clause into the contract, then the award of the contract violates the ADA’s prohibition against obligating funds *in advance* of their availability.
 - d. When a contracting officer awards a contract—containing a “subject to the availability of funds” clause—citing funds of the next fiscal year, this is not a true exception to the ADA’s *in advance* of prohibition. This is because when a contracting officer awards a contract subject to the availability of funds, no funds of the next fiscal year are obligated unless and until those funds become available.
6. Variable Quantity Contracts. Requirements or indefinite quantity contracts for services funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year. The contract also must incorporate FAR 52.232-19, Availability of Funds for the Next Fiscal Year. *See* FAR 32.703-2(b).

B. APPORTIONMENT – THE SECOND LEVEL OF FISCAL CONTROL. 31 U.S.C. §§ 1512 – 1515, 1517(a)(1)

1. Requirement. 31 U.S.C. § 1512 requires apportionment of appropriations. 31 U.S.C. § 1513(b) requires the President to apportion Executive Branch appropriations. The President has delegated the authority to apportion executive branch appropriations to the OMB.¹²
2. Definition. An “apportionment” is a distribution by the OMB of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or programs. The OMB apportions funds to federal agencies based upon the agency’s request on SF 132 (Apportionment and Reapportionment Schedule). With regard to DoD, the OMB generally apportions funds on a quarterly (four times per year) basis. OMB Cir. A-11, § 20.3; DoD FMR, vol. 3, ch. 2, para 020102.
3. The apportionment is OMB’s plan on how to spend the resources provided by law. OMB Cir. A-11, § 120.1; Purpose of Apportionment. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. OMB Cir. A-11, § 120.2. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. *See* 31 U.S.C. § 1512.
 - a. Exceptions. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:
 - (1) Military and civilian pay increases;
 - (2) Laws enacted after budget submission which require additional expenditures; or
 - (3) Emergencies involving life or property.

¹² Appropriations for the legislative and judicial branches are apportioned by officials having administrative control over those appropriations. 31 U.S.C. § 1513(a).

- b. An agency violates the apportionment statute if it must curtail its activity drastically to enable it to complete the fiscal year without exhausting its appropriation. *To John D. Dingell*, B-218800, 64 Comp. Gen. 728 (1985); *To the Postmaster Gen.*, B-131361, 36 Comp. Gen. 699 (1957).

4. The ADA Prohibition

- a. An officer or employee of the United States may not make or authorize an obligation or expenditure that **exceeds** an amount available in an **apportionment**. 31 U.S.C. § 1517 (a)(1).^{13, 14}
- b. It can be argued that the statute *does not* prohibit obligating **in advance of** an apportionment. *See Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997). However, service regulations prohibit the practice. *See DoD FMR vol.3, ch. 13, para 130203A* (stating, “OMB apportionments and reapportionments are required before funds may be obligated, except in certain instances as specified in OMB Circular A-11.”). *See also AF Procedures for Administrative Control of Appropriations*, § 2, para. B.1 (providing that activities may not incur obligations until appropriations are actually apportioned). Moreover, GAO’s Red Book clearly asserts that such an act would be an ADA violation. *See Red Book Annual Update (2015)*, vol. II, 6-141 for further discussion.
- c. So, if an Army contracting officer awarded a contract obligating a given year’s O&M funds, exceeding the apportionment for those O&M funds, the contracting officer would have violated the ADA by exceeding the apportionment. 31 U.S.C. § 1517 (a)(1). Since an apportionment is a division of an appropriation (i.e. a division of the Army O&M appropriation), it is possible to exceed an apportionment without exceeding the appropriation.

¹³ The relevant ADA provision states in pertinent part: “An officer or an employee . . . may not make or authorize an expenditure or obligation *exceeding* an (1) apportionment or (2) the amount permitted by regulations prescribed under section 1514(a) of this title” [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a).

¹⁴ Since the Antideficiency Act requires an apportionment before an agency can obligate the appropriation, 31 U.S.C. § 1512(a), an obligation *in advance of* an apportionment violates the Act. *See B-255529, Jan. 10, 1994*. In other words, if zero has been apportioned, zero is available for obligation or expenditure.

C. ADMINISTRATIVE SUBDIVISIONS – THE THIRD LEVEL OF FISCAL CONTROL. 31 U.S.C. § 1514

1. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that: (1) restrict obligations or expenditures to the amount of apportionments; and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:
 - a. OMB Cir. A-11, Section 150. This circular applies to all Executive agencies and requires OMB approval of fund control systems.
 - b. DoD Directive 7000.14-R; DoD FMR, vol. 14, ch. 1.
 - c. DFAS-IN 37-1, ch. 4 (Army); Air Force Procedures for Administrative Control of Appropriations § 5; Department of the Navy Financial Management Policy Manual, ch. 3. (Navy)
2. Administrative Subdivision of Funds. OMB Cir. A-11, Section 150; DoD FMR, vol. 1.
 - a. **“Formal” Administrative Subdivisions** (i.e. Allocations and Allotments). DFAS-IN 37-1, ch. 3, paras. 0312, 0314; Air Force Procedures for Administrative Control of Appropriations, § 5, para. B. These are formal administrative subdivisions prescribed generally by 31 U.S.C. § 1514. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).
 - b. **“Informal” Administrative Subdivisions** (i.e. Allowance/Target/Advisory Guide). DFAS-IN 37-1, ch. 3, para. 031402; Air Force Procedures for Administrative Control of Appropriations, § 6, para. B. These distributions do not create formal administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution.

3. The ADA Prohibition

- a. An officer or employee may not make or authorize an obligation or expenditure that **exceeds** the amount available in a **formal administrative subdivision** established by regulations. *See* 31 U.S.C. §1517(a)(2).¹⁵

- b. So, if a Navy contracting officer awarded a contract obligating FY 2018 O&M Navy funds which exceeds a formal subdivision (of FY 2018 Navy O&M funds), then the contracting officer would have violated the ADA's prohibition against exceeding a formal administrative subdivision. Since a formal administrative subdivision is a division of an apportionment (i.e. a division of the Navy O&M apportionment), it is possible to exceed a formal administrative subdivision without exceeding an apportionment or exceeding an appropriation.

¹⁵ The relevant ADA provision states in pertinent part: "An officer or an employee . . . may not make or authorize an expenditure or obligation *exceeding* an (1) apportionment or (2) the amount permitted by regulations prescribed under section 1514(a) of this title" [i.e., a formal subdivision] (emphasis added). *See* 31 U.S.C. § 1517(a).

V. P-T-A VIOLATIONS AND THE ANTIDEFICIENCY ACT (AKA ACTIONS THAT CAN RESULT IN ADA VIOLATIONS)

A. Purpose

1. A violation of the Purpose Statute (31 U.S.C. § 1301(a)) may also lead to a violation of the Antideficiency Act (31 U.S.C. § 1341 or § 1517), but all Purpose Statute violations are not ADA violations. *To the Hon. Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984) (stating that even if the wrong appropriation was charged, the ADA is not violated unless the proper funds were not available at the time of the obligation and at the time of correction and continuously between those two times).¹⁶ See also AF Procedures for Administrative Control of Appropriations, § 10, para. F.4. (providing that a reportable ADA violation may be avoidable if proper funds were available at the time of the original, valid obligation). *Department of Labor-Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs*, B-245541, 71 Comp. Gen. 402 (1992); *Funding for Army Repair Projects*, B-272191, 97-2 CPD ¶ 141. The November 2010 update to the DoD FMR changed the three-part ADA corrections test to a two part ADA corrections test. Specifically, the DoD FMR provides that even if the wrong appropriation was charged, the ADA is not violated unless the proper funds were not available at the time of the obligation and at the time of correction. DoD FMR, vol. 14, ch. 2, para. 020102.C.
2. Common “Purpose Statute” Violations - O&M Funds.

¹⁶ The GAO has stated:

Not every violation of 31 U.S.C. § 1301(a) [the Purpose Statute] also constitutes a violation of the Antideficiency Act . . . Even though an expenditure may have been charged to an improper source [i.e. the wrong appropriation], the Antideficiency Act’s prohibitions against incurring obligations *in excess* or *in advance* of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C. § 1301(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriation fund source, although available at the time, was subsequently obligated, making re-adjustment of accounts impossible (emphasis added).

To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422.

- a. There is a limitation of \$1,000,000 on the use of O&M funds for construction. This is a “per project” limit. *See* 10 U.S.C. § 2805(c). Exceeding this threshold may be a reportable ADA violation. *See The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984) (holding that where purpose violations are correctable, ADA violations are avoidable); DoD FMR, vol. 14, ch. 2, para. 020404.4A.1 (stating an ADA violation may occur if this limitation is exceeded); *cf.* AF Procedures for Administrative Control of Appropriations, § 6, para. C.6(a) (“Noncompliance with a statutory restriction on the use of an appropriation is a reportable violation”).
 - b. DoD activities may use O&M funds for purchase of investment items costing not more than \$250,000. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-1113, Sec. 8031. Use of O&M in excess of this threshold is a “Purpose” violation and may trigger an Antideficiency Act violation. *See* DoD FMR, vol. 14, ch. 2, para. 020404.4A.2.
3. The GAO’s concept of “correcting” a Purpose Statute violation (thereby avoiding an ADA violation) is not new. *See* 16 Comp. 750 (1910); 4 Comp. Dec. 314 (1897); DoD FMR, vol. 14, ch. 2, para. 020202.B.
 4. “Correcting” a Purpose Statute violation. Despite violating the Purpose Statute, officials **can** avoid an ADA violation if *both* of the following conditions are met:
 - a. **Proper funds** (the proper appropriation, the proper year, the proper amount) **were available**¹⁷ **at the time of the erroneous obligation**; and
 - b. **Proper funds were available** (the proper appropriation, the proper year, the proper amount) **at the time of correction for the agency to correct the erroneous obligation**.
 5. Funding Correction

¹⁷ A fair interpretation of recent GAO cases would be that “available” as it is applied in the “ADA Correction Test” means an existing balance in an appropriation in either “current” or “expired” status. *Interagency Agreements—Obligation of Funds Under an IDIQ Contract*, B-308969 (May 31, 2007).

- a. Whenever an agency obligates and/or expends improper funds (i.e. the wrong appropriation or the wrong fiscal year), the agency must de-obligate the improper funds and obligate the proper funds. This is called a “funding correction” and must be accomplished whether or not the original obligation results in an ADA violation *See* DoD FMR, vol. 14 ch. 5, para. 050403.
- b. For example, if the Air Force obligated Air Force, O&M funds for a construction project with a funded cost of \$1.5 million, then the Air Force has committed a Purpose Statute violation by obligating O&M funds when it should have obligated Unspecified Minor Military Construction Funds. This Purpose Statute violation will result in an ADA violation unless the Air Force can pass both prongs of the ADA correction test. Whether there is an ADA violation or not, the Air Force must accomplish the “funding correction” by de-obligating the improper funds (Air Force, O&M) and obligating the proper funds (Unspecified Minor Military Construction Funds). *See* DoD FMR, vol. 14 ch. 5, para. 050403.

B. Time (“Bona Fide Needs Rule”)

1. A violation of the Bona Fide Needs Rule (31 U.S.C. § 1502(a)) also may result in a violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517.
2. To determine whether a Bona Fide Needs Rule violation results in an ADA violation, **follow the same analytical process described above** for determining whether a “Purpose Statute” violation is correctable.
3. Common Bona Fide Needs Rule Violations
 - a. Formal Contract Changes. Contract changes that are “within the scope” of the original contract must be funded with the appropriation *initially obligated by the contract*; this is true even if the contract change occurs in a fiscal year subsequent to the fiscal year the contract was awarded. Contract changes that are “outside the scope” of the original contract must be funded with the *appropriation that is current at the time the change is made*. *See, The Honorable Andy Ireland, B-245856.7. 71 Comp. Gen. 502 (1992)*. Obligating funds of the wrong fiscal year results in a violation of the Bona Fide Needs Rule, however, this violation may be corrected by applying the ADA 2-part Correction Test.

- b. Agencies may not expend *current* fiscal year funds for *future* fiscal year needs. *To the Secretary of the Air Force*, B-144641, 42 Comp. Gen. 272 (1962) (stating that a contract for services and supplies with a 3-year base period violated the Bona Fide Needs Rule and the Anti-Deficiency Act because the contract obligated the government in advance of appropriations for the second and third years of contract performance). Such a Bona Fide Needs Rule violation will result in a *per se* ADA violation because this violation cannot pass the ADA 2-part test (if the “proper funds” are future year funds, it is impossible to pass the first prong of the ADA 2-part test—that “proper funds were available at the time of the erroneous obligation”). Note that this analysis differs if you inappropriately obligated *future* year funds for a *current* year need – in that case you *may* be able to correct with ADA’s 2-part test.

C. Amount

1. As previously discussed, making or authorizing obligations or expenditures in excess of funds available in an appropriation, apportionment, or formal administrative subdivision violates the Antideficiency Act. 31 U.S.C. §§ 1341 and 1517.
2. Nevertheless, obligations or expenditures exceeding an informal subdivision of funds do not violate the ADA unless to do so would cause a formal subdivision, an apportionment, or an appropriation to be exceeded.
3. To determine whether an Amount violation results in an actual ADA violation, follow the same analytical process described above used in determining whether a “Purpose Statute” violation is correctable.

4. Common Amount Problems

- a. Exceeding the amount available in an informal subdivision, formal subdivision, apportionment, or appropriation. Remember that the ADA only applies at the following levels: formal subdivision, apportionment, and appropriation. Exceeding the amount available in an informal subdivision does not violate the ADA, however, this could lead to an ADA violation if it causes a formal subdivision, apportionment, or appropriation to be exceeded. For example, if a contracting officer at the 82nd Airborne Division over-obligated its O&M, Army allowance (an informal subdivision), that over-obligation would not violate the ADA unless the over-obligation caused an over-obligation of a formal subdivision (most likely the FORSCOM level), or of an appropriation or apportionment.

- b. Over Obligations of Expired and Closed Appropriations. Over obligations arising under expired and closed appropriations may not be paid from current appropriations. If an agency incurs such over obligations, it must report the over obligation to the President and to Congress, and Congress may enact a deficiency appropriation or authorize the agency to pay the over obligations out of current appropriations; absent Congressional authority, a deficiency will continue to exist in the account. Thus, an over obligation of a prior year appropriation is a reportable violation of the Anti-Deficiency Act; this violates the “in excess of” prong of 31 USC § 1341(a)(1)(A). Additionally, charging an over obligation of a prior year appropriation to a current year appropriation violates the Bona Fide Needs Rule. *See The Honorable Andy Ireland*, B-245856.7. 71 Comp. Gen. 502 (1992).

D. Additional Antideficiency Act Related Issues

1. Indemnification Provisions. Generally, the GAO and courts have ruled that “open-ended” indemnification provisions in contracts violate 31 U.S.C. § 1341. *See e.g., Union Pacific Railroad Corp. v. United States*, 52 Fed. Cl. 730 (2002); *United States Park Police Indemnification Agreement*, B-242146, 1991 US Comp. Gen. LEXIS 1070, Aug. 16, 1991 (stating that absent specific statutory authority, indemnification provisions which subject the government to indefinite or potentially unlimited liability violate the ADA); *Project Stormfury*, B-198206, 59 Comp. Gen. 369 (1980). *To Howard Metzenbaum*, B-174839.2, 63 Comp. Gen. 145 (1984); *Assumption by Gov’t of Contractor Liability to Third Persons*, B-201072, 62 Comp. Gen. 361 (1983); *Reimbursement of the State of New York Under Support Contract*, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 2; cf. *E.I. DuPont De Nemours v. United States*, 365 F.3d 1367 (2004) (holding that the Contract Settlement Act of 1944 exempted certain contracts with indemnification provisions from operation of the Antideficiency Act). There are statutory exceptions to this general rule:
 - a. Public Law 85-804 (codified at 50 U.S.C. §§ 1431- 1435 and implemented by E.O. 10,789 and FAR Subpart 50.4) allows the Secretary of Defense and Service Secretaries to approve the use of contract provisions which provide that the U.S. will indemnify a contractor against risks that are “unusually hazardous” or “nuclear” in nature.
 - b. 10 U.S.C. § 2354 authorizes indemnity provisions for unusually hazardous risks associated with research or development contracts.
 - c. 42 U.S.C. § 2210(j) permits the Nuclear Regulatory Commission and Department of Energy to initiate indemnification agreements that would otherwise violate the Antideficiency Act.
 - d. Thus, the above examples are statutory exceptions to “open ended indemnification” provisions that would—absent statutory authority—violate the ADA’s prohibition against obligating “in advance of” or “in excess” of the amount available in an appropriation.

2. Judgments. A court or board of contract appeals may order a judgment in excess of an amount available in an appropriation or a subdivision of funds. While the “Judgment Fund” (a permanent appropriation allowing the prompt payment judgments) may be available to pay the judgment, the Contract Disputes Act requires agencies to reimburse the Judgment Fund. *See*, 31 U.S.C. § 1304(a); 28 U.S.C § 2677; 28 U.S.C § 2414. Reimbursement of the Judgment Fund must be paid from appropriations current at the time of the judgment against the agency. If the judgment exceeds the amount available in the appropriate current year appropriation, this deficiency is not an Antideficiency Act violation. *Bureau of Land Management, Reimbursement of Contract Disputes Act Payments*, B-211229, 63 Comp. Gen. 308 (1984) (stating that where current funds are insufficient to reimburse the Judgment Fund there is no ADA violation); *Availability of Funds for Payment of Intervenor Attorney Fees*, B-208637, 62 Comp. Gen. 692 (1983).
3. Augmentation. An Antideficiency Act violation may arise if an agency retains (aka “augments”) and spends funds received from outside sources, absent statutory authority. *Unauthorized Use of Interest Earned on Appropriated Funds*, B-283834, 2000 US Comp. Gen. LEXIS 163, Feb. 24, 2000 (unpub.) (stating that an agency’s spending the \$1.575 million in interest it earned after depositing its 1998 appropriation in an interest bearing account was an unauthorized augmentation of funds resulting in an ADA violation). Thus, if an agency improperly receives and retains funds, i.e. interest, from a source other than Congress, then the agency has improperly augmented its appropriation. This augmentation leads to an ADA violation where the agency then expends these additional funds—thereby making obligations or expenditures “in excess” of the amount available in its appropriation.
4. Unauthorized Commitments. Because an unauthorized commitment does not result in a legal obligation, there is no Antideficiency Act violation. Nevertheless, subsequent ratification of the unauthorized commitment could trigger an Antideficiency Act violation. *Air Force Procedures for Administrative Control of Appropriations*, § 10, para. E; *see also* FAR 1.602-3(a).

VI. THE ANTIDEFICIENCY ACT'S LIMITATION ON VOLUNTARY SERVICES.
31 U.S.C. § 1342

A. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. To Glenn English, B-223857, Feb. 27, 1987 (unpub.) (stating that when the agency directed contractors to continue performance despite its insufficient appropriated funds, the agency violated the ADA's prohibition against acceptance of voluntary services). **Thus, absent specific statutory authority, the acceptance of voluntary services is a *per se* ADA violation.**

1. Definition. "Voluntary services" are those services rendered without a prior contract for compensation, or without an advance agreement that the services will be gratuitous. *Recess Appointment of Sam Fox*, B-309301, 2007 US Comp. Gen. LEXIS 97, June, 2007; *Army's Authority to Accept Servs. from the Am. Assoc. of Retired Persons/Nat'l Retired Teachers Assoc.*, B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982.

2. **The ADA Prohibition.** An officer or an employee may not accept 'voluntary services' unless authorized by law. 31 U.S.C. § 1342. The statute states in pertinent part: "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property." *Id.*

a. When voluntary services may be accepted:

(1) When authorized by law; or

(2) For emergencies involving the safety of human life or the protection of property.

b. Examples:

- (1) In 2005, the DoD Comptroller concluded that the Oregon Army National Guard accepted “voluntary services” in violation of 31 U.S.C. § 1342 when it accepted free services (without authority to do so) from four civilians who helped to conduct training. A general officer was named responsible for this violation. See the GAO’s ADA Database at www.gao.gov/legal_products/ADA/Reports/2005.
 - (2) In 2007, the GAO concluded that the President’s appointment of Mr. Sam Fox as ambassador to Belgium while Congress was in recess where Mr. Fox could not be compensated (per 5 U.S.C. § 5503) until confirmed did **not** constitute “voluntary services” prohibited by 31 U.S.C. § 1342. See *Sam Fox*, 6.
3. Acceptance of voluntary services does not create a legal obligation of the government. *Richard C. Hagan v. United States*, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); *T. Head & Co.*, B-238112, 1990 US Comp. Gen. LEXIS 735, July 30, 1990; *Nathaniel C. Elie*, B-218705, 65 Comp. Gen. 21 (1985). Cf. *T. Head & Co. v. Dep’t of Educ.*, GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.
 4. The voluntary services prohibition dates back to 1884.¹⁸
 5. Examples of some types of voluntary services authorized by law:
 - a. 5 U.S.C. § 593 (agency may accept voluntary services in support of alternative dispute resolution).

¹⁸ *Recess Appointment of Sam Fox*, B-309301, 2007 US Comp. Gen. LEXIS 97, June, 2007. In 1884, Congress first prohibited the acceptance of voluntary services in an appropriations law. Congress enacted this provision after receiving claims for “extra services performed here and elsewhere by [employees] of the Government who had been engaged after hours.” *Id.* In 1905, Congress passed a permanent statute in order to “cure [the] abuse” where agencies would “coerce their employees to ‘volunteer’ their services in order to stay within their annual appropriation.” *Id.* Later, these employees would seek payment and then Congress would feel a moral obligation to pass a deficiency appropriation. *Id.*

- b. 5 U.S.C. § 3111 (student intern programs).
 - c. 10 U.S.C. § 1588 (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).
 - d. 10 U.S.C. § 2602 (President may accept assistance from Red Cross).
 - e. 10 U.S.C. § 10212 (SECDEF or Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).
 - f. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).
- B. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. *Voluntary Servs. -- Towing of Disabled Navy Airplane*, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); *Voluntary Servs. in Emergencies*, 2 Comp. Gen. 799 (1923). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.
- C. Gratuitous Services Distinguished
- 1. It is not a violation of the Antideficiency Act to accept unpaid services from a person where an advance written agreement is executed that (1) states that the services are offered without expectation of payment, and (2) expressly waives any future pay claims against the government. *See Dep’t of the Treasury – Acceptance of Voluntary Services*, B-324214, Jan. 27, 2014, 2014 WL 293545; *See Sam Fox*, 4; *Army’s Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat’l Retired Teachers Assoc.*, B-204326, 1982 US Comp. Gen. LEXIS 667, July 26, 1982; *To the Adm’r of Veterans’ Affairs*, B-44829, 24 Comp. Gen. 314 (1944); *To the Chairman of the Fed. Trade Comm’n*, A-23262, 7 Comp. Gen. 810 (1928).

2. In 2014, the GAO determined that the Department of the Treasury violated 31 U.S.C. § 1342 by accepting services from four individuals. Although the individuals agreed not to be compensated through “bind oral waivers” the GAO concluded such waivers were not adequate gratuitous service agreements. Such agreements must be in writing. *Department of the Treasury-Acceptance of Voluntary Services*, B-324214 (January 27, 2014).
3. An employee may *not* waive compensation (via a gratuitous services agreement) if a statute establishes entitlement, unless another statute permits waiver. *To Tom Tauke*, B-206396, Nov. 15, 1988 (unpub.); *The Agency for Int’l Dev. -- Waiver of Compensation Fixed by or Pursuant to Statute*, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); *In the Matter of Waiver of Compensation, Gen. Servs. Admin.*, B-181229, 54 Comp. Gen. 393 (1974); *To the Director, Bureau of the Budget*, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); *To the President, United States Civil Serv. Comm’n*, B-66664, 26 Comp. Gen. 956 (1947).
4. 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).

VII. VOLUNTARY CREDITOR RULE

- A. Definition. A voluntary creditor is one who uses personal funds to pay what is perceived to be a government obligation.
- B. Reimbursement. Generally, an agency may not reimburse a voluntary creditor. Specific procedures and mechanisms exist to ensure that the government satisfies its valid obligations. Permitting a volunteer to intervene in this process interferes with the government's interest in ensuring its procedures are followed. *Bank of Bethesda*, B-215145, 64 Comp. Gen. 467 (1985).
- C. Claims Recovery. *U.S. International Trade Commission – Cultural Awareness*, B-278805, 1999 US Comp. Gen. LEXIS 211, July 21, 1999 (noting that agencies, not the GAO, now must render decisions on such claims); *Lieutenant Colonel Tommy B. Tompkins*, B-236330, 1989 US Comp. Gen. LEXIS 1305, Aug. 14, 1989; *Claim of Bradley G. Baxter*, B-232686, 1988 US Comp. Gen. LEXIS 1511, Dec. 7, 1988; *Irving M. Miller*, B-210986, 1984 US Comp. Gen. LEXIS 1127, May 21, 1984; *Grover L. Miller*, B-206236, 62 Comp. Gen. 419 (1983); *Reimbursement of Personal Expenditures by Military Member for Authorized Purchases*, B-195002, May 27, 1980, 80-2 CPD ¶ 242. See *Reimbursement of Selective Serv. Employee for Payment of Fine*, B-239511, 70 Comp. Gen. 153 (1990) (returning request for decision to agency so it could determine who was responsible for paying fine). Cf. *Use of Imprest Fund to Reimburse Employee for Small Purchase*, B-242412, 1991 US Comp. Gen. LEXIS, July 22, 1991. See DFAS-IN 37-1, ch. 9, para. 092037. Claims are recoverable if:
1. The underlying expenditure is authorized;
 2. The claimant shows a public necessity;
 3. The agency could have ratified the transaction if the voluntary creditor had not made the payment.

VIII. PASSENGER CARRIER USE. 31 U.S.C. § 1344

- A. Prohibition. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for “official purposes.” *Federal Energy Regulatory Comm’n’s Use of Gov’t Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program*, B-243862, 71 Comp. Gen. 469 (1992); *Use of Gov’t Vehicles for Transp. Between Home and Work*, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not ADA violations, but significant sanctions do exist. See *Felton v. Equal Employment Opportunity Comm’n*, 820 F.2d 391 (Fed. Cir. 1987); *Campbell v. Department of Health and Human Servs.*, 40 M.S.P.R. 525 (1989); *Gotshall v. Department of Air Force*, 37 M.S.P.R. 27 (1988); *Lynch v. Department of Justice*, 32 M.S.P.R. 33 (1986).
- B. Exceptions.
1. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.
 - a. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. § 1344(b)(8).
 - b. The statute authorizes domicile-to-duty transportation if it is necessary for fieldwork, or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).
 2. Overseas, military personnel, federal civilian employees, and family members may use government transportation when public transportation is unsafe or unavailable. 10 U.S.C. § 2637.
 3. This statute does not apply to the use of government vehicles (leased or owned) when employees are in a temporary duty status. See *Home-to-Airport Transp.*, B-210555.44, 70 Comp. Gen. 196 (1991) (use of government vehicle for transportation between home and common carrier authorized in conjunction with official travel); *Home-to-Work Transp. for Ambassador Donald Rumsfeld*, B-210555.5, 1983 US Comp. Gen. LEXIS 115, Dec. 8, 1983.

C. Penalties

1. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b).
2. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. *But see* UCMJ art. 121 [10 U.S.C. § 921] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 10 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a \$10,000 fine).

IX. SANCTIONS FOR ANTIDEFICIENCY ACT VIOLATIONS

A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518

1. Officers or employees who authorize or make prohibited obligations or expenditures are subject to administrative discipline, including suspension without pay and removal from office.
2. Military Members “may be subject to appropriate administrative discipline or may be subject to action under the UCMJ.” DoD FMR, vol. 14, ch. 9, para. 090103. Civilian employees may be disciplined by “written admonishment or reprimand, reduction in grade, suspension from duty without pay, or removal from office.” DoD FMR, vol. 14, ch. 9, para. 090102.
3. **Good faith or mistake of fact does not relieve an individual from responsibility for a violation under this section.** Factors such as “a heavy workload at year end” or an employee’s “past exemplary record” generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline. *See* DoD FMR, vol. 14, ch. 9, para. 0902.

- B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A **knowing and willful violation** of the Antideficiency Act is a Class E felony. Punishment may include a \$5,000 fine, confinement for up to two years, or both. *See also* DoD FMR, vol. 14, ch. 9, para. 090302.

X. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, Section 145; DoD FMR, vol. 14, chs. 3-7; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, chs. 3, 4; DON FMPM, ch. 2, pt. F. *See also* U.S. DEP'T OF ARMY, ANTIDEFICIENCY ACT (ADA) INVESTIGATION MANUAL (October 2010).

A. Reporting Suspected Violations.

1. The DoD FMR contains the primary (DoD) guidance regarding the investigation and reporting of ADA violations. According to the FMR, an individual learning of or detecting a suspected ADA violation must report within two weeks the possible violation to his/her chain of command. Upon receiving the report, the military service comptroller “shall evaluate the potential violation for validity and completeness and if it determines a potential violation has occurred, assign a case number for tracking purposes.” DoD FMR, vol. 14, ch. 3, para. 030102 and 0302.¹⁹
2. It should be noted by Army practitioners that DFAS-IN 37-1 (applying solely to the Army) requires that individuals detecting a possible violation “inform the Director for Resource Management (DRM)” who will then *immediately* notify the commander responsible.²⁰
3. Information that must be reported:
 - a. Accounting classification of funds involved;

¹⁹ In November 2010, Chapter 3, Volume 14 of the FMR was updated and in that update, the FMR deleted the requirement to report preliminary cases to the Office of the Under Secretary (Comptroller) Deputy Chief Financial Officer and clarified when a case number is assigned. DoD FMR, vol. 14, ch. 3, Summary of Changes.

²⁰ *See* DEFENSE FINANCE AND ACCOUNTING SERVICE, INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION para. 040204 (January 2015). Rather than report within two weeks to the chain of command (under the FMR), 37-1 requires reporting to the DRM followed by immediate notification to the affected commander, who then has 15 days to send a flash report through the MACOM to the Assistant Secretary of the Army for Financial Management & Comptroller. *Id.* For the remainder of the outline, the text refers to FMR requirements (which apply to all services).

- b. Name and location of the activity where the alleged violation occurred;
- c. Name and location of the activity issuing the fund authorization;
- d. Amount of fund authorization or limitation that allegedly was exceeded;
- e. Amount and nature of the alleged violation;
- f. Date the alleged violation occurred and date discovery;.
- g. Means of discovery;
- h. Description of the fact and circumstances of the case;
- i. Anticipated dates of completions of the investigation and submission of the report; and
- j. The names of work phone numbers of member of the preliminary investigation team.

B. Investigations

1. The first step in the investigation process is a **preliminary review** to gather basic facts and ultimately factually establish whether an Antideficiency Act violation “may have occurred.” DoD FMR, vol. 14, ch. 3, para. 0302. The focus of this review is on the potential violation and not on corrective actions. In the Army, the investigating officer is normally appointed by either the installation commander or by the applicable Army Command (ACOM) commander. *See* DFAS-IN-37-1, ch. 4, para. 040204. In the Air Force, the investigating officer is normally appointed by the Major Command’s (MAJCOM) Comptroller—although the Air Force Comptroller could assume these duties. *See* AFI 65-608, para 4.6.1.
 - a. Completion of the preliminary review is usually required within **14 weeks** from the date of the initial discovery. DoD FMR, vol. 14, ch. 3, para. 030202. For Army activities, the preliminary review must be completed within 90 days after discovery of the suspected ADA violation. DFAS-IN 37-1, ch. 4, para. 040204. For the Air Force, the review must be completed and reported to SAF/FMFA no later than 90 days from the review start date. AFI 65-608, para. 4.6.1.
 - b. The preliminary review should focus on the potential violation not on corrective actions. *See*, DoD FMR, ch. 3, para 030202.
 - c. The results of the preliminary review must be forwarded to the applicable DoD Component Comptroller, and coordinated with the applicable DoD Component office of legal counsel. *See* DoD FMR, vol. 14, ch. 3, para 030204.
2. Upon considering the preliminary review, if the DoD Component Comptroller involved determines that there is a potential violation, then a **formal investigation** must be initiated within two weeks from the approval of the preliminary review report. DoD FMR, vol. 14, ch. 3, para. 030205. On the other hand, if the DoD Component involved determines that no violation occurred, then the preliminary review completes the investigation process. FMR, vol. 14, ch. 3, para 030204.

- a. The purpose of the formal investigation is to determine the relevant facts and circumstances of the suspected violation – if a violation has occurred, what caused the violation, what are appropriate corrective actions and lessons learned, and who was responsible. DoD FMR, vol. 14, ch. 5, para. 0501.
- b. Typically, the Army Command/Air Force MAJCOM commander approves and appoints an adequately trained and qualified individual(s) to serve as formal investigator(s). DoD FMR, vol. 14, ch. 4, para. 040201; DFAS-IN 37-1, ch. 4, para. 040204; AFI 65-608, para. 5.5. A final report on the violation must reach the Office of the Under Secretary of Defense (Comptroller) within **12 months and two weeks** from the date the preliminary report ended (or 12 months from the date the formal investigation began if there is no related preliminary review). DoD FMR, vol. 14, ch. 7, para. 070102.
- c. The investigating officer (IO) must address the following questions:
 - (1) Did the violation occur because an individual carelessly disregarded instructions?
 - (2) Did the violation occur because an individual was inadequately trained or lacked knowledge to properly perform his or her job? If so, then was the individual or a supervisor at fault?
 - (3) Did the violation occur because of an error or mistake in judgment by an individual or a supervisor?
 - (4) Did the violation occur because of lack of adequate procedures and controls? If so, then who was at fault?
 - (5) Did the violation occur because of other reasons? If so, then who was at fault? DoD FMR, vol. 14, ch. 5, para. 050302(E).

- d. If the IO believes criminal issues may be involved, the investigation should be stopped immediately and the IO should consult with legal counsel to determine whether the matter should be referred to the appropriate criminal investigators for resolution. DoD FMR, vol. 14, ch. 5, para. 050302(F).

C. Establishing Responsibility

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., overobligation, overexpenditure, etc.
2. A responsible individual(s) is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. “The investigating officer, however; [sic] shall attempt to discover the specific act, or the failure to take an action, that resulted in the violation, and the responsible individual(s) for the act or the failure to take action.” DoD FMR, vol. 14, ch. 5, para. 050302. *But see* OMB Circular No. A-11 § 145.7 which simply requires reporting the position of violators rather than their actual names.
3. The investigation report *must* assign responsibility for the violation to “one or more individuals” so that “appropriate administrative or disciplinary action” may be imposed. DoD FMR, vol. 14, ch. 5, para. 050302. Generally, the responsible party (or parties) will be the highest ranking official in the decision making process who had actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. *See To Dennis P. McAuliffe*, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.

D. Reporting the Report of Violation to Office of the Undersecretary of Defense (Comptroller) (OUSD(C))

1. At the conclusion of the formal ADA investigation, the IO shall prepare a Report of Violation that documents the results of the investigation pursuant to DoD FMR, vol.14, ch. 7.

2. OUSD(C) Deputy Chief Financial Officer (DCFO) will consider the report and if it agrees, then it will prepare notification letters to the President, Congress, and the Comptroller General. OMB Cir. No. A-11, Section 145; DoD FMR, vol. 14, ch. 7, para. 070501. See Transmission of Antideficiency Act Reports to the Comptroller General of the United States, B-304335, Mar. 8, 2005 (citing 31 U.S.C. §§ 1351, 1517(b), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (2004)).

3. Contents of the final ADA report (to OSD). DoD FMR, vol. 14, ch. 7, figure 7-1.
 - a. Appropriation(s) involved;
 - b. Where violation(s) occurred;
 - c. Name/location of activity issuing the fund authorization;
 - d. Date violation(s) occurred;
 - e. Type of violation(s);
 - f. Effect of violation(s) on next higher level of funding;
 - g. Identification of the responsible individual(s);
 - h. Signed statement(s) of responsible individual(s);
 - i. Date(s) and description of how violation(s) was discovered;
 - j. Cause and circumstances surrounding violation(s);
 - k. Evidence of willful intent to violate;
 - l. Disciplinary action taken;

- m. Corrective action taken;
 - n. Administrative control of funds;
 - o. Component or agency coordination;
 - p. Name and title of holder of the funds subdivision; and
 - q. Any additional information not provided in categories above.
4. The GAO now maintains an online database of all reported ADA violations which are transmitted to it by the federal agencies. *See* www.gao.gov/legal/antideficiency.html. This database includes the letters from the agency head reporting the ADA violation to the President, Congress and the Comptroller General.

XI. CONTRACTOR RECOVERY WHEN THE ADA IS VIOLATED

A. Recovery Under the Contract

1. A contract may be null and void if the contractor knew, or should have known, of a specific spending prohibition. *Hooe v. United States*, 218 U.S. 322 (1910) (contract funded with specific appropriation). *Cf. American Tel. and Tel. Co. v. United States*, 177 F.3d 1368 (Fed. Cir. 1999).
2. Where contractors have not been responsible for exceeding a statutory funding limitation, the courts have declined to penalize them. *See, e.g., Ross Constr. v. United States*, 392 F.2d 984 (1968); *Anthony P. Miller, Inc. v. United States*, 348 F.2d 475 (1965).
3. The exercise of an option may be inoperative if the government violates a funding limitation. The contractor may be entitled to an equitable adjustment for performing under the “invalid” option. *See Holly Corp.*, ASBCA No. 24975, 83-1 BCA ¶ 16,327.

- B. Quasi-Contractual Recovery. Even if a contract is unenforceable or void, a contractor may be entitled to compensation under the equitable theories of quantum meruit (for services) or quantum valebant (for goods). 31 U.S.C. § 3702; *Prestex Inc. v. United States*, 320 F.2d 367 (Ct. Cl. 1963); *Claim of Manchester Airport Auth. for Reimbursement of Oil Spill Clean-up Expenses*, B-221604, Mar. 16, 1987, 87-1 CPD ¶ 287; *Department of Labor--Request for Advance Decision*, B-211213, 62 Comp. Gen. 337 (1983).

- C. Referral of Claims to Congress. The GAO may refer non-payable claims to Congress. 31 U.S.C. § 3702(d); *Campanella Constr. Co.*, B-194135, Nov. 19, 1979, 79-2 CPD ¶ 361.

XII. CONCLUSION

Practitioners should review the annual Antideficiency Act violation reports at <http://www.gao.gov/legal/anti-deficiency-act/about>. Additional resources are available at <http://asafm.army.mil/offices/fo/ada.aspx?OfficeCode=1500>.

CHAPTER 5:



OBLIGATING APPROPRIATED FUNDS

CHAPTER 5

OBLIGATING APPROPRIATED FUNDS

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CHAPTER 5

OBLIGATING APPROPRIATED FUNDS

I. INTRODUCTION

- A. This chapter is aimed to help readers understand:
1. The importance of accounting for commitments and obligations.
 2. Amounts to commit and obligate for various types of contract actions.
 3. 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. [31 U.S.C. § 1501 et seq.](#), Appropriation Accounting.
- C. [Office of Management and Budget Circular A-11](#), Preparation, Submission and Execution of the Budget, Sections 20.5, 82, 120, 123, 130 (Jul. 2017) [hereinafter OMB Cir. A-11].
- D. Government Accountability Office, [Principles of Federal Appropriations Law](#), Vol. II, ch. 7, Obligation of Appropriations (3^d ed. 2006).
- E. Government Accountability Office, [A Glossary of Terms Used in the Federal Budget](#) (Sep. 2005).

- F. Department of Defense, [DOD Financial Management Regulation](#), Vol. 1, General Financial Management Information, Systems and Requirements, Appendix A, Object Classification; Vol. 5, Disbursing Policy, ch.1, Purpose Organization, and Duties; Vol. 3, Budget Execution – Availability and Use of Budgetary Resources, ch.8, Standards for Recording and Reviewing Commitments and Obligations; Vol. 14, Administrative Control of Funds and ADA Violations, ch.1, Administrative Control of Funds [hereinafter DOD FMR].
- G. [Defense Finance and Accounting Service--Indianapolis Regulation 37-1](#), Finance and Accounting, ch. 8, Commitments and Obligation Management (Feb. 2017); Glossary (Mar. 2017) [hereinafter DFAS-IN 37-1].
- H. [Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Procedures For Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force](#) (Sep. 1999) [hereinafter DFAS-DE, Procedures for Administrative Control]; [Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Accounting For Commitments](#) (Oct. 2003) [hereinafter DFAS-DE, Commitments]; and [Defense Finance and Accounting Service Instruction 7000.4-I, Accounting for Obligations](#) (Aug. 2013) [hereinafter DFAS 7000.4-I, Obligations].
- I. [Federal Acquisition Regulation](#) (FAR), 48 C.F.R. Subparts 2, 32, and 52
- J. [Defense Federal Acquisition Regulation Supplement](#) (DFARS), 48 C.F.R. Subpart 232.

III. IMPORTANT DEFINITIONS

- A. **Commitment.** An administrative reservation of funds based upon firm procurement requests, unaccepted customer orders, directives, and equivalent instruments that are committed to substantial expenditure at a future date. DFAS-IN 37-1, ch. 8 (Feb. 2017), Glossary (Mar. 2017); *see also* DOD FMR, vol. 3, ch. 15, para. 150203 (Aug. 2015), [A Glossary of Terms Used in the Federal Budget](#) (Sep. 2005).

- B. Obligation. A legally binding agreement or action that will result in outlays, immediately or in the future. When authorized agency personnel place an order, sign a contract, award a grant, purchase a service, or take other actions that require the government to make payments to the public or from one government account to another, the agency incurs an obligation. It is an Antideficiency violation to involve the federal government in a contract or obligation for payment of money before an appropriation is made, unless authorized by law. Funds that are not legally obligated before their period of availability expires are no longer available for new obligations. The period of availability applies to the obligation of funds, not the liquidation of the obligation by disbursement of payment (expenditure). For purposes of matching a disbursement to its proper obligation, the term “obligation” refers to each separate obligation amount identified by a separate line of accounting. DFAS-IN 37-1, ch.8 (Feb. 2017), Glossary (Mar. 2017); *see also* DOD FMR, vol. 3, ch. 15, para. 150204 (Aug. 2015), [A Glossary of Terms Used in the Federal Budget](#) (Sep. 2005); GAO Redbook, Vol. II, page 7-3 to 7-4.
1. Examples: Amounts of orders placed, contracts awarded, services received, and similar transactions that will require payments during the same or a future period.
 2. The obligation takes place when the definite commitment is made, even though the actual payment may not take place until the following fiscal year. GAO Redbook, Vol. II, page 7-4.
- C. Current Appropriation. An appropriation whose availability for new obligations has not expired under the terms of the applicable appropriations act. *See generally*, GAO Redbook Vol. 1, pages 2-13 to 2-15.
- D. 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).
- E. 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).

- F. Contract. A mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. FAR 2.101. Examples include: Bilateral agreements, awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. *Id.*; *see also* DFAS-IN 37-1, Glossary (Mar. 2017).

IV. IMPORTANT ROLES

- A. Certifying or Authorizing Officer/Official. An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. The certifying officer is responsible for the correctness of the facts and computations and the legality of payment, *i.e.*, certifying the funds are available, meet time limitations, and are for the purpose designated in the appropriation, and may be subject to pecuniary liability resulting from false or misleading certifications. DFAS-IN 37-1, Glossary (Mar. 2017); *see also* DOD FMR, vol. 5, ch. 1, 010303 (Feb. 2016), vol. 5, ch.5, 050202 (July 2017); vol. 11A, ch. 18, 180207 (Mar. 2012); GAO Redbook, Vol. II, pages 9-13, 9-88.
- B. Fund Manager. Individual within a command who manage financial resources to include major activity, sub-activity directors, and their representatives who are delegated fund certification responsibility. Fund managers are responsible for monitoring actual performance to the budget for determining the current status of each job, revising resource estimates as needed, determining if remaining uncommitted resources are sufficient to meet the year's mission requirements, and ensuring all documents have a valid and correct accounting classification. DFAS-IN 37-1, ch.2 (July 2016), Glossary (Mar. 2017).
- C. Contracting Officer. Individuals with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. FAR 2.101; *see also* DFAS-IN 37-1, Glossary (Mar. 2017).

V. ACCOUNTING FOR COMMITMENTS.

- A. General Rules.

1. DOD and OMB have agreed to 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. Commitment accounting is not required for the operation and maintenance appropriation accounts, revolving fund accounts, or military personnel appropriation accounts, but may be used if cost effective. DOD FMR, vol. 3, ch. 15, para. 150203C.
2. The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment document.¹ DOD FMR, vol. 3, ch. 15, para. 150203.A. The date the commitment document is signed by the authorized official determines the accounting period in which the commitment is to be recorded in the general ledger. DOD FMR, vol. 3, ch. 8, para. 080201.
3. Commitment accounting helps ensure that the subsequent entry of an obligation will not exceed available funds. DOD FMR, vol. 3, ch. 15, para. 150203.A. Issuing a commitment authorizing obligations in excess of an appropriation or formal subdivision of funds could result in violations of the Antideficiency Act. *See* 31 U.S.C. § 1341.
4. 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. DOD FMR, vol. 3, ch. 8, para. 080201; DFAS-IN 37-1, ch. 8, para. 080703.
5. Outstanding commitments must be closed or cancelled at the end of the period that the appropriation is available for obligation. Commitments cannot exist in expired appropriation accounts. DOD FMR, vol. 3, ch. 15, para. 150203.F.

B. Determining the Amounts of Commitments. Agencies commit funds according to the following rules:

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, PR&C) or similar documents having the effect of a firm order or authorization to enter into an obligation. *See* Appendix B for an example of the PR&C.

1. General. The amount to be recorded as a commitment is the estimated procurement cost set forth in the commitment document. DOD FMR, vol. 3, ch. 8, para. 080201. The most common type of commitment document is a contract. When drafting contracts, procurement officials may modify the description of the deliverable goods or services, or the contract line item structure, used on a funded purchase request. However, if such adjustments change the purpose for which the funds were committed, the funds must be recertified for the new purpose. To ensure funds are not used for inappropriate purposes, Authorizing Officials must validate the contract documents prior to award. DOD FMR, vol. 3, ch. 8, para. 080204.

2. Other Commitments.
 - a. Letter contracts and letters of intent. When accepted, a letter contract or letter of intent must be recorded as an obligation in the amount of the maximum liability under the agreement. Commit funds **to cover the difference** between the maximum legal liability of the government under the interim agreement and the maximum estimated cost of the definitized contract. An exception is a letter providing that award of the definitive contract is dependent upon a congressional appropriation, in which case no funds are available for commitment. DOD FMR, vol. 3, ch. 8, para. 080202C.
 - b. Open-end contracts and option agreements. Commit funds only when the amount estimated is **reasonably firm**. DOD FMR, vol. 3, ch.8, para. 080203D.
 - c. Contract Amendments or Engineering Changes. Commit an amount based on a stated **cost limitation**. DOD FMR, vol. 3, ch. 8, para. 080202E.
 - d. Intra-Governmental Requisitions and Orders (such as a DD Form 448, "Military Interdepartmental Purchase Request"). Commit the **amount of the order** until validly obligated under the guidelines of the DOD FMR. DOD FMR, vol. 3, ch. 8, paras. 080203F and 0808.
 - e. Commercial Purchase Cards. Commitments must be established in advance in amounts no less than the periodic purchase limits authorized for commercial purchase cards. DOD FMR, vol. 3, ch.8, para. 080203H; *see also* Office of Management and Budget Circular A-23, Preparation, Submission and Execution of the Budget, Appendix B.

f. Imprest Funds.² Record as a commitment **before funds are advanced** to the imprest fund cashier. DOD FMR, vol. 3, ch.8, para. 080203I.

g. Contingent Liabilities.

(1) With regard to fiscal law, a contingent liability represents a variable that cannot be recorded as a valid obligation. DOD FMR, vol. 3, ch. 8, 080203A. Contingent liabilities should be recorded regarding:

(a) Outstanding fixed-price contracts with price escalation, price redetermination, or incentive clauses;

(b) Contracts authorizing variations in quantities to be delivered; and

(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. DOD FMR, vol. 3, ch. 8, 080203A

(2) Commitments of contingent liabilities should be recorded in an amount that is **conservatively estimated to be sufficient** to cover the additional obligations that probably will materialize, based upon judgment and experience. Allowances may be made for the possibilities of downward price revisions and quantity underruns. The contingent liability shall be supported by sufficient detail to facilitate audit. DOD FMR, vol. 3, ch. 8, para. 080203B.

² An imprest fund is a “cash fund of a fixed amount established by an advance of funds with or without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts.” FAR 13.001. For DOD activities, imprest funds may be used **only** for classified operations or contingency. DOD FMR, vol. 5, ch. 2, para. 02090, but see DFARS 213.305-3(d) – which allows for DOD to use imprest funds for humanitarian or peacekeeping operations.

- (3) A contingent liability ripens into a recordable obligation for purposes of 31 U.S.C. § 1501 only upon materialization of the contingency. *See, e.g., National Mediation Board—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act*, B-305484, Jun. 2, 2006; *see also* DOD FMR, vol. 3, ch. 8, para. 080203G.

VI. OBLIGATION OF FUNDS.

A. General Rules.

1. Obligate funds only for the purposes for which they were appropriated (*i.e.*, proper “Purpose,” *see* Chapter 2). 31 U.S.C. § 1301(a).
2. Obligate funds only to satisfy the bona fide needs of the current fiscal year (*i.e.*, proper “Time,” *see* Chapter 3). 31 U.S.C. § 1502(a); DOD FMR, vol. 3, ch. 8, para. 080304A. The period of availability applies to the obligation of funds, not the liquidation of the obligation by the disbursement of payment. DOD FMR, vol. 3, ch. 8, para. 080301. However, funds may only be obligated if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. DOD FMR, vol. 3, ch. 8, para. 080303B.
3. An obligation must be definite and certain, must be recorded in an amount supported by documentary evidence (normally an executed contract), and may not be obligated in excess of (or in advance of) an appropriation or in excess of an apportionment or a formal subdivision of funds (*i.e.*, proper “Amount,” *see* Chapter 4). 31 U.S.C. §§ 1341, 1517; DOD FMR, vol. 3, ch. 8, para. 080301. However, in instances where a definite amount is not known or cannot feasible be ascertained – examples are below – a best estimate should be used. DOD FMR, vol. 3, ch. 8, para. 080303B1; GAO Redbook, Vol. II, page 7-3.

- B. Contract Types. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it. However, regardless of contract-type, obligations must be recorded no later than ten calendar days following the day that an obligation is incurred. Notwithstanding the ten day rule, all obligations must be recorded and included in the official accounting records in the same month in which the obligation is incurred. DoD FMR, vol. 3, ch. 8, para. 080303B. The following paragraphs (and Exhibit E) summarize the rules regarding when obligations should be recorded, and in what amount, for various contract-types:

1. Firm-Fixed Price Contracts (FFP). FAR 16.202.
 - a. FFP contracts are not subject to price changes during performance, regardless of contractor cost experience. All risk of increased costs of performance fall on the contractor.
 - b. Record **total amount** stated in the contract at the time of award. DOD FMR, vol. 3, ch. 8, para. 080601.
2. Fixed-Price contracts with escalation, price redeterminations, incentive provisions, and award fees. DOD FMR, vol. 3, ch.8, para. 080602.
 - a. Fixed-Price Contract with Economic Price Adjustment (FP w/ EPA). FAR 16.203.
 - (1) The Economic Price Adjustment (EPA) clause, FAR 52.216-2, provides for government assumption of a portion of the cost risk of certain unforeseeable price fluctuations, such as material or wage increases. If the clause is inserted into a contract, the government will absorb some cost increases.
 - (2) At the time of contract award, record obligation in the **amount of the base contract**. Obligations related to the various contingencies must be recorded if and when the contingency occurs. *See generally* DOD FMR, vol. 3, ch.8, para. 080602.
 - b. Fixed-Price Contracts with Price Redetermination (FPR). FAR 16.205 and 16.206. Record obligation of the **target or billing price** (the base contract price) at the time of award for both FPR contract types:
 - (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. FAR 16.205.
 - (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. FAR 16.206.

c. Fixed-Price-Incentive Contract (FPI). FAR 16.403.

- (1) An 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, and the contractor bears all costs above the fixed ceiling price.
- (2) At the time of award, record obligation of the **fixed price** stated in the contract, or the target or billing price in the case of a contract with an incentive clause. Subsequently, adjust the obligation to a “best-cost estimate” whenever it is determined that the actual cost of the contract will differ from the original target. DOD FMR, vol. 3, ch.8, para. 080602.

d. Fixed-Price-Award-Fee Contracts. FAR 16.404.

- (1) A negotiated fixed price contract, which includes normal profit, and an opportunity to receive additional award fee based upon the quality of contract performance.
- (2) At the time of award, record an obligation in the amount of the **fixed price** stated in the contract. Record and obligate the award fee when determined that fee will be paid. However, regardless of the FY the award fee is determined, the obligation for that award fee should be recorded against the same appropriation and FY as the contract award. *See generally* DoD FMR, vol. 3, ch. 8, para. 080602. FAR 16.401(e) includes a matrix for assisting contracting officers in determining the appropriate award fee.

3. Cost-Reimbursement Contracts. FAR Subpart 16.3.

- a. These contract types provide for payment of allowable incurred costs to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed – except at its own risk – without the approval of the contracting officer. FAR 16.301-1.

- b. Cost ceilings. Ceilings are imposed through the Limitation of Cost clause, FAR 52.232-20 (fully funded), or the Limitation of Funds clause, FAR 52.232-22 (incrementally funded). The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. RMI, Inc. v. United States, 800 F.2d 246 (Fed. Cir. 1986).
- c. Fees. 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) Contracts. FAR 16.306.
 - (a) Contract for estimated total cost, plus a fixed fee, which is negotiated and set prior to award. FAR 16.306.
 - (b) Record obligation for the **full amount** of the contract (i.e. total estimated costs, including the fixed fee). DOD FMR, vol. 3, ch. 8, para. 080603; DFAS-IN 37-1, Table 8-1.
 - (2) Cost-Plus-Incentive-Fee Contracts (CPIF). FAR 16.304, FAR 16.405-1.
 - (a) This contract-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) Record obligation for the **total estimated payment**, including the target fee. DOD FMR, vol. 3, ch. 8, para. 080603; DFAS-IN 37-1, Table 8-1.
 - (3) Cost-Plus-Award-Fee (CPAF) Contracts. FAR 16.305 and 16.405-2.

- (a) The contractor receives its costs; a base fee that is fixed at award; and, possibly, an additional award fee based upon the quality of the contractor's performance. 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). The award fee is determined unilaterally by the contracting officer, or the Award Fee Determining Official, based upon the guidance contained within FAR 16.401(e).
- (b) Record obligation for the **total estimated payment**, including the base fee. Do not include the award fee amount. Record obligation regarding award fee when determined that award will be paid. DOD FMR, vol. 3, ch. 8, para. 080603; DFAS-IN 37-1, Table 8-1.

(4) Cost Contracts. FAR 16.302.

- (a) The contractor receives its allowable costs but no fee.
- (b) Record obligation for the total estimated cost of the contract. DOD FMR, vol. 3, ch. 8, para. 080603; DFAS-IN 37-1, Table 8-1.

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

- a. T&M contracts and LH contracts are used when it is impossible at the outset to estimate accurately the extent or duration of the work. The work being acquired is defined as a specified number of hours effort by an individual of a certain skill level. 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.
- b. Record obligation of the **minimum liability**, exclusive of permitted variations. Record additional obligations as necessary at the time delivery or task orders are placed. DOD FMR, vol. 3, ch. 8, para. 080603; DFAS-IN 37-1, Table. 8-1.

5. Indefinite Delivery Contracts.

- a. Variable Quantity Contracts.

(1) Indefinite-Quantity/Indefinite-Delivery (IDIQ) Contracts. FAR Subpart 16.5.

(a) Under an IDIQ the government places task or delivery orders for supplies or services. The government must buy at least the guaranteed minimum quantity listed in the contract, but may purchase up to the maximum listed quantity.

(b) Record obligation 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. DFAS-IN 37-1, Table 8-1; DOD FMR, vol. 3, ch. 8, para. 080604.

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

(a) The quantity and price are fixed. The government issues task or delivery orders to specify the delivery date and location.

(b) Record obligation for the **full amount of the definite quantity required in the current year** at the time of contract award. DFAS-IN 37-1, Table 8-1; DOD FMR. Vol. 3, ch. 8, para. 080604. Note that the agency must have a valid *bona fide* need for the full quantity at the time of contract award.

(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) **DO NOT** record an obligation at contract award. Record the obligation related to each order at the time the order is placed. DFAS-IN 37-1, Table. 8-1; DOD FMR, vol. 3, ch. 8, para. 080604.

6. Letter Contracts or Letters of Intent.

- a. Letter contracts are used to expedite performance in exigent or emergency circumstances. The parties must reduce the contract terms to writing within 180 days after issuance. FAR 16.603-2(c); 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).
- b. Record obligation in the amount of the **maximum liability authorized**. When the contract is definitized, adjust the obligation to equal the final amount. In adjusting the balance, use funds currently available for obligation. DOD FMR, vol. 3, ch. 8, para. 080607; DFAS-IN 37-1, Table 8-1; Obligating Letter Contracts, B-197274, Sept. 23, 1983, 84-1 CPD ¶ 90.

7. Purchase Orders.

- a. A purchase order creates an obligation if the purchase order represents acceptance of a binding written offer of a vendor to sell specific goods or furnish specific services at a specific price, or the purchase order was prepared and issued in accordance with small purchase or other simplified acquisition procedures. DOD FMR, vol. 3, ch. 8, para. 080610A.
- b. A purchase order requiring acceptance by the vendor before a firm agreement is reached must be recorded as an obligation in **the amount specified in the order at the time of acceptance**. If written acceptance is not received, delivery under the purchase order is evidence of acceptance to the extent that delivery is accomplished during the period of availability of the appropriation or funding cited on the purchase order. If delivery is accepted subsequent to the period of availability, a new or current funding citation must be provided on an amended purchase order. DOD FMR, vol. 3, ch. 8, para. 080610B.

8. Service Contracts.

- a. **Severable Services.** Absent a statutory exception, severable services are the *bona fide* need of the fiscal year in which performed. Thus, agencies must fund service contracts with dollars available for obligation on the date the contractor performs the services. DOD FMR, vol. 3, ch. 8, para. 080304B; Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216; Matter of Funding of Air Force Cost Plus Fixed Fee Level of Effort Contract, B-277165 (2000).

- b. Statutory exception to severable service bona fide needs rule: DOD agencies may obligate funds current at the time of award to fully 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 41U.S.C.§ 253l. However, the agency must obligate the funds for the contract before the funds expire. National Labor Relations Board – Improper Obligation of Severable Service Contract, Comp. Gen. B-308026, Sept. 14, 2006 (due to “ministerial” error, NLRB failed to obligate FY 05 funds for an option year for service contract that ran from 1 Oct 05 – 30 Sep 06). “Fund holders may obligate funds current when a severable service contract is signed for the amount of the contract provided the contract does not exceed 12 months. Fund holders may also split the obligation between fiscal years that the contract covers provided the contract does not exceed 12 months. Severable service contracts that exceed 12 months will be funded by appropriations of the fiscal years in which the services are rendered.” DFAS-IN Reg. 37-1, para. 080703B; DOD FMR, vol. 3, ch. 8, para. 080304B.

- c. Nonseverable Services. If the services produce a single or unified outcome, product, or report, the services are nonseverable. If so, the government must record an obligation **to cover the entire effort** at the time the contract is awarded, and the contract performance may cross fiscal years. DFAS-IN 37-1, Table 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); DOD FMR, vol. 3, ch. 8, para. 080304B.

9. Options.

- a. An option gives the government the unilateral right, for a specified time, to order additional supplies or services, or to extend the term of the contract, at a specified price. FAR 2.101.

- b. Record obligation in the amount specified **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. *See generally* DFAS-IN Reg. 37-1, para. 080703B and C.

- c. For severable service contracts, option years are treated as new contracts. Therefore, when the severable service contract has renewal options, record obligation funds for **the basic period and any penalty charges for failure to exercise options**. DFAS-IN 37-1, ch. 8, para. 080703B.

10. Rental Agreements and Leases of Real or Personal Property. Generally, obligate for one month at a time throughout the term of the rental agreement. Determine the amount of the obligation by analyzing the government's rights to terminate the rental agreement or lease. DOD FMR, vol. 3, ch. 8, para. 0807.

- (1) If the government may terminate a rental agreement without notice and without obligation for any termination costs, obligate the monthly amount of the rent on a monthly basis. DOD FMR, vol. 3, ch. 8, para. 080702.
- (2) If the government may terminate a rental agreement without cost upon giving a specified number of days' notice, obligate the monthly amount of the rent. Additionally, obligate for the number of days' notice the government is required to give. DOD FMR, vol. 3, ch. 8, para. 080703.
- (3) If the rental agreement provides for a specified payment in the event of termination, obligate the monthly rental amount plus the amount of the termination payment. DOD FMR, vol. 3, ch. 8, para. 080704.
- (4) If a domestic or foreign rental agreement is for 12 months or less, has no termination provision, and is financed with an annual appropriation, obligate the full amount of the rental agreement at the time of execution, even if the rental agreement extends into the next fiscal year. DOD FMR, vol. 3, ch. 8, para. 080705.
- (5) If a domestic or foreign rental agreement is for more than 12 months, funds must be fully obligation at inception, unless the document contains a cancellation clause. DOD FMR, vol. 3, ch. 8, para. 080706.

11. Reimbursable Orders Placed With DOD Components or Other U.S. Government Agencies. DOD FMR, vol. 3, ch. 8, para. 0808; DFAS-IN 37-1, Table 8-2.

- a. **Reimbursable Procurements.** Reimbursable procurements are orders for supplies, materials, service, or equipment placed by the requiring agency for procurement by another DOD Component or Federal Agency on a contract funded by the procuring agency. The requiring agency records an obligation when the procuring agency accepts the order in writing. DOD FMR, vol. 3, ch. 8, para. 080801B.

- b. **Direct Citation Procurements.** Direct Citation Procurements are procurements accomplished by combining the requirements of one or more DoD Components with the requirements of the procuring agency. Record the obligation when the requiring agency is notified, in writing, that the acquiring agency's contract, project order, purchase order, etc., has been executed, or when the requiring agency receives copies of the obligating documents (contract, delivery order, etc.) from the procuring agency. DOD FMR, vol. 3, ch. 8, para. 080802.

- c. **Orders placed with DOD components under the Project Order Statute (41 U.S.C. § 23), or with other U.S. governmental agencies under the Economy Act or non-Economy Act (31 U.S.C. § 1535).** DOD FMR, vol. 3, ch. 8, para. 080803.
 - (1) **Project Orders.** When the performing activity accepts the order in writing, obligate funds in the amount stated in the order. DOD FMR, vol. 3, ch. 8, para. 080703A; DFAS-IN 37-1, Table 8-2.

 - (2) **Economy Act Orders.** Requesting agencies must obligate funds when the performing activity accepts the order in writing. Deobligate funds on Economy Act orders issued against annual or multiple year appropriations to the extent the unit or agency filling the order has not incurred obligation before the period of availability of the funds by providing goods or services, or making an authorized contract to provide the requested goods or services. DOD FMR, vol. 3, ch. 8, para. 080703B; DFAS-IN 37-1, Table 8-2.

 - (3) **Non-Economy Act Orders.** Obligate funds only when supported by documentary evidence of an order required by law to be placed with an agency or upon a binding agreement (funding vehicle) between an agency and another person (including an agency); the agreement is in writing; is for a purpose authorized by law; serves a bona fide need arising, or existing, in the fiscal year or years for which the appropriation is available for new obligations; executed before the end of the period of availability for new obligation of the appropriation or

fund used; and provides for specific goods to be delivered, real property to be bought or leased, or specific services to be supplied. Funds provided to a performing agency for ordered goods where the funds period of availability thereafter has expired shall be deobligated and returned by the performing agency unless the request for goods was made during the period of availability of the funds and the time(s) could not be delivered within the funds period of availability because of delivery, production, manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the parties. DOD FMR, vol. 3, ch. 8, para. 080801C and vol. 11A, ch. 18, para. 180301.

- 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. DFAS-IN 37-1, Table 8-2.
 - e. It is improper to “bank” an agency’s annual funds with a GSA account to cover future year needs. Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001. In accordance with (IAW) 40 U.S.C. 1412(e), Department of Defense (DOD) activities may obtain information technology resources from GSA programs without relying on the Economy Act. The obligation is recorded at the time the activity enters into a binding written interagency agreement with GSA. New needs may not be added to an existing order and funded with expired funds unless deemed to be a within scope change to the original order. DFAS-IN 37-1, para. 080707.
12. Stock Fund Orders. These are orders for stock (i.e. standard) items procured through an integrated material management (IMM) activity, such as vehicle repair parts or ammunition. Record as an obligation when the order is placed. If the item does not have a stock number, record at the time the stock fund accepts the order. DOD FMR, vol. 3, ch. 8, para. 080902.
- a. Adjust obligations for undelivered stock fund orders when a change notice affecting price, quantity, or an acceptable substitution is received. DOD FMR, vol. 3, ch. 8, para. 080903A.

- b. Cancel a stock fund obligation when notice is received of: (a) unacceptable substitution; (b) transfer of a stock-funded item to funding by a centrally managed procurement appropriation within a DOD component; or (c) advice that the stock fund is unable to perform under the terms of the order. DOD FMR, vol. 3, ch. 8, para. 080903A.

VII. ADJUSTING OBLIGATIONS.

- A. Adjusting Obligation Records. For five years after the time an appropriation expires for incurring new obligations, both the obligated and unobligated balances of that appropriation shall be available for recording, adjusting, and liquidating obligations properly chargeable to that account. 31 U.S.C. § 1553(a); DOD FMR, vol. 3, ch. 10, para. 100302; DFAS-IN 37-1, para. 0817 and Table 8-7.
- B. Contract Changes. A contract change is one that requires the contractor to perform additional work. Identity of the appropriate fund for obligation purposes is dependent on whether the change is “in-scope” or “out-of-scope.” The contracting officer is primarily responsible for determining whether a change is within the scope of a contract. DOD FMR, vol. 3, ch. 8, para. 080304.
 - 1. In-scope Changes. Charge the appropriation initially used to fund the contract. DFAS-IN 37-1, Table 8-7.
 - 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).
 - b. Increase of ceiling price under cost-reimbursement contract. For an increase in ceiling price not required in the original contract (i.e., discretionary increase), obligate funds from fiscal year cited in the original contract if available, then current funds. DFAS-IN 37-1, table 8-7, note 1. 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. Out of Scope Changes. Treat as a new obligation and use current funds 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; DFAS-IN 37-1, Table 8-7.
- C. Limitations on use of Expired or Current Funds to adjust obligations. 31 U.S.C. § 1553(c); DOD FMR, vol. 3, chs. 8 and 10; DFAS-IN 37-1, para. 0816.
1. Expired Accounts. If a contract change requires the contractor to perform new work (i.e. an in-scope modification that adds tasks or performance objectives), the change is subject to the following provisions:
 - a. Contract change in Excess of \$4 Million. Approval by the Under Secretary of Defense (Comptroller) is required when the amount of an obligation would cause the total amount of charges in any fiscal year for a single program, project, or activity to exceed \$4 million and the account being used to fund the obligations is no longer available for new obligation. DOD FMR, vol. 3, ch. 10, para. 100306.
 - b. Contract change of \$25 Million or More. In addition to the requirements for changes in excess of \$4 Million, 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 for those changes of \$25 Million or more. DOD FMR, vol. 3, ch. 10, para. 100307.
 - (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 the OUSD(C)(P/B) documentation that explains the circumstances, contingencies, or management practices that caused the need for the adjustment, to include letters to the appropriate congressional committees for the signature of the USD(C).

2. Current Funds otherwise chargeable to Cancelled Account. DOD FMR, vol. 3, ch. 10, para. 100303D. 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;
 - 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.

VIII. UNRECORDED OBLIGATIONS

- A. When an accounting office identifies that an obligation has been incurred, but is not recorded, the following procedures are required:
 1. The accounting office must verify the document was not previously recorded in the official accounting records or was recorded in an amount less than the actual obligation. DOD FMR, vol. 3, ch. 18, para. 081402.

2. DFAS must immediately record the obligation if the dollar amount is \$2,500 or less. If the dollar amount is greater than \$2,500, the accounting office must provide the appropriate DOD Component Financial Manager with a copy of the obligating documents, who will record the obligation within 10 days. If the Financial Manger fails to record the obligation within 10 days, the accounting office must record the obligation on behalf of the Financial Manager. DOD FMR, vol. 3, ch. 18, para. 081403.
 3. Upon recording of the obligation, the accounting office must immediately notify the Funds Holder. DOD FMR, vol. 3, ch. 18, para. 081403.
- B. Over-recording and under-recording obligations are equally improper, as either makes it impossible to determine the actual status of an appropriation and may lead to ADA violations. Such actions may also call into question the accuracy of agency financial statements and the propriety of certifications on obligation reports provided to Congress pursuant to 31 U.S.C. § 1108(c) and 1501(b). To assist in the avoidance of such issues, the DOD FMR now mandates triannual reviews of commitments, obligations, accounts payable, unfiled customer orders and accounts receivable. *See* DOD FMR, vol. 3, ch. 18, para. 0816; DFAS-IN 37-1, para. 0818.

IX. 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 52.249-2, Termination for the Convenience of the Government (Fixed-Price).
 2. The contracting officer is responsible for deobligating all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD FMR, vol. 3, ch. 8, para. 080612; DFAS-IN 37-1, Table 8.7.
 3. If a contract is terminated for default or for the convenience of the government pursuant to: (1) a court order; or (2) a determination by a competent authority—i.e., contracting officer, Board of Contract Appeals, or GAO—that the 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); Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 81-2 CPD ¶ 33; DOD FMR, vol. 3, ch. 10, para. 100308; DFAS-IN 37-1, Table 8-7. If a reprourement will result in an obligation that exceeds \$4 million then the action must first be submitted to USD(C) for approval. *See* DOD FMR, vol. 3, ch. 10, para. 100306 and 100307.

X. MISCELLANEOUS RULES OF OBLIGATION.

- A. Bid Protests. 31 U.S.C. § 1558; DOD FMR, vol. 3, ch. 8, 081303; DFAS-IN 37-1, para. 080706 and Table 8.7.
 1. Funds available at the time of protest or other action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action. A protest or other action consists of a protest filed with the Government Accountability Office, or an action commenced under administrative procedures or for a judicial remedy if:
 - a. The action involves a challenge to—
 - (1) A solicitation for a contract;
 - (2) A proposed award for a contract;
 - (3) An award of a contract; or

- (4) The eligibility of an offeror or potential offeror for a contract or of the contractor awarded the contract. DOD FMR, vol. 3, ch. 8, 081303; DFAS-IN 37-1, para. 080706.
 - 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; DOD FMR, vol. 3, ch. 8, 081303; DFAS-IN 37-1, para. 080706.
 - 2. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558.
 - a. A request for reconsideration of a GAO protest must be made within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b).
 - b. The appeal of a protest decision of a district court or the Court of Federal Claims must be filed with the Court of Appeals for the Federal Circuit within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).
- B. Ratification of Unauthorized Commitments. Charge against the funds that would have been charged had the obligation been valid from its inception. GAO Redbook, Vol. II, page 7-2 and 7-3; 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); *see also* National Science Foundation—Potential Antideficiency Act Violation by the National Science Board Office, B-317413, Apr. 24, 2009.
- 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, Table 8-7, para. 10 and note 3.
- D. Litigation.

1. General. As a general rule, the amount of liability expected to result from pending litigation shall be recorded as an obligation in cases where the government definitely is liable for the payment of money from available appropriations, and the pending litigation is for determining the amount of the government's liability. In other cases, an obligation shall not be recorded until the litigation has been concluded or the government's liability finally is determined. DOD FMR, vol. 3, ch. 8, para. 081305.
2. Settlement of a claim. A claim payable under the law must be recorded as an obligation, when finally approved, in the amount certified for such payment. DOD FMR, vol. 3, ch. 8, para. 081308; DFAS-IN 37-1, Table 8-6. The obligation for interest related to CDA claims must be recorded under the same appropriation that financed the contract. DOD FMR, vol. 3, ch. 8, para. 080608.
3. Judgments or monetary awards. Initially, the government may pay judgments from a permanent appropriation called the Permanent Judgment Appropriation (Judgment Fund). 31 U.S.C. § 1304. The Contract Disputes Act (CDA) requires agencies to reimburse the Judgment Fund for CDA judgments. 41 U.S.C. § 612(c). Agencies make reimbursements from funds available for obligation when the judgment is entered. Expired funds that were current at the time of the judgment may also be used. If more than one appropriation is involved in the monetary judgment, then the reimbursement is prorated against those appropriations. Any proration between or among appropriations must be based on the nature of the claim and the basis of that monetary judgment in the particular case. DOD FMR, vol. 3, ch. 8, para. 0804; DFAS-IN 37-1, Table 8-6, para. 15; Bureau of Land Mgt. - Reimbursement of CDA Payments, B-211229, 63 Comp. Gen. 308 (1984).
4. Attorney fees and other litigation expenses. These costs are not payable by the Judgment Fund. Record obligations against funds that are current at the time of settlement or award. DFAS-IN 37-1, Table 8-6.

XI. CONCLUSION

- A. Commitment accounting allows the government to ensure sufficient funds exist to fund all pending obligations should they all be executed simultaneously. Commitments must be recorded in various amounts for different types of contracts, generally tracking with the amount of liability (or a reasonable estimate of future liability) the government will incur at the time of obligation.

- B. Obligations are accounting transactions based on actual legal liabilities such as contract award, acceptance of orders placed (if that order constitutes acceptance of a contractor's offer to sell), and other transactions. Obligations carry legal liabilities and may lead to Antideficiency Act violations unless they are correctable. Agencies must obligate various amounts based on the known or estimated amount of financial liability the government has in a given contract action.

- C. Most funds are only available for obligation for a certain period of time, after which they expire. Expired funds may be used in some circumstances to adjust old obligations, but are subject to some approval requirements if the adjustment is based on requiring the contractor to perform more work and the amount exceeds \$4 million.

- D. Expired appropriations may remain available for obligation based on the termination of a contract under some conditions.

APPENDIX A
OBLIGATIONS AND COMMITMENTS – COMPARISON CHART

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

APPENDIX B

PURCHASE REQUEST AND COMMITMENT (PR&C)

PURCHASE REQUEST AND COMMITMENT <small>For use of this form, see AR 37-1, the proponent agency is ODA(A/Pd)</small>		1. PURCHASE INSTRUMENT NO.	2. REQUISITION NO.	3. DATE	PAGE OF PAGES
4. TO:		5. THRU:		6. FROM:	
It is requested that the supplies and services enumerated below or on attached list be					
7. PURCHASED FOR		8. DELIVERED TO		9. NOT LATER THAN (Date)	
The supplies and services listed below cannot be secured through normal supply channels or other Army supply sources in the immediate vicinity, and their procurement will not violate existing regulations pertaining to local purchases for stock, therefore, local procurement is necessary for the following reason: (Check appropriate box and complete item.)					
<input type="checkbox"/> 12. LOCAL PURCHASES AUTHORIZED AS THE NORMAL MEANS OF SUPPLY FOR THE FOREGOING BY		<input type="checkbox"/> 13. REQUISITIONING DISCLOSES NONAVAILABILITY OF ITEMS AND LOCAL PURCHASE IS AUTHORIZED BY			
10. NAME OF PERSON TO CALL FOR ADDITIONAL INFORMATION					
11. TELEPHONE NUMBER					
19. ACCOUNTING CLASSIFICATION AND AMOUNT					
FUND CERTIFICATION The supplies and services listed on this request are properly chargeable to the following allotments, the available balances of which are sufficient to cover the cost thereof, and funds have been committed.					
20. TYPED NAME AND TITLE OF CERTIFYING OFFICER					
21. SIGNATURE					
22. DATE					
23. DISCOUNT TERMS					
24. PURCHASE ORDER NUMBER					
25. THE FOREGOING ITEMS ARE REQUIRED NOT LATER THAN AS INDICATED ABOVE FOR THE FOLLOWING PURPOSE					
26. DELIVERY REQUIREMENTS					
ARE MORE THAN 7 DAYS REQUIRED TO INSPECT AND ACCEPT THE REQUESTED GOODS OR SERVICES YES <input type="checkbox"/> NO <input type="checkbox"/>					
IF YES, NUMBER OF DAYS REQUIRED					
27. TYPED NAME AND GRADE OF INITIATING OFFICER		28. SIGNATURE		29. DATE	
30. TELEPHONE NUMBER		31. TYPED NAME AND GRADE OF SUPPLY OFFICER		32. SIGNATURE	
		33. DATE		34. TYPED NAME AND GRADE OF APPROVING OFFICER OR DESIGNEE	
				35. SIGNATURE	
				36. DATE	

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APPENDIX C

DFAS-IN 37-1, Table 8.1 -- Basis for Recording Obligations

Contract Type	Approp. Year	Basis for Recording Obligation	Obligation Amount (See Note 1)
1. Government Charge Card (non-CARE).	Current	Historical	Estimated monthly purchases.
2. Cost reimbursable.	Current	Contract award	Full amount.
3. Cost plus fixed fee.	Current	Contract award	Full amount of contract, including the fixed fee.
4. Cost plus incentive fee.	Current	Contract award	Full amount of contract, including the incentive fee.
5. Cost plus award fee.	Current	Contract award	Full amount of contract, not including the award amount. Obligate award when determined that award will be paid. Obligation for award is against same appropriation and FY used for contract.
6. Cost reimbursable with delivery orders.	Current	Contract award and delivery orders	Minimum liability of the U.S. government when contract awarded. Obligate additional funds over minimum for each order when placed.
7. Firm fixed price.	Current	Contract award	Full amount.
8. Firm fixed price with escalation clause.	Current	Contract award	Target amount.
9. Indefinite delivery, indefinite quantity.	Current	Contract award and delivery orders	When contract is awarded obligate minimum liability of U.S. government. Obligate additional funds over minimum for each order when placed.
10. Indefinite delivery, definite quantity.	Current	Contract award	Full amount for quantity required in current year. See Note 2.
11. Job order contracts.	Current	Contract award	Minimum liability of U.S. government and delivery orders in excess of the minimum liability.
12. Letter contract.	Current	Upon issuance	The amount of maximum legal liability. See Note 3.

13. Letter contract.	Current	When definitized (See Note 4)	Adjust the recorded obligation to equal the contract amount.
14. Non-severable contract. See Note 5.	Current	Contract award	Full amount unless restricted by other obligation rules.
15. Purchase order \$100,000 and less.	Current	Upon issuance	Full amount.
16. Purchase order over \$100,000.	Current	Upon written acceptance or constructive acceptance based on delivery	Full amount.
17. Requirements.	Current	Delivery order	Amount of delivery order.
18. Reserve officer training.	Current/ Next Subject to fund availability	Contract award	Full amount of the contract for the academic year.
19. Severable contracts: a. Contract for services not to exceed 12 months. *b. Contract exceeds 12 months (multiple-year appropriations only). See Note 6.	a. Current b. Current	a. Contract award b. Contract award	*a. Full amount of contract. *b. Current funds in an amount necessary to fund the contract. No contract citing multiple-year appropriations, regardless of the length of the contract, may extend beyond the appropriation's period of availability (i.e., into the expired period).
20. Subscriptions/periodicals.	Current	Contract award	Full amount for subscription periods offered by the vendor. See Note 7.
21. Time and Material.	Current	Contract award and delivery orders	Minimum liability of U.S. Government exclusive of permitted variations. Obligate additional funds for each delivery order when order is placed.
22. Training in a civilian institution when training begins and ends in the current FY.	Current	Contract award	Full amount.
23. Training in a civilian institution when training begins in the current FY but ends in the next FY.	Current	Contract award	Full amount

<p>24. Training in a civilian institution when all of the following conditions exist. See Note 8.</p> <p>a. Training begins within the first 90 days of the next FY;</p> <p>b. Training is not readily available from other sources (See Note 9); and</p> <p>c. Institution requires a non-cancelable contract/ advance payment before the end of the current FY to reserve a space in the course or to pay for instructors.</p>	Current	Contract award	Full amount
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Notes:	
1	Obligate contracts net of discount unless system automatically reduces obligation when discount taken.
2	Delivery is required in current FY but not necessarily deliverable by the contractor in the current FY.
3	Letter contracts are superseded upon definitization, and the total cost of the definitized contract, less either the actual costs incurred under the letter contract (when known), or the maximum legal liability permitted by the letter contract (when actual costs cannot be ascertained), is obligated against the appropriation current at the time the parties enter into the definitized contract.
4	Definitized means when the total contract costs are determined.
5	Non-severable contracts are for single undertakings. For example, painting a building.
6	Severable contracts, for purposes of performance, are continuing and recurring in nature, such as for rents or for performance of purely personal services with compensation fixed in proportion to the amount of work performed.
7	Per 31 U.S.C. § 3324, this includes “Charges for a publication printed or recorded in any way for the auditory or visual use of the agency.”

Notes:

⁸ Tuition payments can be made in advance during the current FY only if the obligation is also properly chargeable to the current FY. Making advance payments to obtain discounts for obligations properly chargeable to the next year's funds is specifically prohibited by 31 U.S.C. § 3324.

⁹ Courses meeting this requirement are generally only offered once a year and options for similar courses meeting the same training requirement are not available.

APPENDIX D

DFAS-IN 37-1, Table 8.6 -- Miscellaneous Rules

If the Obligation is For:	Obligate:
1. Loan agreement.	The amount of the loan to be made.
2. Grant or subsidy.	The actual amount of the grant or subsidy payable.
3. Liability from pending litigation: a. If the government is definitely liable and the litigation is just to determine amount of liability. b. If litigation is to determine the government's liability.	a. Current funds in the amount of the expected liability. b. Current funds when the government's liability is determined.
4. Valid judgment.	Funds current when the judgment is rendered.
5. Claim payable by law.	When the claim is approved. See Note 1.
6. Other legal liabilities of the U.S. government.	Based on documentation or legal determination.
7. Public utilities (that is, electricity, gas, water, telephone).	Funds current in the month the billing period ends, even if the billing period is split between FYs.
8. IMET/FMF training orders.	Funds current when either funded orders or valid travel authorizations are issued. See Note 2.
9. Items bought by an imprest fund.	Funds current when the imprest fund is reimbursed. Imprest funds should be reimbursed at year-end.
10. Interest-penalty charges under Prompt Payment Act (PPA).	Funds available for administration of the program for which interest was incurred. PPA interest and penalties must be paid based on the fiscal year in which the interest was incurred.
11. Contract ratification.	When the U.S. government's liability was incurred.
12. Materiel requisition.	Funds current when the requisition is submitted/ placed by the area's servicing stock record officer.

If the Obligation is For:	Obligate:
13. Settlement of a claim arising out of an original undertaking or resulting from a within-scope change.	Funds available at the time of original undertaking.
14. Settlement of a claim arising out of a change-in-scope change to the original contract.	Funds available and charged for the change in scope.
15. Reimbursement to Judgment Fund for Contract Disputes Act of 1987/Armed Services Board of Contract Appeals judgments.	Funds current at the time of the judgment. Expired funds that were current at the time of the judgment may also be used. This will not result in an Antideficiency Act Violation (63 Comp Gen 308, 1984).
16. Contract litigation costs, if separately stated in the settlement agreement or as a result of judgment.	Funds current at the time of settlement or award (28 U.S.C. § 2412 (D)(4); 5 U.S.C. § 504).
17. Liabilities evidenced by expenditure documents.	Amount of the invoice/bill paid. The invoice/bill may be used as the obligating document.

Notes:
¹ When final approval is required at a higher level than the funded installation and the amount approved exceeds the installation's available funds, defer recording the obligation until enough funds are received to cover the increased amount. This is not an Antideficiency Act Violation.
² Obligate funded IMET orders when issued using funds cited on the order regardless of when the travel or training starts. Funded IMET orders cannot be used to obligate funds of succeeding FYs. Adjust obligations based on actual student input and travel/living costs.

APPENDIX E

DFAS-IN 37-1, Table 8.7 -- Obligations for Adjustments

If Adjustment is:	Then:
1. For increases in a cost reimbursement contract that exceed the original contract ceiling price and are not based on an antecedent liability enforceable by the contractor.	Obligate funds current at time price increase is granted.
2. For increases or decreases to a contract resulting from decisions under 50 U.S.C. §§ 1431-33 and § 1431-35 and correcting mistakes or formalizing informal agreements. ¹	Obligate funds originally cited if the amendment does not change the scope of the contract. Obligate funds current at time amendment is executed, if the amendment changes the scope of the contract.
3. For a contingent obligation, such as one existing under indemnification clause involving an equitable adjustment. ²	Obligate funds originally cited on the contract. Record the obligation in the amount of the contractual liability when the amendment fixing the obligation is executed. If no amendment is required, the adjustment is recorded as an obligation when the event occurs that fixes the amount of the liability.
4. Within-scope change to a contract.	Obligate the original funds cited on contract for increased amount. For contracts funded by the MILCON appropriation, the within scope change may be funded from the funds available for obligation at the time the initial contract was awarded. This includes all five years of funds available at the time the contract was awarded unless the funds have closed. In-scope modifications may be funded with appropriations enacted into law for the four years subsequent to the year for which Congress initially appropriated funds for the project. If original funds have closed, use current funds.
5. Change in scope to a contract.	Obligate funds current when amendment is executed.
6. Within scope contract modification for a Defense Environmental Restoration program contract citing Defense Environmental Restoration Activities	Obligate one of the following: a. Prior-year account that funded the original contract if funds remain in that account, or

If Adjustment is:	Then:
(DERA) funds transferred to Operations and Maintenance, Army (OMA).	b. Current appropriation account that is available for the same purpose as the account that funded the original contracts if no prior-year funds are available.
7. For a contract terminated for the convenience of the U.S. government.	Adjust the recorded obligation to anticipated settlement costs.
8. For a contract terminated for contractor default and for a contract terminated for convenience of the government when the termination for convenience is the result of a court order, a determination by other competent authority (such as a Board of Contract Appeals, GAO, or contracting officer) that the original award was improper/	Obligate funds originally cited (unless original funds closed) to fund a replacement contract, provided all the following conditions are met: a. Original contract was made in good faith; b. Continuing bona fide need still exists for the goods or services ordered; c. Replacement contract is substantially of the same size and scope as the original contract; d. Replacement contract is awarded without undue delay on same basis as original contract.
9. For a protest filed with GAO in connection with a solicitation for, proposed award of, or award of a contract.	Obligate, (after final ruling is made on protest), funds available at the time the protest was filed with GAO, provided the contract is awarded within 100 working days after the ruling.
10. For an obligation covering liquidated damages.	Recover the amount of liquidated damages deducted and withheld. ³
11. For an anticipated price reduction on a contract determined with a written agreement between the contracting officer and the contractor.	Adjust the original obligation as necessary.
12. For a miscellaneous obligation document (MOD) used to record an estimated obligation (such as utility service), and later determined to be over or understated.	Adjust obligations against the MOD using same year funds.
13. Based on receipt of credit for materiel return.	Reduce the obligation to the allotment current at the time the notice of credit was generated. ⁴
14a. Required to make a payment for a recorded unliquidated obligation in a canceled account.	14a. and b. Use unexpired funds available for the same general purpose subject to the unexpended and 1% limitations.

If Adjustment is:	Then:
14b. Required to make a payment for an unrecorded obligation in a canceled account. 14c. Required to record an obligation in a canceled account for a disbursement that was made before the account canceled. ⁵	14c. Record the obligation in the canceled account.
Notes:	
¹ Contract changes citing expired funds require written documentation supporting these charges/adjustments as a legitimate use of expired appropriations. See DoDFMR Volume 3, Chapter 10 .	
² The fund holder is responsible for covering the U.S. government's contingent liability under the contract and for ensuring enough funds are available to cover net increases in obligations if the contingencies become actual liabilities when the formal contract supplement is signed.	
³ If a contractor objects to the deduction of liquidated damages, treat the amount as a contingent liability. Reestablish an obligation only when a formal contractor claim is approved.	
⁴ Maintain financial control over outstanding materiel returns to inventories. Account for returns as reversals of related materiel procurement and/or issue transactions.	
⁵ See Chapter 16 in this regulation for procedures on adjustments to canceled accounts.	

CHAPTER 6:



INTERAGENCY ACQUISITIONS

CHAPTER 6

INTERAGENCY ACQUISITIONS

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CHAPTER 6

INTERAGENCY ACQUISITIONS¹

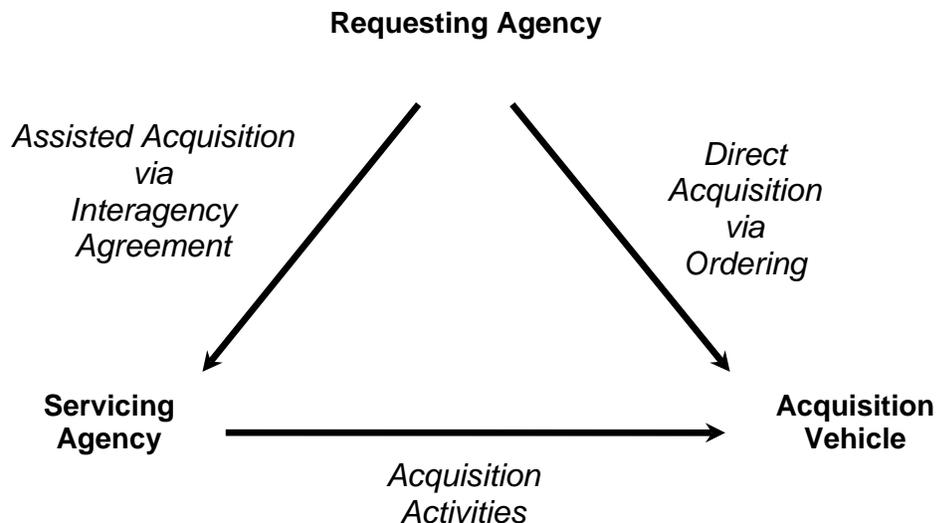
I. INTRODUCTION.

A. Interagency Acquisition: the procedure by which an agency needing supplies or services (the *requesting agency*) obtains them through another federal government agency (the *servicing agency*).

1. Types of Interagency Acquisitions.

a. Direct Acquisitions: the requesting agency places an order directly against a servicing agency's contract.

b. Assisted Acquisitions: the servicing agency and requesting agency enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on behalf of the requesting agency, such as awarding a contract or issuing a task or delivery order, to satisfy the requirements of the requesting agency.



¹ References to the Federal Acquisition Regulation (FAR) in this chapter are current as of 17 January 2017. Numerous changes were made to FAR 17.5 per FAC 2005-55, effective 2 Feb 2012. FAC 2005-62, effective 20 Nov 2012 made additional changes to FAR 17.5 and also added a new section, FAR 17.7 which provides guidance regarding acquisitions made by non-DoD agencies on behalf of DoD agencies. These changes may not appear in commercially printed copies of the FAR with effective dates of Jan 2012 or earlier. See the current on-line version of the FAR available at <http://farsite.hill.af.mil/>. Additionally, a DPAP memo of 2 Jan 2013 called for a DoD-wide review of Interagency Acquisition policy. Practitioners should review the most current policy updates available at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

2. Determination of Best Procurement Approach. For all direct acquisitions and assisted acquisitions subject to the Federal Acquisition Regulation (FAR)², a determination must be made that an interagency acquisition is the best procurement approach.
 - a. Assisted Acquisitions. Prior to requesting that another agency conduct an acquisition on its behalf, the requesting agency shall make a determination that the use of an interagency acquisition represents the best procurement approach. This requires the requesting agency's contracting office to concur that using the acquisition services of another agency— (i) satisfies the requesting agency's schedule, performance, and delivery requirements; (ii) is cost effective (taking into account the reasonableness of the servicing agency's fees); and (iii) will result in the use of funds in accordance with appropriation limitations and compliance with the requesting agency's laws and policies. FAR 17.502-1(a)(1).
 - b. Direct acquisitions. Prior to placing an order directly against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach. This requires the requesting agency's contracting office to consider numerous factors such as: (i) the suitability of the contract vehicle; (ii) the value of using the contract vehicle, including administrative cost savings from using an existing contract, prices, the number of vendors, and reasonable vehicle access fees; and (iii) the expertise of the requesting agency to place orders and administer them against the selected contract vehicle throughout the acquisition lifecycle. FAR 17.502-1(a)(2).
 - c. Interagency Agreements.
 - i) Assisted Acquisition. Prior to the issuance of a solicitation under an *assisted acquisition*, the servicing and requesting agencies shall sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties. The agreement should cover roles and responsibilities for acquisition planning, contract execution, and

²FAR 17.5 does not apply to interagency reimbursable work (other than acquisition assistance); interagency activities where contracting is incidental to the purpose of the transaction; or orders of \$500,000 or less issued against Federal Supply Schedules (FAR 17.500(c)).

contract administration. It should also include any unique terms and conditions³ of the requesting agency that must be incorporated into the order or contract awarded by the assisting agency. If there are no unique terms or conditions, the agreement should so state. A copy of the interagency agreement, prepared in accordance with current OFPP guidance, must be included in the files of both the servicing and requesting agencies. FAR 17.502-1(b).

- ii) Direct Acquisitions. Since the requesting agency administers its own order under a *direct acquisition*, and interagency agreement is not required. FAR 17.502-1(b)(2).

B. Contract Vehicles: Interagency acquisitions are often made using indefinite delivery/indefinite quantity (ID/IQ) contracts under FAR Subpart 16.5 that permit the issuance of task or delivery orders during the term of the contract. Contract vehicles used most frequently to support interagency acquisitions are the General Services Administration (GSA) Schedules (also referred to as Multiple Award Schedules and Federal Supply Schedules), government-wide acquisition contracts (a GWAC is a multi-agency task or delivery order contract, typically for information technology, established by one agency for governmentwide use under authority other than the Economy Act), and multi-agency contracts (a MAC is a task or delivery order contract established by one agency for use by other Government agencies consistent with the Economy Act). In addition to the best procurement approach determinations discussed above, to establish new multi-agency or governmentwide acquisition contracts, a business-case analysis must be prepared and approved in accordance with current Office of Federal Procurement Policy (OFPP) guidance. *See* FAR 17.502-1(c)⁴ for additional guidance.

C. Fiscal Policy: unless authorized by Congress, interagency transactions are generally prohibited.

- 1. Under 31 U.S.C. § 1301 (the “purpose statute”) a federal agency must use its appropriated funds for the purposes for which the appropriations were made. Therefore, unless authorized by Congress, funds appropriated for

³ FAR Subpart 17.7 outlines many of the unique terms and conditions that apply when a nondefense agency procures supplies and services on behalf of a defense agency.

⁴ *See also*, OMB memo, “Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions,” 29 Sep 2011, *available at* <https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/development-review-and-approval-of-business-cases-for-certain-interagency-and-agency-specific-acquisitions-memo.pdf>.

the needs of one federal agency may not be used to fund goods and services for the use of another federal agency.

- a. From the standpoint of the requesting agency, receiving goods or services funded by another agency's appropriations without reimbursing the servicing agency would constitute an improper augmentation of the requesting agency's funds.
 - b. Funds sent by the requesting agency to the servicing agency as reimbursement for goods or services provided could not be retained and spent by the servicing agency, but instead would have to be turned over to the Treasury under 31 U.S.C. § 3302(b) (the Miscellaneous Receipts Statute).
2. Congress has provided several statutory authorities for interagency acquisitions, allowing agencies to avoid these fiscal law limitations.
- a. The Economy Act: 31 U.S.C. §§1535-1536. This is the general authority for interagency acquisitions, but is used only when more specific authority does not apply (see below).
 - b. The Project Order Statute: 41 U.S.C. § 23.
 - c. Other Non-Economy Act Authorities: Government Employees Training Act (GETA), Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWAC), and other required sources.
 - d. These other, more specific "non-Economy Act" authorities, must be used instead of the Economy Act where applicable. (FAR 17.502-2(b)).

II. THE ECONOMY ACT (31 U.S.C. §§ 1535-1536)

- A. Purpose: Provides authority for federal agencies to order goods and services from other federal agencies, or with a major organizational unit within the same agency, if:⁵
1. Funds are available;
 2. The head of the ordering agency or unit decides the order is in the best interests of the government;

⁵ 31 U.S.C. §1535(a); DoD FMR, vol. 11A, ch. 3, para. 030104. The Economy Act was passed in 1932 as an effort to obtain economies of scale and eliminate overlapping activities within the federal government.

3. The agency or unit filling the order can provide or get by contract the ordered goods or services; **and**
4. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.⁶

B. Authorized Uses.

1. Inter-service Support: orders placed between DoD activities, including those: (1) between military departments; or (2) between military departments and other defense agencies.⁷ Also referred to as “intra-agency support.”
2. Intra-governmental Support: orders placed with non-DoD federal agencies.⁸ Also referred to as “Interagency.”
3. The Economy Act applies only in the absence of a more specific acquisition authority. FAR 17.502-2(b).⁹

C. Determinations and Findings (D&F) Requirements (FAR Subpart 17.502-2(c)).

1. Basic Determinations. All Economy Act orders must be supported with a written D&F by the requesting agency stating that:
 - a. The use of an interagency acquisition is in the best interest of the government (FAR 17.502-2(c)(1)(i));
 - b. The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source (FAR 17.502-2(c)(1)(ii)); *see also*, DoD FMR, vol. 11A, ch. 3, para. 030104); **and**
 - c. A statement that at least one of the three following circumstances apply:
 - 1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of

⁶ See *Dictaphone Corp.*, B-244691.2, 92-2 Comp. Gen. Proc. Dec. ¶ 380 (Nov. 25, 1992). See also, DoD FMR, vol. 11a, ch. 3, para. 030104.A (March 2012).

⁷ See FAR 2.101 (defining executive agencies as including military departments); *Obligation of Funds under Military Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980).

⁸ See also, FAR 17.7, Acquisitions by Nondefense Agencies on Behalf of the Department of Defense.

⁹ See also, *An Interagency Agreement—Admin. Office of the U.S. Courts*, B-186535, 55 Comp. Gen. 1497 (1976).

the servicing agency for the same or similar supplies or services;

- 2) The servicing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or
- 3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. FAR 17.502-2(c)(1)(iii). See also, DoD FMR, vol. 11A, ch. 3, para. 030302.B.¹⁰

d. NOTE: In Economy Act transactions between DoD activities, DoDI 4000.19 and DoD FMR vol. 11A, ch. 3, para. 030303 indicate that if the transaction is documented on a DD Form 1144 support agreement signed by the head of the requiring and supplying activities (O6 or GS-15), then no further written determinations are required.¹¹ If there is no support agreement, the D&F is required.

2. D&F Approval Authority. (FAR 17.502-2(c)(2)).

- a. The D&F must be approved by a contracting officer of the requesting agency with the authority to contract for the supplies or services ordered (or by another official designated by the agency head).
- b. If the servicing agency is not covered by the FAR, then the D&F must be approved by the requesting agency's Senior Procurement Executive.
- c. DoD-specific approval authority rules.
 - 1) Interagency Support. The D&F for an order with a non-DoD servicing agency (i.e. "Interagency Support") shall be approved by the head of the major organizational unit ordering the support. This authority may be delegated, but at a level no lower than a Senior Executive Service

¹⁰ Prior to the effective date of FAC 2005-55, FAR 17.503(b) required one of these three statements *only* if the Economy Act transaction required the servicing activity to take some contracting action. The current version of the FAR (FAR 17.502-2(c)) does not make the same distinction. The current version of DoD FMR, vol. 11A, ch. 3, para. 030302.B (March 2012) parallels the prior version of the FAR, specifying that one or more of these statements would need to be included in a D&F *if* the transaction requires a contract action by a non-DoD servicing agency. Despite this inconsistency, the best practice is to include these statements in all D&Fs regardless of whether the Economy Act transaction requires a contract action.

¹¹ *But see*, note 12 *infra*.

(SES)/flag/general officer. DoD FMR, vol. 11A, ch. 3, para. 030304. If the servicing agency is not covered by the FAR, then the D&F must be approved by the requesting agency's Senior Procurement Executive.

- 2) Intra-Agency Support. If the support requested is between DoD activities (i.e. Intra-Agency or Inter-Service support), then the agreement may be approved, provided that the head of the major organizational unit ordering the support determines that it is in the best interest of the U.S. Government and the head of the servicing activity determines that capability exists to provide support without jeopardizing assigned missions. These determinations are accomplished by signing a Support Agreement (DD 1144). No further written determinations¹² are generally required for agreements between DoD Activities. DoD FMR, vol. 11A, ch. 3, para. 030303.

D. Additional Determinations by DoD Policy. (See section V.B., *infra*, discussing requirements for Non-Economy Act orders).

1. Use of a non-DoD contract to procure goods or services in excess of the simplified acquisition threshold (currently \$150,000) requires determinations in addition to the D&F. See FAR 17.700.¹³
 - a. A DoD acquisition official may place an order, make a purchase, or otherwise acquire supplies or services for DoD in excess of the simplified acquisition threshold through a non-DoD agency **only** if the head of the non-DoD agency has certified that the non-DoD agency will comply with defense procurement requirements for the fiscal year, to include applicable DoD financial management regulations. FAR 17.703(a) and DFARS 217.7802 (a). Non-DoD agency certifications and additional information are available at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

¹² Although the DoD FMR indicates that “no further written determinations are required,” it does not take priority over the FAR, which still requires a D&F pursuant to FAR 17.502-2(c). The FAR makes no exception to the D&F requirement for inter-service or intra-DoD transactions made pursuant to the Economy Act. Further, DFARS 217.503(a) requires “a copy of the executed D&F required by FAR 17.502-2” be furnished to the servicing agency, which suggests at least, that a complete file for an Economy Act transaction includes a D&F executed per the guidance in FAR 17.502-2.

¹³ Many applicable memoranda related to interagency acquisitions can be found on the Defense Procurement and Acquisition Policy (DPAP) webpage under “Interagency Acquisition” available at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

- b. With some slight differences between the military departments (*see* DFARS 217.7802(b) and your individual service policy), current policies generally require additional statements including:
 - 1) The order is in the best interest of the military department considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;
 - 2) The supplies or services to be provided are within the scope of the non-DoD contract;
 - 3) The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and
 - 4) The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable procurement statutes, regulations, and directives.
- c. The officials with authority to make these determinations are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).

E. Fiscal Matters.

- 1. Economy Act orders are funded either on a reimbursable basis or by a direct fund citation basis. The ordering agency must pay the actual costs of the goods or services provided (31 U.S.C. § 1535(b); DoD FMR, vol. 11A, ch. 3, para. 030501 and 030601).¹⁴
 - a. Actual costs include:
 - 1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's

¹⁴ See *Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network*, B-238024, 70 Comp. Gen. 592 (1991) (concluding that payment in excess of actual costs not only violated the Economy Act, but also the Purpose Statute. Accordingly, the actual cost limitation is **applicable to both Economy Act and non-Economy Act** transactions).

expenditures are increased. (DoD FMR, vol. 11A, ch. 3, para. 030601);¹⁵ and

- 2) Indirect costs, to the extent they are funded out of currently available appropriations, bear a significant relationship to providing the goods or services, and benefit the ordering agency. (DoD FMR, vol. 11A, ch. 3, para. 030601).¹⁶
 - 3) DoD activities not funded by working capital funds normally do not charge indirect costs to other DoD activities. In the case of working capital funds activities, indirect costs will not be included in reimbursement charges, except those included in stabilized rates. (DoD FMR, vol. 11A, ch. 3, para. 030601; Department of Defense Instruction 4000.19, para. 4.5).¹⁷
- b. When providing goods or services via a contract, the servicing agency may not require, or the requesting agency pay, any fee or charge which exceeds the actual cost (or estimated cost if the actual cost is not known) of entering into and administering the contract. (FAR 17.502-2(d)(4)).
 - c. Payments by the requesting agency are credited to the appropriation or fund that the servicing agency used to fill the order (31 U.S.C. § 1536; 10 U.S.C. § 2205).
 - d. Economy Act orders may **NOT** be used to circumvent the fiscal principles of purpose, time, and amount for appropriations. It is the responsibility of the requesting agency to certify that the funds used are proper for the purpose of the order and for a bona fide need in the fiscal year for which the appropriation is available.¹⁸

2. Obligation and Deobligation of Funds.

a. Obligation.

¹⁵ See *Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978); *GSA Recovery of SLUC Costs for Storage of IRS Records*, B-211953, Dec. 7, 1984 (unpub.) (storage costs); *David P. Holmes*, B-250377, Jan. 28, 1993 (unpub.) (inventory, transportation, and labor costs).

¹⁶ See *Washington Nat'l Airport*, *supra* (depreciation and interest); *Obligation of Funds Under Mil. Interdeptal Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980) (supervisory and administrative expenses).

¹⁷ Instruction 4000.19, *Support Agreements*, para. 4.5 (Apr. 25, 2013). A DoD Working Capital Fund is a revolving, reimbursable operations fund established by 10 U.S.C. § 2208 to sell support goods and services to DoD and other users with the intent to be zero-profit. See DoD FMR vol. 11B, chp 1-2.

¹⁸ DoD FMR vol. 11A, ch. 3, para. 030105. See also, FAR 17.501(b).

- 1) Reimbursable Order: the requesting agency obligates funds current when the performing activity accepts the reimbursable order. (31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030404.A).
 - 2) Direct Citation Order: the servicing agency will provide a copy of the contract or other obligating document to the requesting agency. This will provide the documentation required to record the obligation. DFAS-IN Reg. 37-1, para. 081207.A.7.d.
- b. Deobligation.
- 1) At the end of the period of availability of the requesting agency's appropriation, funds must be deobligated to the extent that the servicing agency has not itself incurred obligations by: (1) providing the goods or services; or (2) by entering into an authorized contract with another entity to provide the requested goods or services. 31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030404.B.¹⁹
 - 2) This deobligation requirement is intended to prevent attempts to use the Economy Act to "park" funds with another agency in order to extend the life of an appropriation.

F. Ordering Procedures.²⁰

1. An Economy Act order may be placed on any form that is acceptable to both the requesting and servicing agencies. (FAR 17.503(b)).
 - a. DoD ordering activities typically use DD Form 448, Military Interdepartmental Purchase Request (MIPR), to place Economy Act orders. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR.
 - b. If the MIPR is not used, the terms of the supporting interagency agreement should specify the method of acceptance.
2. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself. (DoD FMR,

¹⁹ See GAO Redbook, vol. III, ch. 12 (3d Ed.), pp. 12-43 to 12-50.

²⁰ See FAR 17.503; DoD FMR, vol. 11A, ch. 3. In addition, individual agencies will have their own policies for ordering.

vol. 11A, ch. 3, para. 030401). Minimum order requirements under FAR 17.503(b) and DoD FMR, vol. 11A, ch. 3, para. 030501 include:

- a. Specific description of the supplies or services required;
 - b. Delivery requirements,
 - c. Fund citation (either direct or reimbursable);
 - d. Payment provision; and
 - e. Acquisition authority as may be appropriate.
3. The requesting agency shall furnish a copy of the required D&F to the servicing agency with the request for order. FAR 17.502-2(c)(3). When the requesting agency is within DoD, a copy of the executed D&F shall also be furnished to the servicing agency as an attachment to the order. When a DoD contracting office is acting as the servicing agency, a copy of the executed D&F shall be obtained from the requesting agency and placed in the contract file for the Economy Act order. DFARS 217.503(d).
 4. The work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing agency. (DoD FMR, vol. 11A, ch. 3, para. 030405). The requesting agency should, therefore, ensure in advance of placing an order that the servicing agency is capable of fulfilling the requirement.
 5. Although the servicing activity may require advance payment for all or part of the estimated cost of the supplies or services,²¹ DoD policy generally prohibits the practice of advance payment unless the DoD components are specifically authorized by law, legislative action, or Presidential authorization.²²

G. Other Economy Act Applications.

1. Recurring Interagency Support.
 - a. From a fiscal standpoint, the Economy Act may form the basis for interagency agreements that involve recurring interagency support.
 - b. In DoD, recurring interagency support that requires reimbursement should be documented on a DD Form 1144, Support Agreement, or

²¹ 31 U.S.C. § 1535(d); FAR 17.502-2(d); DoD FMR, vol. 11A, ch. 3, para. 030502.

²² Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007.

similar format that contains all the information required on the form. (DoDI 4000.19, Enc.3.2.(a)(1)).

- c. Support is reimbursable to the extent that it increases the support supplier's direct costs. Costs associated with common use infrastructure are non-reimbursable, unless provided solely for the use of one or more tenants. Suppliers of inter-service and intra-governmental support are permitted to waive low cost reimbursements²³ when the costs of billing and collecting the reimbursement would exceed the minor increase in the support supplier's costs (DoDI 4000.19, Enc.3.4(c)).

2. Interagency Details of Personnel.

- a. General Rule: Details of employees from one agency to another must be done under the authority of the Economy Act on a reimbursable basis.²⁴
- b. Exception: Details of employees may be made on a nonreimbursable basis when: (1) specifically authorized by law; (2) the detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission; or (3) the detail is for a brief period and entails minimal cost.²⁵ For this exception to apply, the statute must not only authorize the transfer, but also the nonreimbursement. *Matter of: Nonreimbursable Transfer of Administrative Law Judges*, B-221585, 65 Comp. Gen. 635 (June 9, 1986).

H. Limitations.

- 1. Funding Limitations. As discussed above, an agency shall not use an interagency acquisition to circumvent conditions and limitations imposed on the use of funds. FAR 17.501(b).
- 2. Disputes. No formal method for dispute resolution exists for Economy Act transactions. The requesting and servicing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use

²³ *But see* DoD FMR, vol. 11A, ch. 3, para. 030503.A. (explaining that DoD working capital funds, the Corps of Engineers Civil Works revolving fund, and other DoD revolving funds, may not waive reimbursement of any amount).

²⁴ The detail must be on a reimbursable basis in order to avoid a violation of the Purpose Statute and an improper augmentation of the appropriations of the agency making use of the detailed employees.

²⁵ *See Department of Health & Human Servs. Detail of Office of Community Servs. Employees*, B-211373, 64 Comp. Gen. 370 (1985).

of a third party forum. FAR 17.503(c). The dispute resolution mechanism should be contained in the written interagency agreement. Within DoD, disputes shall be elevated for resolution through each DoD activity's chain of command. (DoDI 4000.19, Enc.3.2(b)(1)).

3. Compliance with CICA. The requesting agency may not procure from a servicing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5); 41 U.S.C. § 253(f)(5); *Valenzuela Eng'g, Inc.*, B-277979, 98-1 Comp. Gen. Proc. Dec. ¶ 51 (Jan. 26, 1998).

III. THE PROJECT ORDER STATUTE (41 U.S.C. § 6307).²⁶

- A. Purpose: provides DoD with authority to order goods and nonseverable services from DoD-owned and operated activities, separate and distinct from the Economy Act.
 1. Allows DoD to place orders or contracts pertaining to “approved projects” with Government-owned establishments. These orders are considered to be obligations “in the same manner as provided for similar orders or contracts placed with...private contractors.” (41 U.S.C. § 6307).
 - a. The term “approved projects” in the statute simply refers to projects approved by officials having legal authority to do so. (DoD FMR, vol. 11A, ch. 2, para. 020103).
 - b. A “project order” is a specific, definite, and certain order issued under the Project Order Statute. (DoD FMR, vol 11A, ch.2, para 020301).
 2. Within DoD, regulatory guidance on project orders is found at DoD FMR, vol. 11A, ch. 2, and DFAS-IN Regulation 37-1, ch. 12, para. 1208.²⁷
- B. Applicability.
 1. DoD-Owned Establishment. Although the language of the statute refers broadly to “Government-owned establishments,” it applies only to transactions between military departments and government-owned, government-operated (GOGO) establishments within DoD. (DoD FMR, vol. 11A, ch. 2, para. 020303).
 2. GOGO establishments include:

²⁶ Numerous sections of Title 41 were renumbered by Pub. L. 111-350, Jan. 4, 2011. The Project Order Statute was previously identified as 41 U.S.C. § 23.

²⁷ The Coast Guard has similar project order authority, at 14 U.S.C. § 151.

- a. Equipment overhaul or maintenance shops, manufacturing or processing plants or shops, research and development laboratories, computer software design activities, testing facilities, proving grounds, and engineering and construction activities. (DoD FMR, vol. 11A, ch. 2, para. 020303).
 - b. GAO decisions have also “found arsenals, factories, and shipyards owned by the military to be GOGOs.” *Matter of John J. Kominski*, B-246773, 72 Comp. Gen. 172 (1993).
3. Government-Operated.
- a. The DoD-owned establishment must substantially do the work in-house.
 - b. While the DoD-owned establishment may contract for incidental goods or services pursuant to a project order, it must itself incur costs of not less than 51% of the total costs attributable to performing the work. (DoD FMR, vol. 11A, ch. 2, para. 020515).
4. Nonseverable Work Only.
- a. Under DoD FMR, vol. 11A, ch. 2, para. 020509, activities may use project orders only for nonseverable or “entire” efforts that call for a single or unified outcome or product, such as:
 - 1) Manufacture, production, assembly, rebuild, reconditioning, overhaul, alteration, or modification of:
 - a) Ships, aircraft, and vehicles of all kinds;
 - b) Guided missiles and other weapon systems;
 - c) Ammunition;
 - d) Clothing;
 - e) Machinery and equipment for use in such operations;
and
 - f) Other military and operating supplies and equipment (including components and spare parts);
 - 2) Construction or conversion of buildings and other structures, utility and communication systems, and other public works;

- 3) Development of software programs and automated systems when the purpose of the order is to acquire a specific end-product;
 - 4) Production of engineering and construction related products and services.
- b. Activities may **not** use project orders for severable services, such as:
- 1) Custodial, security, fire protection, or refuse collection;
 - 2) Routine maintenance in general, such as grounds maintenance, heat and air conditioning maintenance, or other real property maintenance;
 - 3) Services such as education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, utilities, or communications; or
 - 4) Efforts where the stated or primary purpose of the order is to acquire a level of effort (e.g., 100 hours, or one year) rather than a specific, definite, and certain end-product.

C. Fiscal Matters.

1. Obligation of Funds.

- a. A project order is a valid and recordable obligation of the requesting agency when the order is issued and accepted. (DoD FMR, vol. 11A, ch. 2, para. 020301.A).²⁸
- b. The project order must serve a valid *bona fide need* that exists in the fiscal year in which the project order is issued. (DoD FMR, vol. 11A, ch. 2, para. 020508).

2. Deobligation of Funds.

- a. Unlike orders under the Economy Act, there is no general requirement to deobligate the funds if the servicing agency has not performed before the expiration of the funds' period of availability. (41 U.S.C. § 6307).
- b. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the

²⁸ Providing the obligation otherwise meets the criteria for recordation of an obligation contained in 31 U.S.C. § 1501(a) (the "Recording Statute").

work will be completed within the normal production period for the specific work ordered. (DoD FMR, vol. 11A, ch. 2, para. 020510.A).

- c. If that evidence existed at the time of acceptance and is documented in the file, then there are no consequences if the servicing agency subsequently fails to begin work within the 90 days unless that delay extends beyond 1 January of the following calendar year.
 - 1) If work on a project order does not begin, or is not expected to begin, by January 1 of the following calendar year, then the project order must be returned for cancellation and the funds deobligated.
 - 2) If it is documented that the delay is unavoidable and could not have been foreseen at the time of project order acceptance and that documentation is retained for audit review, then the project order can be retained and executed. (DoD FMR, vol. 11A, ch. 2, para. 020510.B).

D. Ordering Procedures.

- 1. Project orders are analogous to contracts placed with commercial vendors and, similar to such contracts, must be specific, definite, and certain both as to the work and the terms of the order itself. (DoD FMR, vol. 11A, ch. 2, para. 020506).
- 2. Project orders shall be issued on a reimbursable basis only (no direct cite orders). (DoD FMR, vol. 11A, ch. 2, para. 020519). The project order may be on a fixed-price or costs-incurred (cost-reimbursement) basis. (DoD FMR, vol. 11A, ch. 2, para. 020701).
- 3. The MIPR is normally used for issuance and acceptance of project orders.
 - a. The DoD FMR states that although “the use of a specific project order form is not prescribed,” activities shall use the “Universal Order Format” described in DoD FMR, vol.11A, ch. 1, whenever practicable. DoD FMR, vol. 11A, ch. 2, para. 020302.
 - b. The Army, however, requires that project orders be issued on a MIPR (DD Form 448). DFAS-IN Reg. 37-1, para. 120803.A.
- 4. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.

5. Because project orders are not made under the authority of the Economy Act, there is no requirement for determinations and findings (D&F).²⁹

IV. OTHER NON-ECONOMY ACT AUTHORITIES.

A. Purpose: specific statutory authority for interagency acquisitions for DoD to obtain goods and services from a non-DoD agency outside of the Economy Act. When any of these more-specific non-Economy Act authorities apply, they must be used instead of the Economy Act.

B. Fiscal Matters.

1. Obligation of Funds. The requesting agency records an obligation upon meeting all the following criteria:³⁰
 - a. A binding agreement, in writing, between the agencies;
 - b. For a purpose authorized by law;
 - c. Serve a bona fide need of the fiscal year or years in which the funds are available for new obligations;³¹
 - d. Executed before the end of the period of availability of the appropriation used; and
 - e. Provides for specific goods to be delivered or specific services to be supplied.
2. Deobligation of Funds.

DoD Policy: In response to several GAO and DoD Inspector General audits indicating contracting and fiscal abuses with DoD agencies' use of interagency acquisitions, the DoD has issued policy that severely restricts the flexibility that these non-Economy Act authorities provide and now applies a deobligation requirement similar to that of the Economy Act. (DoD FMR, vol. 11A, ch. 18, para. 180302).³²

²⁹ See FAR 17.500(c), which excludes interagency reimbursable work performed by federal employees from the requirements of FAR 17.5.

³⁰ DoD FMR vol. 11A, ch. 18, para. 180301.

³¹ While *bona fide need* is generally a determination of the requesting agency and not that of the servicing agency, a servicing agency can refuse to accept a non-Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. (DoD FMR, vol. 11A, ch. 18, para. 180208).

³² Office of the Under Secretary of Defense (Comptroller) memorandum, Subject: Non-Economy Act Orders, dated October 16, 2006 available at <http://www.acq.osd.mil/dpap/specificpolicy/Non-EconomyActPolicy20061018.pdf> .

- 1) General: Expired funds must be returned by the servicing agency and deobligated by the requesting agency to the extent that the servicing agency has not:
 - i) Provided the goods or services (or incurred actual expenses in providing the goods or services); or
 - ii) Entered into a contract with another entity to provide the goods or services before the funds expired, subject to the bona fides need rule.
- 2) Non-Severable Services: the contract must be funded entirely with funds available for new obligations at the time the contract was awarded, even though performance may extend across fiscal years. (DoD FMR, vol. 11A, ch. 18, para. 180302.C).
- 3) Severable Services: one-year funds may be used to fund up to twelve months of continuous severable services beginning in the fiscal year of award and crossing fiscal years under the authority of 10 U.S.C. § 2410a. (DoD FMR, vol. 11A, ch. 18, para. 180302.B).³³
- 4) Goods: if the contract is for goods that were not delivered within the funds period of availability, the funds must be deobligated and current funds used, unless the goods could not be delivered because of delivery, production or manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the contracting parties at the time of contracting. DoD FMR, vol. 11A, ch. 18, para. 180302.A.

3. Advance Payment.³⁴

³³ **NOTE:** The 12 months does not start upon obligation of the funds by the servicing agency, but upon obligation of the funds by the requesting agency. See DoD FMR, vol. 11A, ch. 18, para. 180203.F (requiring a statement on the funding document that states: “all funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but *no later than one year after the acceptance of the order, or upon completion of the order, which ever is earlier*”) (emphasis added). Therefore, a DoD requesting activity can still “lose” funds if the servicing agency does not award a contract promptly after acceptance of the order. See *U.S. Army Europe--Obligation of Funds for an Interagency Agreement for Severable Service, B-323940: Jan 7, 2015*.

³⁴ Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007 available at <http://www.acq.osd.mil/dpap/specificpolicy/attachments/advance-payments-20070307.pdf>.

- a. DoD agencies are prohibited from making advance payments to non-DoD agencies unless specifically authorized by law. (DoD FMR, vol. 11A, ch. 18, para. 180209).
- b. For those few exceptions where DoD is specifically authorized to advance funds, the specific appropriation or law authorizing the advance must be cited on the obligating and/or interagency agreement documents and orders, and any unused amounts of the advance must be collected from the servicing agency immediately and returned to the fund from which originally made. (DoD FMR, vol. 11A, ch. 18, para. 180209).

C. DoD Policy for non-DoD orders.³⁵ (*See* section V.B., *infra*).

1. If the non-Economy Act order is over the Simplified Acquisition Threshold (SAT; currently \$150K), comply with your Military Department's policy requirements for use of non-DoD contracts over the SAT, in addition to the requirements below. (*See supra* part II.D., discussing determinations for Economy Act orders).
2. Non-Economy Act orders may be placed with a non-DoD agency for goods or services if:³⁶
 - a. Proper funds are available;
 - b. The non-Economy Act order does not conflict with another agency's designated responsibilities (*e.g.*, real property lease agreements with GSA);
 - c. The requesting agency determines the order is in the best interest of the Department; and
 - d. The servicing agency is able and authorized to provide the ordered goods or services.
3. Best Interest Determination.
 - a. Each requirement must be evaluated to ensure that non-Economy Act orders are in the best interest of DoD. Factors to consider include: satisfying customer requirements; schedule, performance, and delivery requirements; cost effectiveness, taking into account the discounts and fees; and contract administration, to include oversight. (DoD FMR, vol. 11A, ch. 18, para. 180204; *see also*

³⁵ *See generally*, DoD FMR, vol. 11A, ch. 18. *See also* FAR 17.7.

³⁶ DoD FMR, vol. 11A, ch. 18, para. 180202

FAR 17.502-1(a) requiring a determination of best procurement approach and consideration of similar factors).

- b. If the order is in excess of the SAT, then the best interest determination must be documented in accordance with individual Military Department policy.

D. Content of Orders. (DoD FMR, vol. 11A, ch. 18, para. 180203).

1. A firm, clear, specific, and complete description of the goods or services ordered;
2. Specific performance or delivery requirements;
3. A proper fund citation;
4. Payment terms and conditions;
5. The specific non-Economy Act statutory authority used;
6. *For severable services:* “These funds are available for severable service requirements crossing fiscal years for a period not to exceed one year, where the period of any resultant contract for services commences this fiscal year. All funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but no later than one year after the acceptance of the order or upon completion of the order, which ever is earlier.”
7. *For goods and non-severable services:* “I certify that the goods or non-severable services to be acquired under this agreement are a necessary expense of the appropriation charged, and represent a bona fide need of the fiscal year in which these funds are obligated.”
8. The requesting agency’s DoD Activity Address Code (DODAAC).
9. Contracting Officer Review. If the non-Economy Act order is in excess of \$500,000, it must be reviewed by a DoD warranted contracting officer prior to sending the order to the funds certifier or issuing the MIPR. (DoD FMR, vol. 11A, ch. 18, para. 180206).

E. Commonly used non-Economy Act transaction authorities.

1. Government Employees Training Act (GETA). (5 U.S.C. § 4104).
 - a. Purpose: permits agencies to provide training to employees of other federal agencies on a reimbursable basis.

- 1) Servicing agency is authorized to collect and to retain a fee to offset the costs associated with training the employees of other agencies.
 - 2) Reimbursement is NOT authorized for training of other agency employees if funds are already provided for interagency training in its appropriation.³⁷
- b. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.
- c. Limitation: Non-government personnel.
- 1) This authority applies only to transactions between federal government agencies; therefore, it does not authorize the provision of training to non-government personnel.
 - 2) The Comptroller General has not objected to federal agencies providing training to non-government personnel on a space-available basis incidental to the necessary and authorized training of government personnel, but the non-government personnel must reimburse the government for the costs of that training, and the agency providing the training must deposit the fees collected in the Treasury as miscellaneous receipts.³⁸
2. Federal Supply Schedules (FSS). (41 U.S.C. § 251 *et seq* -- The Federal Property and Administrative Services Act of 1949; 40 U.S.C. § 501; FAR Subpart 8.4).
- a. Purpose: authorizes the General Services Administration (GSA) to enter into contracts for government-wide use outside of the restrictions of the Economy Act.
- 1) The FSS program (also known as the GSA Schedules Program or the Multiple Award Schedule Program) provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.

³⁷ OFFICE OF PERSONNEL MANAGEMENT, TRAINING POLICY HANDBOOK: AUTHORITIES AND GUIDELINES 26, May 11, 2007.

³⁸ *Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses*, B-271894, 1997 U.S. Comp. Gen. LEXIS 252; *To the Secretary of Commerce*, B-151540, 42 Comp. Gen. 673 (1963).

- 2) The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards thousands of government-wide ID/IQ contracts for over 11 million commercial items and services.
 - 3) Agencies place orders or establish blanket purchasing agreements against these Schedule contracts.
- b. The procedures of FAR 17.5 do not apply to orders of \$500,000 or less issued against Federal Supply Schedules. FAR 17.500(c)(2).
 - c. Ordering Guidelines: FAR Subpart 8.4 provides detailed guidance on the use of FSS, including ordering procedures for services requiring or not requiring a statement of work, establishing blanket purchase agreements under an FSS contract, and the limited “competition” requirements for FSS orders.
 - d. DoD Policy: contracting officers must: (1) consider labor rates as well as labor hours and labor mixes when establishing a fair and reasonable price for an order; (2) evaluate proposed prices for both services and products when awarding combination orders; (3) seek discounts and explain why if they were not obtained; and (4) solicit as many contractors as practicable.³⁹
3. Committee for Purchase From People Who Are Blind or Severely Disabled. (41 U.S.C. §§ 46-48c – The Javits-Wagner-O’Day Act (JWOD Act); 41 C.F.R. Part 51; FAR Subpart 8.7).
 - a. Purpose: provides authority to orchestrate agencies’ purchase of goods and services provided by nonprofit agencies employing people who are blind or severely disabled.
 - b. Program Oversight: the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) oversees the AbilityOne program (formerly known as the JWOD Program).
 - c. Ordering Requirements:
 - 1) The JWOD Act requires agencies to purchase supplies or services on the Procurement List (this list may be accessed at <http://www.abilityone.gov>) maintained by the

³⁹ Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Use of Federal Supply Schedules and Market Research, dated January 28, 2005 *available at* <http://www.acq.osd.mil/dpap/specificpolicy/DPAP%20Memo%20dtd%20Jan%2028%202005.pdf>.

Committee,⁴⁰ at prices established by the Committee, from AbilityOne nonprofit agencies if they are available within the period required.

- 2) These supplies or services may be purchased from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee.
4. Federal Prison Industries, Inc. (FPI or UNICOR). (18 U.S.C. §§ 4121-4128; FAR Subpart 8.6).
- a. Originally required federal departments and agencies to purchase products of FPI that met requirements and were available at market price or less, unless FPI granted a waiver for purchase of the supplies from another source. (10 U.S.C. § 2410n).⁴¹
 - b. Current Requirements:
 - 1) The law has changed in recent years, minimizing the “mandatory source” nature of FPI.⁴²
 - 2) When acquiring an item for which FPI has a significant market share⁴³ DoD must use competitive procedures or fair opportunity procedures under the FAR to procure the product. DFARS 208.602-70.
 - 3) If FPI does not have a significant market share, comply with procedures under FAR 8.602.
 - i) Before purchasing products from FPI, agencies must conduct market research to determine whether the FPI item is comparable to supplies available from the private sector in terms of price, quality,

⁴⁰ The decision to place an item or service on the procurement list is subject to review. See Systems Application Technologies v. United States, 107 Fed. Cl. 795 (2012) (concluding that the Committee’s decision to place Army live-fire range operation and maintenance services on the Procurement List was arbitrary and capricious).

⁴¹ FPI products are listed in the FPI Schedule, at <http://www.unicor.gov>. FPI also offers services, though agencies have never been required to procure services from FPI.

⁴² National Defense Authorization Act for FY2002, Pub. L. No. 107-107; Bob Stump National Defense Authorization Act for FY2003, Pub. L. No. 107-314; Consolidated Appropriations Act of 2004, Pub. L. No. 108-199.

⁴³ Significant market share is defined as “FPI share of the Department of Defense market is greater than five percent.” See Office of the Under Secretary of Defense (AT&L) Policy Memorandum, Subject: Competition Requirements for Purchases from Federal Prison Industries, dated 28 March 2008, available at <http://www.acq.osd.mil/dpap/policy/policyvault/2008-0230-DPAP.pdf>.

and time of delivery. This is a unilateral determination of the contracting officer that is not subject to review by FPI. (FAR 8.602).

- ii) If the FPI item is determined not to be comparable, then agencies should acquire the items using normal contracting (i.e., competitive) procedures, and no waiver from FPI is required.
- iii) If the FPI item is comparable, then the agency must obtain a waiver to purchase the item from other sources, except when:
 - a) Public exigency requires immediate delivery or performance;
 - b) Used or excess supplies are available;
 - c) The supplies are acquired and used outside the United States;
 - d) Acquiring supplies totaling \$3,500 or less;
 - e) Acquiring items FPI offers exclusively on a competitive (non-mandatory) basis; or
 - f) Acquiring services.

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

- a. Purpose: required the Director, Office of Management and Budget (OMB) to improve the way the federal government acquires and manages information technology by designating one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.
 - 1) Government-wide Acquisition Contracts (GWACs) are multiple award task order or delivery order contracts used by other agencies to procure information technology products and services outside of the Economy Act. (FAR 2.101; see also discussion and references at section I.B *supra* regarding business-case analysis for new or renewed GWACs).
 - 2) To use GWACs, agencies may either obtain a delegation of authority from the GWAC Center or work through a procurement support operation such as GSA's Office of Assisted Acquisition Services.

- b. Presently, three agencies serve as executive agents to award and administer GWACs pursuant to OMB designation: GSA, NASA, and the National Institutes of Health. These agencies operate several GWACs. A list of current GWACs is provided below.

Government-wide Acquisition Contracts (GWACs)

Managing Agency	Vehicle	Available Information Technology Products and Services	Agency website address for more information
7. GSA	Alliant/Alliant Small Business	Flexible access to customized IT solutions	www.gsa.gov/gwacs
8. GSA	STARS	Services from disadvantaged small businesses	www.gsa.gov/gwacs
9. GSA	Veterans Technology Services	Information systems engineering and systems operations and maintenance from service-disabled veteran-owned small businesses.	www.gsa.gov/gwacs
10. HHS-NIH	Chief Information Officer Solutions & Partners 3 (CIO-SP3/CIO-SP3 SB)	Hardware; software development; systems integration; technical support services	/http://nitaac.nih.gov
11. HHS-NIH	Chief Information Officer Commodities Store (CIO-CS)	Commercial-off-the-shelf products; software; maintenance; peripherals	http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/
13. NASA	Scientific Engineering Workstation Procurement (SEWP)	High-end scientific and engineering products	http://www.sewp.nasa.gov/

6. **Franchise Funds.** (The Government Management Reform Act of 1994, Pub. L. No. 103-356, Title IV, § 403, 103 Stat. 3413 (Oct. 13, 1994)).
- a. Purpose: authorized the Director of OMB to establish six franchise fund pilot programs to provide common administrative support services on a competitive and fee basis.
- 1) OMB designated pilots at Department of Interior, Department of Treasury, Department of Commerce, Environmental Protection Agency, Veterans Affairs, and Department of Health and Human Services.
 - 2) Of these, the DoD most frequently uses Interior Business Center (formerly GovWorks was the Department of the Interior franchise fund),⁴⁴ run by the Department of the

⁴⁴ A previous DoD-wide prohibition on purchases in excess of \$100,000 through GovWorks imposed on June 14, 2007, has since been rescinded. See Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, subject: Revision to DoD Prohibition to Order, Purchase, or Otherwise Procure Property or Services through the Acquisition Services directorate of the Department of Interior's National Business Center locations, Herndon, Virginia (formerly known as GovWorks and now known as AQD-Herndon) and Sierra Vista,

Interior, and FedSource, run by the Department of the Treasury.

- b. Operating Details:
 - 1) Franchise funds are revolving, self-supporting businesslike enterprises that provide a variety of common administrative services, such as payroll processing, information technology support, employee assistance programs, and contracting services.
 - 2) To cover their costs, the franchise funds charge fees for services. Unlike other revolving funds, the laws authorizing each franchise fund allow them to charge for a reasonable operating reserve and to retain up to 4 percent of total annual income for acquisition of capital equipment and financial management improvements.
- c. Although these pilots were to expire at the end of fiscal year 1999, they have been extended several times.
 - 1) The termination provision at section 403(f) was amended to be limited to the DHS Working Capital Fund. (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Title VII, § 730, 121 Stat. 1844 (Dec. 26, 2007)).
 - 2) Because the termination provision no longer applies to the other franchise fund pilot programs, the others are now apparently permanent.
- d. NOTE: while the deobligation requirements of the Economy Act do not apply, various audits have identified contracting and fiscal abuses with DoD's use of franchise funds.⁴⁵ Accordingly, the deobligation policies described in section IV.B *supra*, would apply here as well.

V. DOD POLICY ON USE OF NON-DOD CONTRACTS.⁴⁶

Arizona (formerly known as Southwest Branch and now known as ACQ-Sierra Vista), dated March 28, 2008, available at <http://www.acq.osd.mil/dpap/policy/policyvault/2008-0213-DPAP.pdf>. However, this memo imposed a new restriction on acquisition of furniture.

⁴⁵ See, e.g., GOVERNMENT ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: FRANCHISE FUNDS PROVIDE CONVENIENCE, BUT VALUE TO DOD IS NOT DEMONSTRATED, GAO-05-456 (July 2005); *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157.

⁴⁶ Common policy applicable for Economy Act and non-Economy Act transactions.

- A. General Policy: “use of non-DoD contracts and the services of assisting agencies to meet DoD requirements, when it is done properly, is in the best interest of the Department, and necessary to meet our needs.”⁴⁷
- B. Requirements For Use of Non-DoD Contracts Over the Simplified Acquisition Threshold (currently \$150,000).⁴⁸
1. The policies of the Military Departments require certain written determinations or certifications prior to using a non-DoD contract for goods or services over \$150,000 (under the Economy Act or under any non-Economy Act authority, to include orders against GSA’s FSS).
 2. The officials with authority to make these determinations/certifications are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).
 3. This requirement is separate and distinct from the D&F required for Economy Act transactions, but may be combined with the D&F for approval by an official with authority to make all determinations and issue all approvals.
 4. With some slight differences between the Military Departments (see your individual service policy), these policies generally require statements⁴⁹ including:
 - a. The order is in the best interest of the Military Department considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

⁴⁷ Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, Subject: Interagency Acquisition, dated January 18, 2008 *available at* <http://www.acq.osd.mil/dpap/policy/policyvault/2007-0203-DPAP.pdf>.

⁴⁸ *See* policies of each of the Military Departments, which implement Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (Oct. 28, 2004) and the requirements of Office of the Secretary of Defense (OSD) memorandum, Subject: Proper Use of Non-DoD Contracts, dated October 29, 2004, *available at* <http://www.acq.osd.mil/dpap/specificpolicy/attachments/2005-0924-DPAP.pdf>.

⁴⁹ These considerations are also outlined in DFARS 217.78, Contracts or Delivery Orders Issued by a Non-DoD Agency.

- b. The supplies or services to be provided are within the scope of the non-DoD contract;
 - c. The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and
 - d. The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable statutes, regulations, and directives.
5. Of the Military Departments, the Army's policy is the most stringent, requiring enhanced coordination prior to making the orders.
- a. For all non-DoD orders over the Simplified Acquisition Threshold, the required written certification must be prepared with the assistance (and written coordination) of the Army contracting officer and the fund certifying official.
 - b. For direct acquisitions of services, the requiring activity must also obtain written concurrence from the non-DoD contracting officer at the servicing agency that the services are within the scope of the contract (unless the Army contracting office has access to the non-DoD contract document), and the Army contracting officer must obtain written coordination from supporting legal counsel.
 - c. For assisted acquisitions of both supplies and services:
 - 1) The requiring activity must first consult with the Army contracting office, which will advise regarding the various DoD contractual options available to obtain the goods or services, and which will provide any unique terms, conditions and requirements that must be incorporated into the resultant non-DoD order to comply with DoD rules.
 - 2) The fund authorizing official must annotate the MIPR with the following statement: "This requirement has been processed in accordance with Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (Public Law 108-375) and the Army Policy memorandum on Proper Use of Non-Department of Defense contracts, dated July 12, 2005. The order is properly funded (correct appropriation and year), and it is in compliance with Army procedures for placement of orders on the Army's behalf by a non-DoD organization."

- 3) The head of the requiring activity shall obtain written coordination from supporting legal counsel prior to sending the order to the servicing agency.
 - 4) The requiring activity must also provide a copy of the certification to the non-DoD contracting officer.
- C. Certifications. Under DFARS 217.7802(a) and FAR 17.7, the requesting agency may not procure from a non-DoD servicing agency that fails to comply with DoD procurement laws and regulations unless the Under Secretary of Defense determines in writing that “it is necessary in the interest of the Department of Defense to continue to procure property and services through the non-defense agency during such fiscal year.” (Pub. L. No. 110-181 (2008 National Defense Authorization Act, § 801)).⁵⁰ Certifications from non-DoD agencies indicating that they will comply with defense procurement and financial management regulations are maintained at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.
- D. Interagency Agreements. Prior to the issuance of a solicitation arising from an assisted acquisition,⁵¹ the servicing agency and the requesting agency shall both sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties. FAR 17.502-1(b). An interagency agreement should cover roles and responsibilities related to acquisition planning, contract execution, and contract administration. It should also cover procedures for resolution of disputes that may arise.⁵² DoD agencies are specifically required to use an Interagency Agreement for all assisted interagency acquisitions regardless of dollar value. Additionally, DoD agencies must include specific enumerated elements or utilize a model agreement per

⁵⁰ See Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Delegation of Authority under Section 801 of the National Defense Authorization Act for Fiscal Year 2008, dated July 19, 2008. See also Office of the Under Secretary of Defense (AT&L) memorandum, Subject: National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110-181, Section 801, *Internal Controls for Procurements on Behalf of the Department of Defense by Certain Non-Defense Agencies, Requests for “Waiver,”* dated September 18, 2009. Waiver procedures are also addressed in FAR 17.703(e) and (f).

⁵¹ Since the requesting agency administers an order in a direct acquisition themselves, there is generally no need for a written interagency agreement outlining roles and responsibilities as there is in an assisted acquisition. See FAR 17.502-1(b)(2).

⁵² FAR 17.503(c).

Office of Federal Procurement Policy Memo (OFPP).⁵³ Service specific⁵⁴ directives should also be consulted for additional guidance on preparation, content, and approval of interagency agreements.

⁵³ See Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Meeting Department of Defense Requirements Through Interagency Acquisition, dated October 31, 2008, *available at* <http://www.acq.osd.mil/dpap/policy/policyvault/USA000871-08-DPAP.pdf>. This memo does not eliminate requirements under FAR 17.5 or DFARS 217.78, which take precedence in any conflict with OFPP guidance.

⁵⁴ In preparing interagency agreements to support assisted acquisitions, agencies should review the Office of Federal Procurement Policy guidance, Interagency Acquisitions, *available at* http://www.whitehouse.gov/omb/procurement_index_interagency_acq/.

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CHAPTER 7:



REVOLVING FUNDS

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CHAPTER 7

REVOLVING FUNDS

I. INTRODUCTION.

A. References.

1. 10 U.S.C. 2208. Working-capital funds.
2. 10 U.S.C. 2209. Management funds.
3. Department of Defense Financial Management Regulation, DoD Reg. 7000.14-R, vol. 2B, ch.9 [hereinafter DoD FMR]; vol. 3, ch. 19; vol. 11B, ch. 1; and vol. 12, ch. 1.
4. U.S. Government Accountability Office, Principles of Federal Appropriations Law, Vol. III, Ch. 12, Acquisition of Goods and Services, GAO-08-978SP [hereinafter “GAO Redbook”], Third Edition, Volume III; pages 12-85 to 12-140 (*available at* <http://www.gao.gov/legal/red-book/overview>).

B. Definition.

1. “A fund established to finance a cycle of operations through amounts received by the fund. Within the Department of Defense, such funds include the Defense Working Capital Fund, as well as other working capital funds.” DoD FMR, vol. 2A, ch. 1, para. 010107.B.54.
2. “Accounts authorized by specific provisions of law to finance a continuing cycle of business-type operations, and which are authorized to incur obligations and expenditures that generate receipts.” DoD FMR, Glossary.

3. “A revolving fund has two key features: it is a ‘single combined account to which receipts are credited and from which expenditures are made’” and its “generated or collected receipts are available for expenditure for the authorized purposes of the fund without the need for further Congressional action and without fiscal year limitation.” Congressional Research Service, *Interagency Contracting: An Overview of Federal Procurement and Appropriations Law*, Jan. 11, 2011, at 13 (quoting the GAO Redbook).
4. Revolving funds fall into three broad categories: public enterprise, trust, and intragovernmental.
 - a. Public Enterprise Revolving Fund: a fund that derives most of its receipts from sources outside the federal government. It usually involves a business-type operation, which generates receipts, that are in turn, used to finance a cycle of operations. These funds finance most government corporations and are commonly used for credit programs (direct loan, loan guarantee) of agencies such as the Department of Housing and Urban Development and the Small Business Administration. GAO Redbook, Vol. III, pg. 12-97.
 - b. Trust Revolving Fund: a fund that is permanently established to fund a continuing cycle of business-type operations except that it is used for specific purposes or programs in accordance with a statute that designates the fund as a trust fund. Examples of trust revolving funds include certain statutorily created life insurance funds such as the Employee’s Life Insurance Fund and the Veteran’s Special Life Insurance Fund. GAO Redbook, Vol. III, pg. 12-98.
 - c. Intragovernmental Revolving Funds: a revolving fund whose receipts come primarily from other government agencies, programs, or activities. It is designed to carry out a cycle of business-type operations with other federal agencies or separately funded components of the same agency. Examples of these types of funds include stock funds, industrial funds, supply funds, working capital funds, and franchise funds. GAO Redbook, Vol. III, pg. 12-98.

C. Background. DoD FMR, vol. 2B, ch. 9, para. 090102.

1. Revolving funds satisfy the DoD's recurring requirements using a business-like buyer-and-seller approach. The revolving fund structure creates a customer-provider relationship between military operating units and their support organizations. The intent of this structure is to make decision-makers at all levels more aware of the costs of goods and services by making military operating units pay for the support they receive.
2. Revolving funds are not profit-oriented entities. The goal of a revolving fund is to break even over the long term. Revolving funds stabilize or fix their selling prices to protect customers from unforeseen fluctuations.
3. In the past, the DoD had two distinct types of revolving funds.
 - a. The DoD used stock funds to procure material in bulk from commercial sources, hold it in inventory, and sell it to authorized customers.
 - b. The DoD used industrial funds to provide industrial and commercial goods and services (e.g., depot maintenance, transportation, and research and development) to authorized customers.
4. In 1991, Congress established the Defense Business Operations Fund (DBOF) and authorized its indefinite continuation in 1994. National Defense Authorization Act, 1995, Pub. L. No. 103-337, § 311, 108 Stat. 2662, 2708-09 (1994). The DBOF combined the DOD's existing nine stock and industrial funds and five defense business functions into a single revolving fund.
5. In 1996, the DoD Comptroller reorganized the DBOF and created several working capital funds including an Army Working Capital Fund, a Navy Working Capital Fund, an Air Force Working Capital Fund, and a Defense-Wide Working Capital Fund. In 1997, the DOD Comptroller established a separate working-capital fund for the Defense Commissary Agency. This working-capital fund took effect in FY 1999.
6. In 1998, Congress repealed the statutory authority (10 U.S.C. § 2216a) for the DBOF. See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, § 1008(b), 112 Stat. 1921, 2114 (1998).

7. Defense Working Capital Fund (DWCF). A revolving fund using a business-like buyer-and seller approach with a goal of breaking even over the long term. Stabilized rates or prices are generally established each fiscal year. The DWCF was established on December 11, 1996, upon the reorganization of the former Defense Business Operations Fund (DBOF). DoD FMR, Glossary.

D. General Concepts.

1. Revolving funds are designed to give management personnel the financial authority and flexibility necessary to adjust their operations.
 - a. Funding is not tied to a particular fiscal year.
 - b. Revolving funds operate under a buyer/seller or provider/customer relationship concept.
 - c. Revolving funds derive their name from the cyclical nature of their cash flow.
2. Congress normally provides appropriations to start, increase, or restore a revolving fund.
 - a. The working capital resources are referred to as “the corpus” of the fund.
 - b. Working capital and assets may also be transferred from existing appropriations and fund accounts.
3. Customer orders provide the budgetary resources necessary to finance the revolving fund’s continued operations.
 - a. The fund sells inventory and/or services to authorized 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.

- E. Other Federal Agency Revolving Funds. Most agencies have at least one working capital fund covering common agency services and/or supplies. The following is a partial listing of the various authorities applicable to civilian agencies: 33 U.S.C. § 576 (Corps of Engineers); 15 U.S.C. § 1521 (Commerce); 7 U.S.C. § 2235 (Agriculture); 15 U.S.C. § 278b (National Institute of Standards and Technology); 20 U.S.C. § 3483 (Education); 22 U.S.C. § 2684 (State); 28 U.S.C. § 527 (Justice); 29 U.S.C. §§ 563, 563a (Labor); 31 U.S.C. § 322 (Treasury); 40 U.S.C. § 293 (General Services Administration); 42 U.S.C. § 3513 (Health and Human Services); 42 U.S.C. § 3535(f) (Housing and Urban Development); 43 U.S.C. § 1467 (Interior); 43 U.S.C. § 1472 (Bureau of Reclamation); and 49 U.S.C. § 327 (Transportation).

II. STATUTORY BASIS AND REQUIREMENTS.

- A. Working-Capital Funds. 10 U.S.C. §§ 2208(a)-(b). The Secretary of Defense may request that the Secretary of the Treasury establish working-capital funds.
1. Purpose. 10 U.S.C. § 2208(a). The DoD uses working-capital funds to:
 - a. Finance inventories of supplies;
 - b. Provide working capital for industrial-type activities; and
 - c. Provide working capital for commercial-type activities that provide common services within or among the DOD's various departments and agencies.
 2. Goal. 10 U.S.C. §§ 2208(a), (e). The DoD's goal is to account for and control program costs and work as economically and efficiently as possible.
 3. The Charter. DoD FMR, vol. 2B, ch. 9, para. 090102.C.
 - a. The Secretary or Assistant Secretary of the Military Department (or the Director of the Defense Agency) must prepare and sign charter that details the scope of the potential activity group.

- b. The Military Department (or Defense Agency) must submit the charter to the Undersecretary of Defense (Comptroller) for approval.
- c. The DoD Comptroller will evaluate the potential activity group based on the following criteria:
 - (1) The products or services the potential activity group will provide to its customers;
 - (2) The potential activity group's ability to establish a cost accounting system to collect its costs;
 - (3) The potential customer base; and
 - (4) Any buyer-seller advantages and disadvantages (e.g., the customers' ability to influence cost by changing demand).

4. Cash Management Policy. DoD FMR, vol. 2B, ch. 9, para 090103.

- a. Operating Expenses. 10 U.S.C. §§ 2208(c)-(d), (g)-(h). Working-capital funds pay for their own operations.
 - (1) Congress normally appropriates funds to capitalize working-capital funds initially; however, the Secretary of Defense may also provide capitalizing inventories.
 - (2) Working-capital funds pay the cost of:
 - (a) Supplies acquired, manufactured, repaired, issued, or used;
 - (b) Services or work performed; and
 - (c) Applicable administrative expenses.
 - (3) Customers then reimburse working-capital funds from:

- (a) Available appropriations; or
 - (b) Funds otherwise credited for those costs.

- b. Cash Management. DoD FMR, vol. 2B, ch. 9, para. 090103.A. See Memorandum, DoD Comptroller, Working Capital Funds Cash Management Responsibility (5 Jan. 1995).
 - (1) Military Departments (and Defense Agencies) are responsible for the cash management of their working capital funds.
 - (2) In peacetime, DoD Components *should* maintain the minimum cash balance necessary to meet their operational (7-10 days) and disbursement (6 months) requirements.
 - (3) Working capital funds should strive to eliminate the need to use advance billings to maintain their cash solvency.

- c. Contracting in Advance of the Availability of Funds. 10 U.S.C. § 2208(k). Working-capital funds may contract for the procurement of a capital asset in advance of the availability of funds in the working-capital fund if that capital asset is for:
 - (1) Unspecified minor military construction projects costing more than \$250,000;
 - (2) Automatic data processing equipment or software costing more than \$250,000;
 - (3) Other equipment costing more than \$250,000; and
 - (4) Other capital improvements costing more than \$250,000.

- d. 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. Advance billing is a billing of a customer by the fund, or a requirement for a customer to reimburse or otherwise credit the fund, for the cost of goods or services provided (or for other expenses incurred) on behalf of the customer that is rendered or imposed *before* the customer receives the goods or before the services have been performed. *But see, National Technical Information Service – Use of Customer Advance Deposits for Operating Expenses*, B-243710, 71 Comp. Gen. 224, 226 (1992) (NTIS had no authority to use customer advances that were not directly related to a firm order to pay its operating expenses).
- (1) The Secretary concerned must notify Congress of the advanced billing within 30 days of the end of the month in which it made the advanced billing. The Secretary of Defense may waive the notification requirement during a war, national emergency, or contingency operation. 10 U.S.C. 2208(l)(2).
 - (2) The notification must include: the reason(s) for the advance billing; an analysis of the effects of the advance billing on military readiness; and an analysis of the effects of the advance billing on the customer.
 - (3) The total amount of the advance billings rendered or imposed for all working capital funds of the DoD in a given fiscal year may not exceed more than \$1 billion per year.
- e. Separate Accounting, Reporting, and Auditing. 10 U.S.C. § 2208(n). The Secretary of Defense must account for, report, and audit the funds and activities managed through working-capital funds separately.
- f. Charges for Goods and Services Provided through the Fund. 10 U.S.C. § 2208(o).
- (1) Charges for the goods and services provided through a working-capital fund must include amounts necessary to recover:

- (a) The full costs of the goods and services provided; and
 - (b) The depreciation of the fund's capital assets.
- (2) Charges for the goods and services provided through a working-capital fund may **not** include amounts necessary to recover:
 - (a) The costs of military construction projects other than minor military construction projects financed under 10 U.S.C. § 2805(c). This authorizes the funding of minor military construction with Operations and Maintenance funds in an amount not exceeding \$750,000. The increased threshold for funding life, health, or safety deficiencies up to \$1.5 million was removed in section 2802 of the FY 2012 NDAA.
 - (b) The costs incurred to close or realign military installations; or
 - (c) The costs associated with mission critical functions.
- g. Procedures for Accumulation of Funds. 10 U.S.C. § 2208(p). 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.
- h. Capital Budget. DoD FMR, vol. 2B, ch. 9, para. 090104.
 - (1) Working capital funds must finance the acquisition of most of their capital assets through the fund. This requirement does not apply to construction or the capital assets listed in DoD FMR, vol. 2B, ch. 9, para. 090104.E (e.g., major Range and Test Facility Activities items, major weapons systems, equipment and minor construction purchased to meet mobilization requirements).

- (2) Capital assets include depreciable property, plant, equipment, and software that:
 - (a) Has a unit cost that is greater than or equal to \$250,000 (except for Minor Construction, which has a capitalization threshold of \$100,000); and
 - (b) Has a useful life of 2 years or more.

- i. Minor Construction. DoD FMR, Vol. 2B, ch. 9, para. 090104.O.
 - (1) Working-capital funds must finance minor construction projects costing more than \$750,000 through the annual Military Construction Appropriations Act. Projects costing more than \$250,000 must be approved in writing by the Director for Revolving Funds and identified separately in the component's annual operating budget (AOB) prior to execution. DoD FMR, vol. 2B, ch. 9, para. 090104.O.1.
 - (2) Working-capital funds may finance project planning and design costs through the fund.

- j. The Full Recovery of Costs and Setting of Prices. DoD FMR, Vol. 2B, ch. 9, paras. 090107 and 090108.
 - (1) Managers of activity groups must set their prices to recover their full costs over the long run (i.e., they must set their prices to recoup actual/projected losses or return actual/projected gains in the budget year).
 - (a) Supply management activity groups establish customer rates by applying a surcharge to the commodity costs.
 - (b) Non-supply management activity groups establish unit cost rates based on identified output measures or representative outputs (e.g., cost per direct labor hour, cost per product, cost per item received, cost per item shipped, etc.).

- (2) Prices normally remain fixed during the budget year. This is known as the stabilized rate policy.¹ The stabilized rate is determined by adjusting anticipated workload and projected overhead costs for the budget year for both inter-Fund transactions (i.e., adjustments to reflect changes in the costs of purchases between activities within the Fund) and the impact of prior year gains or losses as reflected by the [Accumulating Operating Result]. DoD FMR, vol. 2B, ch. 9, para. 090108.B.1. This policy protects customers from unforeseen inflationary increases and other cost uncertainties. *See* DoD FMR, vol. 2B, ch. 9, para. 090108 and 090109 for exceptions to this policy.

 - k. Revenue Recognition. DoD FMR, vol. 2B, ch. 9, para. 090107.O.
 - (1) Working-capital funds must recognize revenue and associated costs in the same accounting period. Recognizing gains and losses in the same period enables activity managers to evaluate the performance of their organizations.
 - (2) Non-supply Defense Working Capital Fund activities must use the “Percentage of Completion Method” of recognizing revenue.
 - (3) Working-capital funds may not recognize an amount of revenue that exceeds the amount specified in the order.

 - l. Execution Requirements. DoD FMR, vol. 3, ch. 19, para. 1903.
 - (1) 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 because they do not provide a direct monetary source to liquidate financial transactions. DoD FMR, vol. 3, ch. 19, paras. 190207.
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- (2) The Office of Management and Budget (OMB) apportions appropriations and contract authority to working-capital funds by means of an SF 132. Contract authority is the legal ability to enter into contracts and incur obligations *before* budgetary authority is available to make outlays to liquidate those obligations. DoD FMR, Vol. 3, Ch. 19, para. 190205.D (emphasis in original).
- (3) A working capital fund may not incur obligations in excess of its apportioned budgetary resources or total approved operating costs.
- (4) 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, unless it is apportioned.
- (5) Working-capital funds must maintain a positive budgetary balance.

III. DEFENSE WORKING CAPITAL FUNDS.

A. Types of Funds. DoD FMR, vol. 2B, ch. 9.

1. Supply Management Activity Groups.

- a. Supply management activity groups provide a means of accounting for and financing the purchase, storage, and sale of common use items and depot level repair assemblies.
- b. Each supply management activity group acquires materials and supplies with its appropriations and other cash accounts. These transactions increase the activity group's inventory and decrease its cash.
 - (1) The materials and supplies are held in inventory until the activity group issues (sells) them to authorized customers.

- (2) Examples of the types of materials and supplies that supply management activity groups typically acquire are listed in DoD FMR, Vol. 4, Ch. 4, and typically include: subsistence items; military exchange items; fuel, chemicals, and gases; construction materials; medical and dental supplies; military clothing and individual equipment; and certain spare and repair parts.
 - 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.
 - a. Non-supply management activity groups finance the operating costs of major service units, such as arsenals, depots, and shipyards.
 - b. Non-supply management activity groups provide services on a reimbursable basis to authorized customers.
 - (1) Non-supply management activity groups do not maintain inventories of finished products.
 - (2) Non-supply management activity groups generate work by accepting customer orders.
3. Management Funds. 10 U.S.C. § 2209.
 - a. Management fund accounts are working fund accounts authorized by law to facilitate accounting for administration of intragovernmental activities other than a continuing cycle of operations. The DoD uses management funds to conduct operations financed by at least two appropriations and whose costs may not be distributed and charged to those appropriations immediately.

- b. There is an Army Management Fund, a Navy Management Fund, and an Air Force Management Fund. Such accounts generally do not own a significant amount of assets.
- c. 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. *See* DoD FMR, vol. 12, ch. 1, para. 0105.

IV. OTHER REVOLVING FUND AUTHORITIES

A. The Clinger-Cohen Act of 1996

- 1. General. Section 5112(e) of the FY 1996 National Defense authorization Act (Pub. L. No. 104-106) (permanently codified at 40 U.S.C. § 14129e) instructed the Director, Office of Management and Budget (OMB), to designate as considered appropriate, one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.
- 2. Implementation.
 - a. OMB has designated the General Services Administration (GSA) as the executive agent for certain government-wide acquisitions of information technology (IT). Examples include the Alliant, Alliant Small Business, and the 8(a) STARS programs. Two other agencies have OMB designations to administer GWACs (government-wide acquisition contracts) for IT – the National Institutes of Health (NIH) (for the CIO-SP3, CIO-SB, and ECS programs) and NASA (for the SEWP program).

- b. The scope of the designation is limited to programs that are funded on a reimbursable basis through the Information Technology Fund established by 40 U.S.C. § 757 (repealed by Pub. L. 109-313, Oct. 6, 2006, and subsumed into the Acquisition Services Fund under 40 U.S.C. § 321). These programs include the Federal Systems Integration and Management Center (FEDSIM) and Federal Computer Acquisition Center (FEDCAC), as well as other existing government-wide IT acquisition programs. The OMB designation, in combination with 40 U.S.C. § 757, provides separate authority for acquisition from these GSA programs.
- c. If the Clinger-Cohen Act applies, the Economy Act is inapplicable.
- d. **Obligation.** Orders placed pursuant to the Clinger-Cohen Act shall be treated for obligational purposes as if they were placed with commercial activities. In other words, obligation occurs upon the formation of a binding agreement between the ordering agency and the GSA, and deobligation is not required to take place merely because the ordering agency's appropriation has expired. **NOTE:** While not required by law, DoD policy requires deobligation for non-Economy act orders essentially the same as for Economy Act orders. DoD FMR, vol. 11A, ch. 18, para. 180302. See Chapter 6, *Interagency Acquisitions*, of this Deskbook for further details of DoD policy on use of non-DoD contracts.
- e. Funds may not be used for other purposes in addition to or in lieu of what was included in the interagency agreement. *See Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, April 25, 2001 available at: <http://www.gao.gov/assets/370/365289.pdf>.
- f. As with Economy Act orders, agencies may not circumvent the competition requirements by placing an order against a contract under one of these programs which falls outside the scope of that contract. *See e.g., Floro & Associates*, B-285451.3; B-285451.4, 2000 CPD ¶172 (GSA's task order for "management services" was materially different from that of the underlying contract, which required "commercially off-the shelf hardware and software resulting in turnkey systems for GSA's client agencies").

- g. An interagency agreement is akin to a contract, and the obligational consequences of an interagency agreement entered into under a revolving fund authority are the same as if it were a contract. *See U.S. Army Europe--Obligation of Funds for an Interagency Agreement for Severable Services*, B-323940, Jan. 7, 2015.

B. Franchise Funds.

1. Background. Congress has decided that competition between agencies on services that were common between the various agencies would result in increased efficiency and lower cost. As a result, Section 403 of the Government Management Reform Act of 1994, Pub. L. 103-356, 108 Stat. 3410, 3413 (found at 31 U.S.C. § 501 note) established a pilot “franchise fund” program. These franchise funds are a special version of working capital funds which permit other agencies (not just the franchise fund’s sponsor) to place orders.
2. The Pilot Program. The Office of Management and Budget (OMB) selected six agencies to run pilot programs covering capital equipment, automated data processing systems, and financial management/management information systems. The following agencies have authority to establish franchise funds (GAO Redbook, Vol. III, pg. 12-103):
 - a. Department of Veterans Affairs. See Pub. L. No. 104-201, 110 Stat. 2874, 2880 (1996) (made permanent by Pub. L. No. 109-114);
 - b. Environmental Protection Agency. See Pub. L. No. 104-204, 110 Stat. 2874, 2912-13 (1996);
 - c. Department of Commerce. See Pub. L. No. 104-204, 110 Stat. 2874, 2912-13 (1996);
 - d. Department of Interior. See Pub. L. No. 104-208, §113, 110 Stat. 3009, 3009-200 (1996); and
 - e. Department of Treasury. See Pub. L. No. 104-208, 110 Stat. 3009, 3009-316, -317 (1996).

- f. Federal Aviation Administration. See Pub. L. No. 104-205, 110 Stat. 2951, 2957-58 (1996);
 - g. Health and Human Services. This franchise fund operates under authority of the HHS service and supply fund.
3. OMB defined 12 operating principles for business-like operations in a 1996 guide for franchise fund pilots.
- a. Services
 - b. Organization
 - c. Competition
 - d. Self-Sustaining/ Full Cost Recovery
 - e. Performance Measures
 - f. Benchmarks
 - g. Adjustments to Business Dynamics
 - h. Surge Capacity
 - i. Cessation of Activity
 - j. Voluntary Exit
 - k. FTE Accountability
 - l. Initial Capitalization
4. Franchise fund pilots provide common administrative services such as acquisition management, administrative management, information technology services, financial management services, records management, employee assistance programs, facilities management and clinical occupational health.

5. Franchise funds share a common feature with other revolving funds in that they are intended to break even over the long term. Most franchise fund authorities do however, authorize servicing agencies to charge a fee calculated to return in full all expenses necessary for operation of the fund. Some also allow the funds to retain up to 4% of total annual income to support acquisition of capital equipment, with any excess funds reverting back to the Treasury.
6. **Obligation.** The obligation rules of the franchise funds work similarly to the other non-Economy Act authorities. Upon entering into a binding interagency agreement, the ordering agency obligates funds and need not deobligate upon expiration of the ordering agency's appropriation. The interagency agreement establishes the boundaries on the amount to be obligated, however. In addition, if the work is accomplished at a lower rate than initially anticipated, the remaining obligated fund may not be used to pay for other work not covered by the initial interagency agreement. **NOTE:** While not required by law, DoD policy requires deobligation essentially the same as for Economy Act orders. DoD FMR, vol. 11A, ch. 18, para. 180302. See Chapter 6, *Interagency Acquisitions*, of this Deskbook for further details of DoD policy on use of non-DoD contracts.

V. **GENERAL FISCAL PRINCIPLES RELATED TO REVOLVING FUNDS.**

- A. The Miscellaneous Receipts Statute. 31 U.S.C. § 3302(b). The statute requires an official or agent of the Government to deposit money received from any source in the Treasury without deduction for any charge or claim. GAO Redbook, Vol. III, pg. 12-106.
 1. General Rule.
 - a. Income generated by a revolving fund represents money collected for the use of the United States.
 - b. A revolving fund may only withdraw or expend this income in consequence of an appropriation made by law.

- c. Retention of customer funds by Working Capital Fund. See 10 U.S.C. §§ 2208, 2210; *see also* 31 U.S.C. § 322(d). Congress has expressly created an exception to the Miscellaneous Receipts Statute permitting working capital funds to retain customer funds (“The fund shall be reimbursed . . . from amounts available to the Department or from other sources, for supplies and services at rates that will equal [its] expenses of operation . . . Amounts the Secretary decides are in excess of the needs of the fund shall be deposited . . . in the Treasury as miscellaneous receipts.”). Once the customer funds are transferred into the revolving fund, however, the ordering agency must comply with the normal fiscal rules concerning obligation and bona fide needs. Agencies, therefore, may not “bank” or “park” their money in a revolving fund to prolong its life. *See Implementation of the Library of Congress FEDLINK Revolving Fund*, B-288142, Sep. 6, 2001; *Matter of: Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, Apr. 25, 2001.
- B. The Purpose Statute. 31 U.S.C. § 1301. The Purpose Statute requires federal agencies to apply appropriations only to the objects for which Congress made the appropriations.
- 1. Restrictions on the Use of Revolving Funds.
 - a. Federal agencies may only use revolving funds for expenditures that are reasonably connected to the authorized activities of the fund. *See The Honorable Robert W. Kastenmeier*, B-230304, 1988 WL 227283 (C.G. Mar. 18, 1988) (unpub.) (Federal Prison Industries, Inc., can use its revolving fund to construct industrial facilities and secure camps to house prisoners engaged in public works, but not general penal facilities or places of confinement); *see also GSA – Working Capital Fund*, B-208697, 1983 WL 27433 (C.G. Sep. 28, 1983) (unpub.) (GSA cannot use its working-capital fund for its mail room, library, and travel services because these items were not specifically authorized); *To the Administrator, Veterans Admin.*, B-116651, 40 Comp. Gen. 356, 358 (1960) (a proposal to finance and operate a centralized silver reclamation program was not the type of operation the VA’s supply fund authorized).

- b. A revolving fund must deposit any money generated by using the fund for an unauthorized purpose in the Treasury as a miscellaneous receipt. *See To the Administrator, Veterans Admin.*, B-116651, 40 Comp. Gen. 356, 358 (1960) (stating that the VA must deposit collections from the sale of reclaimed silver and scrap gold must be deposited in the Treasury).
- 2. Restrictions on the Use of Customer Appropriations. DoD FMR, vol. 11B, ch. 1, para. 010110.
 - 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 does apply to the use of customer appropriations. In other words, a customer agency must obligate its funds pursuant to its own *bona fide* need within the specified period of availability of the appropriation it is using. A valid, definite, certain, and binding agreement with a servicing agency must be entered to support a valid obligation. *See GovWorks*, B-308994, Jul. 17, 2007.
 - d. Once a revolving fund has “earned” the receipts and collections from customers, those funds may be used without fiscal year limitation. A fund “earns” customer funds by providing the requested goods or services. This is distinguishable from customer funds that are “advanced” to a revolving fund, which will retain their fiscal year limitation until the goods and services are provided. *See GAO Redbook*, Vol . III, p. 12-114.
- C. The Bona Fide Needs Rule. 31 U.S.C. § 1502(a). This statute states that an appropriation limited to a definite period is only available for the payment of expenses properly incurred during that period.

1. Restrictions on the Use of Revolving Funds.
 - a. 10 U.S.C. § 2210 states that: “Obligations may, without regard to fiscal year limitations, be incurred against anticipated reimbursements to stock funds in such amounts and for such period as the Secretary of Defense . . . may determine to be necessary to maintain stock levels consistently with planned operations for the next fiscal year.”
 - (1) Revolving funds are “no year” funds. *See, e.g.,* Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, 113 Stat. 1212 (1999). No-year funds are available for any need, whether past, present, or future, provided that the use of such funds is consistent with any other limitations upon the appropriation’s availability. *Matter of: General Services Administration—Availability of No-Year Appropriations for a Modification of an Interagency Order*, B-326945, Sep. 28, 2015. However, it is still improper to “bank” an agency’s annual funds with a GSA account to cover future year needs. *Matter of: Implementation of the Library of Congress FEDLINK Revolving Fund*, B-288142, Sep. 6, 2001; *Matter of: Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, Apr. 25, 2001.
 - (2) Revolving funds are not dependent upon annual appropriations.
 - b. The Bona Fide Needs Rule does not normally apply to the use of revolving funds. *But see* 10 U.S.C. § 2213(a) (limiting the acquisition of any supply item to 2 years of operating stock); U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESS, DEFENSE WORKING CAPITAL FUND: IMPROVEMENTS NEEDED FOR MANAGING THE BACKLOG OF FUNDED WORK (2001).

VI. VIOLATIONS OF THE ANTIDEFICIENCY ACT.

- A. Types of Violations. 10 U.S.C. §§ 1341-1342; DoD FMR, vol. 14, ch. 2. An Antideficiency Act violation occurs when a revolving fund:

1. Obligates funds in excess of an appropriation or apportionment. 31 U.S.C. § 1341(a)(1)(A). *See U.S. Army, Corps of Engineers Civil Works Revolving Fund*, B-242974.8, Dec. 11, 1992, 72 Comp. Gen. 59, 61 (the Antideficiency Act prohibits the Corps of Engineers from over obligating the available budget authority in its Civil Works Revolving Fund); *National Technical Information Service – Use of Customer Advance Deposits for Operating Expenses*, B-243710, 71 Comp. Gen. 224, 227 (1992) (NTIS violated the Antideficiency Act to the extent it used monies that were not available to it to pay its operating expenses and no other funds were available to cover the obligations). *See also*, DoD FMR, Vol. 3, Ch. 19, para. 190207 explaining that a potential ADA violation may occur when obligations exceed “apportioned contract authority and/or budgetary resources.”
2. Obligates funds in advance of an appropriation required to support that obligation, absent a specific exception. 31 U.S.C. § 1341(a)(1)(B).
3. Has an appropriation level deficit cash balance with the U.S. Treasury. 31 U.S.C. § 1341(a)(1)(A).
4. Accepts voluntary services. 31 U.S.C. § 1342.

B. Application of the Antideficiency Act to Reimbursable Orders.

1. A reimbursable order is an agreement to provide goods or services to certain activities, tenant activities, or individuals where the support is:
 - a. Initially provided using mission funds; and
 - b. Reimbursed through a billing procedure.
2. Reimbursable orders will not be administered or accounted for as separate subdivisions of funds like allotments.
 - a. The ordering activity will perform appropriation-type accounting for the order as if it were a contract.

- b. A revolving fund will not necessarily violate 31 U.S.C. § 1517 if it incurs obligations, costs, or expenditures that exceed the amount of a single reimbursable order.
 - c. However, the revolving fund may not exceed its own total obligation authority, or the total obligation authority of the ordering activity.
3. Reimbursable orders for work or services done on a cost-reimbursable basis will contain a cost ceiling for billing purposes. This limits an ordering activity's liability if a revolving fund incurs costs that exceed the ceiling.

C. Other Possible Antideficiency Act Violations.

- 1. Construction. DoD FMR, vol. 2B, ch. 9, para. 090104.O. Activities financed by working capital funds may only use \$750,000 of these funds to finance construction projects.
- 2. Specific Statutory Limitations. *See, e.g.*, National Defense Authorization Act, 1995, Pub. L. No. 103-337, § 314, 108 Stat. 2663 (1994) (imposing a limit of 65% of sales on the obligational authority of stock funds during FY 1995 to further the drawdown of defense stocks). *This is merely an illustrative example. This limitation no longer applies. *See, e.g.*, Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub.L. No. 105-261, 112 Stat. 1920 (1998). Practitioners dealing with working capital funds should review the yearly DoD authorization and appropriation acts to determine whether Congress has imposed any such limitations.

VII. CONCLUSION.

APPENDIX A

WORKING CAPITAL FUNDS - Statutes

10 U.S.C.

United States Code, 2011 Edition

Title 10 - ARMED FORCES

Subtitle A - General Military Law

PART IV - SERVICE, SUPPLY, AND PROCUREMENT

CHAPTER 131 - PLANNING AND COORDINATION

Sec. 2208 - Working-capital funds

From the U.S. Government Printing Office, www.gpo.gov

VIII. §2208. Working-capital funds

(a) To control and account more effectively for the cost of programs and work performed in the Department of Defense, the Secretary of Defense may require the establishment of working-capital funds in the Department of Defense to—

(1) finance inventories of such supplies as he may designate; and

(2) provide working capital for such industrial-type activities, and such commercial-type activities that provide common services within or among departments and agencies of the Department of Defense, as he may designate.

(b) Upon the request of the Secretary of Defense, the Secretary of the Treasury shall establish working-capital funds established under this section on the books of the Department of the Treasury.

(c) Working-capital funds shall be charged, when appropriate, with the cost of—

(1) supplies that are procured or otherwise acquired, manufactured, repaired, issued, or used, including the cost of the procurement and qualification of technology-enhanced maintenance capabilities that improve either reliability, maintainability, sustainability, or supportability and have, at a minimum, been demonstrated to be functional in an actual system application or operational environment; and

(2) services or work performed; including applicable administrative expenses, and be reimbursed from available appropriations or otherwise credited for those costs, including applicable administrative expenses and costs of using equipment.

(d) The Secretary of Defense may provide capital for working-capital funds by capitalizing inventories. In addition, such amounts may be appropriated for the purpose of providing capital for working-capital funds as have been specifically authorized by law.

(e) Subject to the authority and direction of the Secretary of Defense, the Secretary of each military department shall allocate responsibility for its functions, powers, and duties to accomplish the most economical and efficient organization and operation of the activities, and the most economical and efficient use of the inventories, for which working-capital funds are authorized by this section.

(f) The requisitioning agency may not incur a cost for supplies drawn from inventories, or services or work performed by industrial-type or commercial-type activities for which working-capital funds may be established under this section, that is more than the amount of appropriations or other funds available for those purposes.

(g) The appraised value of supplies returned to working-capital funds by a department, activity, or agency may be charged to that fund. The proceeds thereof shall be credited to current applicable appropriations and are available for expenditure for the same purposes that those appropriations are so available. Credits may not be made to appropriations under this subsection as the result of capitalization of inventories under subsection (d).

(h) The Secretary of Defense shall prescribe regulations governing the operation of activities and use of inventories authorized by this section. The regulations may, if the needs of the Department of Defense require it and it is otherwise authorized by law, authorize supplies to be sold to, or services to be rendered or work performed for, persons outside the Department of Defense. However, supplies available in inventories financed by working capital funds established under this section may be sold to contractors for use in performing contracts with the Department of Defense. Working-capital funds shall be reimbursed for supplies so sold, services so rendered, or work so performed by charges to applicable appropriations or payments received in cash.

(i) For provisions relating to sales outside the Department of Defense of manufactured articles and services by a working-capital funded Army industrial facility (including a Department of the Army arsenal) that manufactures large caliber cannons, gun mounts, recoil mechanisms, ammunition, munitions, or components thereof, see section 4543 of this title.

(j)(1) The Secretary of a military department may authorize a working capital funded industrial facility of that department to manufacture or remanufacture articles and sell these articles, as well as manufacturing, remanufacturing, and engineering services provided by such facilities, to persons outside the Department of Defense if—

(A) the person purchasing the article or service is fulfilling a Department of Defense contract or a subcontract under a Department of Defense contract, and the solicitation for the contract or subcontract is open to competition between Department of Defense activities and private firms; or

(B) the Secretary would advance the objectives set forth in section 2474(b)(2) of this title by authorizing the facility to do so.

(2) The Secretary of Defense may waive the conditions in paragraph (1) in the case of a particular sale if the Secretary determines that the waiver is necessary for reasons of national security and notifies Congress regarding the reasons for the waiver.

(k)(1) Subject to paragraph (2), a contract for the procurement of a capital asset financed by a working-capital fund may be awarded in advance of the availability of funds in the working-capital fund for the procurement.

(2) Paragraph (1) applies to any of the following capital assets that have a development or acquisition cost of not less than \$250,000:

(A) An unspecified minor military construction project under section 2805(c) of this title.

(B) Automatic data processing equipment or software.

(C) Any other equipment.

(D) Any other capital improvement.

(l)(1) An advance billing of a customer of a working-capital fund may be made if the Secretary of the military department concerned submits to Congress written notification of the

advance billing within 30 days after the end of the month in which the advanced billing was made. The notification shall include the following:

(A) The reasons for the advance billing.

(B) An analysis of the effects of the advance billing on military readiness.

(C) An analysis of the effects of the advance billing on the customer.

(2) The Secretary of Defense may waive the notification requirements of paragraph (1)—

(A) during a period of war or national emergency; or

(B) to the extent that the Secretary determines necessary to support a contingency operation.

(3) The total amount of the advance billings rendered or imposed for all working-capital funds of the Department of Defense in a fiscal year may not exceed \$1,000,000,000.

(4) In this subsection:

(A) The term “advance billing”, with respect to a working-capital fund, means a billing of a customer by the fund, or a requirement for a customer to reimburse or otherwise credit the fund, for the cost of goods or services provided (or for other expenses incurred) on behalf of the customer that is rendered or imposed before the customer receives the goods or before the services have been performed.

(B) The term “customer” means a requisitioning component or agency.

(m) Capital Asset Subaccounts.—Amounts charged for depreciation of capital assets shall be credited to a separate capital asset subaccount established within a working-capital fund.

(n) Separate Accounting, Reporting, and Auditing of Funds and Activities.—The Secretary of Defense, with respect to the working-capital funds of each Defense Agency, and the Secretary of each military department, with respect to the working-capital funds of the military department, shall provide for separate accounting, reporting, and auditing of funds and activities managed through the working-capital funds.

(o) Charges for Goods and Services Provided Through the Fund.—(1) Charges for goods and services provided for an activity through a working-capital fund shall include the following:

(A) Amounts necessary to recover the full costs of the goods and services provided for that activity.

(B) Amounts for depreciation of capital assets, set in accordance with generally accepted accounting principles.

(2) Charges for goods and services provided through a working-capital fund may not include the following:

(A) Amounts necessary to recover the costs of a military construction project (as defined in section 2801(b) of this title), other than a minor construction project financed by the fund pursuant to section 2805(c) of this title.

(B) Amounts necessary to cover costs incurred in connection with the closure or realignment of a military installation.

(C) Amounts necessary to recover the costs of functions designated by the Secretary of Defense as mission critical, such as ammunition handling safety, and amounts for ancillary tasks not directly related to the mission of the function or activity managed through the fund.

(p) Procedures For Accumulation of Funds.—The Secretary of Defense, with respect to each working-capital fund of a Defense Agency, and the Secretary of a military department, with respect to each working-capital fund of the military department, shall establish billing procedures to ensure that the balance in that working-capital fund does not exceed the amount

necessary to provide for the working-capital requirements of that fund, as determined by the Secretary.

(q) Annual Reports and Budget.—The Secretary of Defense, with respect to each working-capital fund of a Defense Agency, and the Secretary of each military department, with respect to each working-capital fund of the military department, shall annually submit to Congress, at the same time that the President submits the budget under section 1105 of title 31, the following:

(1) A detailed report that contains a statement of all receipts and disbursements of the fund (including such a statement for each subaccount of the fund) for the fiscal year ending in the year preceding the year in which the budget is submitted.

(2) A detailed proposed budget for the operation of the fund for the fiscal year for which the budget is submitted.

(3) A comparison of the amounts actually expended for the operation of the fund for the fiscal year referred to in paragraph (1) with the amount proposed for the operation of the fund for that fiscal year in the President's budget.

(4) A report on the capital asset subaccount of the fund that contains the following information:

(A) The opening balance of the subaccount as of the beginning of the fiscal year in which the report is submitted.

(B) The estimated amounts to be credited to the subaccount in the fiscal year in which the report is submitted.

(C) The estimated amounts of outlays to be paid out of the subaccount in the fiscal year in which the report is submitted.

(D) The estimated balance of the subaccount at the end of the fiscal year in which the report is submitted.

(E) A statement of how much of the estimated balance at the end of the fiscal year in which the report is submitted will be needed to pay outlays in the immediately following fiscal year that are in excess of the amount to be credited to the subaccount in the immediately following fiscal year.

(r) Notification of Transfers.—(1) Notwithstanding any authority provided in this section to transfer funds, the transfer of funds from a working-capital fund, including a transfer to another working-capital fund, shall not be made under such authority unless the Secretary of Defense submits, in advance, a notification of the proposed transfer to the congressional defense committees in accordance with customary procedures.

(2) The amount of a transfer covered by a notification under paragraph (1) that is made in a fiscal year does not count toward any limitation on the total amount of transfers that may be made for that fiscal year under authority provided to the Secretary of Defense in a law authorizing appropriations for a fiscal year for military activities of the Department of Defense or a law making appropriations for the Department of Defense.

(Added Pub. L. 87–651, title II, §207(a), Sept. 7, 1962, 76 Stat. 521; amended Pub. L. 97–295, §1(22), Oct. 12, 1982, 96 Stat. 1290; Pub. L. 98–94, title XII, §1204(a), Sept. 24, 1983, 97 Stat. 683; Pub. L. 98–525, title III, §305, Oct. 19, 1984, 98 Stat. 2513; Pub. L. 100–26, §7(d)(2), Apr. 21, 1987, 101 Stat. 280; Pub. L. 101–510, div. A, title VIII, §801, title XIII, §1301(6), Nov. 5, 1990, 104 Stat. 1588, 1668; Pub. L. 102–172, title VIII, §8137, Nov. 26, 1991, 105 Stat. 1212; Pub. L. 102–484, div. A, title III, §374, Oct. 23, 1992, 106 Stat. 2385; Pub. L. 103–160, div. A, title I, §158(b), Nov. 30, 1993, 107 Stat. 1582; Pub. L. 105–85, div. A, title X, §1011(a), (b), Nov. 18, 1997, 111 Stat. 1873; Pub. L. 105–261, div. A, title X, §§1007(e)(1), 1008(a), Oct. 17,

1998, 112 Stat. 2115; Pub. L. 105–262, title VIII, §8146(d)(1), Oct. 17, 1998, 112 Stat. 2340; Pub. L. 106–65, div. A, title III, §§331(a)(1), 332, title X, §1066(a)(16), Oct. 5, 1999, 113 Stat. 566, 567, 771; Pub. L. 106–398, §1 [[div. A], title III, §341(f)], Oct. 30, 2000, 114 Stat. 1654, 1654A–64; Pub. L. 108–375, div. A, title X, §1009, Oct. 28, 2004, 118 Stat. 2037; Pub. L. 111–383, div. A, title XIV, §1403, Jan. 7, 2011, 124 Stat. 4410; Pub. L. 112–81, div. B, title XXVIII, §2802(c)(1), Dec. 31, 2011, 125 Stat. 1684.)

Historical and Revision Notes
1956 Act

<i>Revised section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
2208(a)	5:172d(a).	July 26, 1947, ch. 343, §405; added Aug. 10, 1949, ch. 412, §11 (8th through 15th pars.), 63 Stat. 587.
2208(b)	5:172d(b).	
2208(c)	5:172d(c) (less 2d sentence). 5:172d(d).	
2208(d)		
2208(e)	5:172d(e)	
2208(f)	5:172d(f).	
2208(g)	5:172d(h).	
2208(h)	5:172d(g).	
2208(i)	5:172d(c) (2d sentence).	

In subsection (a)(1), (c)(1), (f), (g), and (h), the words “stores, . . . materials, and equipment” are omitted as covered by the word “supplies”, as defined in section 101(26) of title 10.

In subsection (c), the word “used” is substituted for the word “consumed”. The words “and costs of using equipment” are inserted to reflect an opinion of the Assistant General Counsel (Fiscal Matters), Department of Defense, February 2, 1960.

In subsection (d), the first sentence (less 1st 18 words) of 5 U.S.C. 172d(d) is omitted as executed.

In subsection (h), the following substitutions are made: “prescribe” for “issue”; and “persons” for “purchasers or users”. The word “shall” is substituted for the words “is authorized to” in the first sentence and for the word “may” in the last sentence to reflect the opinion of the Assistant General Counsel (Fiscal Matters), October 2, 1959, that the source law requires the action in question.

1982 Act

<i>Revised section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
2208(h) (3d sentence)	10:2208 (note).	Dec. 21, 1979, Pub. L. 96–154, §767, 93 Stat. 1163.

The word “hereafter” is omitted as executed.

IX. PRIOR PROVISIONS

Provisions similar to those in subsecs. (m) to (q) of this section were contained in section 2216a of this title prior to repeal by Pub. L. 105–261, §1008(b).

X. AMENDMENTS

2011—Subsec. (c)(1). Pub. L. 111–383, §1403(1), inserted before semicolon “, including the cost of the procurement and qualification of technology-enhanced maintenance capabilities that

improve either reliability, maintainability, sustainability, or supportability and have, at a minimum, been demonstrated to be functional in an actual system application or operational environment”.

Subsec. (k)(2). Pub. L. 111–383, §1403(2), substituted “\$250,000” for “\$100,000” in introductory provisions.

Subsec. (k)(2)(A). Pub. L. 112–81, §2802(c)(1)(A), substituted “section 2805(c)” for “section 2805(c)(1)”.

Subsec. (o)(2)(A). Pub. L. 112–81, §2802(c)(1)(B), substituted “section 2805(c)” for “section 2805(c)(1)”.

2004—Subsec. (r). Pub. L. 108–375 added subsec. (r).

2000—Subsec. (j)(1). Pub. L. 106–398 substituted “contract, and the solicitation” for “contract; and” at end of subpar. (A) and all that follows through “(B) the solicitation”, substituted “; or” for period after “private firms”, and added a new subpar. (B).

1999—Subsec. (j). Pub. L. 106–65, §§331(a)(1), 332, designated existing provisions as par. (1), redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, substituted “, remanufacturing, and engineering” for “or remanufacturing” in introductory provisions, inserted “or a subcontract under a Department of Defense contract” before the semicolon in subpar. (A), substituted “solicitation for the contract or subcontract” for “Department of Defense solicitation for such contract” in subpar. (B), and added par. (2).

Subsec. (l)(2)(A). Pub. L. 106–65, §1066(a)(16), inserted “of” after “during a period”.

1998—Subsec. (l)(3), (4). Pub. L. 105–261, §1007(e)(1), and Pub. L. 105–262 amended subsec. (l) identically, adding par. (3) and redesignating former par. (3) as (4).

Subsecs. (m) to (q). Pub. L. 105–261, §1008(a), added subsecs. (m) to (q).

1997—Subsec. (k). Pub. L. 105–85, §1011(a), added subsec. (k) and struck out former subsec. (k) which read as follows: “The Secretary of Defense shall provide that of the total amount of payments received in a fiscal year by funds established under this section for industrial-type activities, not less than 3 percent during fiscal year 1985, not less than 4 percent during fiscal year 1986, and not less than 5 percent during fiscal year 1987 shall be used for the acquisition of capital equipment for such activities.”

Subsec. (l). Pub. L. 105–85, §1011(b), added subsec. (l).

1993—Subsec. (i). Pub. L. 103–160 amended subsec. (i) generally. Prior to amendment, subsec. (i) required that regulations under subsec. (h) authorize working-capital funded Army industrial facilities to sell manufactured articles and services to persons outside the Department of Defense in specified cases.

1992—Subsec. (j). Pub. L. 102–484 substituted “The Secretary of a military department may authorize a working capital funded industrial facility of that department” for “The Secretary of the Army may authorize a working capital funded Army industrial facility”.

1991—Subsecs. (j), (k). Pub. L. 102–172 added subsec. (j) and redesignated former subsec. (j) as (k).

1990—Subsec. (i)(1). Pub. L. 101–510, §801, added par. (1), redesignated par. (3) as (2), and struck out former pars. (1) and (2) which read as follows:

“(1) Regulations under subsection (h) may authorize an article manufactured by a working-capital funded Department of the Army arsenal that manufactures large caliber cannons, gun mounts, or recoil mechanisms to be sold to a person outside the Department of Defense if—

“(A) the article is sold to a United States manufacturer, assembler, or developer (i) for use in developing new products, or (ii) for incorporation into items to be sold to, or to be used in a contract with, an agency of the United States or a friendly foreign government;

“(B) the purchaser is determined by the Department of Defense to be qualified to carry out the proposed work involving the article to be purchased;

“(C) the article is not readily available from a commercial source in the United States; and

“(D) the sale is to be made on a basis that does not interfere with performance of work by the arsenal for the Department of Defense or for a contractor of the Department of Defense.

“(2) Services related to an article sold under this subsection may also be sold to the purchaser if the services are to be performed in the United States for the purchaser.”

Subsec. (k). Pub. L. 101–510, §1301(6), struck out subsec. (k) which read as follows:

“Reports annually shall be made to the President and to Congress on the condition and operation of working-capital funds established under this section.”

1987—Subsec. (i)(3). Pub. L. 100–26 inserted “(22 U.S.C. 2778)” after “Arms Export Control Act”.

1984—Subsecs. (i) to (k). Pub. L. 98–525 added subsecs. (i) and (j) and redesignated former subsec. (i) as (k).

1983—Subsec. (d). Pub. L. 98–94 substituted “In addition, such amounts may be appropriated for the purpose of providing capital for working-capital funds as have been specifically authorized by law” for “If this method does not, in the determination of the Secretary of Defense, provide adequate amounts of working capital, such amounts as may be necessary may be appropriated for that purpose”.

1982—Subsec. (h). Pub. L. 97–295 inserted provision that supplies available in inventories financed by working capital funds established under this section may be sold to contractors for use in performing contracts with the Department of Defense.

XI. EFFECTIVE DATE OF 1998 AMENDMENT

Pub. L. 105–261, div. A, title X, §1007(e)(2), Oct. 17, 1998, 112 Stat. 2115, and Pub. L. 105–262, title VIII, §8146(d)(2), Oct. 17, 1998, 112 Stat. 2340, provided that: “Section 2208(l)(3) of such title, as added by paragraph (1), applies to fiscal years after fiscal year 1999.”

XII. EFFECTIVE DATE OF 1983 AMENDMENT

Section 1204(b) of Pub. L. 98–94 provided that: “The amendment made by subsection (a) [amending this section] shall apply only with respect to appropriations for fiscal years beginning after September 30, 1984.”

XIII. ADVANCE BILLING FOR FISCAL YEAR 2006

Pub. L. 109–234, title I, §1206, June 15, 2006, 120 Stat. 430, provided in part that: “Notwithstanding 10 U.S.C. 2208(l), the total amount of advance billings rendered or imposed for all working capital funds of the Department of Defense in fiscal year 2006 shall not exceed \$1,200,000,000”.

XIV. ADVANCE BILLING FOR FISCAL YEAR 2005

Pub. L. 109–13, div. A, title I, §1005, May 11, 2005, 119 Stat. 243, provided that for fiscal year 2005, the limitation under subsec. (l)(3) of this section on the total amount of advance

billings rendered or imposed for all working capital funds of the Department of Defense in a fiscal year would be applied by substituting “\$1,500,000,000” for “\$1,000,000,000”.

XV. OVERSIGHT OF DEFENSE BUSINESS OPERATIONS FUND

Pub. L. 103–337, div. A, title III, §311(b)–(e), Oct. 5, 1994, 108 Stat. 2708, which related to purchase from other sources, limitation on inclusion of certain costs in DBOF charges, procedures for accumulation of funds, and annual reports and budget, was repealed and restated in section 2216a(d)(2)(B), (f) to (h)(3) of this title by Pub. L. 104–106, div. A, title III, §371(a)(1), (b)(1), Feb. 10, 1996, 110 Stat. 277–279.

Pub. L. 103–337, div. A, title III, §311(f), (g), Oct. 5, 1994, 108 Stat. 2709, required Secretary of Defense to submit to congressional defense committees, not later than Feb. 1, 1995, a report on progress made in implementing the Defense Business Operations Fund Improvement Plan, dated September 1993, and required Comptroller General to monitor and evaluate the Department of Defense implementation of the Plan and to report to congressional defense committees not later than Mar. 1, 1995.

XVI. CHARGES FOR GOODS AND SERVICES PROVIDED THROUGH DEFENSE BUSINESS OPERATIONS FUND

Section 333(a), (b) of Pub. L. 103–160, which provided that charges for goods and services provided through Defense Business Operations Fund were to include amounts necessary to recover full costs of development, implementation, operation, and maintenance of systems supporting wholesale supply and maintenance activities of Department of Defense and use of military personnel in provision of goods and services, and were not to include amounts necessary to recover costs of military construction project other than minor construction project financed by Defense Business Operations Fund pursuant to section 2805(c)(1) of this title, and which required full cost of operation of Defense Finance Accounting Service to be financed within Defense Business Operations Fund through charges for goods and services provided through Fund, was repealed and restated in section 2216a(d)(1)(A), (C), (2)(A) of this title by Pub. L. 104–106, div. A, title III, §371(a)(1), (b)(2), Feb. 10, 1996, 110 Stat. 277–279.

XVII. CAPITAL ASSET SUBACCOUNT

Section 342 of Pub. L. 102–484, as amended by Pub. L. 103–160, div. A, title III, §333(c), Nov. 30, 1993, 107 Stat. 1622, which provided that charges for goods and services provided through the Defense Business Operations Fund include amounts for depreciation of capital assets which were to be credited to a separate capital asset subaccount in the Fund, authorized Secretary of Defense to award contracts for capital assets of the Fund in advance of availability of funds in the subaccount, required Secretary to submit annual reports to congressional defense committees, authorized appropriations to the Fund for fiscal years 1993 and 1994, and defined terms, was repealed and restated in section 2216a(d)(1)(B), (e), (h)(4), and (i) of this title by Pub. L. 104–106, div. A, title III, §371(a)(1), (b)(3), Feb. 10, 1996, 110 Stat. 277–279.

XVIII. LIMITATIONS ON USE OF DEFENSE BUSINESS OPERATIONS FUND

Pub. L. 102–190, div. A, title III, §316, Dec. 5, 1991, 105 Stat. 1338, as amended by Pub. L. 102–484, div. A, title III, §341, Oct. 23, 1992, 106 Stat. 2374; Pub. L. 103–160, div. A, title III, §§331, 332, Nov. 30, 1993, 107 Stat. 1620; Pub. L. 103–337, div. A, title III, §311(a), Oct. 5, 1994, 108 Stat. 2708, which authorized Secretary of Defense to manage performance of certain working-capital funds established under this section, the Defense Finance and Accounting

Service, the Defense Industrial Plan Equipment Center, the Defense Commissary Agency, the Defense Technical Information Service, the Defense Reutilization and Marketing Service, and certain activities funded through use of working-capital fund established under this section, directed Secretary to maintain separate accounting, reporting, and auditing of such funds and activities, required Secretary to submit to congressional defense committees, by not later than 30 days after Nov. 30, 1993, a comprehensive management plan and, by not later than Feb. 1, 1994, a progress report on plan's implementation, and directed Comptroller General to monitor and evaluate the plan and submit to congressional defense committees, not later than Mar. 1, 1994, a report, was repealed and restated in section 2216a(a)–(c) of this title by Pub. L. 104–106, div. A, title III, §371(a)(1), (b)(4), Feb. 10, 1996, 110 Stat. 277, 279.

XIX. DEFENSE BUSINESS OPERATIONS FUND

Section 8121 of Pub. L. 102–172, which established on the books of the Treasury a fund entitled the “Defense Business Operations Fund” to be operated as a working capital fund under the provisions of this section and to include certain existing organizations including the Defense Finance and Accounting Service, the Defense Commissary Agency, the Defense Technical Information Center, the Defense Reutilization and Marketing Service, and the Defense Industrial Plant Equipment Service, directed transfer of assets and balances of those organizations to the Fund, provided for budgeting and accounting of charges for supplies and services provided by the Fund, and directed that capital asset charges collected be credited to a subaccount of the Fund, was repealed by Pub. L. 104–106, div. A, title III, §371(b)(5), Feb. 10, 1996, 110 Stat. 280.

XX. SALE OF INVENTORIES FOR PERFORMANCE OF CONTRACTS WITH DEFENSE DEPARTMENT

Pub. L. 96–154, title VII, §767, Dec. 21, 1979, 93 Stat. 1163, which had provided that supplies available in inventories financed by working capital funds established pursuant to this section could, on and after Dec. 21, 1979, be sold to contractors for use in performing contracts with the Department of Defense, was repealed and restated in subsec. (h) of this section by Pub. L. 97–295, §§1(22), 6(b), Oct. 12, 1982, 96 Stat. 1290, 1315.

CHAPTER 8:



CONSTRUCTION FUNDING

CHAPTER 8

CONSTRUCTION FUNDING

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CHAPTER 8

CONSTRUCTION FUNDING

I. INTRODUCTION

A methodical approach to construction projects is imperative. Additionally, proper documentation of the project file and legal analysis will aid in future audits. Finally, the thresholds for military construction are ever changing, as evidenced by the most recent changes discussed herein.

The 2015 National Defense Authorization Act (NDAA), Public Law 113-291, significantly changed the military construction funding landscape.¹ Most important to commands and their legal advisors is the increase in authority to use Operations and Maintenance (O&M) funding for unspecified minor military construction projects costing not more than \$1,000,000, a generous increase in spending authority from \$750,000. More significant, perhaps, is the increase in the authority for the service secretaries to use Unspecified Minor Military Construction (UMMC) funding, a lump sum appropriation provided by Congress to the service secretaries for minor military construction, to fund military construction projects not exceeding \$3,000,000, an increase of \$1,000,000 from the previous cap of \$2,000,000. Another significant increase in funding authority in the 2015 NDAA relates to funding military construction that is designed to address a “life, health, or safety” (LHS) issues. Specifically, this authority applies to the UMMC funding at the service secretary level only. Therefore, the Secretary of the Army may, after congressional notification, spend up to \$4,000,000 to address a LHS concern without entering into the congressional appropriations cycle. This is an increase of \$1,000,000 from the previous cap of \$3,000,000.

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. § 6303.
- C. Annual Military Construction Authorization and Appropriation Acts and their accompanying Conference Reports.

¹ The 2016 NDAA, Public Law 114-92 did not change the 2015 NDAA military construction thresholds. The 2017 NDAA, Public Law 114-328 also did not change the military construction thresholds.

- D. DOD Directive 4270.5, Military Construction (12 February 2005) [hereinafter DOD Dir. 4270.5].
- E. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 6, Military Construction/Family Housing Appropriations (June 2013) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 6].
- F. DOD Instruction 4165.56, Relocatable Buildings (January 7, 2013) [hereinafter DODI 4165.56] .
- G. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 8, Facilities Sustainment and Restoration/Modernization (June 2013) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 8].
- H. DOD Regulation 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].
- I. DFAS-IN Regulation 37-1, Finance and Accounting Policy Implementation (October 30, 2015) [hereinafter DFAS-IN 37-1].
- J. Army Regulation 415-32, Engineer Troop Unit Construction in Connection with Training Activities (April 15, 1998) [hereinafter AR 415-32].
- K. Army Regulation 420-1, Army Facilities Management (RAR August 28, 2012) [hereinafter AR 420-1].²
- L. DA Pamphlet 420-1-2, Army Military Construction and Non-Appropriated Funded Construction Program Development and Execution (April 2, 2009) [hereinafter DA Pam 420-1-2].
- M. DA Pamphlet 420-11, Project Definition and Work Classification (March 18, 2010) [hereinafter DA Pam 420-11].

² AR 420-1 supersedes AR 11-27 (3 Feb 1997), AR 210-50 (3 Oct 2005), AR 415-15 (12 June 2006), AR 420-15 (15 Apr 1997), AR 420-18 (3 Jan 1992), AR 420-49 (19 Sep 2005), AR 420-70 (10 Oct 1997), AR 420-72 (1 May 2000), and AR 420-90 (4 Oct 2006).

- N. DFAS-IN Manual 37-100-11, Appendix A, Expense and Investment Criteria (Definition of a system for RLB analysis).
- O. AFI 32-1021, Planning and Programming of Facility Military Construction (MILCON) Projects (June 14, 2010) [hereinafter AFI 32-1021].
- P. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (October 17, 2014) [hereinafter AFI 32-1032].
- Q. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch. 9, Military Construction Appropriations (August 16, 2012) [hereinafter AFI 65-601, vol. 1, ch. 9].
- R. AFI 65-601, vol. 1, Budget Guidance and Procedures, ch 21, Military Family Housing (MFH) Appropriations (August 16, 2012) [hereinafter AFI 65-601, vol. 1, ch. 21].
- S. OPNAVINST 11010.20G, Facilities Projects Manual (October 14, 2005) [hereinafter OPNAVINST 11010.20G].
- T. OPNAVINST 11010.33C, Procurement, Lease and Use of Relocatable Buildings (March 7, 2006) [hereinafter OPNAVINST 11010.33C].

III. DEFINITIONS

- A. Appropriate Committees of Congress.

10 U.S.C. § 2801(c)(1) defines the “appropriate committees of Congress” as “the congressional defense committees and, with respect to any project to be carried out by, or for the use of, an intelligence component of the Department of Defense, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.”

- B. Facility.

10 U.S.C. § 2801(c)(2). The term “facility” means “a building, structure, or other improvement to real property.” Service regulations further define the term. For example, AR 420-1, Glossary, defines facility as including “any interest in land, structure, or complex of structures together with any associated road and utility improvements necessary to support the functions of an Army activity or mission.”

- C. Incrementation - The splitting of a project into separate parts where-

1. It is done solely to reduce costs below an approved threshold or minor construction ceiling, and;
2. Each part *is*³ in itself complete and usable, and;
3. The total project is not complete until all parts are complete.
4. In order to determine what constitutes a stand-alone project, i.e., a complete and useable facility, a comparison of interdependence as opposed to facility interrelationship should be made.

D. Interdependent Facilities

Those 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 runways, taxiways, ramp space and lighting are mutually dependent to accomplish the intent of the construction. AR 415-32, Section II, Terms.

E. Interrelated Facilities

Those 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. Their common purpose to support health, welfare, and morale creates an interrelationship. However, neither facility is necessary for the operation of the other. AR 415-32, Section II, Terms.

F. Military Construction.

1. Statutory Definition. 10 U.S.C. § 2801(a). The term “military construction” includes “any construction, development, conversion, or

³ See AR 415-32. This definition is a better, more accurate definition than the definition in DA PAM 420-11. The definition of incrementation in DA PAM 420-11 is a typographical error and conflicts with the definition above, which is taken from AR 415-32. DA PAM 420-11 improperly included the word “not” in part b. of the definition (“Each part is “not” complete and usable”). The correct incrementation definition is conjunctive, not disjunctive, because each part can be complete and useable in its own right as a standalone project. However, those projects standing alone in the context of a military construction project will not meet the definition of “complete and useable” because the project’s original classification requires all parts to be complete in order for the military construction project to be complete and usable.

extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements....”

2. Service Regulation Definitions. See, e.g., AR 420-1, para. 4-17; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20G, para. 4.1.1. a. The term “construction” includes:

- (1) The erection, installation, or assembly of a new facility;
- (2) The addition, expansion, extension, alteration, functional conversion, or replacement of an existing facility;
- (3) The relocation of a facility from one site to another;
- (4) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and
- (5) Related real property requirements, including land acquisitions, site preparation, excavation, filling, landscaping, and other land improvements.

G. 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....”

H. Military Installation

10 U.S.C. § 2801(c)(4). The term “military installation” means “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.”

I. Project Splitting

Programming a MILCON project in separate increments solely to reduce the projects Program Amount (PA) below an approval threshold or a construction appropriation ceiling amount, which would result in programming an other-than

complete and useable facility. Incrementation is contained within the definition of project splitting in AR 420-1. As defined, incrementing an OMA funded construction project solely to reduce the estimated cost below statutory limitations, contracting threshold, or project approval levels results in project splitting. AR 420-1, Glossary.

J. Relocatable Buildings

Personal property used as a structure designed to be readily moved, erected, disassembled, stored, and reused and meets the twenty-percent (20%) rule. Personal property is managed as equipment. Tents that use real property utilities will be considered relocatable. AR 420-1, Glossary.

K. 20% Rule

The sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20% of the purchase cost of the relocatable building. If the percentage is greater than 20%, then the facility is real property and follows real property project approval authorities. Foundations include blocking, footings, bearing plates, ring walls, and slabs. Foundations do not include construction cost of real property utilities, roads, sidewalks, parking, force protection, fencing, signage, lighting, and other site preparation (clearing, grubbing, ditching, drainage, filling, compacting, grading, and landscaping). AR 420-1, Glossary.

IV. 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.

V. DEFINING THE SCOPE OF THE PROJECT (WHAT IS THE PROJECT?).

- A. Military Construction Project.

1. Definition. A “military construction project” includes all work necessary to produce a complete and usable facility, or a complete and usable improvement to an existing facility. 10 U.S.C. § 2801(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.L.2; AR 415-32, Glossary, sec. II; AR 420-1, para. 2-12d and 4-17; AFI 32-1021, para. 3.2.1; OPNAVINST 11010.20G, para. 4.2.1; see also The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (concluding that the Air Force improperly incremented a project involving 12 related trailers into 12 separate projects).
2. Project splitting and incrementation are prohibited.

See AR 415-32, Glossary, sec. II; AR 420-1, para. 2-15; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, para 4.2; OPNAVINST 11010.20G, para. 4.2.1.

3. An agency may not treat “clearly interrelated”⁴ construction activities as separate projects. The Hon. Michael B. Donley, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991); The Hon. Bill Alexander, House of Representatives, B-213137, Jan. 30, 1986 (unpub). NOTE: The GAO used the term “clearly interrelated” in the Donley case in the same manner that DOD and the military departments use the term “interdependent.”

B. Guidance and Restrictions.

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:

⁴ AR 415-32, Sec. II, Terms, 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).

- (a) An approval threshold; or
 - (b) The UMMC cost ceiling;
 - (2) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction; and
 - (3) Engaging in concurrent work to reduce the cost of a construction project below a cost variation notification level.
 - b. However, the conference report indicated that a military department could carry out an UMMC construction project before or after another military construction project under certain circumstances.⁵
 - (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

⁵ The conference report indicated that a military department should rarely use these exceptions. H.R. REP. NO. 97-612 (1982).

improvement of a facility through a series of minor construction projects).

b. DOD Components must:

- (1) Identify the required end result of a minor construction project and its correlation with the installation master plan; and
- (2) Comply with the intent of 10 U.S.C. § 2805 (UMC).

c. Multi-Use Facilities.

- (1) DOD Components may divide construction work in a multi-use facility into separate projects if each project is:
 - (a) Clearly defined; and
 - (b) Results in a complete and usable facility.
- (2) DOD Components must nevertheless treat the following construction work in a multi-use facility as one project:
 - (a) All construction work for the same or related functional purposes;
 - (b) All concurrent construction work in contiguous (e.g., touching) areas; and
 - (c) All construction work in common areas.

3. Army Guidance and Restrictions. AR 420-1, para.2-15; DA Pam 420-11, para. 1-7n.

a. AR 420-1, para. 2-15a, specifically prohibits the following practices:

- (1) The acquisition or improvement of a facility through a series of minor military construction projects;
- (2) The subdivision, splitting, or incrementing of a project to avoid:

- (a) A statutory cost limitation; or
 - (b) An approval or contracting threshold; and
 - (3) The development of a minor military construction project solely to avoid the need to report a cost variation on an active military construction project to Congress.
 - b. In addition, AR 420-1, para. 2-15b, prohibits the Army from using its UMMC funds to begin or complete a “specified” military construction project.
4. Air Force Guidance and Restrictions.
- a. AFI 32-1021, para. 4.2.2, specifically prohibits:
 - (1) Undertaking an UMMC project at the same time as a “specified” military construction project.
 - (2) Splitting a project into increments to avoid:
 - (a) An approval threshold; or
 - (b) The UMMC cost ceiling; and
 - (3) Incrementing a project if the resulting sacrifice of economy of scale increases the cost of the construction.
 - b. However, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project before a “specified” military construction project to satisfy a new mission requirement if the UMMC project will provide a complete and usable facility that meets a specific need during a specific period of time.
 - c. In addition, AFI 32-1021, para. 4.2, permits an installation to undertake an UMMC project after a “specified” military construction project to satisfy a new mission requirement that arises after the completion of the “specified” project.
 - d. AFI 32-1032, para. 3.4.2, generally prohibits:

- (1) Modifying a newly constructed facility within 12 months of the beneficial occupancy date (BOD) unless an unforeseeable mission or equipment change causes the modification(s); and
 - (2) Using O&M funds to correct deficiencies in projects funded by MILCON funds.
- e. AFI 32-1032, para. 5.3.1, requires the Air Force to include all of the known UMMC work required in a facility during the next 24 months in a single project.
 - f. AFI 32-1032, para. 5.3.2, only permits multiple minor construction projects in a single building within a 24 month period if:
 - (1) The Air Force could not have reasonably anticipated the requirement for the additional project when it initiated the previous project;
 - (2) The requirement for the additional project is for a distinctly different purpose or function; and
 - (3) Each project results in a complete and usable facility or improvement.

5. Navy Guidance and Restrictions.

- a. OPNAVINST 11010.20G, para. 4.2.1, generally requires shore activities to incorporate all work required to meet a requirement in a single facility in a single project.
- b. OPNAVINST 11010.20G, para. 4.2.1.f, specifically prohibits:
 - (1) Acquiring a facility—or an improvement to a facility—through a series of minor construction projects;
 - (2) Splitting a project solely to:
 - (a) Avoid an approval requirement; or
 - (b) Circumvent a statutory funding limitation;

- (3) Splitting a project if the resulting sacrifice of economy of scale increases the cost of the construction (e.g., building several small buildings instead of one large building); and
 - (4) Undertaking concurrent work to avoid the MILCON reprogramming approval procedures (e.g., using O&M funds to augment a construction project).
- c. However, OPNAVINST 11010.20G, para. 4.2.1.b, permits a shore activity to undertake an UMMC project before a “specified” military construction project to satisfy an urgent requirement if the UMMC project will provide a complete and usable facility during a specific period of time.
 - d. In addition, OPNAVINST 11010.20G, para. 4.2.1.b, permits a shore activity to undertake an UMMC project after a “specified” military construction project to satisfy a new mission requirement that develops after the BOD of the “specified” project.
 - e. OPNAVINST 11010.20G, para. 4.2.3, only permits multiple minor construction projects in a single facility if:⁶
 - (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.

VI. CLASSIFYING THE WORK.

A. Project Classification.

Project classification is performed by the garrison staff officer charged with facilities engineering, housing, and environmental support (Engineers). AR 420-

⁶ Cf. OPNAVINST 11010.20G, para. 4.2.1.a (imposing similar requirements for construction work involving multiple facilities).

1, 2-5 (b) (6). This person sometimes holds the title of facilities engineer and resides in the Directorate of Public Works (DPW).

B. Determine whether the work is defined as construction, repair, maintenance, or something else (like RLB's when they are classified as personal property).

1. Construction

a. 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.

b. Regulatory Definition. See AR 420-1, para. 4-17 and Glossary, sec. II; AR 415-32, Glossary, sec. II; DA Pam 420-11, para. 1-6c; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, atch 1; OPNAVINST 11010.20G, para. 4.1.1. Construction includes:

(1) The erection, installation, or assembly of a new facility.

(2) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility.

(a) An addition, expansion, or extension is a change that increases the overall physical dimensions of the facility.

(b) 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.

(c) A conversion is a change to the interior or exterior arrangements of a facility that permits its use for a new purpose.

(d) A replacement is the complete reconstruction of a facility that has been damaged or destroyed beyond economical repair.

- (3) The relocation of a facility from one site to another.⁷
 - (a) A facility may be moved intact, or disassembled and later reassembled.
 - (b) Work includes the connection of new utility lines, but excludes the relocation of roads, pavements, or airstrips.
 - (c) Relocation of two or more facilities into a single facility is a single project.
- (4) 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.
- (5) Related site preparation, excavation, filling, landscaping, or other land improvements.⁸
- (6) Construction may include relocatable buildings (RLBs) in some circumstances. See, AR 420-1, para. 6-17; Memorandum HQDA, DAIM-ZA, 10 Feb 2008 subject: Interim Policy Change on Relocatable Buildings for Paragraphs 6-13 through 6-17 in AR 420-1, Army Facilities Management (10 February 2008); AFI 32-1021, Planning and Programming of Facility Construction Projects (12 May 1994); and OPNAVINST 11010.33C, Procurement, Lease and Use of Relocatable Buildings (7 Mar 2006), Appendix B, & Appendix E (RLB Funding Flowchart)
 - (a) Personal property used as a structure designed to be readily moved, erected, dissembled, stored, and reused and meets the twenty-percent (20%) rule. Personal property is managed as equipment. Tents

⁷ The Secretary of a military department must notify the appropriate committees of Congress before using UMMC funds to transfer or relocate any activity from one base or installation to another. Military Construction Appropriations Act, 2003, Pub. L. No. 107-249 § 107, 116 Stat. 1578 (2002).

⁸ This includes the foundation, site work, and utility work associated with the setup of a relocatable building. AR 420-1.

that use real property utilities will be considered relocatable. AR 420-1 Glossary.

- (b) 20% Rule- The sum of building disassembly, repackaging, and non-recoverable building components, including typical foundation costs must not exceed 20% of the purchase cost of the relocatable building. If the percentage is greater than 20%, then the facility is real property and follows real property project approval authorities. Foundations include blocking, footings, bearing plates, ring walls, and slabs. Foundations do not include construction cost of real property utilities, roads, sidewalks, parking, force protection, fencing, signage, lighting, and other site preparation (clearing, grubbing, ditching, drainage, filling, compacting, grading, and landscaping). AR 420-1 Glossary. Note: DoD removed the 80/20 requirement. See DoDI 4156.56, Relocatable Buildings, Jan. 7, 2013.
- (c) Under the interim policy relocatable buildings may be used for no more than 6 years unless approved by ASA (I&E).⁹
- (d) If the costs do not exceed 20%, account for the buildings as personal property (use either O&M or Procurement funds, as appropriate).
- (e) When properly classified as an unfunded construction cost, relocatable buildings must be funded “with Operation and Maintenance, Army funds or Other Procurement, Army (OPA) depending on the Expense-Investment Threshold contained in law for capital equipment purchase. Whether the relocatables are procured to be stacked or installed individually, all the modules that comprise the relocatable building are a system. This includes the normal amenities or components one finds in buildings, plumbing, electrical systems, and heating ventilation and air condition, etc. It

⁹ Requests for extensions beyond the 6 years must be approved by the Assistant Chief of Staff for Installation Management, DAIM-ODF and then forwarded to ASA(I&E).

does not include furnishings or other attachments.”
ASA(I&E) RLB memo, (13 May 2009).

- (f) Legal review required prior to approval of relocatable building purchase or lease. AR 420-1, para. 6-14l(2).
- (g) Disposition: When classified as real property, the cost to disassemble is classified as demolition. Upon becoming moveable, salvageable relocatable buildings are classified as equipment and disposed of in accordance with DoD Instruction 5000.64. DoDI 4165.56, para. 3b.

2. Maintenance and Repair.

- a. Maintenance and repair projects are not construction for fiscal funding purposes. AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20G, para. 3.1.1, and para 5.1.1. Therefore, maintenance and repair projects are not subject to the \$1 Million O&M limitation on construction.¹⁰ 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”).
- b. Definitions.
 - (1) Maintenance.
 - (a) AR 420-1, Glossary, sec. II, defines maintenance as the “work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose.” It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking;

¹⁰ But see 10 U.S.C. § 2811. If the estimated cost of a repair project exceeds \$7.5 million, the Secretary concerned must approve the project in advance. 10 U.S.C. § 2811(b). The Secretary must then notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2811(d).

refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, para. 1-6a.

- (b) AFI 32-1032, para. 4.1.1, defines maintenance as “work required to preserve real property and real property systems or components and prevent premature failure or wearing out of the same.” It includes: (a) work required to prevent and arrest component deterioration; and (b) landscaping or planting work that is not capitalized. See AFI 65-601, vol. 1, atch 1.
- (c) OPNAVINST 11010.20G, para. 5.1.1, defines maintenance as “the day-to-day, periodic, or scheduled work required to preserve or return a real property facility to such a condition that it may be used for its designated purpose.”
 - (i) 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).
 - (ii) 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:
 - (a) Minimize or correct wear; and
 - (b) Ensure the maximum reliability and useful life of the facility or component.

(2) Repair.

- (a) **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.

- (b) Sustainment definition. DOD FMR Reg. 7000.14-R, vol. 2B, ch. 8, para. 080105. Sustainment means the maintenance and repair activities necessary to keep an inventory of facilities in good working order. It includes regularly scheduled adjustments and inspections, preventive maintenance tasks, and emergency response and service calls for minor repairs. It also includes major repairs or replacement of facility components (usually accomplished by contract) that are expected to occur periodically throughout the life cycle of facilities. This work includes regular roof replacement, refinishing of wall surfaces, repairing and replacement of heating and cooling systems, replacing tile and carpeting, and similar types of work. It does not include environmental compliance costs, facility leases, or other tasks associated with facilities operations (such as custodial services, grounds services, waste disposal, and the provision of central utilities). When repairing a facility, the military department or agency may.
 - (c) The 2017 NDAA, Public Law 114-328, Adds to the 10 U.S.C. § 2811 definition of repair. Specifically, Section 2802 states a repair project now includes the conversion of “a real property facility, system, or component to a new functional purpose without increasing its external dimensions.” Prior to this change, all facility conversions were considered new construction.
- (3) Army Definition. AR 420-1, Glossary, sec. II; Repair is:
- (a) Restoration of a real property facility (RPF) to such condition that it may be used effectively for its designated functional purpose.
 - (b) Correction of deficiencies in failed or failing components of existing facilities or systems to meet current Army standards and codes where such work, for reasons of economy, should be done

concurrently with restoration of failed or failing components.

(c) A utility system or component may be considered “failing” if it is energy inefficient or technologically obsolete.

(i) The term “repair” does not include:

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

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

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

(d) Increasing exterior building dimensions; or

(e) Completely replacing a facility.

(4) Air Force Definition. AFI 32-1032, paras. 4.1.2 and 5.1.2. See AFI 65-601, vol. 1, atch 1. The term “repair” means to restore real property, real property systems, and real property components to such a condition that the Air Force may use it effectively for its designated functional purpose. However, AFI 32-1032, para. 4.2, 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:

(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);
 - (iii) Removing or treating hazardous substances for environmental restoration purposes unless the work supports a construction project;
 - (iv) Replacing one type of roofing system with a more reliable or economical type of roofing system;
 - (v) Installing exterior appurtenances (e.g., fire escapes, elevators, ramps, etc.) to meet current building standards, code requirements, and/or access laws; and
 - (vi) Installing force protection measures outside the footprint of the facility.
- (b) The term “repair” does not include:
- (i) Expanding a facility’s foundation beyond its current footprint;
 - (ii) Elevating or expanding the “functional space” of a facility;
 - (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; or
- (5) Navy Definition. OPNAVINST 11010.20G, para. 3.1.1. 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.”
- (a) The term “repair” includes:¹¹
 - (i) Interior rearrangements (except for load-bearing walls) and restoration of an existing facility to allow for effective use of existing space or to meet current building code requirements (for example, accessibility, health, safety, or environmental);
 - (ii) Minor additions to components in existing facilities to return the facilities to their customary state of operating efficiency (e.g.,

¹¹ OPNAVINST 11010.20G, para. 3.1.3, contains several additional examples of repair projects.

installing additional partitions while repairing deteriorated partitions);

- (iii) The replacement of facility components, including that equipment which is installed or built-in as an integral part of the facility. Restoration or sustainment has the effect of merely keeping the facility in its customary state of operating efficiency without adding increased capability for the facility;
 - (iv) The replacement of energy consuming equipment with more efficient equipment if:
 - (a) The shore activity can recover the additional cost through cost savings within 10 years;
 - (b) The replacement does not substantially increase the capacity of the equipment; and
 - (c) The new equipment provides the same end product (e.g., heating, cooling, lighting, etc.).
 - (v) Demolition of a facility or a portion of a facility because the extent of deterioration is such that it can no longer be economically maintained, or because the facility is a hazard to the health and safety of personnel is classified as repair. Demolition of an excess facility is always classified as repair. (When demolition is done to clear the footprint for a new facility, the demolition should be included as part of the scope of the construction project and paid for from the same fund source as the construction project fund source.)
- (b) The term “repair” does not include additions, expansions, alterations, or modifications required solely to meet new purposes or missions.

3. Concurrent Work. AR 420-1, para. 3-53g; AFI 32-1032, paras. 3.5.6 and 4.2.4; OPNAVINST 11010.20G, para. 3.1.1.b.
 - a. A military department or agency can normally do construction, maintenance, and repair projects simultaneously as long as each project is complete and usable.
 - b. A military department must treat all the work as a single construction project if:
 - (1) The work is so integrated that the department or agency may not separate the construction work from the maintenance and repair work; or
 - (2) The work is so integrated that each project is not complete and useable by itself.

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

A. Applicability of Project Limits.

AR 420-1, Glossary, sec. II; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20G, para. 2.1.1.b. Project limits only apply to funded costs.

B. Funded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170203; AR 415-32, para. 2-5a; AR 420-1, Glossary, sec. II; DA Pam 420-11, Glossary, sec. II; AFI 32-1021, attach 1; AFI 65-601, vol. 1, para. 9.13.3; OPNAVINST 11010.20G, para. 2.1.1.b.

1. Funded costs are costs chargeable to the appropriation designated to pay for the project.
2. Funded costs include, but are not necessarily limited to:
 - a. Materials, supplies, and services applicable to the project;¹²

¹² AR 420-1, para. 2-17c, specifically includes government-owned materials, supplies, and services as funded costs. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.I.6 (prohibiting DOD components from using materials, supplies, or items of installed equipment on their own minor construction projects on a non-reimbursable basis); AR 415-32, para. 2-5a(1) (including

- b. Installed capital equipment;¹³
- c. Transportation costs for materials, supplies, and unit equipment;¹⁴
- 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;¹⁵
- h. Operation and maintenance costs for government-owned equipment (e.g., fuel and repair parts); and
- i. Demolition and site preparation costs.

C. Unfunded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170301; AR 415-32, para. 2-5b; AR 420-1, Glossary, sec. II; AFI 32-1021, attch 1; AFI 65-601, vol. 1, para. 9.14; OPNAVINST 11010.20G, para. 2.1.1.k.

materials, supplies, and services furnished on a non-reimbursable basis by other military departments and defense agencies).

¹³ 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.

¹⁴ 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).

¹⁵ 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).

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.

2. Unfunded costs include, but are not necessarily limited to:
 - a. Military and civilian prisoner labor;
 - b. Depreciation of government-owned equipment used to build the project;¹⁶
 - c. Materials, supplies, and equipment obtained for the project on a non-reimbursable basis as excess distributions from another military department or federal agency.¹⁷
 - d. Licenses, permits, and other fees chargeable under:
 - (1) A State or local statute; or
 - (2) A status of forces agreement (SOFA);
 - e. Unfunded civilian fringe benefits;
 - f. Contract or in-house planning and design costs;¹⁸

¹⁶ Equipment maintenance and operation costs are funded costs.

¹⁷ Generally, DOD Reg 7000.14-R prohibits obtaining equipment or material from another agency on a non-reimbursable basis. In certain cases, DOD regulations permit such acquisition, such as in an excess distribution situation. The costs of capital equipment items obtained in such rare instance on a non-reimbursable basis, including excess distributions from another military department or governmental agency, may be classified as unfunded. However, the value of Army-owned materials, supplies, or items of capital equipment, such as the air conditioner, must always be charged to the construction project as a funded project cost. See DA Pam 420-11, Glossary.

¹⁸ See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170501C (stating that planning and design costs are excluded from the cost determination for purposes of determining compliance with 10 U.S.C.

- g. Gifts from private parties;¹⁹ and
 - h. Donated labor and material.²⁰
3. Report unfunded costs to higher headquarters even though they do not apply toward the military construction appropriation limitations.

VIII. SELECTING THE PROPER APPROPRIATION.

A. Sources of Military Construction Funding.

1. Military Construction Appropriations Acts (MILCON Appropriations Act). See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No 114-113 (2015).
2. Provides appropriated funds (MILCON) for DOD's specified and unspecified military construction (UMC) programs.
3. MILCON appropriations are generally available for 5 years.

B. Department of Defense Appropriations Act.

See, e.g., Consolidated Appropriations Act, 2016, Pub. L. No. 114-113.,

1. Provides some miscellaneous sources of money for military construction projects, including Operations and Maintenance (O&M) funds and Research, Development, Test, and Evaluation (RDT&E) funds.
2. Appropriations are generally available for 1 year.

§ 2805). But see OPNAVINST 11010.20G, para. 2.1.1.k(5) (stating that planning and design costs are funded costs in design-build contracts).

¹⁹ 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/>.

²⁰ The acceptance of donated labor may violate the prohibition against accepting voluntary services. 31 U.S.C. § 1342.

C. Sources of Military Construction Authority.

1. Specified Military Construction Projects.

a. Scope of Authorization. The Secretary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects that are specifically authorized by law. 10 U.S.C. § 2802. Congress typically authorizes these projects in the annual Military Construction Authorization Act. The conference report accompanying the Military Construction Authorization Act breaks down project authorizations by project.

(1) Congress typically specifically authorizes only those military construction projects expected to exceed \$3 million.²¹

(2) A military department may not carry out a military construction project expected to exceed \$3 million without specific Congressional authorization and approval.

b. Proper Appropriation. Congress provides funding for specified military construction projects in the annual Military Construction Appropriations Act. Congress funds each military department's entire military construction program with lump sum appropriations. For example, the Army's principal military construction appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.²²

c. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by installation and project. An example of this breakdown is provided at Appendix G

2. "Unspecified Minor Military Construction (UMMC) Projects.

a. Scope of Authorization. 10 U.S.C. § 2805(a). See AR 420-1, Appendix D; AFI 32-1021, ch. 4; AFI 32-1032, para. 3.3.3; AFI

²¹ Congress may also specify projects under \$3 million. *See, e.g.*, Military Construction Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004); H.R. CONF. REP. NO. 108-773 (2004).

²² The statutory provisions governing military family housing are at 10 U.S.C. §§ 2821-2837.

65-601, vol. 1, para. 9.12.6; OPNAVINST 11010.20G, para. 4.4.4. The Secretary concerned may use military construction appropriations from the unspecified military construction program to carry out military construction projects not otherwise authorized by law.

- b. A UMMC project is defined as a military construction project having an approved cost of \$3 million or less.²³
- c. A UMMC project can have an approved cost up to \$4 million if the project is intended solely to correct a deficiency that threatens life, health, or safety.
 - (1) There is no statutory guidance as to what constitutes a project “intended solely to correct a deficiency that threatens life, health, or safety.”
 - (2) AR 420-1 provides that a project submitted for approval under the enhanced threshold must include the following justification:²⁴
 - (a) A description when the requirement was identified and why deferral of the project until the next Military Construction Act poses an unacceptable and imminent risk to personnel;
 - (b) A description of ongoing actions and temporary work-arounds to mitigate risk and safeguard lives;
 - (c) An explanation of why the deficiency cannot be corrected by other means; and
 - (d) An assurance that the project is intended primarily to correct the deficiency that threatens life, health, or safety.

²³ Section 2803 of the National Defense Authorization Act for Fiscal Year 2008 increased the cap for Unspecified Minor Military Construction from \$1.5 million to \$2 million, and again in 2015 from \$2 million to \$3 million.

²⁴ This justification requirement applies to all UMMC projects having an approved cost over \$3M and all OMA-funded military construction projects costing more than \$1M.

- d. Proper Appropriation. Congress usually provides funding for UMMC projects in the Military Construction Appropriations Act or other Consolidated legislation.
- e. Congress appropriates “Unspecified Minor Construction” funds as part of the lump-sum military construction appropriation for each service. Of the lump-sum military construction appropriation, the conference report accompanying the Military Construction Appropriations Act identifies the amount available for unspecified minor construction.
- f. The Army refers to its “unspecified” military construction appropriations as “Unspecified Minor Military Construction, Army” (UMMCA). AR 420-1, Appendix D.²⁵
- g. Requirements for Use. 10 U.S.C. § 2805(b).
 - (1) Before beginning an UMMC project with an approved cost greater than \$1 Million, the Secretary concerned must approve the project.
 - (2) In addition, the Secretary concerned must:
 - (a) Notify the appropriate committees of Congress;²⁶ and
 - (b) Wait 21 days.²⁷

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

²⁵ Note that throughout this outline the terms unspecified military construction (UMC) and unspecified minor military construction (UMMC) are used interchangeably. UMC can refer to specific MILCON funding or simply to the concept of all unspecified minor construction paid for with either UMMC or O&M funds.

²⁶ 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).

²⁷ The Air Force imposes a 30-day waiting period. AFI 32-1021, para. 4.5. In addition, the statutory waiting period is reduced to 14 days for electronically-submitted notice.

- a. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). See Changes made by 2012 National Defense Authorization Act. The Secretary of a military department may use O&M funds to execute UMMC projects not otherwise authorized by law and costing not more than: \$1 million.²⁸
- b. General Prohibition on the Use of O&M Funds. 41 U.S.C. § 6303.
 - (1) Most installations use O&M funds to finance routine operations; however, 41 U.S.C. § 6303 prohibits a federal agency from entering into a public contract to build, repair, or improve a public building that binds the government to pay a sum that exceeds the amount Congress specifically appropriated for that purpose.
 - (2) In The Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422, 433 (1984), the General Accounting Office (GAO) interpreted 41 U.S.C § 12 to:
 - (a) Require specific Congressional authorization for military construction projects; and
 - (b) Prohibit the use of other, more general appropriations for military construction projects.
- c. Within the Army, approval authority for O&M-funded minor military construction projects has been delegated to Commander, IMCOM, who may redelegate this authority. AR 420-1, para. 2-14a.
- d. Special Requirements for Exercise-Related UMMC Projects.

See Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 (2010); see also AR 415-32, para. 3-11d. For procedural guidance for executing ERC, see Joint Chiefs of Staff, INSTR. 4600.02A,

²⁸ The 2012 National Defense Authorization Act removed language that previously allowed funding a construction project under \$1.5 million with O&M if it was solely to correct a deficiency that is life threatening, health-threatening- or safety-threatening. Currently there is no authority that would fund a O&M Minor Military Construction project with a funded cost above \$1 million (i.e. the traditional life, health and safety exception would not be applicable to O&M funded construction). However, the life, health, and safety exception remains for UMMC funded (rather than O&M funded) construction over \$1 million as noted in 10 U.S.C. 2805 (a) (2).

Exercise-Related Construction Standard Operating Procedures (18 March 2011).

- (1) If a military department expects to spend more than \$100,000 for temporary or permanent construction during a proposed exercise involving U.S. personnel, the SECDEF must notify the appropriate committees of Congress of the plans and scope of the exercise.
- (2) The SECDEF must provide this notice 30 days before the start of the exercise.

4. Combat and Contingency Related O&M Funded Construction.

- a. O & M funded contingency construction started with section 2808 of the FY 04 NDAA and has been extended and modified by each NDAA since 2004 (see Sec. 2802 of the FY 16 NDAA).
 - (1) Authority derived from the National Defense Authorization Act- the Secretary of Defense may obligate appropriated funds available for operation and maintenance to carry out a construction project inside the area of responsibility of the United States Central Command or the area of responsibility and area of interest of Combined Joint Task Force-Horn of Africa that the Secretary determines meets each of the following conditions:
 - (a) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation.
 - (b) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence, unless the military installation is located in Afghanistan, for which projects using this authority may be carried out at installations deemed as supporting a long-term presence.

- (c) The United States has no intention of using the construction after the operational requirements have been satisfied.
 - (d) The level of construction is the minimum necessary to meet the temporary operational requirements.
- (2) Notification of Obligation of Funds. Before using appropriated funds available for operation and maintenance to carry out a construction project outside the United States that has an estimated cost in excess of the amounts authorized for unspecified minor military construction projects under section 2805(c) of title 10, United States Code, the Secretary of Defense shall submit to the congressional committees specified in subsection (f) a notice regarding the construction project. The project may be carried out only after the end of:
- (a) the 10-day period beginning on the date the notice is received by the committees or, if earlier,
 - (b) the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of title 10, United States Code. The notice shall include the following:
 - (i) Certification that the conditions specified in subsection (a) are satisfied with regard to the construction project.
 - (ii) A description of the purpose for which appropriated funds available for operation and maintenance are being obligated.
 - (iii) All relevant documentation detailing the construction project.
 - (iv) An estimate of the total amount obligated for the construction.
- (3) Annual Limitation on Use of Authority.—

- (a) The total cost of the construction projects carried out under the authority of this section using, in whole or in part, appropriated funds available for operation and maintenance shall not exceed \$200,000,000 in a fiscal year.
 - (b) The Secretary of Defense may authorize the obligation of not more than an additional \$10,000,000 of appropriated funds available for operation and maintenance for a fiscal year if the Secretary determines that the additional funds are needed for costs associated with contract closeouts. Funds obligated under this paragraph are not subject to the limitation in the second sentence of paragraph (1).
- (4) Quarterly Report – No Longer Required.
- (a) The FY 2016 NDAA no longer requires quarterly reports. See Sec. 2802.

Between 2004 and 2016, the Secretary of Defense was required to, not later than 30 days after the end of each fiscal-year quarter during which appropriated funds available for operation and maintenance are obligated or expended to carry out construction projects outside the United States, submit to the congressional committees specified in subsection (f) a report on the worldwide obligation and expenditure during that quarter of such appropriated funds for such construction projects. The ability to use this section as authority during a fiscal year to obligate appropriated funds available for operation and maintenance to carry out construction projects outside the United States shall commence for that fiscal year only after the date on which the Secretary of Defense submits to the congressional committees specified in subsection (f) all of the quarterly reports that were required under paragraph (1) for the preceding fiscal year.

- (5) Congressional Committees.—The congressional committees referred to in this section are the following:

- (a) The Committee on Armed Services and the Subcommittee on Defense and Subcommittee on Military Construction, Veterans Affairs, and Related Agencies on Appropriations in the Senate.
 - (b) The Committee on Armed Services and the Subcommittee on Defense and Subcommittee on Military Construction, Veterans Affairs, and Related Agencies of the Committee on Appropriations of the House of Representatives.
- (6) EXPIRATION OF AUTHORITY.—The authority to obligate funds under this section expires on the later of—September 30, 2012; or the date of the enactment of an Act authorizing funds for military construction for fiscal year 2013.
- (7) DEFINITIONS.—In this section:
- (a) The term ‘area of responsibility,’ with respect to the CJTF-Horn of Africa, is Kenya, Somalia, Ethiopia, Sudan, Eritrea, Djibouti, and Seychelles.
 - (b) The term ‘area of interest’, with respect to the Combined Task Force-Horn of Africa, is Yemen, Tanzania, Mauritius, Madagascar, Mozambique, Burundi, Rwanda, Comoros, Chad, the Democratic Republic of Congo, and Uganda.
- b. Other Contingency Construction Authority.
- (1) 10 U.S.C. § 2804. See DOD Dir. 4270.5; AR 420-1, para. 4-9; AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20G, para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
 - (a) Scope of Authority. The Secretary of Defense may use this authority—or permit the Secretary of a military department to use this authority—to carry

out contingency construction projects not otherwise authorized by law.²⁹

- (b) Proper Appropriation. Funds are specifically appropriated for construction under 10 U.S.C. § 2804.³⁰
- (c) Requirements for Use.
 - (i) Before using this authority, the SECDEF must determine that deferral of the project until the next Military Construction Appropriations Act would be inconsistent with:
 - (a) National security; or
 - (b) National interest.
- (d) In addition, the SECDEF must:
 - (i) Notify the appropriate committees of Congress;³¹ and

²⁹ The Secretary of a military department must forward contingency construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3.

³⁰ In 2003 Congress dramatically increased the amount of funding potentially available to DOD under this authority. See Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, 117 Stat. 587 (2003). Section 1901 of the supplemental appropriation authorized the Secretary of Defense to transfer up to \$150 million of funds appropriated in the supplemental appropriation for the purpose of carrying out military construction projects not otherwise authorized by law. The conference report accompanying the supplemental appropriation directed that projects that had previously been funded under the authority the DOD Deputy General Counsel (Fiscal) 27 February 2003 memorandum be funded pursuant to 10 U.S.C. § 2804 in the future. However, because the 2004 and 2005 Defense Authorization Acts authorized DOD to spend up to \$200 million of O&M per fiscal year on such construction projects, DOD's authority to fund projects pursuant to 10 U.S.C. § 2804 was later significantly reduced. See Pub. L. 108-767, 118 Stat. 1811, Section 2404(a)(4) (limiting funding under this authority to \$10 million for fiscal year 2005).

³¹ The SECDEF must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2804(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.3

- (ii) Wait 21 days.³²
- (e) Limitations.
 - (i) Legislative History. H.R. Rep. No. 97-612 (1982).
 - (a) The legislative history of the MCCA indicates that the Secretaries of the military departments should use this authority only for extraordinary projects that develop unexpectedly.
 - (b) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.
 - (ii) DOD Limitations.
 - (a) DOD Dir. 4270.5, para. 4.2, requires the Heads of DOD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.
 - (b) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.4, states that: “Actual construction shall not commence prior to the receipt of appropriate DOD and congressional

(detailing the requirements for reprogramming requests). But see DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects).

³² 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.

approval [of the reprogramming request].”

(iii) Army Limitations. AR 420-1, para. 4-9b(6).

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

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

(iv) Air Force Limitations. AFI 32-1021, para. 5.2.3.1.

(a) The use of this authority is rare.

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

c. **Train and Equip Related Construction:** Section 1201 of the 2013 NDAA expanded the authority normally contained in the train and equip provisions allowed in section 1206 of the 2006 NDAA by adding authority to conduct “small scale military construction activities.”

(1) Limitations

(a) Not more than \$750,00 may be obligated for small scale military construction activities; and

(b) Not more than \$25,000,000 may be obligated or expended for small-scale military construction activities under all programs authorized under this authority.

5. Emergency Construction Projects. 10 U.S.C. § 2803. See DOD Dir. 4270.5; AR 420-1, para. 4-55; AFI 32-1021, para. 5.2.1; AFI 65-601, vol. 1, para. 9.12.3; OPNAVINST 11010.20G, para. 4.4.2; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

- a. Scope of Authority. The Secretary of a military department may use this authority to carry out emergency construction projects not otherwise authorized by law.
- b. Proper Appropriation. The Secretary concerned must use unobligated military construction funds to finance these projects.³³
 - (1) Congress must normally approve a reprogramming request for the project.³⁴
 - (2) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.
 - (3) The Secretary concerned may not obligate more than \$50 million per fiscal year for emergency construction (per 2007 Nat'l Defense Authorization Act).
- c. Requirements for Use.
 - (1) Before using this authority, the Secretary concerned must determine that:
 - (a) The project is vital to:
 - (i) National security; or
 - (ii) The protection of health, safety, or the quality of the environment; and

³³ 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).

³⁴ The Secretary concerned must submit a reprogramming request to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.E.2 (detailing the requirements for reprogramming requests); see also DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.5 (requiring prior congressional notification and approval for reprogramming action); AR 420-1, para. 4-55c(4) (noting that Congress will probably not approve a reprogramming request unless there is truly a dire need for the project).

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

(i) National security; or

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

(2) In addition, the Secretary concerned must:

(a) Notify the appropriate committees of Congress;³⁵ and

(b) Wait 21 days.

d. Limitations.

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

(a) The legislative history of the MCCA indicates that the Secretaries of the military departments should rarely use this authority.³⁶

(b) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.; AR 420-1, para. 4-55c.

(2) DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170302.E.4, states that: “Actual construction shall

³⁵ 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).

³⁶ 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).

not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request].”

- (3) Army Limitations. The Army should execute emergency construction projects under its UMMC program, if possible. AR 420-1, para. 4-55e.
6. Reserve Component Construction Authorities.
 - a. Specified Military Construction Projects. 10 U.S.C. § 18233. The Secretary of Defense may carry out military construction projects authorized by law.
 - (1) Includes authority to acquire, lease, or transfer, and construct, expand, rehabilitate, or convert and equip such facilities as necessary to meet the missions of the reserve components.
 - (2) Allows the SECDEF to contribute amounts to any state (including the District of Columbia, Puerto Rico, and the territories and possessions of the United States, (10 U.S.C. § 18232(1)) for the acquisition, conversion, expansion, rehabilitation of facilities for specified purposes. 10 U.S.C. § 18233(a) (2) through (6).
 - (3) Authorizes the transfer of title to property acquired under the statute to any state, so long as the transfer does not create a state enclave within a federal installation. 10 U.S.C. § 18233(b).
 - b. Military Construction Funded with Operation & Maintenance accounts. 10 U.S.C. § 18233 and 18233a . AR 140-483, Ch. 7.
7. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DOD Dir. 4270.5; AR 420-1, para. 4-57; AFI 32-1021, para. 5.2.4; AFI 65-601, vol. 1, para. 9.12.5; OPNAVINST 11010.20G, see para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
 - a. Scope of Authority. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects that are necessary to support the use of the armed forces in the event of:

- (1) A declaration of war; or
 - (2) A Presidential declaration of a national emergency.³⁷
 - b. Proper Appropriation. The SECDEF must use unobligated military construction funds, including funds appropriated for family housing, to finance these projects.
 - c. Requirements for Use. The SECDEF must notify the appropriate committees of Congress;³⁸ however, there is **no waiting period** associated with the use of this authority.
 - d. On November 14, 1990, President George H.W. Bush invoked this authority to support Operation Desert Shield. See Executive Order No. 12734, 55 Fed. Reg. 48,099 (1990), reprinted in 10 U.S.C. § 2808. His son, President George W. Bush invoked this authority on 16 November 2001. See Executive Order No. 13235, 66 Fed. Reg. 58,343 (2001).³⁹
8. Environmental Response Actions. 10 U.S.C. § 2707. See DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.
- a. Scope of Authority. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects for environmental response actions.

³⁷ The Secretary of a military department must forward construction requests to the SECDEF through the Under Secretary of Defense for Acquisition and Technology (USD(A&T)). DOD Dir. 4270.5, para. 5.3. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.H.

³⁸ 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).

³⁹ National emergency construction authority. Exec. Ord. No. 13235 of Nov. 16, 2001, [66 Fed. Reg. 58343](#), provides: "By the authority vested in me as President by the Constitution and the laws of the United States of America, including the National Emergencies Act ([50 U.S.C. 1601](#) et seq.), and [section 301 of title 3, United States Code](#), I declared a national emergency that requires the use of the Armed Forces of the United States, by Proclamation 7463 of September 14, 2001 [[50 USCS § 1621](#) note], because of the terrorist attacks on the World Trade Center and the Pentagon, and because of the continuing and immediate threat to the national security of the United States of further terrorist attacks. To provide additional authority to the Department of Defense to respond to that threat, and in accordance with section 301 of the National Emergencies Act ([50 U.S.C. 1631](#)), I hereby order that the emergency construction authority at [10 U.S.C. 2808](#) is invoked and made available in accordance with its terms to the Secretary of Defense and, at the discretion of the Secretary of Defense, to the Secretaries of the military departments."

- b. Proper Appropriation. The SECDEF must use funds specifically appropriated for environmental restoration to finance these projects.⁴⁰
- c. Requirements for Use.
 - (1) Before using this authority, the SECDEF must determine that the project is necessary to carry out an environmental response action under:
 - (a) The Defense Environmental Restoration Program, 10 U.S.C. §§ 2701-2708; or
 - (b) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675.
 - (2) In addition, the SECDEF must:
 - (a) Notify the appropriate committees of Congress;⁴¹ and
 - (b) Wait 21 days.⁴²

9. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DOD Dir. 4270.5; AR 420-1, para. 4-56; AFI 32-1021, para. 5.2.2; AFI 65-601, vol. 1, para. 9.12.7; OPNAVINST 11010.20G, para. 4.4.3; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

⁴⁰ Congress provides annual appropriations for environmental restoration projects. See, e.g., Department of Defense Appropriations Act, 2005, Pub. L. No. 108-287, 118 Stat. 951 (2004). See DOD Dir. 4270.5, para. 4.2 (stating that reprogramming is not necessary for these projects). But see DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.G.2 (detailing the requirements for reprogramming requests).

⁴¹ 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).

⁴² DOD Reg. 7000.14-R, vol. 3., ch. 17, para. 170102.G.1, indicates that Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

- a. Scope of Authority. The Secretary of a military department may use this authority to repair, restore, or replace a facility that has been damaged or destroyed.⁴³

- b. Proper Appropriation.
 - (1) O&M Funds. See H.R. Rep. No. 97-612 (1982); see also AR 420-1, para. 4-56c; AFI 32-1021, para. 5.2.2.2.
 - (a) The Secretary concerned may use O&M funds under 10 U.S.C. § 2805(c) if the cost of the project is \$1 million or less.⁴⁴
 - (b) The Secretary concerned may also use O&M funds to repair or restore a facility temporarily to:
 - (i) Prevent additional significant deterioration;
 - (ii) Mitigate a serious life or safety hazard; or
 - (iii) Avoid severe degradation of a critical mission.
 - (2) Military Construction (MILCON) Funds.⁴⁵ See H.R. Rep. No. 97-612 (1982).
 - (a) The Secretary concerned may use MILCON funds to construct a replacement facility if an economic analysis of life-cycle costs shows that replacement is more cost effective than repair.⁴⁶

⁴³ 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.

⁴⁴ The expanded thresholds for Life, Health, and Safety threatening situation should be considered for use in these situations.

⁴⁵ MILCON funds are the funds Congress appropriates under the Military Construction Appropriations Act. They include both “specified” funds and UMMC funds.

⁴⁶ 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).

- (i) Congress must normally approve a reprogramming request for the project.⁴⁷
 - (ii) If Congress fails to approve the reprogramming request, the Secretary concerned may not carry out the project.
- (b) If the Secretary concerned intends to use UMMC funds to construct a replacement facility, the Secretary concerned must comply with 10 U.S.C. § 2805 and any applicable regulations.
- (c) Requirements for Use. If the estimated cost of the project exceeds the UMMC threshold the Secretary concerned must:
 - (i) Notify the appropriate committees of Congress;⁴⁸ and
 - (ii) Wait 21 days.
- (d) Limitations.
 - (i) DOD Limitations. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.J.5, states that: “Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request].”

⁴⁷ The Secretary concerned must submit reprogramming requests to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.5, para. 3.2; AR 420-1, para. 4-56d. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070302.B.6 (requiring prior congressional notification and approval for reprogramming action).

⁴⁸ The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2854(b). See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.J.3 (detailing the requirements for reprogramming requests).

- (ii) Army Limitations. AR 420-1, para. 4-56c(2) restricts the use of this authority for family housing projects.
- (iii) Air Force Limitations. AFI 32-1021, para. 5.2.2.1, provides additional criteria for repairing damaged Air Force facilities.
 - (a) The damaged or destroyed facility must have been in use (or planned for use) at the time it was damaged or destroyed.
 - (b) The new or repaired facility must normally be the same size as the damaged or destroyed facility; however, the MAJCOM may approve limited increases to achieve economy of design or compliance with new criteria. But see H.R. Rep. No. 97-612 (1982) (stating that “any replacement facility [may] use current design and material criteria and may be increased in size to meet current mission and functional requirements”).
 - (c) A MAJCOM may not use this authority to correct space deficiencies.
- (iv) Navy Limitations. Unless a shore activity must restore or replace a facility immediately to prevent an undue impact on mission accomplishment, the shore activity should include the restoration or replacement project in its annual budget program. OPNAVINST 11010.20G, para. 4.4.3 (noting that “[t]he Secretary of Defense has restricted the use of this authority to complete replacement or ‘major

restoration' of a facility which is urgently required").⁴⁹

D. Statutory Thresholds.

1. If the approved cost of the project is \$1 Million or less, use O&M funds. 10 U.S.C. § 2805 (c) & AR 420-1 para. 4-9 b. (9) (c) 1.
2. If the approved cost of the project is between \$1 Million and \$3 Million (\$4 Million if the project is intended solely to correct a deficiency that threatens life, health, or safety), use UMMC funds, unless you have authority to use operation and maintenance funds pursuant to statutory authority listed above. 10 U.S.C. § 2805 a.
3. If the approved cost of the project is greater than \$3 million, use "specified" MILCON funds unless you have authority to use operation and maintenance funds pursuant to statutory authority listed above.

E. Exceeding a Statutory Threshold.

AR 420-1, app. D, para. D-4; AFI 32-1021, para. 4.7.

1. Exceeding a statutory threshold violates the Purpose Statute and may result in a violation of the Anti-deficiency Act. See AR 420-1, app. D, para. D-4a.
2. When a project exceeds—or is expected to exceed a statutory threshold—the department or agency must:
 - a. Stop all work immediately;
 - b. Review the scope of the project and verify the work classification; and
 - c. Consider deleting unnecessary work.⁵⁰

⁴⁹ OPNAVINST 11010.20G, para. 4.4.3, defines "major restoration" as "restoration costing in excess of 50 percent of the plant replacement value (PRV)."

⁵⁰ The department or agency must avoid project splitting. Therefore, the department or agency should only delete truly unnecessary work. AR 420-1, app. D, para. D-4b(3).

3. If the project still exceeds the statutory threshold, the department or agency must correct the Purpose violation by deobligating the improper funds and obligating the proper funds.
4. In addition, the department or agency should attempt to avoid a final Anti-deficiency Act report by obtaining proper funds that were available:
 - a. When the violation occurred; and
 - b. When the violation was discovered and corrected⁵¹;

F. Authorized Variations.⁵²

10 U.S.C. § 2853; AR 420-1, paras. 4-50 and 4-51; AFI 65-601, vol. 1, para. 9.4.3; AFI 32-1021, para. 4.6.5; OPNAVINST 11010.20G.

1. Cost Increases or Decreases.
 - a. No authority exists to increase the authorized scope of a project.
 - b. There are no cost increases authorized for O&M funded projects under 10 U.S.C. § 2805. The \$1 million cap is absolute.
 - c. For MILCON funded projects, The Secretary of a military department may increase or decrease the cost of a “specified” military construction project by the lesser of:

⁵¹ Obtaining the proper funds (i.e., funds that meet the 2-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.

⁵² These authorized variations apply only to “specified” military construction projects. 10 U.S.C. § 2853. They do not generally apply to UMMC projects. However, 10 U.S.C. § 2805(a)(1) permits the Secretaries of the military departments to carry out UMMC projects “within an amount equal to 125 percent of the amount authorized by law for such purpose.” In addition, 10 U.S.C. § 2863 permits the SECDEF and the Secretaries of the military departments to use unobligated funds appropriated to the department and available for military construction or family housing construction to pay meritorious contractor claims arising under military construction contracts or family housing contracts “[n]otwithstanding any other provision of law.” 10 U.S.C. § 2863 does not authorize SECDEF or the Secretaries of the military departments to exceed statutory funding ceilings for OMA funded unspecified minor military construction projects.

- (1) 25% from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition
 - (2) 200% of the UMMC ceiling (currently \$3 million).
 - (3) Note that certain costs, such as contractor claims and certain environmental remediation costs, do not count. (10 USC 2853c)
 - d. However, the Secretary concerned must first determine that:
 - (1) The increase or decrease is required solely to meet unusual variations in cost; and
 - (2) The military department could not have reasonably anticipated the cost variation at the time Congress originally approved the project.
 - e. Note that these are changes to a project's authorization with thresholds based off of the project's appropriation.
2. Scope Increases and Reductions.
- a. **Scope Reductions.** The Secretary of a military department may reduce the scope of a "specified" military construction project by not more than 25% from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition. 10 USC 2853(b)(1).
 - b. **Scope Increases.** The scope of work for a military construction project or for the construction, improvement, and acquisition of a military family housing project may not be increased above the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition. 10 USC 2853(b)(2)

3. Notification Requirements for Variations Exceeding Secretarial Authority. The Secretary concerned must notify the appropriate committees of Congress of any cost increases or decreases, or scope reductions, that exceed the authorized variations discussed above and then must wait for either 14 or 21 days (depending on type of notice). (10 USC 2853(c)).

IX. IDENTIFYING THE PROPER APPROVAL AUTHORITY.

A. Approval of Construction Projects.

1. Army. AR 420-1, app. D.
 - a. Commander, IMCOM may approve a minor construction project with total funded costs of \$1 million or less. This authority may be delegated to HQIMCOM staff members and to IMCOM region directors. Commander, IMCOM may also permit redelegation of this authority.
 - b. The Deputy Assistant Secretary of the Army for Installation and Housing (DASA (IH)) approves UMMC projects costing between \$1 million and \$3 million.⁵³ AR 420-1, app. D.
2. Air Force. AFI 32-1032, 5.1.⁵⁴
 - 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).⁵⁵
 - b. The SAF/MII approves UMMC projects costing between \$500,000 and \$1.5 million.
3. Navy. OPNAVINST 11010.20G, app. C.
 - a. The Commanding Officer (C.O.) or Major Claimant approves projects costing \$300,000 or less (\$1 million or less if the project is

⁵³ There is a discrepancy between the increased UMMC amount of \$3 million and the amount that is authorized by AR 420-1. JAs should verify whether the amount has increased to \$3 million.

⁵⁴ This regulation predates the legislation that increased the statutory threshold for O&M projects to \$1 million.

⁵⁵ The AF/ILE may further delegate this authority. AFI 32-1032, para. 1.4.

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.

4. Congressional notification and approval is required for projects expected to exceed \$1.5 million. AR 415-15, app. B, para. B-2f; AFI 32-1032, para. 3.5.4; OPNAVINST 11010.20G, app. C.

B. Approval of Maintenance and Repair Projects.

1. Army. AR 420-1, para. 2-16.

a. Using funds available to the Secretary concerned for operation and maintenance, the Secretary concerned may carry out repair projects for an entire single-purpose facility or one or more functional areas of a multipurpose facility. 10 USC § 2811(a) Before a military department can carry out a repair project that costs more than \$7.5 million, the Secretary concerned must approve the project. 10 U.S.C. § 2811(b). In addition, if the project costs more than \$7.5 million, the Secretary concerned must submit a report to the appropriate committees of Congress containing information specified in 10 U.S.C. § 2811(d).

b. Commander, IMCOM may approve maintenance and repair projects when:

(1) The funded project cost does not exceed \$3 million; and for a combined maintenance and repair project, the total of the maintenance cost and the repair cost does not exceed \$3 million.

(2) The repair cost (or repair plus construction project cost for a combined undertaking) does not exceed 50 percent of the replacement cost of the facility for projects whose funded costs are greater than \$750,000.

(3) WWII temporary buildings that have total repair and construction costs in excess of \$40 per square foot in accordance with AR 420-1 paragraph 2-13.

- (4) Environmental documentation has been completed in accordance with AR 200–1 and 32 CFR 651.
 - c. Commander, IMCOM may delegate and permit redelegation of this authority. AR 420-1, para. 2-16b.
- 2. Air Force. AFI 32-1032, paras. 3.7 and 4.4.1.
 - a. Installation commanders have unlimited approval authority for maintenance projects.
 - b. The AF/ILE may approve – or delegate approval authority for – repair projects costing \$5 million or less.
 - c. The SAF/MII approves repair projects costing more than \$5 million.
- 3. Navy. OPNAVINST 11010.20G, app. C.
 - a. Commander, Naval Installations Command, approval is required for all minor construction projects and combination projects over \$500,000.
 - b. Commander, Naval Installations Command, approval is required for all repair projects over \$500,000.
 - c. The DASN (I&F) approves general repair projects costing \$5 million or more.
 - d. The C.O. approves recurring maintenance projects, and specific maintenance projects costing \$500,000 or less. Commander, Naval Installations Command, approval is required for all maintenance projects over \$500,000.
- 4. Congressional notification and approval is required for projects expected to exceed \$7.5 million. 10 U.S.C. § 2811(d). The Secretary’s notification to the appropriate committees of Congress containing information specified in 10 U.S.C. § 2811(d).

X. CONCLUSION.

- A. It is important to take a systematic approach in reviewing a construction funding issue. The framework for such a review is located in herein. This checklist does not address every issue but identifies the major steps in the process for construction funding fiscal review.

- B. Regardless of your opinion regarding a construction project, it is valuable to document the rationale that you used to come to your conclusion. Doing this allows others to isolate the issues that you identified within the project file and understand your logic and reasoning.

XI. NOTES

APPENDIX A - CONSTRUCTION FUNDING CHECKLIST

1. Define the Scope of the Project. (i.e., What is the construction project? Is there one, two, three, etc.? And how do they relate to one another?)

- a. A military construction project includes all construction work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. Critical is whether the project, standing alone, meets this requirement.
- b. Avoid project splitting and/or incrementation of projects.
- c. Downscoping is permissible, provided it results in a complete and usable facility.
- d. Interrelated or Interdependent?

2. Classify the Work (Is it construction, maintenance, or repair?)

- a. Construction: Erection, installation, or assembly of a new facility, or the addition, expansion, or relocation of an existing facility.
- b. Maintenance: Work required to preserve or maintain a facility.
- c. Repair: Project to restore a facility to its designated purpose. Remember “failed or failing.”

3. Determine the Funded and Unfunded Costs

KEY: Funded costs are tied to relevant thresholds, while unfunded costs do not count towards these same thresholds. See AR 420-1 & DA- PAM 420-11

- a. Common funded costs: materials, supplies, services, installed capital equipment, transport of materials, civilian labor, supervision and inspection (Corps of Engineers).
- b. Common unfunded costs: military personnel labor, excess distributions (DRMO).

4. Select the Proper Appropriation (Construction Projects)⁵⁶

- a. Less than \$1 Million, O&M Funds
- b. \$1 Million - \$3 Million, UMMC Funds (LHS, up to \$4 Million).
- c. Over \$3 Million, Specified MILCON Funds (Congress).

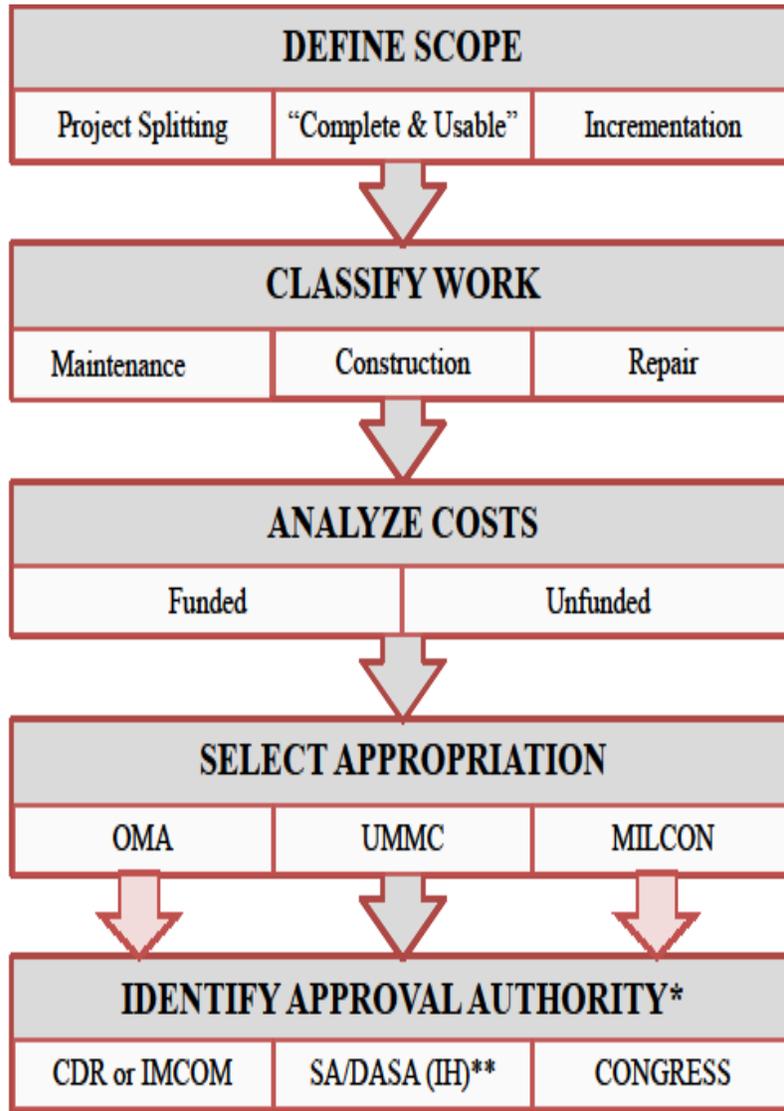
5. Identify the Proper Approval Authority (Construction Projects)⁵⁷

- a. Less than \$1 Million, ARMY Command Commander (if delegated)/IMCOM .
- b. \$1 Million - \$3 Million, DASA (IH), (LHS, up to \$4M).
- c. More than \$3 Million, Congress.

⁵⁶ Maintenance and Repair Projects are generally funded with O&M funds.

⁵⁷ Maintenance and repair projects have different approval thresholds from construction. MACOM commander/IMA Director may approve maintenance and repair projects costing less than \$3 million (which can be delegated). Maintenance and repair projects exceeding \$3 million must be approved by HQDA. The Secretary concerned must approve a repair project exceeding \$7.5 million, and must notify Congress. 10 U.S.C. § 2811.

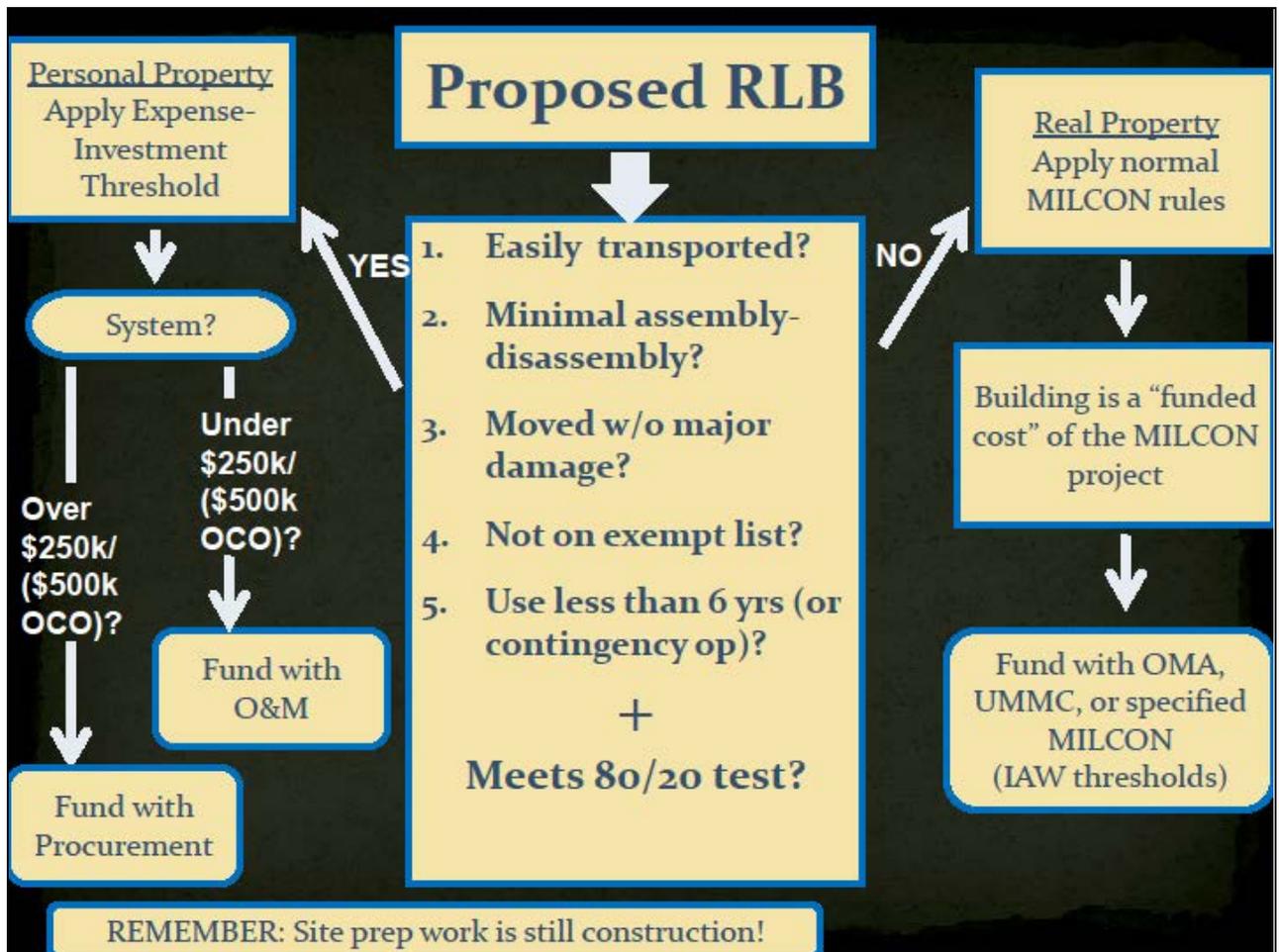
APPENDIX B - CONSTRUCTION FUNDING FLOW CHART



* If Maintenance & Repair, only O&M (<\$3M CDR, IMCOM) (\$3-7.5M HQDA) (>\$7.5M Congress)

**Notify Congress/Wait

APPENDIX C – RELOCATABLE BUILDING FLOW CHART



APPENDIX C –MILITARY CONSTRUCTION THRESHOLDS

2015 NDAA: Construction Funding Changes

“OLD” Rule

O&M \$0 – \$750,000

UMMC \$750,000,001 - \$2,000,000

*LHS increases to \$3,000,000

MILCON >\$2,000,000

“NEW” Rule

O&M \$0 - \$1,000,000

UMMC \$1,000,001 - \$3,000,000

*LHS increases to \$4,000,000

MILCON >\$3,000,000

CHAPTER 9:



CONTINUING RESOLUTION AUTHORITY & FUNDING GAPS

CHAPTER 9

CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS

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CHAPTER 9

CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS

I. INTRODUCTION

II. REFERENCES

- A. Office of Management and Budget Circular A-11, Section 123, Apportionments Under a Continuing Resolution, and Section 124, Agency Operations in the Absence of Appropriations (2017) [OMB Cir. A-11] (*available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf*).
- B. Government Accountability Office, Office of General Counsel, Principles of Federal Appropriations Law, Vol. II, Ch. 8, Continuing Resolutions, GAO-06-382SP (3d ed. 2006) and Annual Update of the 3rd Edition, March 2015, Ch. 8, Continuing Resolutions, GAO-15-303SP [GAO Red Book] (*available at <https://www.gao.gov/legal/red-book/overview>*).
- C. DOD 7000.14-R, Department of Defense Financial Management Regulation (FMR), Glossary, (*available at <http://comptroller.defense.gov/fmr.aspx>*).
- D. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, (Jan. 2000 with changes through December 2017). [DFAS-IN 37-1] (*available at <https://www.asafm.army.mil/dfas.aspx?doc=37-1>*).
- E. Pub. L. 115-56 (September 8, 2017), Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017 (*available at <https://www.congress.gov/bill/115th-congress/house-bill/601>*).
- F. Public Law 115-90 (December 8, 2017), Further Continuing Appropriations Act, 2018 (*available at <https://www.congress.gov/bill/115th-congress/house-joint-resolution/123>*).
- G. Public Law 115-96 (December 22, 2017), Further Additional Continuing Appropriations Act, 2018 (*available at <https://www.congress.gov/bill/115th-congress/house-bill/1370>*).
- H. H.R. 195 (January 22, 2018), Extension of Continuing Appropriations Act, 2018 (*available at <https://www.congress.gov/bill/115th-congress/house-bill/195>*).

III. DEFINITIONS

A. Continuing Resolution (CR).

1. Definition: “An appropriation, in the form of a joint resolution, that provides **budget authority** for federal agencies, specific activities, or both to continue operation when Congress and the President have not completed action on the regular appropriation acts by the beginning of the fiscal year.” (emphasis added) [GAO, A Glossary of Terms Used in the Federal Budget Process](#), GAO-05-734SP (Washington DC, September 2005) 35-36.
 - a. Budget Authority - Budget authority means “the authority provided by Federal law to incur financial obligations . . .” [2 U.S.C. § 622\(2\)](#).
 - b. Examples of “budget authority” include appropriations, borrowing authority, contract authority, and spending authority from offsetting collections. [OMB Cir. A-11](#), § 20.4.
2. The Continuing Resolution, in the absence of an appropriation act, provides authority for Agencies to continue current operations. Such continuing resolutions are subject to Office of Management and Budget (OMB) apportionment in the same manner as appropriations. DOD 7000.14-R, [DOD Financial Management Regulation, Glossary](#).
3. [A]n interim appropriation to provide authority for specific ongoing activities in the event that regular appropriations have not been enacted by the beginning of the fiscal year or the expiration of the previous continuing resolution. A continuing resolution has a fixed lifespan. [DFAS-IN 37-1](#) , Chapter 8 (February 2017), para. 0805.
4. Once the Continuing Resolution becomes a public law (after both houses of Congress have passed the bill and it has been signed by the President) it has the same force and effect as any other statute. *Oklahoma v. Weinberger*, 360 F. Supp. 724, 726 (W.D. Okla. 1973).

B. Funding Gap. A funding gap occurs when no appropriation act or continuing resolution exists. [DFAS-IN 37-1](#), (February 2017) para. 080601.

C. Joint Resolution. A joint resolution, with the exception of proposed amendments to the Constitution, become law in the same manner as bills. Like a bill, it may originate in either the House of Representatives or in the Senate. A joint resolution originating in the House of Representatives is designated "H.J. Res." followed by its individual number. If it originates in the Senate, it is designated

"S.J. Res." followed by its number. Joint resolutions contain a "resolving clause" that states, "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all, etc." See http://www.senate.gov/legislative/common/briefing/Enactment_law.htm.

- D. New Start. Initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year. [GAO Redbook, Vol. II](#), p. 8-24 (Feb. 2006).

IV. INTRODUCTION TO THE LEGISLATIVE PROCESS

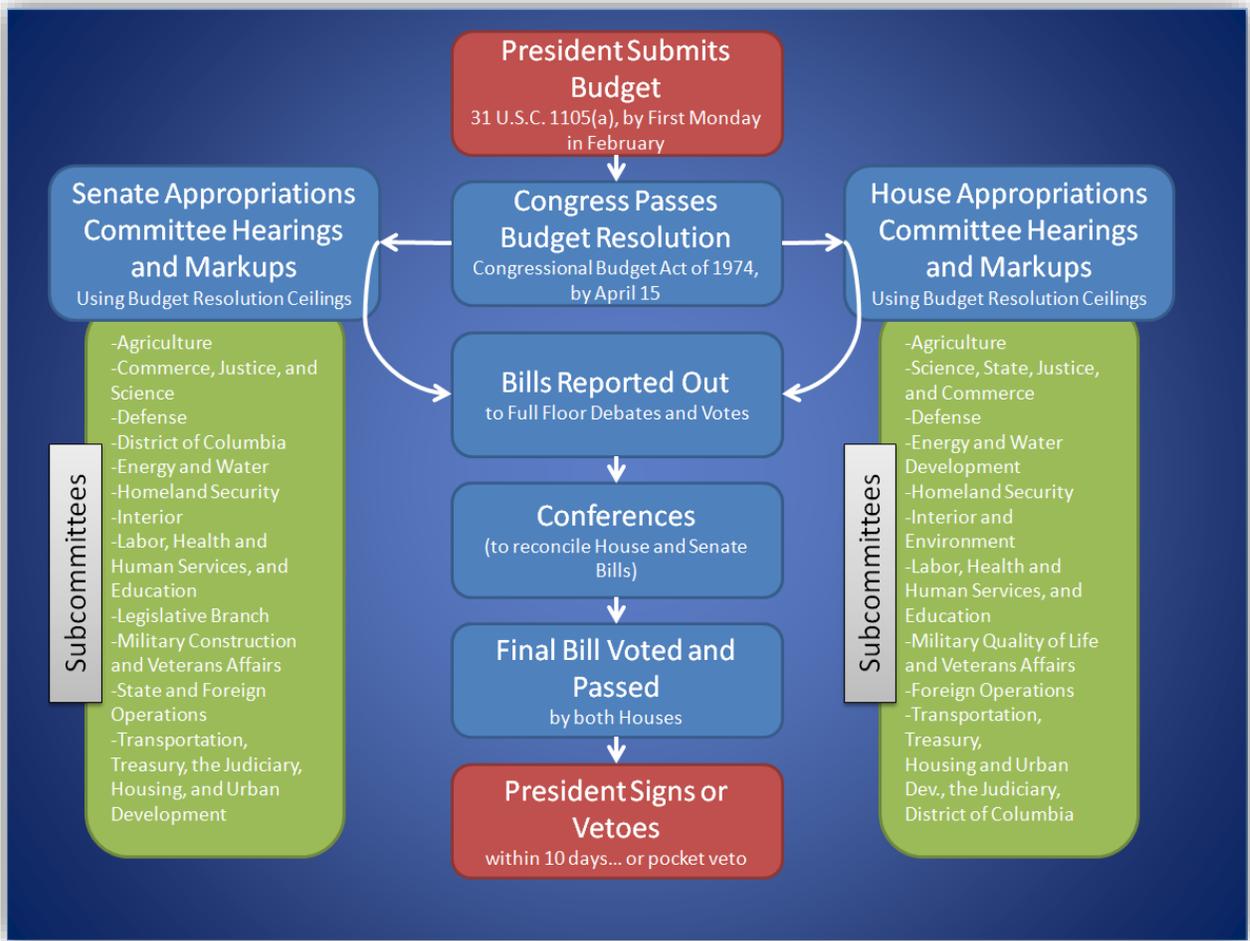
- A. Background. The Constitution of the United States provides that positive authority is required to spend money. Art I, Sec 9, Clause 7. The Constitution gives Congress the authority to determine what rules will govern making the budget. Art I, Sec 5, Clause 2. Congress and the President must enact appropriations which provide funding for federal agencies to operate in a new fiscal year by October 1st, the first day of the fiscal year. [Congressional Budget & Impoundment Control Act of 1974](#) (Pub. L. 94-344). Historically, one or more of the required appropriations acts are delayed well beyond Oct.1st. See Congressional Research Service, Duration of Continuing Resolution in Recent Years (January 14, 2016), available at <http://www.fas.org/sgp/crs/misc/R42647.pdf>.
- B. The Congressional Budget Process. [The Congressional Budget & Impoundment Control Act of 1974](#) (Titles I-IX of Pub. L. 93-344, 2 U.S.C. 601-688) established the congressional budget process which provides timelines to ensure Congress completes its work on budgetary legislation by the start of the Fiscal Year. CRS Report for Congress, March 20, 2008, [98-472 GOV](#). The federal budget establishes the level of total spending and revenues as well as how the spending should be divided up. The budgetary timetable is below¹:

¹ Congressional Research Service, [Introduction to the Federal Budget Process](#) (December 3, 2012), Table 1 at p. 12.

Table I. Congressional Budget Process Timetable

Deadline	Action to be completed
First Monday in February	President submits budget to Congress.
February 15	CBO submits report on economic and budget outlook to Budget committees.
Six weeks after President's budget is submitted	Committees submit reports on views and estimates to respective Budget Committee.
April 1	Senate Budget Committee reports budget resolution.
April 15	Congress completes action on budget resolution.
June 10	House Appropriations Committee reports last regular appropriations bill.
June 30	House completes action on regular appropriations bills and any required reconciliation legislation.
July 15	President submits mid-session review of his budget to Congress.
October 1	Fiscal year begins.

- C. **Appropriation Process.** The overall appropriations process begins when the President submits the budget proposal for the next Fiscal Year. [Congressional Budget & Impoundment Control Act of 1974](#) (Pub. L. 94-344) requires Congress to adopt a Budget Resolution setting spending limits for each appropriations subcommittee. Using those figures as a ceiling, the committees draft and mark up proposed legislation that is eventually approved by the full appropriations committees and reported out to the floor of the respective house (House or Senate) for debate and vote. Once passed within each house, the House and Senate versions are reconciled using a Conference Report. Once a final bill is agreed to by both houses, it is passed and submitted to the President for final signature or veto. The chart below illustrates this process:



- D. Forms of Congressional Action. Congress introduces proposals in one of four forms: a bill, a joint resolution, a concurrent resolution, or a simple resolution. The most customary form is the bill. Continuing Resolutions are joint resolutions.
1. House & Senate Appropriations Committees draft the federal appropriations acts for consideration and passage by Congress. The level of appropriations is limited by the Budget Resolution, drafted by the Budget Committee. For more information, see <http://appropriations.house.gov/> and <http://www.appropriations.senate.gov/>.
 2. The House & Senate Armed Services Committees are responsible for the annual defense authorization bill. For more information, see <http://armed-services.senate.gov> and <http://armedservices.house.gov>.
- E. Regular Appropriations Acts. There are 13 appropriations acts regularly passed by Congress. The Department of Defense generally operates under two

appropriations acts - the Department of Defense Appropriations Act and the Military Construction Appropriations Act.

- F. Options. Congress can pass appropriations acts separately or as a group.
1. When the appropriations acts are passed as a group, they are referred to as a Consolidated Appropriation Act (CAA) or an Omnibus Appropriations Act.
 2. When passed separately, the DOD Appropriations Act (DODAA) provides funding for most of DOD's normal operations.
 3. The Military Construction Appropriations Act (MILCON AA) provides funding for military construction projects.
 4. Since deploying troops to Iraq and Afghanistan, Congress has typically used Emergency Supplemental Appropriations to fund overseas contingency operations.
- G. The National Defense Authorization Act (NDAA). The NDAA is an act that provides authority to execute the programs specified in it. An authorization act differs from the appropriations act in that the authorization act does not have any funding attached to it. It only provides authority to spend funds. It essentially gives us additional purposes that we can spend money on. See Congressional Research Service, *The Congressional Appropriations Process: An Introduction* (November 30, 2016), available at <https://www.senate.gov/CRSPubs/8013e37d-4a09-46f0-b1e2-c14915d498a6.pdf>.

V. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS

- A. Continued Operations – History as Potential Antideficiency Act Violations.
1. Background. The Attorney General issued two opinions in the early 1980s stating the language and history of the Antideficiency Act unambiguously prohibits agency officials from incurring obligations in the absence of appropriations. In 1995, following those two memorandums, the Office of Legal Counsel of the Department of Justice issued an opinion reaffirming and updating the prior memos. [OMB Cir. No. A-11](#), Sec. 124.1. This 1995 memo is often referred to as the "Dellinger Memo."
 2. Additionally, the Comptroller General opined that permitting federal employees to work after the end of one fiscal year and before the enactment of a new appropriations act or a continuing resolution violates the Antideficiency Act (ADA). [Representative Gladys Noon Spellman](#), B-197841, March 3, 1980 (unpub).
 3. Memorandum #1: The President asked the Attorney General if an agency can lawfully permit its employees to continue work after the expiration of

the agency appropriation for the prior fiscal year and prior to any appropriation for the fiscal year. The Attorney General opined that absent an appropriations act or a continuing resolution, executive agencies must take immediate steps to cease normal operations. "Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations," Opinion of the U.S. Attorney General, Benjamin R. Civiletti, 43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16 (April 25, 1980). *See* [Appendix A](#).

4. Memorandum #2: The President asked the Attorney General what activities could continue to occur during a funding gap. "[Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations](#)" Opinion of the U.S. Attorney General, Benjamin R. Civiletti, 43 U.S. Op. Atty. Gen. 293, 5 U.S. Op. Off. Legal Counsel 1 (January 16, 1981).
5. Memorandum #3: The Dellinger Memo. In anticipation of a potential funding gap, the Clinton Administration requested updated guidance on the scope of permissible government activity. In response, the Department of Justice reemphasized the restricted level of allowable government activity. The Memo also noted, however, that a lapse in appropriations will not result in a total "government shut-down." DOJ Memorandum for Alice Rivlin, Office of Management and Budget, Aug. 16, 1995 ([Appendix B](#)).

B. Continued Operations - Permissible Activities.

1. The Office of Management and Budget (OMB) issues guidance concerning actions to be taken by agencies during funding gaps.
 - a. Agencies must develop contingency plans to conduct an orderly shutdown of operations.
 - b. During a funding gap, agencies may continue:
 - (1) Activities otherwise authorized by law, e.g., activities funded with multi-year or no-year appropriations;
 - (2) Activities authorized through extraordinary contract authority. *See, e.g.,* [41 U.S.C. § 11](#) (Feed and Forage Act).
 - (3) Activities that protect life and property during emergencies. *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 B.
3. DFAS Guidance.
 - a. [DFAS-IN 37-1](#), para. 0805, provides the following guidance concerning operations during a funding gap:
 - (1) No new obligations may be incurred unless they can be lawfully funded from prior appropriations or are specifically authorized by law.
 - (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 December 2016, DOD issued detailed guidance addressing what activities the military departments and other DOD agencies could perform during the absence of appropriations (i.e., a funding gap). This information as well as additional guidance can be found in the CRA General Guidance. (*See* References & [Appendix D](#)).
 - a. Activities that could continue during the funding gap:
 - (1) Units and the administrative, logistical, and maintenance functions required in support of major contingency tasking;

- (2) Units and personnel supporting ongoing international treaties, commitments, essential peacetime engagement and counterdrug operations;
- (3) Units and personnel preparing for or participating in operational exercises;
- (4) Functions or activities necessary to protect life and property or to respond to emergencies;²
- (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;³
- (8) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session;
- (9) Legal support for any permitted activities;
- (10) MWR activities to the extent operated by NAF personnel; and
- (11) Childcare activities, including Department of Defense Dependents Schools.

b. Activities required to be suspended during the funding gap:

- (1) Basic, skill, and qualification training which will obligate current FY funds;

² 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).

³ For contract actions not within the scope of the original contract and that are in direct support of permissible activities, the contracting officer will cite one of the following three authorities in support of the new obligation: (1) the Constitution as interpreted by Attorney General opinions for general support of National Security operations, (2) [41 U.S.C. § 11](#) for obligations covered by the Food and Forage Act, and (3) [31 U.S.C. § 1342](#) for obligations for protection of life and property against imminent danger.

- (2) Military Personnel Selection Boards and Administrative Boards;
 - (3) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel, and;
 - (4) PCS moves and TDY travel for active duty, reserve, and civilian personnel engaged in otherwise non-exempt activities using current FY funding.
5. Funding Gap Issues.
- a. Agencies generally cannot predict whether a funding gap will occur or estimate its duration. Consequently, it is difficult for agencies to plan for such gaps.
 - b. Efficient operation of government is clearly compromised. *See* [General Accounting Office, Government Shutdown: Permanent Funding Lapse Legislation Needed, GAO/GGD-91-76, June 6, 1991](#); [General Accounting Office, Funding Gaps Jeopardize Federal Government Operations, 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.").
 - d. Congress may provide funding for some operations that otherwise would not be funded. *See, e.g.,* Pay Our Military Act, 2013, [H.R. 3210](#) (Providing continuing appropriations for pay and allowances for active duty military members and civilian and contractors providing support to those military members during a funding gap in FY14); Honoring the Families of Fallen Soldiers Act, 2013, [Pub. L. No. 113-44](#), 127 Stat. 555 (Providing continuing appropriations for payment of death gratuities; funeral, burial, and transfer expenses; and basic housing allowance for dependents of a member who died on active duty).

VI. CONTINUING RESOLUTIONS

- A. General Legal Implications of Continuing Resolutions.
 1. If Congress fails to pass, or the President fails to sign, an appropriation act before 1 October, a funding gap occurs unless Congress passes, and the President signs, interim legislation authorizing executive agencies to continue incurring obligations. This interim legislation is referred to as a

continuing resolution. It is a statute that has the force and effect of law. *See Oklahoma v. Weinberger*, 360 F. Supp. 724 (W.D. Okla. 1973).

2. Comparison of Continuing Resolutions with Appropriation Acts.
 - a. Appropriation acts appropriate specified sums of money. Continuing Resolutions specify a “rate” based on the last fiscal year’s appropriations (sometimes adjusted upwards or downwards), but do not specify sums of money.
 - b. Continuing resolutions include language such as "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations" to signify the temporary nature of the appropriation.
 - (1) Traditional CRs do not usually appropriate specific sums of money, instead using terms such as “such amounts as may be necessary for continuing projects” at a certain “rate for operations.”
 - (2) To determine the sum of money appropriated for a given activity it is necessary to examine documents other than the resolution. For example, you may need to apply a formula to previous year’s appropriations to determine the amount under the current resolution.
 - (3) The Continuing Resolution for FY 2018 provided⁴:

“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 2018, and for other purposes, namely:

⁴ FY 18 Pub. L. 115-56 (September 8, 2017) provided continuing appropriations thru December 8, 2017.

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2017 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in this Act, that were conducted in fiscal year 2016, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: . . .”

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

1. Continuing resolutions provide interim funding for projects or activities for which funding or authority was available in the previous year’s appropriation. Generally, the scope of a continuing resolution’s applicability is quite broad:

“SEC. 103. Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.”⁵

2. New Starts. Continuing resolutions generally do not allow agencies to initiate new programs, or expand the scope of existing programs, projects, and activities. During a continuing resolution, a hot issue is generally how to define a “new start.” There are several authorities to consult: Congress, GAO, and Agency policy.
3. Congress. In recent years, Congress has expressly resolved differing interpretations by explicitly defining “new starts” in the continuing resolution itself.

- a. For example, the [FY 2018 Continuing Resolution](#) provided, in part:

“SEC. 102. (a) No appropriation or funds made available [in this continuing resolution] . . . shall be used for: (1) the new production of items not funded for production in fiscal year 2017 or prior years; (2) the increase in production rates above those sustained with fiscal year 2017 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization . . .

⁵ Id.

for which appropriations, funds, or other authority were not available during fiscal year 2017.”⁶

- b. Under the definition in the FY 2018 continuing resolution, if an agency had authority and sufficient funds to carry out a particular program in the preceding year, that program is not a new project or activity regardless of whether it was actually operating in the preceding year. This type of language would seem to permit minor O&M construction and UMMC unless further restricted by policy.
4. GAO’s Take on New Starts. GAO has looked at the definition of “new start” in a series of cases.
- a. Default: When continuing resolutions contain a section stating that no funds made available under the resolution shall be available to initiate or resume any project or activity which was *not conducted* during the preceding fiscal year, GAO has found the term “projects or activities” to refer to the individual program rather than the total appropriation. See Chairman, Nat’l Advisory Council on Extension and Continuing Educ., [B-169472](#), 52 Comp. Gen. 270 (1972); Secretary of the Interior, [B-125127](#), 35 Comp. Gen. 156 (1955).
 - b. Construction: GAO has also found that where, in the previous fiscal year, funds were available generally for construction of buildings, including plans and specifications, it was not a new start to begin a construction project under a continuing resolution – even though the specific construction project was not actually under way in the previous year. Because funds were available generally for construction in the previous year, this specific project was not a new project or activity and thus could be funded under the continuing resolution. See Lt. Gen. F.T. Unger, [B-178131](#), Mar. 8, 1973.
 - c. Variations: Uncle Bud’s, Inc., 206 B.R. 889 (Bankr. M.D. Tenn., 1997) (finding that under a continuing resolution, the bankruptcy court could collect a new quarterly fee as part of the bankruptcy process because, while the fee was new, the U.S. Trustee has long been required to collect fees imposed by law); Availability of Higher Educ. Act Loan Funds, [B-201898](#), 60 Comp. Gen. 263 (1981) (finding that the Department of Education could release \$25 million from its revolving fund for higher education loans, even though the authority to do so was not in the FY1980 appropriation, because Congress expressly specified that the funding for the

⁶ Id.

continuing resolution was based on the FY1980 appropriation as passed by the House of Representatives, which included releasing funding for the loans); Environmental Defense Center v. Babbitt, 73 F.3d 867 (9th Cir. 1995) (finding that, under a FY1996 continuing resolution, the Department of the Interior could not take final decision making on whether to list the California Red-legged Frog as an endangered species because Congress had banned use of FY1995 funds from being used to make endangered species determinations and the FY1996 continuing resolution effectively continued the ban).

5. Policy. When continuing resolutions are passed, typically agencies will come out with policy guidance that can further define the definition of a “new start.”
 - a. In 1998, The Assistant Secretary of the Army (Financial Management & Comptroller) provided guidance in Continuing Resolution General Guidance, (OASA-FMC, August 1998) regarding “new starts.” At that time:
 - (1) Definition: A new start is the initiation, resumption, or continuation of any project, subproject, activity, budget activity, program element, and subprogram within a program element for which an appropriation, fund, or other authority was not available during the previous fiscal year.
 - (2) Military Personnel (MILPER) Appropriations. New starts for MILPER include new entitlements and new recruitment bonuses, which were not approved in previous legislation, and are not permitted. An example of a new start is the payment of adoption expenses approved for the first time in FY1989.
 - (3) Operation and Maintenance (O&M). Continuation of normal operations is authorized. Obligations may be incurred for essential operating expenses, including expenses to cover annual contracts that are regularly awarded and obligated in full at the beginning of the fiscal year.
 - (4) Modifications to O&M programs are generally permitted; they are not considered new starts or scope increases as they do not change the overall purpose of the program. O&M-funded minor construction is not considered a new start and is permitted. An example of an increase in scope of an ongoing program that would not be permitted under CRA is the inception of the National Training Center,

which was initiated as a new phase of the Army's training program.

- (5) Procurement and Research, Development, Test and Evaluation (RDT&E) Appropriations. Generally, a continuing resolution allows previously approved programs to be released at rates sustained during the previous fiscal year. New start restrictions apply to the execution of new investment items not funded for production in the previous fiscal year. Items for which funding was provided in the previous year, or for which funding was provided in prior years and is still available for obligation (e.g., procurement items funded one or two years ago) are not considered new starts.
- (6) Military Construction Appropriations. Any project or activity for which an appropriation, fund, or other authority was not provided during the previous fiscal year is considered a new start and will not be initiated under a continuing resolution. Minor construction funded with Military Construction funds is considered a new start and may not be initiated under a continuing resolution. Planning and design is not considered a new start. Therefore, in general, only planning and design funds may be executed under a continuing resolution.

- b. When the actual appropriations act becomes law, expenditures made pursuant to the continuing resolution must be charged against the new appropriations act:

“Sec. 107. Expenditures made pursuant to this Act 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 2018 Continuing Resolution](#).

C. Availability of Appropriations as to Time under a Continuing Resolution.

1. A continuing resolution provides budget authority:
 - a. Until a fixed cut-off date specified in the continuing resolution;
 - b. Until an appropriations act or a new replaces it; or
 - c. For an entire fiscal year, if no appropriations act is passed
2. The [FY 2018 Continuing Resolution](#) provided:

“SEC. 106. Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2018, appropriations and funds made available and authority granted pursuant to this Act shall be available until whichever of the following first occurs:

(1) the enactment into law of an appropriation for any project or activity provided for in this Act;

(2) the enactment into law of the applicable appropriations Act for fiscal year 2018 without any provision for such project or activity; or

(3) December 8, 2017.”

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

1. Continuing resolutions provide the full amount of the previous year’s appropriation (with increases or decreases as specified) regardless of the duration of the individual continuing resolution. A three-day continuing resolution appropriates the same amount as a full-year continuing resolution. *But see* apportionment requirements, below.
2. Current rate. GAO defines “current rate” as “the rate of operations carried on within the appropriation for the prior fiscal year. [B-152554](#), Nov. 4, 1974. The current rate is equivalent to the total appropriation, or the total funds which were available for obligation, for an activity during the previous fiscal year.” [GAO Redbook, Vol. II](#), ch. 8, Continuing Resolutions at p. 8-10 (2006).
 - a. Continuing Resolutions specifically establish the current rate with reference to the prior fiscal year’s appropriation. For example, the [FY 2018 Continuing Resolution](#) provided funding “at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2017.” Pub. L. 115-56 (2017).
 - 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 equals 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).

- c. Apportionment. OMB apportions the funds appropriated by Continuing Resolutions. [31 U.S.C. § 1512](#).
- (1) OMB provides apportionment guidance in the form of a Bulletin. For FY18, [OMB Bulletin 17-02](#) (28 September 2017) gave agencies specific guidance for implementation of the 2018 continuing resolution(s).
 - (2) Some funds are apportioned automatically. OMB specified for the 2018 continuing resolution(s) amounts would be automatically apportioned by multiplying the annualized amount provided by the continuing resolution by:
 - (a) The percentage of the year (pro-rata) covered by the CR. For Public Law 115-56 use 18.90% (69/365).
 - (b) NOTE: When the previous FY also began with a continuing resolution, the agency may have altered its normal pattern of obligations to respond to limited fiscal resources during the continuing resolution period. This may lead to an artificially low pattern of obligation from the previous fiscal year and skew this calculation, resulting in insufficient automatic apportionments.
 - (c) In some cases, agencies that usually obligate or disburse their entire appropriation early in the FY (e.g., grants, loans, foreign aid) are prevented from doing so to preserve flexibility when the actual appropriations are debated and passed.
- d. 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).

3. Additional Budgetary Constraints.

- a. Beginning in FY1996, every continuing resolution contained the following provisions:⁷

“SEC. 109. Notwithstanding any other provision of this Act, except section 106, for those programs that would otherwise have high initial rates of operation or complete distribution of appropriations at the beginning of fiscal year [XX] because of distributions of funding to States, foreign countries, grantees, or others, such high initial rates of operation or complete distribution shall not be made, and no grants shall be awarded for such programs funded by this Act that would impinge on final funding prerogatives.

SEC. 110. This Act shall be implemented so that only the most limited funding action of that permitted in the Act shall be taken in order to provide for continuation of projects and activities.”⁸

- b. 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, H.J. Res. 108-4](#) (emphasis added).

- c. Reductions to Amount Appropriated. During the life of the 2014 Continuing Resolution, the rate for operations was calculated to reflect reductions to the FY2013 appropriations made by the Presidential Sequester and the Consolidated and Further Continuing Appropriations. See [FY 2014 Continuing Resolution, Pub. L. 113-46](#).

⁷ [GAO Redbook, Vol. II](#), ch. 8, Continuing Resolutions at p. 8-16 (2006).

⁸ Pub. L. 115-56 (September 8, 2017), the 2018 Continuing Resolution.

- E. Relationship of a Continuing Resolution to Other Legislation.
1. A continuing resolution appropriates funds that are “not otherwise appropriated.” *See e.g.* [Appendix D](#). The continuing resolution does not apply to an agency program funded under another appropriation.
 2. Specific inclusion of a program in a continuing resolution provides authorization and funding to continue the program despite expiration of authorizing legislation. Authority to Continue Domestic Food Programs Under Continuing Resolution, [B-176994](#), 55 Comp. Gen. 289 (1975).

VII. CONCLUSION

- A. Continuing resolutions are appropriations that authorize agencies to obligate funds based on authorities in the previous appropriations act and at levels specified for continued operations. Agencies have authority under most continuing resolutions to engage in programs, projects, or activities for which the agency had authority during the previous year’s appropriation. However, no “new starts” are authorized. A new start is something the agency did not have budget authority to do under the last appropriations act.
- B. Funding gaps are times during which no appropriation, continuing resolution, or other budget authority exists to cover new obligations. In such situations, agency operations are severely restricted. In some cases, civilian employees not in an exempted status must be furloughed (placed on leave without pay). Military operations can continue, but travel and other expenses are severely restricted.
- C. In the case of both continuing resolutions and funding gaps, judge advocates should look for recent guidance published by DOD or specific service comptroller offices. Properly advising commands on operations during continuing resolutions or funding gaps requires a detailed knowledge of applicable statutes and guidance.

APPENDIX A
THE CIVILETTI MEMO

(43 U.S. Op. Atty. Gen. 224, 4A U.S. Op. Off. Legal Counsel 16)
APRIL 25, 1980

MY DEAR MR. PRESIDENT:

You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980 opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer or employee of the United States to:

involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.⁹ On its face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.¹⁰ On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although 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

⁹ 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.

¹⁰ 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).

APPENDIX A THE CIVILETTI MEMO

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.¹¹

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 1956.¹² On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.¹³ 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.¹⁴ 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.¹⁵ Various agencies of the Executive branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the administrative problems posed by the Antideficiency Act. During lapses in appropriations during

¹¹ 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).

¹² 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.

¹³ Act of July 15, 1952, ch. 758, §1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

¹⁴ In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor. In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954). In 1956, Congress's temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

¹⁵ 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).

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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,¹⁶ 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.¹⁷ Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the Government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the apparent authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing legal authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

¹⁶ The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

¹⁷ 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).

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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.¹⁸

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,
BENJAMIN R. CIVILETTI

¹⁸ See 21 Op. A.G. 288.

**APPENDIX B
THE DELLINGER MEMO**

**GOVERNMENT OPERATIONS IN THE EVENT OF A LAPSE
IN APPROPRIATIONS**

A government agency may employ personal services in advance of appropriations only when there is a reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property, and when there is some reasonable likelihood that either or both would be compromised in some significant degree by the delay in the performance of the function in question.

August 16, 1995

**MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET**

This memorandum responds to your request to the Attorney General for advice regarding the permissible scope of government operations during a lapse in appropriations.¹

The Constitution provides that “no money shall be drawn from the treasury, but in consequence of appropriations made by law.” U.S. Const. art. I, § 9, cl. 7. The treasury is further protected through the Antideficiency Act, which among other things prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel except in emergencies, unless otherwise authorized by law. *See* 31 U.S.C. § 1341 *et seq.*²

In the early 1980s, Attorney General Civiletti issued two opinions with respect to the implications of the Antideficiency Act. *See Applicability of the Antideficiency Act Upon A Lapse in an Agency’s Appropriations*, 4A Op. O.L.C. 16 (1980); *Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations*, 5 Op. O.L.C. 1 (1981) (“1981 Opinion”). The 1981 Opinion has frequently been cited in the ensuing years. Since that opinion was written, the Antideficiency Act has been amended in one respect, and we analyze the effect of that amendment below. The amendment amplified on the emergencies exception for employing federal personnel by providing that “[a]s used in this section, the term ‘emergencies involving the safety of human life or the protection of property’ does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.

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With respect to the effects of this amendment, we continue to adhere to the view expressed to General Counsel Robert Damus of the Office of Management and Budget that “the 1990 amendment to 31 U.S.C. § 1342 does not detract from the Attorney General’s earlier analyses; if anything, the amendment clarified that the Antideficiency Act’s exception for emergencies is narrow and must be applied only when a threat to life or property is imminent.” Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, to Robert G. Damus, General Counsel, Office of Management and Budget (Oct. 19, 1993) (“*1993 Letter*”). In order to ensure that the clarification of the 1990 amendment is not overlooked, we believe that one aspect of the *1981 Opinion*’s description of emergency governmental functions should be modified. Otherwise, the *1981 Opinion* continues to be a sound analysis of the legal authorities respecting government operations when Congress has failed to enact regular appropriations bills or a continuing resolution to cover a hiatus between regular appropriations.

I.

Since the issuance of the extensive *1981 Opinion*, the prospect of a general appropriations lapse has arisen frequently. In 1981, 1982, 1983, 1984, 1986, 1987, and 1990, lapses of funding ranging from several hours to three days actually did occur. While several of these occurred entirely over weekends, others required the implementation of plans to bring government operations into compliance with the requirements of the Antideficiency Act. These prior responses to the threat of or actual lapsed appropriations have been so commonly referred to as cases of “shutting down the government” that this has become a nearly universal shorthand to describe the effect of a lapse in appropriations. It will assist in understanding the true extent of the Act’s requirements to realize that this is an entirely inaccurate description. Were the federal Government actually to shut down, air traffic controllers would not staff FAA air control facilities, with the consequence that the nation’s airports would be closed and commercial air travel and transport would be brought to a standstill. Were the federal government to shut down, the FBI, DEA, ATF and Customs Service would stop interdicting and investigating criminal activities of great varieties, including drug smuggling, fraud, machine gun and explosives sales, and kidnapping. The country’s borders would not be patrolled by the border patrol, with an extraordinary increase in illegal immigration as a predictable result. In the absence of government supervision, the stock markets, commodities and futures exchanges would be unable to operate. Meat and poultry would go uninspected by federal meat inspectors, and therefore could not be marketed. Were the federal Government to shut down, medicare payments for vital operations and medical services would cease. VA hospitals would abandon patients and close their doors. These are simply a few of the significant impacts of a federal government shut down. Cumulatively, these actions and the others required as part of a true shut down of the federal government would impose significant health and safety risks on millions of Americans, some of which would undoubtedly result in the loss of human life, and

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they would immediately result in massive dislocations of and losses to the private economy, as well as disruptions of many aspects of society and of private activity generally, producing incalculable amounts of suffering and loss.

The Antideficiency Act imposes substantial restrictions on obligating funds or contracting for services in advance of appropriations or beyond appropriated levels, restrictions that will cause significant hardship should any lapse in appropriations extend much beyond those we have historically experienced. To be sure, even the short lapses that have occurred have caused serious dislocations in the provision of services, generated wasteful expenditures as agencies have closed down certain operations and then restarted them, and disrupted federal activities. Nevertheless, for any short-term lapse in appropriations, at least, the federal Government will not be truly “shut down” to the degree just described, simply because Congress has itself provided that some activities of Government should continue even when annual appropriations have not yet been enacted to fund current activities.

The most significant provisions of the Antideficiency Act codify three basic restrictions on the operation of government activities. First, the Act implements the constitutional requirement that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” U.S. Const. art. I, § 9, cl. 7. Second, when no current appropriations measure has been passed to fund contracts or obligations, it restricts entering into contracts or incurring obligations (except as to situations authorized by other law). Third, it restricts employing the services of employees to perform government functions beyond authorized levels to emergency situations, where the failure to perform those functions would result in an imminent threat to the safety of human life or the protection of property.³ The *1981 Opinion* elaborated on the various exceptions in the Antideficiency Act that permit some continuing government functions, and we will only summarize the major categories here:

- Multi-year appropriations and indefinite appropriations.

Not all government functions are funded with annual appropriations. Some operate under multi-year appropriations and others operate under indefinite appropriations provisions that do not require passage of annual appropriations legislation. Social security is a prominent example of a program that operates under an indefinite appropriation. In such cases, benefit checks continue to be honored by the treasury, because there is no lapse in the relevant appropriation.

- Express authorizations: contracting authority and borrowing authority.

Congress provides express authority for agencies to enter into contracts or to borrow funds to accomplish some of their functions. An example is the “food and forage” authority

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given to the Department of Defense, which authorizes contracting for necessary clothing, subsistence, forage, supplies, etc. without an appropriation. In such cases, obligating funds or contracting can continue, because the Antideficiency Act does not bar such activities when they are authorized by law. As the *1981 Opinion* emphasized, the simple authorization or even direction to perform a certain action that standardly can be found in agencies' enabling or organic legislation is insufficient to support a finding of express authorization or necessary implication (the exception addressed next in the text), standing alone. There must be some additional indication of an evident intention to have the activity continue despite an appropriations lapse.

- Necessary implications: authority to obligate that is necessarily implied by statute.

The *1981 Opinion* concluded that the Antideficiency Act contemplates that a limited number of government functions funded through annual appropriations must otherwise continue despite a lapse in their appropriations because the lawful continuation of other activities necessarily implies that these functions will continue as well. Examples include the check writing and distributing functions necessary to disburse the social security benefits that operate under indefinite appropriations. Further examples include contracting for the materials essential to the performance of the emergency services that continue under that separate exception. In addition, in a 1980 opinion, Attorney General Civiletti opined that agencies are by necessary implication authorized "to incur those minimal obligations necessary to closing [the] agency." The *1981 opinion* reiterated this conclusion and consistent practice since that time has provided for the orderly termination of those functions that may not continue during a period of lapsed appropriations.

- Obligations necessary to the discharge of the President's constitutional duties and powers.

Efforts should be made to interpret a general statute such as the Antideficiency Act to avoid the significant constitutional questions that would arise were the Act read to critically impair the exercise of constitutional functions assigned to the Executive. In this regard, the *1981 Opinion* noted that when dealing with functions instrumental in the discharge of the President's constitutional powers, the "President's obligational authority . . . will be further buttressed in connection with any initiative that is consistent with statutes — and thus with the exercise of legislative power in an area of concurrent authority — that are more narrowly drawn than the Antideficiency Act and that would otherwise authorize the President to carry out his constitutionally assigned tasks in the manner he contemplates." *1981 Opinion*, at 6-7.

- Personal or voluntary services "for emergencies involving the safety of human life or the protection of property."

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The Antideficiency Act prohibits contracting or obligating in advance of appropriations generally, except for circumstances just summarized above. The Act also contains a separate exception applicable to personal or voluntary services that deal with emergencies. 31 U.S.C. § 1342. This section was amended in 1990. We will analyze the effects of that amendment in Part II of this memorandum.

Finally, one issue not explicitly addressed by the *1981 Opinion* seems to us to have been settled by consistent administrative practice. That issue concerns whether the emergency status of government functions should be determined on the assumption that the private economy will continue operating during a lapse in appropriations, or whether the proper assumption is that the private economy will be interrupted. As an example of the difference this might make, consider that air traffic controllers perform emergency functions if aircraft continue to take off and land, but would not do so if aircraft were grounded. The correct assumption in the context of an anticipated long period of lapsed appropriations, where it might be possible to phase in some alternatives to the government activity in question, and thus over time to suspend the government function without thereby imminently threatening human life or property, is not entirely clear. However, with respect to any short lapse in appropriations, the practice of past administrations has been to assume the continued operation of the private economy, and so air traffic controllers, meat inspectors, and other similarly situated personnel have been considered to be within the emergency exception of section 1342.

II.

The text of 31 U.S.C. § 1342, as amended in 1990, now reads:

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term “emergencies involving the safety of human life or the protection of property” does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1342. Because of the section 1342 bar on employing personal services, officers and employees may employ personal services in excess of other authorizations by law only in emergency situations.⁴ This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

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The central interpretive task under section 1342 is and has always been to construe the scope of the emergencies exception of that section. When the *1981 Opinion* undertook this task, the predecessor to section 1342 did not contain the final sentence of the current statute, which was added in 1990. Examining that earlier version, the Attorney General concluded that the general language of the provision and the sparse legislative history of it did not reveal its precise meaning. However, the opinion was able to glean some additional understanding of the statute from that legislative history.

The Attorney General noted that as originally enacted in 1884, the provision forbade unauthorized employment “except in cases of sudden emergency involving the loss of human life or the destruction of property.” 23 Stat. 17. He then observed that in 1950, Congress enacted the modern version of the Antideficiency Act and accepted revised language for section 1342 that originally had been suggested by the Director of the Bureau of the Budget and the Comptroller General in 1947. In analyzing these different formulations, the Attorney General stated that

[w]ithout elaboration, these officials proposed that ‘cases of sudden emergency’ be amended to ‘cases of emergency,’ ‘loss of human life’ to ‘safety of human life,’ and ‘destruction of property’ to ‘protection of property. These changes were not qualified or explained by the report accompanying the 1947 recommendation or by any aspect of the legislative history of the general appropriations act for fiscal year 1951, which included the modern section [1341]. Act of September 6, 1950, Pub. L. No. 81-759, § 1211, 64 Stat. 765. Consequently, we infer from the plain import of the language of their amendments that the drafters intended to broaden the authority for emergency employment.

5 Op. O.L.C. at 9.

The *1981 Opinion* also sought guidance from the consistent administrative practice of the Office of Management and Budget in applying identical “emergencies” language found in another provision. That other provision prohibits OMB from apportioning appropriated funds in a manner that would indicate the need for a deficiency or supplemental appropriation, except in cases of “emergencies involving the safety of human life, [or] the protection of property” — phraseology identical to the pre-1990 version of section 1342.⁴ Combining these two sources with the statutory text, the Attorney General articulated two rules for identifying functions for which government officers may enter into obligations to pay for personal services in excess of legal authority other than section 1342 itself:

First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

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5 Op. O.L.C. at 8.

While we continue to believe that the 1981 articulation is a fair reading of the Antideficiency Act even after the 1990 amendment, *see 1993 Letter*, we are aware of the possibility the second of these two rules might be read more expansively than was intended, and thus might be applied to functions that are not emergencies within the meaning of the statute. To forestall possible misinterpretations, the second criteria's use of the phrase "in some degree" should be replaced with the phrase, "in some significant degree."

The reasons for this change rest on our understanding of the function of the 1990 amendment, which comes from considering the content of the amendment, its structure, and its sparse legislative history. That history consists of a solitary reference in the conference report to the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388:

The conference report also makes conforming changes to title 31 of the United States Code to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.

H.R. Rep. No. 964, 101st Cong., 2d Sess. 1170 (1990). While hardly articulating the intended scope of the exception, the conference report does tend to support what would otherwise be the most natural reading of the amendment standing alone: because it is phrased as identifying the functions that should be excluded from the scope of the term "emergency," it seems intended to limit the coverage of that term, narrowing the circumstances that might otherwise be taken to constitute an emergency within the meaning of the statute.

Beyond this, however, we do not believe that the amendment adds any significant new substantive meaning to the pre-existing portion of section 1342, simply because the most prominent feature of the addition — its emphasis on there being a threat that is imminent, or "ready to take place, near at hand," *see Webster's Third New International Dictionary* 1130 (1986) — is an idea that is already present in the term "emergency" itself, which means "an unforeseen combination of circumstances or the resulting state that calls for immediate action" to respond to the occurrence or situation. *Id.* at 741. ⁷ The addition of the concept of "imminent" to the pre-existing concept of "emergency" is thus largely redundant. This redundancy does, however, serve to emphasize and reinforce the requirement that there be a

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threat to human life or property of such a nature that immediate action is a necessary response to the situation. The structure of the amendment offers further support for this approach. Congress did not alter the operative language of the statute; instead, Congress chose to enact an interpretive provision that simply prohibits overly expansive interpretations of the “emergency” exception.

Under the formulation of the *1981 Opinion*, government functions satisfy section 1342 if, inter alia, the safety of human life or the protection of property would be “compromised, in some degree.” It is conceivable that some would interpret this phrase to be satisfied even if the threat were de minimis, in the sense that the increased risk to life or property were insignificant, so long as it were possible to say that safety of life or protection of property bore a reasonable likelihood of being compromised at all. This would be too expansive an application of the emergency provision. The brief delay of routine maintenance on government vehicles ought not to constitute an “emergency,” for example, and yet it is quite possible to conclude that the failure to maintain vehicles properly may “compromise, to some degree” the safety of the human life of the occupants or the protection of the vehicles, which are government property. We believe that the revised articulation clarifies that the emergencies exception applies only to cases of threat to human life or property where the threat can be reasonably said to be near at hand and demanding of immediate response.

WALTER DELLINGER
Assistant Attorney
General Office of Legal
Counsel

1. We do not in this memorandum address the different set of issues that arise when the limit on the public debt has been reached and Congress has failed to raise the debt ceiling.

2. For the purposes of this inquiry, there are two relevant provisions of the Antideficiency Act. The first provides that “[a]n officer or employee of the United States Government or the District of Columbia government may not . . . involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” 31 U.S.C. § 1341(a)(1)(B). The second provides that “[a]n officer or employee of the United States Government . . . may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342.

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3. These restrictions are enforced by criminal penalties. An officer or employee of the United States who knowingly and willfully violates the restrictions shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both. 31 U.S.C. § 1350.

4. The Attorneys General and this office have declined to catalog what actions might be undertaken this heading. In 1981, for example, Attorney General Civiletti quoted Attorney General (later Justice) Frank Murphy. “These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. . . . The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.” 5 Op. O.L.C. at 7 n.9 (quoting 39 Op. Att’y Gen. 343, 347-48 (1939)). This power should be called upon cautiously, as the courts have received such Executive Branch assertions skeptically. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *George v. Ishimaru*, 849 F. Supp. 68 (D.D.C.), *vacated as moot*, No. 94-5111, 1994 WL 517746 (D.C. Cir., Aug. 25, 1994). *But see Haig v. Agee*, 453 U.S. 280 (1981); *In re Neagle*, 135 U.S. 1 (1890).

5. The *1981 Opinion* concluded that:

[d]espite the use of the term ‘voluntary service,’ the evident concern underlying this provision is not government agencies’ acceptance of the benefit of services rendered without compensation. Rather, the original version of Section [1342] was enacted as part of an urgent deficiency appropriation act in 1884, Act of May 1, 1994, ch. 37, 23 Stat. 15, 17, in order to avoid claims for compensation arising from the unauthorized provision of services to the government by non- employees, and claims for additional compensation asserted by government employees performing extra services after hours. This is, under [section 1342), government officers and employees may not involve government in contract for *employment*, i.e., for compensated labor, except in emergency situations. 30 Op. Att’y Gen. 129, 131 (1913).

6. 31 U.S.C. § 1515 (recodified from § 665(e) at the time of the Civiletti opinion). Analyzing past administrative practice under this statute, Attorney General Civiletti found that:

Directors of the Bureau of the Budget and of the Office of Management and Budget have granted dozens of deficiency reapportionments under this subsection in the last 30 years, and have apparently imposed no test more stringent than the articulation of a reasonable relationship between the funded activity and the safety of human life or the protection of property. Activities for which deficiency apportionments have been granted on this basis

APPENDIX B THE DELLINGER MEMO

include [FBI] criminal investigations, legal services rendered by the Department of Agriculture in connection with state meat inspection programs and enforcement of the Wholesome Meat Act of 1967, 21 U.S.C. §§601-695, the protection and management of commodity inventories by the Commodity Credit Corporation, and the investigation of aircraft accidents by the National Transportation Safety Board. These few illustrations demonstrate the common sense approach that has guided [the interpretation] of Section 665(e). Most important, under Section 665(e)(2), each apportionment or reapportionment indicating the need for a deficiency or supplemental appropriation has been reported contemporaneously to both Houses of Congress, and, in the face of these reports, Congress has not acted in any way to alter the relevant 1950 wording of § 665(e)(1)(B), which is, in this respect, identical to § 665(b).

5 Op. O.L.C. at 9-10.

7. *See also* Random House Dictionary of the English Language Unabridged 636 (2d ed. 1987) (“emergency” means “a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action”); Webster’s II New Riverside University Dictionary 427 (1988) (“an unexpected, serious occurrence or situation urgently requiring prompt action”).

APPENDIX C
OMB CONTINUING RESOLUTION BULLETIN 17-02



THE DIRECTOR

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

September 28, 2017

OMB BULLETIN NO. 17-02

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Apportionment of the Continuing Resolution(s) for Fiscal Year 2018

1. Purpose and Background. Public Law 115-56 provides continuing appropriations for the period October 1, 2017, through December 8, 2017. As of October 1, 2017, I am automatically apportioning, as specified in section 3 of this Bulletin, amounts provided by section 101 of this continuing resolution (CR), as well as amounts in any section that provides a CR funding level other than that provided by section 101 ("anomaly"). This Bulletin supplements instructions for apportionment of CRs in OMB Circular No. A-11, sections 120 and 123.

2. Amounts Provided. Section 101(a) of Public Law 115-56 provides such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year (FY) 2017 and under the authority and conditions provided in such Acts, for continuing projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for in Public Law 115-56, that were conducted in FY 2017, and for which appropriations, funds, or other authority were made available in divisions A-L of the Consolidated Appropriations Act, 2017 (Public Law 115-31), excluding section 540 of division B, section 310 of division F and sections 420 and 421 of division K, but including the following: sections 171, 175, 194 and 195 of Public Law 114-223, as amended by division A of Public Law 114-254; language in division G revising the application of the FLAME Wildfire Suppression Reserve Fund; division A of Public Law 114-223, except for appropriations for fiscal year 2017 in the matter preceding the first proviso under the heading "Medical Community Care"; and division B of Public Law 114-254.

Section 101(b) of Public Law 115-56 reduces the rate for operations provided by section 101(a) for each account by 0.6791 percent except for the funding levels listed in Attachment A, item 3.

3. Automatic Apportionments. Attachment A contains detailed instructions on calculating the rate for operations provided by the CR. To calculate the amount automatically apportioned through the period ending December 8, 2017, (and any extensions thereof), multiply the annualized amount provided by the CR in section 101 (or in an anomaly) by the percentage of the year (pro-rata) covered by the CR. For Public Law 115-56 use 18.90 percent (69/365).

Unless determined otherwise by you and requested through your RMO (see Attachment A, item 12), all automatically apportioned CR funds are apportioned as Category B (lump sum),

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regardless of quarterly restrictions (e.g., amounts apportioned as Category A) imposed in last year's apportionments. Limitations on programs (e.g., other Category Bs) and footnotes included in last year's apportionments remain in effect under the CR.

During the period of the CR, section 115 applies the 0.6791 percent reduction specified in section 101(b) to FY 2018 discretionary appropriations that were provided in advance by appropriations Acts and that become available on October 1, 2017. This automatic apportionment does not apply to those accounts. Your RMO will apportion those accounts separately.

4. Accounts with Zero Funding Excluded from Automatic Apportionment. If either the House or Senate has reported or passed a bill that provides no funding for an account at the time the CR is enacted or extended, this automatic apportionment does not apply to that account. Reported bills are those that have been filed by the full House or Senate Appropriations Committee for floor action. You may request that OMB provide an account-specific apportionment for such accounts during the period of the CR, if needed.

5. Programs under Section 111. Funds for appropriated entitlements and other mandatories and activities under the Food and Nutrition Act of 2008, as defined in item 10 of Attachment A, are automatically apportioned as needed to carry out programs at a rate to maintain program levels under current law, i.e., at the FY 2018 level less any applicable FY 2018 sequestration pursuant to section 251A of the Balanced Budget and Emergency Deficit Control Act of 1985. This automatic apportionment does not, however, apply to programs with more complex funding structures. Agencies should contact their RMO representatives to determine if their account is automatically apportioned or if an account-specific apportionment is required.

Section 111 does not apply to the associated discretionary administrative expenses for those programs. The associated discretionary administrative expenses are automatically apportioned at the pro-rata amount based on FY 2017 annualized levels in section 101.

6. Credit Limitations. If there is an enacted credit limitation (i.e., a limitation on loan principal or commitment level) in FY 2017, then the automatic apportionment is the pro-rata share of the credit limitation or the budget authority (i.e., for subsidy cost), whichever is less. To calculate amounts available, see exhibit 123 of OMB Circular No. A-11.

7. Apportionments for Amounts In Excess of the Automatic Apportionment (Exception Apportionments). If you seek an amount for an account that exceeds the amount automatically apportioned by this bulletin, you must provide a written justification that includes the legal basis for the exception apportionment (see section 123.7 of OMB Circular No. A-11). OMB expects to approve exception apportionment requests only in extraordinary circumstances.

You or your RMO may determine that an amount for a program or account should be less than the amount automatically apportioned to ensure that an agency does not impinge on the final funding prerogatives of the Congress or to encourage prudent financial management and execution of mission. In these cases, an account-specific apportionment may also be required.

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OMB CONTINUING RESOLUTION BULLETIN 17-02

You do not need to request a new apportionment for subsequent extensions of the CR (unless otherwise required by your RMO). Instead, in the case of accounts that receive an account-specific apportionment at any time during the CR period, the automatic apportionment will apply to such accounts under any subsequent extensions of the CR, provided that the total amount apportioned during the CR period does not exceed the total annualized level of the CR. However, any footnotes on the account-specific apportionment continue to apply to the accounts, when subsequently operating under the automatic apportionment.

The requirements described in this section do not apply to account-specific apportionments for accounts with zero funding (see section 4 above) or to account-specific apportionments to invoke anomalies that provide authority for apportionment at an accelerated rate for operations. In order to utilize the accelerated rate for operations you must request an account-specific apportionment. In the interim you will be automatically apportioned the pro-rata share of the rate for operations.



Mick Mulvaney
Director

Attachment(s)

- Attachment A: Continuing Resolution Frequently Asked Questions
- Attachment B: Non-CHIMP Cancellations Recurring in a 2018 Continuing Resolution
- Attachment C: Changes in Mandatory Programs Recurring in a 2018 Continuing Resolution

APPENDIX D
DOD FUNDING GAP GUIDANCE (2018)



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

JAN 18 2018

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF, NATIONAL GUARD BUREAU
COMMANDERS OF THE COMBATANT COMMANDS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM
EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF
DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC
AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTOR, STRATEGIC CAPABILITIES OFFICE
DIRECTORS OF DEFENSE AGENCIES
DIRECTORS OF DOD FIELD ACTIVITIES

SUBJECT: Guidance for Continuation of Operations During a Lapse of Appropriations

Appropriations provided under the Continuing Appropriations Act, 2018 (division D of Public Law 115-56), as amended, expire at 11:59 PM on Friday, January 19, 2018. The Administration does not want a lapse in appropriations, which would result in a government shutdown, to occur. The Administration is willing to work with the Congress to enact a short-term continuing resolution (CR) to fund critical Federal government operations and allow Congress the time to complete the full-year 2018 appropriations. The Secretary and I hope that the Congress will pass a CR or an annual appropriations bill for Defense activities during FY 2018. However, prudent management requires that the Department be prepared for the possibility of a lapse in appropriations.

The attachment to this memorandum provides instructions for continuation of essential operations in the absence of appropriated funds. The Department will, of course, continue to prosecute the war in Afghanistan and ongoing operations against al-Qaeda and the Islamic State of Iraq and Syria, including preparation of forces for deployment into those conflicts. The Department must, as well, continue many other operations necessary for the safety of human life



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or the protection of property (a copy of military operations necessary for national security will be supplied separately). These activities will be “excepted” from the effects of a lapse in appropriations: all other activities would need to be shut down in an orderly and deliberate fashion, including – with few exceptions – the cessation of temporary duty travel.

All military personnel performing active duty will continue in a normal duty status regardless of their affiliation with excepted or non-excepted activities. Military personnel will not be paid until such time as Congress makes appropriated funds available to compensate them for this period of service. Civilian personnel who are necessary to carry out or support excepted activities will also continue in normal duty status and also will not be paid until Congress makes appropriated funds available. Civilian employees paid from lapsed appropriations and who are not necessary to carry out or support excepted activities will be furloughed, i.e., placed in a non-work, non-pay status.

The responsibility for determining which activities meet the criteria for being excepted from shutdown resides with the Secretaries of the Military Departments and Heads of the DoD Components, including the combatant commanders with respect to activities undertaken by their immediate headquarters and subordinate joint headquarters, who may delegate this authority as they deem appropriate. The attached guidance should be used to assist in making this determination. The guidance does not identify every excepted activity, but rather provides overarching direction and general principles for making these determinations. It should be applied prudently in the context of a Department at war, with decisions guaranteeing our continued robust support for those engaged in that war, and providing assurance that the lives and property of our Nation’s citizens will be protected.

This memorandum contains guidance to begin detailed planning. No shutdown actions are to be taken until you receive further notice.

Within the Office of the Secretary of Defense, the Under Secretary of Defense (Comptroller) will take the lead in preparing for operations in the absence of appropriations, assisted by other offices as necessary.

To repeat, the Secretary and I hope that Congress will pass a funding bill and the DoD will avoid a shutdown. This guidance is intended to support prudent planning.



Attachment:
As stated

cc:
Director for National Intelligence

**APPENDIX D
DOD FUNDING GAP GUIDANCE (2018)**

**For Planning Purposes Only - Do Not Implement Until Direction from the
Deputy Secretary of Defense or his Designee**

**CONTINGENCY PLAN GUIDANCE
FOR CONTINUATION OF
ESSENTIAL OPERATIONS
IN THE ABSENCE OF
AVAILABLE APPROPRIATIONS**

January 2018

**For Planning Purposes Only - Do Not Implement Until Direction from the
Deputy Secretary of Defense or his Designee**

APPENDIX D DOD FUNDING GAP GUIDANCE (2018)

**For Planning Purposes Only - Do Not Implement Until Direction from the
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GENERAL INFORMATION

This document provides guidance for identifying those missions and functions of the Department of Defense (DoD) that may continue to be carried out in the absence of available appropriations. The information provided in this document is not exhaustive, but rather illustrative, and is intended primarily to assist in the identification of those activities that may be continued notwithstanding the absence of available funding authority in the applicable appropriations (excepted activities). Activities that are determined not to be excepted, and which cannot be performed by utilizing military personnel in place of furloughed civilian personnel, will be suspended when appropriated funds expire. The Secretary of Defense may, at any time, determine that additional activities shall be treated as excepted.

Components should consult the Office of Management and Budget website (http://www.whitehouse.gov/omb/memoranda_default) and section 124 of OMB Circular A-11 (Preparation, Submission and Execution of the Budget) for the latest guidance issued on operations during a lapse in appropriation and the Office of Personnel Management website (<http://www.opm.gov/policy-data-oversight/pay-leave/furlough-guidance/#url=Overview>) for the latest guidance on civilian furloughs during a government shutdown.

Antideficiency Act Compliance

The Antideficiency Act prohibits Federal agencies from incurring obligations that are in advance of, or that exceed, an appropriation. Thus, with certain limited exceptions, a Federal agency may not incur obligations when the funding source for the obligation is an appropriation that has lapsed (i.e., no longer available for new obligations). Also prohibited is the acceptance of voluntary services. Federal agencies may not accept services from employees, whose salaries are set by law without the obligation of appropriations for their compensation, except for emergencies involving the safety of human life or the protection of property.

After operating appropriations have lapsed for new obligations, the Department may incur costs in advance of an appropriation *only* for those activities that have been designated as “excepted.” Such excepted situations include: (1) statutes that expressly authorize incurring obligations in advance of appropriations, (2) emergencies involving the safety of human life or the protection of property, and (3) functions necessary to discharge the President’s constitutional duties. No disbursements may be made to liquidate obligations incurred for excepted activities *until* Congress provides an appropriation to cover these obligations. No obligations may be made to support a non-excepted activity during a lapse in appropriations, as that is a violation of the Antideficiency Act.

New obligations may be charged to appropriation accounts or funds that do not expire for new obligation on September 30th to the extent sufficient unobligated balances exist. For DoD, after operating appropriations lapse, unobligated balances exist in accounts for procurement; research, development, test and evaluation; military construction; working capital funds; and other revolving and management funds.

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Where funds were obligated in a prior fiscal year or are obligated during the lapse from an unexpired account, such funds may be disbursed if funds are available for continued program administration and program payment processing, or if the administration and payment activities for the programs themselves are excepted as necessary by implication. *Thus no costs may be incurred in a lapsed appropriation account/fund to support the activities funded with unobligated balances unless these activities are supporting designated "excepted" activities.*

Military Personnel

Military personnel on active duty, including reserve component personnel on Federal active duty, will continue to report for duty and carry out assigned duties. This includes duty involving excepted and, to the extent they can be performed without incurring new obligations, non-excepted activities. Military personnel on active duty may be assigned to carry out non-excepted activities in place of furloughed civilian personnel only to the extent that the non-excepted activity is capable of performance without incurring new obligations. As is always the case, military personnel may not exercise the functions of a Presidentially-appointed, Senate-confirmed official. See 10 U.S.C. section 973(b).

Reserve component personnel performing Active Guard Reserve (AGR) duty will continue to report for duty to carry out AGR authorized duties for the period of their AGR tour. Reserve component personnel will not perform inactive duty resulting in the obligation of funds, except where such duty directly supports an excepted activity, and may not be ordered to or extended on active duty, including AGR duty, except in support of military operations and activities necessary for national security or disaster response, including fulfilling associated pre-deployment requirements. The list of military operations and activities necessary for national security will be provided separately. Orders for members of the National Guard currently performing duties under 32 U.S.C. 502(f) (other than AGRs) will be terminated unless such duties are in support of excepted activities.

Movement of military personnel associated with permanent change of station will be limited as follows:

- 1) Moves TO an excepted activity will continue.
- 2) Moves FROM an excepted activity will continue only to the extent the commander of the excepted activity determines it essential to mission (e.g., overburden of local infrastructure), or required to enhance support of excepted activities.
- 3) Accession and training moves associated with recruitment and initial entry training will continue, along with subsequent movement to first station when required by "1" above.
- 4) Movement to comply with separation instructions will continue *only* if the funds were obligated prior to the appropriations lapse; no costs may be incurred unless it is already funded in the Permanent Change of Station order.

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Civilian Personnel

Civilian personnel, including military technicians, who are not necessary to carry out or support excepted activities, are to be furloughed using lapse in appropriations (often called emergency shutdown) procedures and guidance provided by the Office of Personnel Management. Only the minimum number of civilian employees necessary to carry out excepted activities will be excepted from furlough. Positions that provide direct support to excepted positions may also be deemed excepted if they are critical to performing the excepted activity. Determinations regarding the status of civilian positions will be made on a position by position basis, using the guidance in this document. Determinations shall be made for all positions, including those in the Senior Executive Service or equivalent, as well as those located overseas.

Individuals who are needed to support excepted activities generally should only work on excepted activity work. Once the excepted activity work is completed, the individual should be furloughed using government emergency shutdown procedures. If the excepted activity is to be performed intermittently during the day, management should consolidate excepted activities to the maximum extent possible for performance by the fewest number of employees. Management needs to determine if military personnel vice civilians can provide the needed support to the “excepted” activity.

Following the expiration of appropriations, a minimum number of civilian employees may be retained as needed to execute an orderly suspension of non-excepted activities within a reasonable timeframe. *Reminder: at no time may contractors perform inherently governmental work; this includes during a government shutdown.*

Senate-confirmed officials appointed by the President are not subject to furlough. Their immediate office personnel necessary to support excepted activities may be excepted from furlough at the discretion of the appointee.

Foreign national employees paid with host country funds are not subject to furlough; if the Department reimburses the host nation for foreign national employee labor costs, then they are subject to furlough unless they support an excepted activity. However, foreign national employees governed by country-to-country agreements that prohibit furloughs are exempt from furlough. Foreign national employees may not engage in any activities that incur new obligations, unless in support of an excepted activity. *Reminder: No disbursements may be made to liquidate obligations incurred for foreign nationals until Congress provides an appropriation to cover these obligations (i.e., no pay may be made unless the individuals are paid from appropriation accounts/funds with unobligated, unexpired balances).*

Civilian personnel whose salaries are reimbursed from a non-DoD source (e.g., the Foreign Military Sales Trust Fund) are not exempt from furlough solely on that basis; if the appropriation account into which reimbursements are to be made has lapsed, such employees will be furloughed unless they are working on excepted activities. Personnel whose compensation is paid from a DoD appropriation or fund that has sufficient budgetary authority (e.g., multiyear appropriations with available balances from prior years) may not be furloughed using the rules for emergency

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shutdown furloughs as long as there are sufficient balances in the accounts to pay all compensation costs for these civilians. Normal reprogramming rules remain in effect for these multiyear accounts. Prior to exhaustion of such appropriations, civilians funded in multiyear appropriations or funds may be furloughed *only* if the rules for an administrative furlough are applied; prior notification is required unless suspended or shortened based on emergency. Heads of activities may, on their authority, require the return to work of civilian personnel in the event of developments (natural disasters, accidents, etc.) that pose an imminent danger to the safety of human life or the protection of property.

Permanent change of station (PCS) for civilian personnel will continue only to the extent expenses are chargeable to a funded PCS order issued prior to the funds lapse. Expenses for movement of civilian personnel chargeable to lapsed appropriations will be limited as follows:

- 1) Moves TO an excepted activity that cannot be delayed will continue.
- 2) Moves FROM an excepted activity will continue only to the extent the commander of the excepted activity determines it essential to mission (e.g., overburden of local infrastructure), or required to enhance support of excepted activities.

Temporary Duty (TDY) Travel and Conference Participation

In the absence of appropriations, TDY travel and conference participation scheduled to begin after the shutdown occurs should be cancelled, except as noted below. Any TDY travel or conference participation that began prior to the shutdown should, except as noted below, be terminated (i.e., return to one's official duty station) as quickly as possible, but in an orderly fashion. This includes TDY travel and conference participation associated with professional military education training.

All TDY travel and participation in conferences in direct support of military operations in Afghanistan, against al-Qaeda, and to counter the Islamic State of Iraq and Syria and other terrorist groups threatening the national security of the United States, including TDY travel of reservists on active duty, may be undertaken or continue. Attendance at such conferences remains subject to applicable conference attendance policies. Other travel/conference participation directly related to safety of human life or the protection of property, including national security, as well as foreign relations (e.g., negotiating international agreements), may be undertaken or continued *only if* approved, in writing, by the appropriate approval authority listed below and only in the most limited circumstances. The approval authority (which may be delegated to appropriate senior officials) for any such TDY travel or conference participation is the:

- Secretary of a Military Department for personnel assigned to that Military Department
- Head of a Defense agency for personnel assigned to that Defense agency
- Chairman of the Joint Chiefs of Staff for personnel assigned to the Joint Staff
- Combatant Commander for personnel assigned to that combatant command
- Principal Staff Assistant (PSA) for personnel assigned to that office

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Notwithstanding the approval authority stated above, all TDY travel/conference participation by Presidential Appointed – Senate Confirmed (PAS) personnel must be approved by the Deputy Secretary of Defense.

Approving officials will implement a mechanism within their organizations for approving such travel and conference participation.

Contracts

Contractors performing under a fully funded contract (or contract option) that was awarded prior to the expiration of appropriations may continue to provide contract services, whether in support of excepted activities or not. However, new contracts (including contract renewals or extensions, issuance of task orders, exercise of options) may not be executed, nor may increments of funding be placed on incrementally funded contracts or to cover cost overruns, unless the contractor is supporting an excepted activity. No funds will be available to pay such new contract or place additional increments of funding on contracts until Congress appropriates additional funds.

The expiration of an appropriation does not require the termination of contracts (or issuance of stop work orders) funded by that appropriation unless a new obligation of funds is required under the contract and the contract is not required to support an excepted activity. In cases where additional funding is required and/or oversight, engagement, or inspection by Federal employees who have been furloughed is critical to successful performance under the contract and the contract is not required to support an excepted activity, the issuance of a stop work order or the termination of the contract may be required.

The Department may continue to enter into new contracts, or place task orders under existing contracts, to obtain supplies and services necessary to carry out or support excepted activities even though there are no available appropriations. It is emphasized that this authority is to be exercised *only* when determined to be necessary - where delay in contracting would create an imminent risk to the safety of human life or the protection of property, including endangering national security.

Additionally, when authorized by the Secretary of Defense, contracts for covered items may be entered into under the authority of the Feed and Forage Act.

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**SAFETY OF HUMAN LIFE OR PROTECTION OF PROPERTY
(NATIONAL SECURITY)**

Excepted	<ul style="list-style-type: none"> • Military operations and activities authorized by deployment or execute orders, or otherwise approved by the Secretary of Defense, and determined to be necessary for national security, including administrative, logistical, medical, and other activities in direct support of such operations and activities; training and exercises required to prepare for and carry out such operations. • Activities of forces assigned or apportioned to combatant commands to execute planned or contingent operations necessary for national security, including necessary administrative, logistical, medical, and other activities in direct support of such operations; training and exercises required to prepare for and carry out such operations. • Activities necessary to continue recruiting for entry into the Armed Forces during contingency operations (as such term is defined in 10 U.S.C 101(13)), including activities necessary to operate Military Entrance Processing Stations (MEPS) and to conduct basic and other training necessary to qualify such recruited personnel to perform their assigned duties. • Command, control, communications, computer, intelligence, surveillance, and reconnaissance activities required to support national or military requirements necessary for national security or to support other excepted activities, including telecommunications centers and phone switches on installations, and secure conference capability at military command centers. • Activities required to operate, maintain, assess, or disseminate the collection of intelligence data necessary to support tactical and strategic indications and warning systems, and military operational requirements. • Activities necessary to carry out or enforce treaties and other international obligations.
Footnotes	<ul style="list-style-type: none"> • Activities involving technical intelligence information collection, analysis and dissemination functions not in direct support of excepted 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) are not excepted activities. • Emergency & Extraordinary Expense (EEE) authority expires when O&M accounts lapse at the end of the fiscal year, to include Official Representation Funds. • Death gratuities may not be paid during a lapse of appropriations because the military personnel appropriations expire on September 30th.

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SAFETY OF HUMAN LIFE OR PROTECTION OF PROPERTY

Excepted	<ul style="list-style-type: none"> • Response to emergencies, including fire protection, physical and personnel security, law enforcement/counter terrorism, intelligence support to terrorist threat warnings, Explosive Ordnance Disposal operations, emergency salvage, sub-safe program, nuclear reactor safety and security, nuclear weapons, air traffic control and harbor control, search and rescue, utilities, housing and food services for military personnel, and trash removal. • Emergency repair & non-deferrable maintenance to utilities, power distribution system buildings or other real property, including bachelor enlisted quarters (BEQ), bachelor officers' quarters (BOQ), and housing for military personnel. • Repair of equipment needed to support services for excepted activities, including fire trucks, medical emergency vehicles, police vehicles, or material handling vehicles. • Monitoring and maintaining alarms and control systems, utilities, and emergency services. • Receipt/safekeeping of material delivered during shutdown. • Control of hazardous material and monitoring of existing environmental remediation. • Oil spill/hazardous waste cleanup, environmental remediation, or pest control, only to the extent necessary to prevent imminent danger to the safety of human life or the protection of property. • Safe storage or transportation of hazardous materials, including ammunition, chemical munitions, photo processing operations. • Emergency reporting response and input to the National Response Team and coordinating with Environmental Protection Agency (EPA) and other agencies on fire, safety, occupational health, environmental, explosive safety for vector borne disease management. • Activities, both in the Continental United States (CONUS) and overseas, required for the safety of DoD or other U.S. Government employees or for the protection of DoD or other U.S. Government property. • Commissaries located overseas, and any determined to be in remote U.S. locations where no other sources of food are reasonably available for military personnel. • Defense support to civil authorities in response to disasters or other imminent threats to human life or property, including activities of the U.S. Army Corps of Engineers with respect to responsibilities to state and local governments that involve imminent threats to human life or property. • Foreign humanitarian assistance in response to disaster or other crises posing an imminent threat to human life. • Emergency counseling and crisis intervention intake screening and referral services. • Counseling and other services and support for victims of sexual assault. • Religious, suicide, or substance abuse counseling and services. • Counterdrug activities determined to be necessary for the safety of human life or the protection of property. • Operation of mortuary affairs activities and attendant other services necessary to properly care for the fallen and their families. • Other activities authorized by the Secretary of Defense to provide for the safety of human life or the protection of property.
Footnote	Activities in support of environmental requirements, which are not necessary to prevent imminent threat to human life or property, are not excepted activities.

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MEDICAL/DENTAL CARE

Excepted	<ul style="list-style-type: none"> • Inpatient care in DoD Medical Treatment Facilities and attendant maintenance of patient medical records. • Acute and emergency outpatient care in DoD medical and dental facilities. • Private Sector Care under TRICARE. • Certification of eligibility for health care benefits. • Medical care for Wounded Warriors, including surgery to continue recovery of function/appearance. • Veterinary Services that support excepted activities (i.e., food supply and service inspections).
Footnotes	<ul style="list-style-type: none"> • Contingency planning in medical command headquarters not immediately necessary to support excepted activities is not an excepted activity. • Elective surgery and other elective procedures in DoD medical and dental facilities are not excepted activities.

ACQUISITION AND LOGISTIC SUPPORT

Excepted	<ul style="list-style-type: none"> • Contracting, contract administration, contract payment (for contracts funded with prior year funds), or logistics operations in support of excepted activities. • Activities required to contract for and to distribute items as authorized by the Feed and Forage Act (e.g., clothing, subsistence, forage, fuel, quarters, transportation, and medical and hospital supplies). • Central receiving points for storage of supplies and materials purchased prior to the shutdown.
Footnote	Once individuals are no longer needed to implement the orderly shutdown; they are to be furloughed unless they are needed to support excepted activities.

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EDUCATION AND TRAINING

Excepted	<ul style="list-style-type: none"> • Education and training necessary to participate in or support excepted activities. • DoD Education Activity (DoDEA) educational activities for the regular school year.
Footnotes	<ul style="list-style-type: none"> • DoDEA summer school activities generally are non-excepted activities unless required by law. • DoDEA sporting events and extracurricular activities are non-excepted; an event or activity may only continue during a lapse in appropriations if the event or activity is fully funded with non-appropriated funds. • Installation education centers may continue to operate utilizing military personnel, so that private agencies such as colleges and universities may provide courses for which payment has already been made. • Civilian personnel, including technicians, on TDY for training or education associated with non-excepted activities should be returned to their home stations as part of the orderly closedown of operations. • Civilian personnel on PCS orders attending training or educational activities should remain in place and not attend classes as no cost may be incurred during a lapse in appropriations. If the civilian's compensation is paid by an appropriation account or fund that has unobligated balances from prior year appropriations, then the employee may continue to attend class. • Military personnel on PCS orders attending training and educational activities may continue to attend classes only if the instructor is military or is a contractor paid with prior year funds; no costs may be incurred above what is required for safety of human life or the protection of property. • Students at the military academies may continue to attend classes only if the instructor is military or is a contractor paid with prior year funds; no costs may be incurred above what is required for safety of human life or the protection of property. • Sporting events and extracurricular activities at the military academies are non-excepted; an event or activity may only continue during a lapse in appropriations if the event or activity is <i>fully</i> funded with (1) non-appropriated funds (NAF), provided that NAF funding for the event is not dependent on Uniform Funding and Management transfers or MWR Utilization Support and Accountability reimbursements from appropriated funds and/or (2) unobligated balances in a statutory gift fund.

LEGAL ACTIVITIES

Excepted	<ul style="list-style-type: none"> • Litigation activities associated with imminent or ongoing legal action, in forums inside or outside of DoD, to the extent required by law or necessary to support excepted activities. • Legal support for excepted activities, including activities by special victims' counsel and legal assistance for military and civilian personnel deployed, or preparing to deploy, in support of military or stability operations. • Legal activities needed to address external (non-judicial) deadlines imposed by non-DoD enforcement agencies, to the extent necessary to continue excepted activities. • Legal support activities essential to implementation of orderly shutdown of agencies.
Footnote	Once individuals are no longer needed for implementing the orderly shutdown; they are to be furloughed unless they are needed to support excepted activities.

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AUDIT AND INVESTIGATION COMMUNITY

Excepted	<ul style="list-style-type: none"> • Criminal investigations related to the safety of human life or the protection of property, including national security, as determined by the head of the investigating unit, and investigations involving undercover activities. • Counterterrorism and counterintelligence investigations.
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MORALE WELFARE & RECREATION/NONAPPROPRIATED FUNDS

Excepted	Morale, Welfare, and Recreation (MWR) and Non-Appropriated Fund (NAF) activities necessary to support excepted activities, e.g., operation of mess halls; physical training; child care activities required for readiness.
Footnotes	<ul style="list-style-type: none"> • Activities funded entirely through NAF sources will not be affected. • Military personnel may be assigned to carry out or support non-excepted MWR activities, where deemed necessary or appropriate, to replace furloughed employees. • Community and public outreach programs are non-excepted activities; such programs may only continue during a lapse in appropriations if they are <i>fully</i> funded with non-appropriated funds and such NAFs are not derived from transfers or reimbursements from appropriated funds; this includes jet and jump demonstration teams, band and ceremonial unit appearances, port visits, Service weeks, and nonprofit and corporate leader outreach.

FINANCIAL MANAGEMENT

Excepted	<ul style="list-style-type: none"> • Activities necessary to control funds, record new obligations incurred in the performance of excepted activities, and manage working capital funds. • Activities necessary to effect upward adjustment of obligations and the reallocation of prior-year unobligated funds in support of excepted activities. • Financial support activities essential to implementation of orderly shutdown of agencies.
Footnotes	<ul style="list-style-type: none"> • Preparation of financial reports, research and correction of problem disbursements, adjustments to prior-year funds (excepted as noted above) including those related to programs and contracts that do not support excepted activities, and approval of the use of currently available funds to pay obligations against closed accounts are not excepted activities. • Once individuals are no longer needed for implementing the orderly shutdown; they are to be furloughed unless they are needed to support excepted activities. • Disbursing and Paying Agents may not make disbursements to liquidate an obligation (e.g., disburse cash) incurred for an excepted activity chargeable to a lapsed appropriation.

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WORKING CAPITAL FUND/REVOLVING FUNDS

Excepted	<ul style="list-style-type: none"> • Defense Working Capital Fund (DWCF)/Revolving Fund (RF) activities with positive cash balances may continue to operate until cash reserves are exhausted. • When cash reserves are exhausted, DWCF/RF activities must continue operations in direct support of excepted activities. • DWCF/RF activities may continue to accept orders financed with appropriations enacted prior to the current fiscal year or unfunded orders from excepted organizations. Unfunded orders will be posted to accounts receivable and not actually billed until appropriations are enacted.
Footnotes	<ul style="list-style-type: none"> • DWCFs/RFs generally are not directly impacted by a lapse in annual appropriations. • Management actions should be taken to sustain operations and minimize operational impact resulting from late approval of annual appropriations. • Management actions that could be taken to conserve cash reserves include: delay of training, minimal travel, reduction in supplies, civilian furloughs using the rules for an administrative furlough (i.e., 30-prior notification), and other actions consistent with management objectives. • Inter-DWCF/RF billings will continue unless a suspension request is approved by the Office of the Under Secretary of Defense (Comptroller). • Approval may be requested for advance billing of funded customer orders. • Plan guidance for excepted activities is applicable to DWCF/RF internal operations.

ACTIVITIES FUNDED WITH UNOBLIGATED, UNEXPIRED BALANCES

Excepted	<ul style="list-style-type: none"> • Any activity funded with appropriation accounts or funds that have unobligated, unexpired balances may continue to execute its mission provided all costs, including the compensation of the employees supporting these activities, are paid directly from these same appropriation accounts or funds.
Footnotes	<ul style="list-style-type: none"> • Appropriation accounts or funds with unobligated balances that carry over from prior year appropriations generally are not directly impacted by a lapse in annual appropriations. • When the unobligated balances are exhausted, these programs must shut down unless they are supporting excepted activities. • No obligations chargeable to lapsed annual appropriations may be incurred to support an activity/program that is being funded with unobligated carryover balances unless the supporting activity is designated as an “excepted” activity. • Management actions that may be taken to conserve unobligated balances include: delay of training, minimal travel, reduction in supplies, civilian furloughs using the rules for an administrative furlough (i.e., 30-prior notification), and other actions consistent with management objectives.

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APPENDIX E CONTINUING RESOLUTIONS 1998-2016

Table 2. Number and Duration of Continuing Resolutions (CRs): FY1998-FY2016

Fiscal Year	Number of CRs	Total Duration in Days ^a	Average Duration for Each Act	Final Expiration Date ^b
1998	6	57	9.5	11-26-1997
1999	6	21	3.5	10-21-1998
2000	7	63	9.0	12-02-1999
2001	21	82	3.9	12-21-2000
2002	8	102	12.8	01-10-2002
2003	8	143	17.9	02-20-2003
2004	5 _a	123	24.6	01-31-2004
2005	3	69	23.0	12-08-2004
2006	3	92	30.7	12-31-2005
2007	4	365	91.3	09-30-2007
2008	4	92	23.0	12-31-2007
2009	2	162	81.0	03-11-2009
2010	2	79	39.5	12-18-2009
2011	8	365	45.6	9-30-2011
2012	5	84	16.8	12-23-2011
2013	2	365	182.5	9-30-2013
2014	4 _a	110 _a	27.5	01-18-2014
2015	5	156	31.3	03-06-2015
2016	3	83	27.7	12-22-2015
Total	106	2,613	—	—
Annual Average	5.6	137.5	24.6	—

Sources: Prepared by the Congressional Research Service using data from the Legislative Information System; Congressional Research Service, appropriations status tables (various fiscal years), available at <http://crs.gov/Pages/appover.aspx>; and various other sources.

- a. Duration in days is measured, in the case of the first CR for a fiscal year, from the first day of the year (October 1). For example, a CR enacted on September 30 that provided funding through October 12 would be measured as having a 12-day duration. For subsequent CRs for a fiscal year, duration in days is measured from the day after the expiration of the preceding CR.
- b. The final expiration date is the date the CR expired. In some of these instances, the CR had previously been superseded by the enactment of the remaining regular appropriations acts for that fiscal year. For example, in FY2014, the expiration date of P.L. 113-73, the fourth CR for FY2014, was January 18, 2014. However, final regular appropriations were enacted the previous day in the Consolidated Appropriations Act, 2014 (P.L. 113-76).

See Congressional Research Service, Continuing Resolutions: Overview of Components and Recent Practices (January 14, 2016), available at <https://fas.org/sgp/crs/misc/R42647.pdf>.

CHAPTER 10:



OPERATIONAL FUNDING

CHAPTER 10

OPERATIONAL FUNDING

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CHAPTER 10

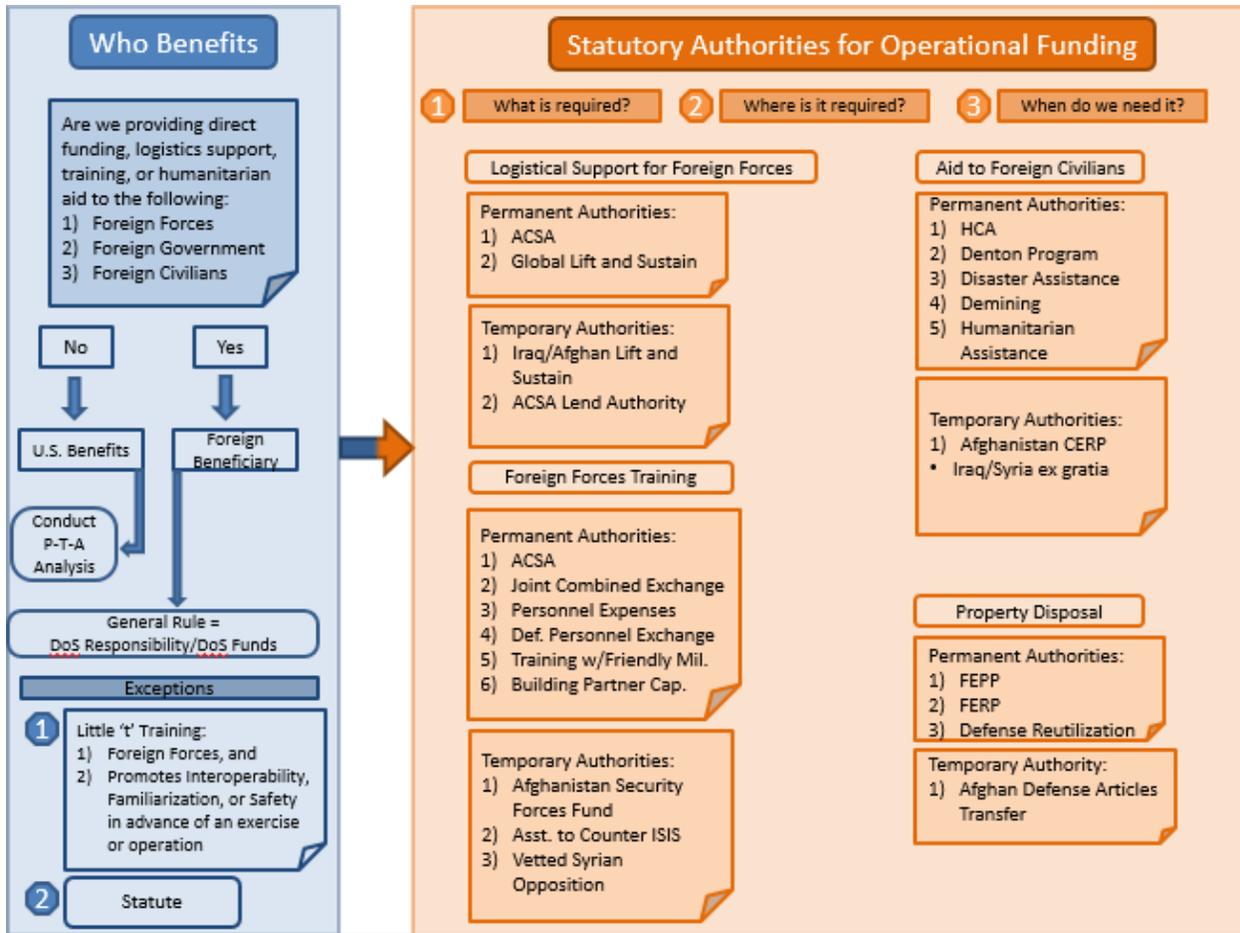
OPERATIONAL FUNDING

I. OBJECTIVES

- A. Appreciate the roles and responsibilities of the Department of Defense (DoD) and the Department of State (DoS) in funding military foreign assistance.
- B. Develop tools to analyze and compare the “purpose” of proposed military foreign assistance operations with the “purpose” of particular appropriations and authorizations.
- C. Achieve general familiarity with past and current appropriations and authorizations for military foreign assistance operations.

II. INTRODUCTION AND ANALYTICAL FRAMEWORK

- A. “Military Operation”
 - 1. Joint Publication (JP) 1-02 defines a military operation as follows: a series of tactical actions with a common purpose or unifying theme; a military action or the carrying out of a strategic, operational, tactical, service, training, or administrative military mission.
 - 2. JP 3-0, *Joint Operations*, identifies the realm of military operations including, but not limited to, major operations, homeland defense, civil support, show of force, enforcement of sanctions, peace operations, counterinsurgency operations, combating terrorism, foreign humanitarian assistance, and routine/recurring military activities (*see* Figure V-2 of JP 3-0).
 - 3. JP 1-02 defines combined, as in combined operations, as between two or more forces or agencies of two or more allies.
- B. Framework for Analysis: Who Benefits?



1. Most fiscal issues concerning the funding of “operations” will follow the traditional Purpose-Time-Amount analysis. Operational Funding is an in-depth analysis of the “purpose” prong with special emphasis on contingency operations and funding foreign militaries, foreign governments, and other entities not traditionally funded by the military departments’ Operation and Maintenance (O&M) funds.
2. Judge Advocates may find the tools located at Appendices A and B to be helpful when analyzing recommended projects and missions for their commanders in an operational environment. ***While both are intended to provide assistance to the practitioner, neither is a substitute for careful research based on unique facts for each situation.***

III. THE CONSTITUTIONAL AUTHORITY TO FUND UNITED STATES MILITARY OPERATIONS.

A. The President's Commander-in-Chief Powers

Under the U.S. Constitution, the President has the power to conduct foreign affairs, to exercise the Commander in Chief authority, to enter into treaties with other nations, and to receive foreign ambassadors to the United States.

1. U.S. Const. Art II, § 2, cl. 1: "The President shall be the Commander in Chief of the Army and Navy of the United States"
2. U.S. Const. Art II, § 2, cl. 2: "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"

B. The Congressional Power of the Purse

Congress can indirectly affect the conduct of foreign affairs by restricting or expanding the appropriated funds available for foreign affairs activities conducted by the executive agencies, including the DoD.

1. U.S. Const. Art I, § 9, cl. 7: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law"
2. U.S. Const. Art IV, § 3, cl. 2: "The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"
3. *United States v. MacCollom*, 426 U.S. 317, 321 (1976). "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

C. Beyond the Constitutional Framework.

While the Constitution provides the underlying foundation for understanding congressional authority to issue appropriations, Congress further relies upon a robust legislative framework for regulating how those appropriations are expended. In the field of foreign assistance, fully understanding the fiscal legislative framework is critical to determining how to properly fund certain military operations.

IV. THE LEGISLATIVE FRAMEWORK REGULATING OPERATIONAL FUNDING

A. Fiscal Legislative Controls

For military commanders, there is NO deployment exception to the fiscal law framework! The same congressionally imposed fiscal limitations regulating the obligation and expenditure of funds for U.S. military forces still applies to funding training and operating with foreign military forces (*See* Deskbook chapters 2-4). However, Congress requires military commanders to only expend funding for foreign assistance when there is express authority to do so – even during contingency operations.

1. 31 U.S.C. § 1301(a): “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” However, appropriation and/or authorization acts may specifically authorize the secretary to transfer amounts appropriated to other programs, generally with intense congressional oversight.
2. Necessary Expense Doctrine (Three-Part Purpose Test).¹
 - a. “[T]he expenditure must be reasonably related to the purposes for which the appropriation was made.” (commonly referred to as “necessary and incident”).
 - b. “[T]he expenditure must not be prohibited by law.”
 - c. “[T]he expenditure must not fall specifically within the scope of some other category of appropriations.” (note that this applies even where a more appropriate funding source is exhausted and unavailable).

B. Appropriations vs. Authorizations

An appropriation is the statutory authority to incur obligations and make payments out of the U.S. Treasury for specified purposes. The appropriation draws the “pot of money” from the U.S. Treasury with a basic purpose attached to

¹ *See The Honorable Bill Alexander*, B-213137, 63 Comp. Gen. 422 (1984) [hereinafter HBA]. In response to a request for an opinion by Congressman Bill Alexander, the General Accountability Office (GAO) Comptroller General reviewed the use of DoD O&M funds to fully fund the foreign assistance activities of DoD during combined joint military exercises with Honduras.

it, while an authorization may provide additional purposes for which that “pot of money” may be used.

1. Congress provides an annual National Defense Authorization Act (NDAA) as a vehicle to provide additional authorizations for the funds that are appropriated in the yearly DoD Appropriations Act (DoDAA). Many of these additional authorizations exceed the basic purpose of the appropriation to which they were linked.²
2. Traditionally, Congress appropriates funds and authorizes additional purposes for those funds in three annual public laws:
 - a. National Defense Authorization Act (NDAA): provides the maximum amounts that may be appropriated to the DoD and additional purposes for which the funds drawn by the appropriations act may be used.
 - b. Department of Defense Appropriations Act (DoDAA): Appropriates funds for annual DoD military activities. These activities are often referred to as “baseline operations.”
 - c. Military Construction Appropriation Act (MILCONAA): Appropriates Unspecified Minor Military Construction (UMMC) and Specified Military Construction (MILCON) funds for DoD.
3. The current DoD authorization and appropriation acts are as follows (as of January 2018):
 - a. Further Additional Appropriation Act, 2018: Provides continuing appropriations through 19 January 2018, or the enactment of applicable appropriations legislation. Enacted by the President on 22 December 2017.
 - b. 2018 NDAA: Authorizes appropriations for FY 2018 DoD military activities. Enacted by the President on 12 December 2017.

C. “Permanent” vs. “Temporary” Authorizations

1. Permanent appropriations and authorizations are incorporated into U.S. statutory code (e.g., Title 10 for DoD authorities). These are presumed to

be permanent until Congress modifies or eliminates the authorization in a later statute.

2. Unlike permanent funding authorities, temporary authorizations are not incorporated into the U.S. Code. Their period of availability is complete unless, or until Congress subsequently re-authorizes the specific funding authority.

V. DEPARTMENT OF DEFENSE AUTHORIZATIONS AND APPROPRIATIONS³

A. The Military’s Role in Funding/Executing Foreign Assistance⁴

1. **General Rule.** The DoS has the executive responsibility, legal authority, and congressional funding to conduct Foreign Assistance on the U.S. Government’s behalf. Foreign assistance includes security assistance to a foreign military or government, development assistance for the physical and governmental infrastructure projects benefiting a foreign nation, and humanitarian assistance benefiting a foreign population.⁵
2. The DoD has the executive responsibility, legal authority and congressional funding to secure and defend U.S. interests at home and abroad with military forces. Absent express congressional authority, the Secretary of Defense (SECDEF) may only obligate defense funding when it benefits U.S. military forces. DoD may conduct foreign assistance under the following two exceptions: (1) “Little t” training and (2) specific appropriation or authorization from Congress for the DoD to conduct the assistance.
 - a. “Little t” training: conducting training or instruction for foreign forces for the primary purpose of promoting interoperability,

³ At the time of revision of this chapter (15 January 2018), the DoD was operating pursuant to the Further Additional Appropriation Act, 2018 P. L. No. 115-96, 131 Stat. 2044 (2017).

⁴ Joint Publication 1-02 defines foreign assistance as “[a]ssistance to foreign nations ranging from the sale of military equipment to donations of food and medical supplies to aid survivors of natural and man-made disasters; that may be provided through development assistance, humanitarian assistance, and security assistance.”

⁵ The Foreign Assistance Act of 1961 created the authority for the executive branch to conduct foreign assistance on behalf of the United States. *See* Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. §2151 (2012)); *see also* Exec. Order No. 10973, 26 C.F.R. 639 (1961) which delegated the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State.

safety, and/or familiarization with U.S. military forces in advance of an operation or exercise.

(1) Practitioners must differentiate little t training from other forms of training that would be considered “Security Assistance” or training, as provided in 10 U.S.C. §301(9).⁶ Security Assistance Training, as discussed in the Honorable Bill Alexander Opinion of 1984⁷ is that training which rises to a level of formal training comparable to that normally provided by security assistance projects for which comprehensive legislative programs and specific appropriation categories have been, or should be, established; foreign military security assistance primarily undertaken to improve a foreign military force’s operational readiness. In general, this type of training must be funded/authorized by the DoS, unless DoD has been given specific authorization to conduct these activities.

(2) Evaluation factors: cumulative financial costs; training duration; size of foreign military training force; expected foreign military, training proficiency outcome; training location; and primary training beneficiary.

(3) Examples:

- (a) “Little t” training: A two day, airborne insertion exercise involving a company sized element of foreign military paratroopers. The training is of short duration, costs are limited, unit size is small, and training will promote interoperability with U.S. military forces. Certain training expenses may be funded with O&M appropriations.
- (b) “Security Assistance” Training: Training a battalion’s worth of foreign military forces to become airborne paratroopers during a month-long airborne training program. The training duration and costs are likely significant; the training goes beyond mere interoperability/safety; and the training primarily benefits the aspiring foreign

⁶ Training “includes formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, contract technicians, contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aids, orientation, and military advice to foreign military units and forces.” 22 U.S.C. 2403(n).

⁷ HBA, *supra* note 1.

paratroopers. Training expenses will have to be funded using DoS security assistance appropriations, unless DoD has express congressional authority to conduct this training.

- b. Statutory Appropriation or Authorization. Express congressional authority for DoD to conduct foreign assistance training and operations under codified statutory authority or a temporary authorization/appropriation.

B. Framework for Defense Authorizations and Appropriations.

In order to determine whether or not a military commander has authority to conduct foreign assistance operations, JAs should first assess the operation's nature and type for funding purposes. Since Congress does not provide authorities and authorizations in specified categories, it may be helpful to consider funding authorities in four general categories: 1. Logistical Support for Foreign Forces, 2. Training for Foreign Forces, 3. DoD Aid and Assistance to Foreign Civilians, 4. Disposal of Property. Within these categories, practitioners will find both permanent and temporary authorities to fund foreign assistance operations. Judge Advocates should be engaged early in the operational planning process to identify how to properly fund these various mission types.

C. General-Purpose Funds.

1. Emergency & Extraordinary Expenses ("Triple E"): 10 U.S.C. § 127.

- a. Purpose: "for any emergency or extraordinary expense which cannot be anticipated or classified."
- b. Time: 1 year O&M funds
- c. Amount: the 2017 Consolidated Appropriations Act (CAA) appropriates the following:
 - (1) Secretary of Defense: \$36,000,000 in DoD O&M
 - (2) Secretary of the Army: \$12,478,000 in DA O&M
 - (3) Secretary of the Navy: \$15,055,000 in Navy O&M
 - (4) Secretary of the Air Force: \$7,699,000 in AF O&M

- d. Approval Authority: Secretary of Defense, Secretaries of the military departments, and Inspector General. Authority may be delegated (and re-delegated).
- e. Congressional Notification: Secretary of Defense must provide 15 days advance notice before expending or obligating funds
 - (1) in excess of \$1,000,000, and 5 days advance notice before expending or obligating in excess of \$500,000, but not in excess of \$1,000,000; or,
 - (2) in excess of \$100,000 for intelligence or counter-intelligence activities.⁸
- f. Practitioner Notes:
 - (1) Common Use: Official Representation Funds (ORF) pursuant to DoDI 7250.13 and AR 37-47. These funds are for official courtesies and other representation.
 - (2) Generally, aside from ORF, these funds are not likely to be tapped other than as a last resort for funding a unique emerging requirement.
 - (3) Though highly regulated, from a legislative perspective, “Triple E” or EEE funds are exceptionally flexible. From a purpose perspective they are often available for any mission; however, from a practical perspective, they are unlikely to be tapped due to regulatory controls.

2. Combatant Commander Initiative Funds (CCIF): 10 U.S.C. § 166a.

- a. Purpose: Enables the Chairman of the Joint Chiefs of Staff to act quickly to support the Combatant Commanders when they lack the flexibility and resources to solve emergent challenges and unforeseen contingency requirements critical to joint war fighting readiness and national security interests.
 - (1) Limited by statute to (1) force training, (2) contingencies, (3) selected operations, (4) command and control, (5) joint exercises (including activities of participating countries), (6) humanitarian and civic assistance (including urgent and

⁸ National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2018, P.L. 115-91, § 1041 (2018).

unanticipated humanitarian relief and reconstruction assistance), (7) military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses), (8) personnel expenses of defense personnel for bilateral or regional cooperation programs, (9) force protection, and (10) joint warfighting capabilities.

(2) CJCS priority consideration for:

- (a) Activities that enhance war fighting capability, readiness, and sustainability of the forces assigned to the requestor.
- (b) Activities not within the AOR of a commander that would reduce the threat to or increase national security of the U.S.
- (c) Urgent and unanticipated humanitarian relief and reconstruction- particularly where engaged in a contingency operation.

b. Time: 1 year O&M funds

c. Amount: 2017 CAA not to exceed \$15,000,000 of DoD O&M.

d. Limitations:

- (1) Not more than \$20,000,000 may be used to purchase items with a unit cost greater than the expense/investment threshold of \$250,000.
- (2) Not more than \$10,000,000 may be used to pay the expenses of foreign countries participating in joint exercises.
- (3) Not more than \$5,000,000 may be used to provide military education and training to military and related civilian personnel of foreign countries.
- (4) No funds may be used for any activity which Congress has denied authorization.

- e. Approval Authority: Initiatives nominated by Combatant Commanders with final approval authority of CJCS.⁹
- f. Practitioner Notes:
 - (1) Funding: Funds are controlled by CJCS, and projects are competitively selected from amongst the COCOMs.
 - (2) Common Use: Unforeseen or emergent contingency operation requirements.

D. Building and Funding Foreign Partners.

Within this functional category, there are two general subgroups of funds. The first group funds joint exercises and training, while the second provides logistical support to foreign forces. When foreign forces are our partners in contingency operations, Congress may provide temporary authorities that can fund both training and logistical support. The commander's legal counsel assists with determining the proper authority and funding source for providing security assistance to foreign military forces.

- 1. Subgroup One: Funding Joint and Combined Exercises and Training.
 - a. Joint Combined Exchange Training (JCET): 10 U.S.C. § 322¹⁰
 - (1) Purpose: Primary purpose is to pay the training expenses for SOF forces assigned to a combatant command. (SOF includes civil affairs and military information support operations forces).
 - (2) Time/Amount: 1 year, Defense Wide, O&M funds; as authorized by Congress.
 - (3) Practitioner's Notes: Where available, the SOCOM Commander or commander of any other specified or

⁹ Chairman, Joint Chiefs of Staff Instruction (CJCSI) 7401.01F, Combatant Commander Initiative Fund (30 November 2012).

¹⁰ Pursuant to Sec. 1244, FY17 NDAA, the former 10 U.S.C. §2011 is transferred to chapter 16 of title 10 and redesignated as 10 U.S.C. §322. The table of sections at the beginning of chapter 101 of title 10, United States Code, is amended by striking the items relating to sections 2010 and 2011. See FY17 NDAA, Sec. 1244(d).

unified combatant command may pay any of the following expenses:

- (a) Expenses of SOF assigned to that command in conjunction with training, and training with, the armed forces and other security forces of a friendly foreign country.
- (b) Expenses of deploying SOF for training.
- (c) In the case of training in conjunction with a friendly developing country, the incremental expenses incurred by that country as the direct result of such training.
 - (i) Incremental expenses: the reasonable and proper cost of rations, fuel, training ammunition, transportation, and other goods and services consumed by such country, but **does not include** pay, allowances, and other normal costs of such country's personnel.

(4) Primary purpose of the training must be to train the SOF of the combatant command.

b. Training with Friendly Foreign Countries: Payment of Training and Exercise Expenses:¹¹ 10 U.S.C. §321.

(1) Purpose: authorizes armed forces under the jurisdiction of the Secretary of Defense to train with the military forces or other security forces of a friendly foreign country so long as the Secretary determines that it is in the national security interest of the U.S. to do so AND the primary purpose of the training for which payment may be made shall be to train United States forces.

- (a) Authorizes the payment of incremental expenses as defined in 10 U.S.C. §301.

¹¹ This authority was formerly found in 10 U.S.C. § 2010 and Sec. 1203, FY14 NDAA (formerly known as General Purpose Forces Training Friendly Foreign Militaries). Section 1203 was repealed by Sec. 1244, FY17 NDAA and the authority was permanently codified at 10 U.S.C. §321.

(b) Does not include any form of lethal assistance (excluding training ammunition); or pay, allowances, and other normal costs of the personnel of the country.

(2) Limitations:

(a) Any training conducted by general purpose forces of the U.S. under this authority may only be with the military forces of a friendly foreign country.

(b) Any training conducted shall, to the maximum extent practicable support the mission essential tasks for which the training unit providing the training is responsible.

(c) Any training conducted shall, to the maximum extent practicable include elements that promote both observance of and respect for human rights and fundamental freedoms; and respect for legitimate civilian authority within the foreign country concerned.

(3) Training and Exercise Approval Authority: SECDEF.

(4) Payment Authority: Secretary of a military department or the commander of a combatant command.

(5) Practitioner Notes:

(a) The new §321 was created pursuant to Sec. 1244, FY 17 NDAA which consolidated 10 U.S.C. §2010 (Developing Countries Combined Exercise Program (DCCEP)) and Sec. 1203, FY14 NDAA which authorized training of “General Purpose Forces of the United States” with military and other security forces of friendly countries.

(b) The Assistant SECDEF for Strategy, Plans, and Capabilities published a 2018 list of countries approved for payment of incremental expenses for training and exercises and with DCCEP funding.

(c) In addition to the limitations on incremental expenses, Congress also included quarterly notice of the schedule of planned training engagements for the next calendar quarter.

c. Payment of Personnel Expenses Necessary for Theater Security Cooperation: 10 U.S.C. §312.¹²

(1) Purpose: authorizes the Secretary of Defense to pay personal expenses, such as travel, subsistence, administrative support, and medical care for certain defense, and in some cases, non-defense personnel of foreign countries if the Secretary determines they are necessary for theater security cooperation.

(2) Types of Expenses Authorized:

(a) Personnel Expenses. The Secretary may pay travel, subsistence, and similar expenses of, and special compensation for:

(i) Defense personnel of friendly foreign governments; and

(ii) Other personnel of friendly foreign governments and non-governmental personnel (with concurrence of the Secretary of State).

(b) Liaison Officer Administrative/Service Support. The secretary may provide administrative services and support for the performance of duties by a liaison officer of a foreign country while the liaison officer is assigned temporarily to any headquarters in the DOD.

(i) This support can be provided on a reimbursable or non-reimbursable basis. Any terms of reimbursement must be specified in the appropriate agreements used to assign the officer.

(ii) Administrative services and support includes base or installation support services, office space, utilities, copying services, fire and police protection, training programs conducted to

¹² Sec. 1243, FY17 NDAA created 10 U.S.C. §312 in order to consolidate and revise a number of permanent Title 10 provisions concerning the payment of personnel expenses necessary for theater security cooperation. Accordingly, Sec. 1243, FY17 NDAA repealed the following code provisions: 10 U.S.C. §1050 (Latin American Cooperation), 10 U.S.C. §1050a (African Cooperation), 10 U.S.C. §1051 (Multilateral, Bilateral or Regional Cooperation Programs), and 10 U.S.C. 1051a (Liaison Officers of Certain Foreign Nations).

familiarize, orient, or certify liaison personnel regarding unique aspects of the assignments of the liaison personnel, and computer support.

(c) Liaison Officer Travel/Subsistence/Medical Care. The Secretary may pay the expenses of a liaison officer in connection with the assignment of that officer to any headquarters in the DOD.¹³ Authorized expenses include:

(i) Travel and subsistence;

(ii) Personal expenses directly necessary to carry out duties;

(iii) Medical care at a civilian medical facility under certain conditions;¹⁴

(iv) Mission-related travel expenses if such travel is in support of the national security interests of the United States and the officer or official making the request directs round-trip travel from the assigned location to one or more travel locations.

(d) Conferences, Seminars, and Similar Meetings. The authority to pay personnel expenses includes the authority to pay travel and subsistence expenses in connection with the attendance of such personnel at any conference, seminar, or similar meeting that is in direct support of enhancing interoperability between the U.S. armed forces and the national security forces of a friendly foreign country for the purposes of conducting operations, the provision of equipment for training, or the planning for, or the execution of, bilateral or multilateral training, exercises, or military operations.

¹³ The statute requires that the assignment of that liaison officer be at the request of a combatant commander, the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, the Commandant of the Marine Corps, or the head of a Defense Agency. *See* 10 U.S.C. § 312.

¹⁴ These medical expenses are authorized if: 1) adequate medical care is not available to the liaison officer at a local military medical treatment facility; 2) the Secretary determines that payment of such medical expenses is necessary and in the best interests of the United States; AND 3) medical care is not otherwise available to the liaison officer pursuant to any treaty or other international agreement.

(i) The Secretary of Defense may also pay other limited expenses as the Secretary considers appropriate in the national security interest of the United States.

(3) Amount Limitations:

(a) Travel and Subsistence. Travel and subsistence expenses authorized may not, in the case of any individual, exceed the amount that would be payable under chapter 7 or 8 of title 37 to a member of the armed forces of a comparable grade for authorized travel of a similar nature.

(b) Travel and Related Expenses of Liaison Officers. The amount paid for expenses for any liaison officer in any fiscal year may not exceed \$150,000.

(4) Expense Type Limitations:

(a) Primarily for Personnel from Developing Countries.¹⁵ Payment authority is only for the payment of expenses of, and special compensation for, personnel from developing countries.

(i) Exception: SECDEF may authorize the payment of such expenses and special compensation for personnel from a country other than a developing country if the Secretary determines that such payment is necessary to respond to extraordinary circumstances and is in the national security interest of the United States.

(b) Non-Defense Liaison Officers. The authority to pay non-defense liaison officer expenses may be exercised only if the assignment of that liaison officer as a liaison officer with the DOD was accepted by the Secretary of Defense with the coordination of the Secretary of State.

¹⁵ “Developing country” as it applies to chapter 16 of title 10 United States Code means all low and middle income countries based on gross national income per capita as published annually in the World Bank list of economies. Adopting this definition aligns the DoD with the common standard accepted across the U.S. Government. Office of the Under Secretary of Defense Memorandum, 15 May 2017.

- (5) Approval Authority: Secretary of Defense (with Secretary of State concurrence where required).
- d. Regional Centers for Security Studies (RSC): 10 U.S.C. § 342(f)(3)(A)¹⁶
- (1) Purpose: authorizes SECDEF to waive costs of RSC activities for foreign military officers and foreign defense and security personnel from a developing country if the Secretary determines that attendance of such personnel without reimbursement is in U.S. national security interests.
- (a) The Secretary may, with the concurrence of the Secretary of State, waive costs of personnel of nongovernmental and international organizations who participate in RSC activities if the Secretary determines that attendance of such personnel without reimbursement is in the national security interest of the U.S. The amount of reimbursement that may be waived under this provision in any fiscal year may not exceed \$1,000,000.
- (b) Funds available for the payment of personnel expenses under section 312 of title 10 are also available for the costs of the operation of the Regional Centers.
- (2) Time/Amount: Waived costs are paid from appropriations available to the RSCs and funds made available, to the extent provided in an appropriations act, for programs that begin in one fiscal year and are completed in the subsequent fiscal year.
- (3) Approval Authority: SECDEF (SECSTATE concurrence required for waiver of costs for personnel of nongovernmental and international organizations).
- e. Exchange of Defense Personnel Between the United States and Friendly Foreign Countries: 10 U.S.C. §311¹⁷

¹⁶ This authority was formerly codified at 10 U.S.C. §184(f)(3). Section 1241(e), FY17 NDAA transferred §184 to §342 and amended the authority. *Also see* DoD Directive 5200.41 (30 Jun. 2016)

¹⁷ This code section was created by Sec. 1242, FY17 NDAA. The former 10 U.S.C. §168 (Military to Military Contacts) was repealed by Sec. 1253, FY17 NDAA.

- (1) Purpose: Authorizes the Secretary of Defense to enter into international defense personnel exchange agreements.

(a) International Defense Personnel Exchange Agreement defined: An agreement with the government of a friendly foreign country or international or regional security organization for the reciprocal or non-reciprocal exchange of members of the armed forces and civilian personnel of the DOD; military and civilian personnel of the defense or security ministry of that foreign government or international or regional security organization.

- (2) Payment of Costs: Each government shall pay the salary, per diem, cost of living, travel costs, cost of language or other training, and other costs for its own personnel in accordance with the applicable laws and regulations of such government.

(a) Governments will not have to pay for the costs of temporary duty directed by the host government; the cost of training programs conducted to familiarize, orient, or certify exchanged personnel regarding unique aspects of the assignments of the exchanged personnel; or costs incident to the use of the facilities of the host government in the performance of assigned duties.

- (3) Approval Authority: SECDEF

(a) SECSTATE concurrence is required for exchange agreements with a non-defense security ministry of a foreign government or an international or regional security organization.

2. Subgroup Two: Providing logistical support to foreign forces.

- a. Acquisition & Cross-Servicing Agreements (ACSA): 10 U.S.C. §§ 2341–2350¹⁸ (DoDD 2010.9 and CJCSI 2120.01).

- (1) Purpose: bilateral agreements for the reimbursable mutual exchange of Logistical Supplies, Services, and Support

¹⁸ See DoDD 2010.9 (28 April 2003)(C1, 30 Sept. 2016): Acquisition and Cross-Servicing Agreements; Implemented by CJCSI 2120.01D (21 May 2015): Acquisition and Cross-Servicing Agreements.

(LSSS) excluding Significant Military Equipment (SME).¹⁹ Commanders must still use proper appropriated funds for acquiring LSSS from foreign forces.

(a) Two authorities/methods exist:

(i) Acquisition Only Authority (AoAs) (10 U.S.C. § 2341): Limited authority for SECDEF to acquire LSSS for deployed forces from eligible countries and organizations.²⁰

(ii) Cross-Servicing Agreement (10 U.S.C. § 2342): Permits SECDEF, after consultation with SECSTATE, to both purchase LSSS as well as provide LSSS on a reimbursable basis with eligible countries.

(2) Time:

(a) Funds may not be obligated for acquisitions beyond or before the period of availability. ACSA orders may not be placed in one fiscal year for a future fiscal year unless a “subject to availability of funds” clause is inserted.

(b) ACSA reimbursement must be by three methods and within the following time periods²¹:

¹⁹ See 10 U.S.C. §2350. Authorized logistical support includes: food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Logistical support also includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List promulgated under the Arms Export Control Act.

²⁰ Eligible countries and organizations include: (a) NATO countries, (b) NATO subsidiaries, (c) UN or any other international organization of which the U.S. is a member, (d) any non-NATO member if it has a defense alliance with the U.S, permits stationing of U.S. Forces, allows preposition of U.S. materiel in their country, or serves as host for U.S. military exercises and operations in the country. The Joint Staff J-4 maintains a list of current ACSAs, as well as frequently asked questions and training tools. You may find info at: [https://intellipedia.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_\(ACSA\)](https://intellipedia.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_(ACSA)).

²¹ ACSA authority is the only congressional authorization for DoD to receive direct reimbursement from foreign nations for the costs of DoD-provided support during interactions, combined exercises and operations.

- (c) Payment-in-Kind (PIK): Reimbursement must occur within 90 days of initial provision of LSSS.²²
 - (i) Defined: The receiving defense department reimburses the providing defense department the full value of the LSSS in currency.
 - (ii) Example: DoD provides \$10,000 in tents to a foreign defense department and receives \$10,000 in currency.
- (d) Replacement-in-Kind (RIK): Reimbursement must occur within 1 year of initial provision of LSSS.²³
 - (i) Defined: the receiving defense department reimburses the providing defense department by providing the same type of LSSS.
 - (ii) Example: DoD provides tents to a foreign defense department and receives the exact same type of tents.
- (e) Equal Value Exchange (EVE): Reimbursement must occur within 1 year of initial provision of LSSS.²⁴
 - (i) Defined: the receiving defense department reimburses the providing defense department by providing LSSS with the same value as the LSSS initially provided.
 - (ii) Example: DoD provides \$10,000 in tents and is reimbursed by the foreign defense department with \$10,000 of fuel.

²² DoD FMR, Volume 11A, Chapter 8, para. 080202A.

²³ *Id.* at para. 080202B.

²⁴ *Id.*

- (3) Amount: during any fiscal year, DoD is limited to the following amounts in obligations and reimbursable (applies to PIK transactions only, not exchange transactions)
- (a) Acquisitions from NATO countries, etc. may not exceed \$200,000,000 (with no more than \$50,000,000 for supplies other than petroleum, oil, and lubricants (POL)).
 - (b) Acquisitions from non-NATO countries may not exceed \$60,000,000 (with no more than \$20,000,000 for supplies other than POL).
 - (c) Transfers to NATO countries, etc. may not exceed \$150,000,000.
 - (d) Transfers to non-NATO countries may not exceed \$75,000,000.
 - (e) Waiver: the above limitations are not applicable during contingency operations or non-combat operations (including humanitarian or foreign disaster assistance and UN peacekeeping missions) for the purposes of that operation.
- (4) Approval Authorities:
- (a) Authority to Enter/Revise Agreements: SECDEF (after consultation with SECSTATE for non-NATO members). Authority may also be delegated to the CJCS, who may also re-delegate the authority to the CCMDs.²⁵
 - (b) Transaction Approval Authority: Personnel are designated specifically based on knowledge and experience to carry out transactions.

²⁵ DoDD 2010.9 para.5 allows Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) to delegate (with coordination) to the CJCS who may further delegate to lead agents. Pursuant to CJCSI 2120.01D, Enclosure A, the CJCS has exercised re-delegation authority to the CCMDs to negotiate and conclude agreements. However, all new/revised agreements must still be referred to USD(AT&L) for review and provision of authority to conclude the agreements.

(5) Practitioner's Notes:

- (a) ACSA's may not be used to procure goods or services that are reasonably available from U.S. commercial sources.
- (b) Size and scope of support under ACSA should be considered in relation to that nation's capability to reimburse the U.S. for the LSSS. Developing nations with little reimbursement capability will not be required to reimburse the U.S. for LSSS provided there are available U.S. appropriations or authorizations to otherwise fund the request.
- (c) Common Use: Providing food, transportation, and lodging.

b. ACSA-Lend Authority: 2015 NDAA §1207 (amending §1202(3), FY 2007 NDAA by extending lending authority to 30 SEP 2019).

- (1) Purpose: Temporary Authority exists to lend personnel protection and personnel survivability equipment, for the use of such equipment by military forces of a nation participating in (1) a coalition operation with the U.S. as part of a contingency operation (i.e. Afghanistan; Iraq); (2) when participating in combined UN peacekeeping operations; or (3) in connection with training for either of the first two categories.
- (2) Time: This authorization is available until 30 September 2019.
- (3) Approval Authority:
 - (a) SECDEF designates CCDRs as approval authorities.²⁶

²⁶ See Memorandum from Sec'y of Def. to Commander, U.S. European Command et al., subject: Approval and Delegation of Authority to Loan Personnel Protection and Personnel Survivability Equipment to Certain Foreign Forces Under Acquisition and Cross-Servicing Agreements (25 Feb. 2015) (authorizing CCDRs to enter into these arrangements and listing the authorized equipment).

- (b) Requires SECSTATE Concurrence.²⁷
- (c) When lending in connection with training, a notice and wait period is required. SECDEF must submit intent to congressional committees and wait 15 days.

(4) Practitioner Notes:

- (a) This may NOT be used to lend military equipment to the Afghan military.
- (b) Requires CCDR determination of “no unfulfilled requirements” prior to lending.
- (c) Lend period may not be longer than the duration of that country’s participation in the operation concerned.
- (d) Operates as a “reimbursement-in-kind” ACSA transaction, because equipment is returned. By policy, normal wear and tear is acceptable; however, recipient must sign agreement to cover non-routine damage or loss. SECDEF has authority to waive the reimbursement required to equipment that is damaged or destroyed as a result of combat operations if waiver is in the national security interest of the United States.

c. Global Lift and Sustain: 10 U.S.C. § 331²⁸

- (1) Purpose: Authorizes the Secretary of Defense to provide support to friendly foreign countries in connection with the conduct of designated operations.²⁹ Support that can be authorized includes:

²⁷ See Letter from John F. Kerry, Sec’y of State, to Robert O. Work, Deputy Sec’y of Def. (Feb. 23, 2015) (concurring in the loan of equipment identified under Sec. 1207, FY15 NDAA to certain coalition members and for designated operations).

²⁸ This authority was formerly located at 10 U.S.C. §127d. Sec. 1245, FY17 NDAA redesignated and amended §127d as 10 U.S.C. §331.

²⁹ The SECDEF is the authority responsible for designating operations. 10 U.S.C. §331(b)(1).

(a) Provision of LSSS³⁰ to security forces of a friendly foreign country participating in an operation with the armed forces under the jurisdiction of the SECDEF; OR a military or stability operation that benefits the national security interests of the U.S.

(b) Provision of LSSS to:

(i) Military forces of a friendly foreign country solely for the purpose of enhancing the interoperability of the logistical support systems of military forces participating in a combined operation with the United States in order to facilitate such operation; OR

(ii) A nonmilitary logistics, security, or similar agency of a friendly foreign government if such provision would directly benefit the armed forces under the jurisdiction of the SECDEF.

(c) Procurement of equipment for the purpose of the loan of such equipment to the military forces of a friendly foreign country participating in a U.S.-supported coalition or combined operation and the loan of such equipment to those forces to enhance capabilities or to increase interoperability with the armed forces under the jurisdiction of the SECDEF and other coalition partners.

(d) Provision of specialized training to personnel of friendly foreign countries in connection with such an operation, including training of such personnel before deployment in connection with such operation.

(e) Small-scale construction³¹ to support military forces of a friendly foreign country participating in a U.S.-supported coalition or combined operation when the construction is directly linked to the ability of such forces to participate in such operation effectively and is limited to the geographic area where such operation is taking place.

³⁰ 10 U.S.C. §331(h) (“In [§331] the term [LSSS] has the meaning given that term” in 10 U.S.C. §2350(1)).

³¹ Within Chapter 16, Title 10 U.S.C. the term “small-scale construction” is defined as construction at a cost not to exceed \$750,000 for any project. 10 U.S.C. §301(9).

- (2) Time: 1 year DoD O&M funds.
- (3) Amount:
 - (a) Aggregate value of all LSSS provided pursuant to authority referenced in (1)(a), (d), (e) above may not exceed \$450,000,000 in any fiscal year.
 - (b) Aggregate value of all LSSS provided pursuant to authority referenced in (1)(b) above may not exceed \$5,000,000 in any fiscal year.
- (4) Approval Authority: Secretary of Defense
 - (a) Requires Secretary of State concurrence.
- (5) Practitioner Notes:
 - (a) NOT for joint training exercises — may only be used for combined operations with U.S. forces during active hostilities, as part of a contingency operation, or noncombat operation (such as humanitarian/foreign disaster assistance, country stabilization operation, or UN peacekeeping operation).
 - (b) Not available for Iraq/Afghanistan due to the availability of specific temporary authority— Afghanistan and Iraq Lift and Sustain.
 - (c) DSCA managed program.

d. Personnel Details to Foreign Governments: 10 U.S.C. § 712

- (1) Purpose: Authorizes the President, when he considers it in the public interest, to detail members of the armed forces to assist in military matters in any republic in North/Central/South America, Republics of Cuba, Haiti, or Santo Domingo, and in any other country during a war or declared national emergency.
- (2) Time/Amount: May be on a reimbursable or non-reimbursable basis. No other limits provided.

(3) Approval Authority: the President.

e. Authority to Support Office of Security Cooperation in Iraq (OSCI): 2018 NDAA § 1224

(1) Purpose: SECDEF may, with SECSTATE concurrence, support United States Government transition activities in Iraq by providing funds for OSCI and security assistance teams in Iraq.

(2) Types of support may include life support, transportation and personal security, and construction and renovation of facilities.

(3) Time/Amount: 1 year FY 18 Air Force O&M³²; \$42,000,000³³

f. Coalition Support Fund (CSF): (2018 NDAA § 1212; Extension and Modification of Authority for Reimbursement of Certain Coalition Nations for Support Provided to U.S. Military Operations)

(1) Purpose: Authorizes the Secretary of Defense to reimburse any key cooperating nation (other than Pakistan) for logistical, military, and other support (including country access) provided to or in connection with U.S. military operations in Afghanistan, Iraq, or Syria; For Pakistan for certain activities meant to enhance the security situation in the AFG-PAK border region and for counterterrorism. Reimbursement may be monetary or through “in kind” reimbursement:

(a) Specialized training in connection with operations

(b) Procurement and provision of supplies

(c) Procurement of specialized equipment and loaning of equipment on a non-reimbursable basis

(2) Time: 1 year DoD O&M (Overseas Contingency Operating Budget)

³² Beginning in 2012, the NDAA designated Air Force O&M as the funding source for this authority.

³³ In FY17, \$60,000,000.00 was appropriated. Consolidated Appropriations Act 2017, Pub. L. No. 115-31, §9011 (2017).

- (3) Amount: Not to exceed \$900,000,000 (\$700,000,000 limit on support to Pakistan).³⁴
 - (4) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior notice to Congress (unless reimbursement is for access based on international agreement).
 - (5) Practitioner Notes:
 - (a) Notably, the CSF includes reimbursements for “access,” and also includes a provision for specialized training, or loan of supplies and equipment on a non-reimbursable basis known as the Coalition Readiness Support Program (CRSP). Thus, the CSF authorization contains components of both training and logistic support.
 - (b) There are a number of prohibitions and limitations concerning reimbursement to Pakistan, including a prohibition on reimbursement to Pakistan for support during periods closed to transshipment when the ground lines from Pakistan to Afghanistan were closed to U.S. supply shipments.
 - (c) Funding administered by DSCA.
- g. Afghanistan and Iraq Lift and Sustain: most recently amended currently at 2018 NDAA §1201
- (1) Purpose: Providing supplies, services, transportation, including airlift and sealift, and other logistical support to coalition forces supporting military and stability operations in Afghanistan and Iraq.
 - (2) Time: 1 year, DoD O&M funds. Authority expires on 31 DEC 2018
 - (3) Amount: not to exceed \$450,000,000.

³⁴ Limitations to the total amount of reimbursements provided to Pakistan began in FY 2013. See NDAA for FY 2013, P.L. 112-239 §1227 (2013).

- (4) Reporting requirements: SECDEF must provide quarterly reports to the congressional defense committees.
- (5) Practitioner Notes:
 - (a) Limitation: Separate funding authority to support coalition military operations in Afghanistan and Iraq.
 - (b) Key distinction between coalition support and lift and sustain funds:
 - (i) CSF: used to reimburse countries for costs they incur.
 - (ii) L&S: used by the military departments to fund costs incurred for services provided to support eligible countries.

E. DoD Aid and Assistance to Foreign Civilians³⁵

1. Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA): 10 U.S.C. §§ 401, 402, 404, 407, 2557, 2561.³⁶

- a. Purpose: The Overseas Humanitarian, Disaster and Civic Aid (OHDACA), <http://www.dsca.mil>, appropriation supports the SECDEF and COCOMs' security cooperation strategies to build indigenous capabilities and cooperative relationships with allies, friends, civil society, and potential partners. The appropriation provides low cost, non-obtrusive and highly effective activities that help partners help themselves, improves access to areas not otherwise available to U.S. Forces, and build collaborative relationships with host nation's civil society.

³⁵ See The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq. general authority for humanitarian assistance for civilian populations.

³⁶ Defense Security Cooperation Agency (DSCA) manages the OHDACA appropriation. DoD 5105.38-M, Security Assistance Management Manual (SAMM) contains guidance for DoD's civilian assistance programs.

Time/Amount: Generally 2 year funds. The 2017 CAA provided \$123,125,000 to finance the humanitarian assistance and mine action programs as well as foreign disaster relief initiatives.

2. Individual Statutory Authorizations:

a. 10 U.S.C. § 401: Humanitarian and Civic Assistance (HCA)³⁷

(1) Purpose: 10 U.S.C. § 401 authorizes the Secretary of a military department to conduct HCA activities in conjunction with authorized military operations and exercises.

(a) Secretary concerned must determine that HCA activities will promote the security interests of both the U.S and the country where such activities will be carried out, while also utilizing the specific operational readiness skills of the members of the armed forces conducting the activities.

(b) U.S. Armed Forces personnel participate in HCA activities to create strategic, operational, and/or tactical effects that support a COCOM's objectives in theater security cooperation or designated contingency plans while concurrently reinforcing skills required for the operational readiness of the forces executing the HCA mission. U.S. military occupational specialists shall provide services relevant to their specialty.

(c) HCA activities means:³⁸

(i) Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or underserved by medical, surgical, dental, and veterinary professionals, respectively, including education, training, and technical assistance related to the care provided;

³⁷ See DoDI 2205.02, Humanitarian and Civic Assistance Activities, 23 June 2014 (establishing DOD policy and assigning responsibility for conducting HCA activities).

³⁸ See *id.* (providing examples of authorized HCA projects).

- (ii) Construction of rudimentary surface transportation systems;
- (iii) Well drilling and construction of basic sanitation facilities;
- (iv) Rudimentary construction and repair of public facilities.³⁹

(d) Unauthorized HCA Expenses.

(i) Unauthorized HCA expenses that cannot be paid from HCA funds include costs associated with the military operation (e.g., transportation; personnel expenses; petroleum, oil, and lubricants; and equipment repair). These costs are covered by funds available for the military op.

(ii) Other unauthorized expenses include salaries of host-nation participants and per diem expenses of U.S. Armed Forces conduct HCA activities.

(2) Funding: Pursuant to 10 U.S.C. §401(c), expenses for HCA “shall be paid for out of funds specifically appropriated for such purpose.” Section 401 also authorizes the use of DoD O&M under HCA authority for “incidental costs of carrying out such assistance.” Accordingly, practitioners must look to the appropriation act to determine what funds have been made available for this use:

- (a) The OHDACA appropriation is expressly available to fund §401 projects. (Current policy, however, **does not** allow use of OHDACA funds for these projects-see Practitioner’s Notes below at (5)(b)).⁴⁰

³⁹ In FY07, DoD sought express language in 10 U.S.C. § 401 to authorize certain types of communications and information technology (IT) assistance. Although Congress did not add the language, the Joint Explanatory note to the FY07 NDAA noted that “restoring basic information and communications capacity is a fundamental element of humanitarian and civic assistance....rudimentary construction and repair of public facilities...includes information and communications technology as necessary to provide basic information and communication services.”

⁴⁰ See DEF. SEC. COOPERATION AGENCY, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL sec. C12.1 (30 Apr. 12).

(b) 2017 CAA §8011: O&M funds may be expended on §401 projects.

(i) These funds may be obligated for HCA costs and for costs “incidental to authorized operations and pursuant to authority granted in section 401”⁴¹

(3) Approval Authority:

(a) Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD(SO/LIC)), other than Command-approved HCA projects. Projects are nominated through the appropriate geographic Combatant Commander. Projects also require approval of SECSTATE or designee.

(b) Command Approved HCA: HCA projects that are at or below the approval cost threshold, currently \$15,000, and are approved at the CCMD level. Projects that exceed this threshold are forwarded to the ASD(SO/LIC). Combatant commanders ensure that command approved HCA projects:

(i) Are coordinated with USAID.

(ii) Conform to U.S. Policy and program guidance.

(iii) Are conducted with the approval of SECSTATE or SECSTATE’s Designee.

(iv) Are for an activity that is incidental to an authorized military operation.

(v) Do not exceed \$15,000.

(4) Command Approved HCA examples:

⁴¹ The specific language in 10 USC § 401(c)(4) is, “Nothing in this section may be interpreted to preclude the incurring of minimal expenditures by the Department of Defense for purposes of humanitarian and civic assistance out of funds other than funds appropriated . . . except that funds appropriated to the [DoD] for operation and maintenance . . . may be obligated for humanitarian and civic assistance under this section only for incidental costs of carrying out such assistance.”

(a) Veterinary Civic Action Projects to treat livestock for parasitic infections and diseases allowing veterinarians the training opportunity to diagnose and treat diseases not seen in the United States.

(b) The provision of preventative medical services by US medical personnel to indigenous communities with limited access to government health care facilities.

(c) The opening of an access road through trees and underbrush for several hundred yards, but not the asphaltting of a roadway.

(5) Practitioner's Notes:

(a) Limitations: (1) cannot duplicate other forms of U.S. economic assistance; (2) not for military or paramilitary activities; (3) expenses may not include costs of the military operation that would have occurred regardless of the HCA.

(b) Because HCA may be funded with O&M appropriations, the Defense Security Cooperation Agency (DSCA) does not expend OHDACA funds on authorized HCA activities. However, all HCA projects are reported to DSCA for accountability purposes.

(c) *See* DODI 2205.02 for DOD policy on conducting HCA activities.

b. 10 U.S.C. § 402: Transportation of Humanitarian Relief Supplies to Foreign Countries (Denton program).

(1) Purpose: transport to any country, without charge,⁴² supplies furnished by NGO's for humanitarian assistance on a space-available basis.

(2) Practitioner's Notes:

⁴² 10 U.S.C. § 402(d)(2) authorizes the Secretary of Defense to require reimbursement for incurred transportation costs.

(a) Before transporting supplies, the Secretary of Defense must determine:

(i) The transport of the supplies is consistent with U.S. foreign policy;

(ii) The supplies are suitable for humanitarian purposes and in usable condition;

(iii) Legitimate humanitarian need exists for the supplies by the people for whom intended;

(iv) Supplies will, in fact, be used for humanitarian purposes; and

(v) Adequate arrangements have been made for the distribution of the supplies in the destination country.

(b) Charity group must coordinate through USAID for approval to utilize Denton Program

(c) DSCA coordinates with USAID during the application process.

(d) Supplies may not be distributed, directly or indirectly, to any individual, group, or organization engaged in military or paramilitary activity.

c. 10 U.S.C. § 404: Foreign Disaster Assistance

(1) Purpose: to provide disaster assistance outside the U.S. to respond to manmade or natural disasters when necessary to prevent the loss of life. Assistance provided may include transportation, supplies, services, and equipment.⁴³

⁴³ Transportation may be provided to prevent serious harm to the environment and where human lives are not at risk only if no other means of transportation is reasonably available.

- (2) Approval Authority: POTUS has delegated authority to SECDEF who must have SECSTATE's concurrence.⁴⁴
 - (3) Practitioner's Notes:
 - (a) Within 48 hours of commencing relief activities, POTUS must transmit a report to Congress.
 - (b) Example: providing assistance to Haiti after the significant earthquake in January 2010. Operation Unified Response, JTF- Haiti, provided logistics supplies, medical care to the victims.
- d. 10 U.S.C. § 407: Humanitarian Demining Assistance and Stockpiled Conventional Munitions Assistance⁴⁵
- (1) Purpose: to carry out humanitarian demining and stockpiled conventional munitions assistance that promote either (1) the U.S. and the country where the activities will be carried out; or (2) the operational readiness skills of the armed forces who participate in the activities.
 - (2) Time/Amount: No more than \$10,000,000 may be spent for equipment, services, and supplies for humanitarian demining activities per year.
 - (3) Approval Authority: Service Department Secretary with specific Secretary of State approval.
 - (4) Practitioner's Notes:
 - (a) No duplication of other services provided.
 - (b) Expenses covered include: travel, transportation, and subsistence expenses of DoD personnel;

⁴⁴ Executive Order 12966 (60 Fed. Reg. 36949) (July 14, 1995) authorizes the Secretary of Defense to authorize disaster relief and begin execution in emergency situations where there is insufficient time to seek Secretary of State concurrence provided such concurrence is sought as soon as practicable thereafter.

⁴⁵ Section 1092 of the 2012 NDAA expanded the scope of 10 USC 407 to also include "stockpiled conventional munitions assistance."

equipment, supplies, and services acquired for the activities.

- (c) This authority was part of section 401 until section 407 was created (and section 401 amended) in the 2007 NDAA. Some implementing guidance, including the SAMM, still refer to demining as part of 401, but as of 17 Oct 2006, demining activities are authorized by section 407 instead of section 401.

e. 10 U.S.C. § 2557: Excess Non-Lethal Supplies.

(1) Purpose:

- (a) For Humanitarian Relief, SecDef may transfer excess non-lethal supplies to DoS for distribution to foreign governments and civilian organizations when requested by the local U.S. embassy.
- (b) For homeless veterans, SecDef may make excess clothing, shoes, sleeping bags, and related nonlethal excess supplies available to Secretary of Veteran's Affairs on a non-reimbursable basis.
- (c) In addition, SecDef may transfer such supplies to the Department of Homeland Security (HS) at the request of the Secretary of HS in support of domestic emergency assistance activities.⁴⁶

(2) Practitioner's Notes:

- (a) DoD transfers the property to the appropriate Department Secretary concerned who then has the responsibility to distribute the property. **NOTE: There are several ways to transfer property to DoS (see Property Disposal section of this outline).**
- (b) Property must primarily benefit the intended recipient country civilians or Veterans. For foreign assistance, this may be used in conjunction with

⁴⁶ 2011 NDAA §1074 expanded this authority to include domestic emergencies.

§2561 Humanitarian Assistance funds to get materials to location.

- (c) Nonlethal Excess Supplies = property, other than real property, that is excess under DoD regulations and is not a weapon, ammunition, or other equipment/material designed to inflict serious bodily harm or death.

f. 10 U.S.C. § 2561: Humanitarian Assistance (HA).

- (1) Purpose: Authorization to use DoD Humanitarian Assistance appropriations in order to support the national security and foreign policy goals of the U.S.

- (a) Transportation of Humanitarian Relief
- (b) HA – other (O)

(2) Practitioner’s Notes:

- (a) Example uses of HA(O) include construction or refurbishment of local infrastructure facilities, disaster preparedness or refugee repatriation training, exercises or seminars, assessment visits, and technical and logistics assistance for foreign recipients.
- (b) May be executed by contract rather than servicemembers. This is distinguished from section 401 HCA, which precludes contracting due to requirement for development of operational readiness skills.
- (c) As a transportation authority, section 2561 is the primary means to ship goods and supplies donated by NGOs/private charities to foreign countries *on a funded basis*. OHDACA funds all costs of transportation, and there is no “space available” requirement. (*Compare* to section 402, the Denton program.)

- (d) Section 2561's transportation authority is often used in conjunction with section 2557 to ship the non-lethal excess supplies to a recipient country.

F. Conducting Counterinsurgency, Counterterrorism & Overseas Contingency Operations (OCO).

The nature of operations must adapt to specific environments, and commanders often request additional or special fiscal authorities to fill any capability gaps in the general fiscal framework. Many current operating environments require counterinsurgency and counterterrorism authorities that Congress has provided to DoD upon request. These authorities, which are generally temporary, can and do change overtime, as operational environments and needs likewise change. Often, these authorities are tailored to specific locations, or they are only available for a limited period of time.

1. Using O&M in contingency operations:

a. Operations Enduring Freedom, Resolute Support, and Inherent Resolve are funded with OCO appropriations. As part of the purpose analysis, you must therefore determine whether the particular expenditure should be funded with base or OCO appropriations. This distinction is particularly important with the decreased amount in OCO appropriations. In order to use OCO appropriations, the following must apply:

(1) The mission has to involve combat or direct combat support operations in Afghanistan, the Persian Gulf, Gulf nations, or in other specified areas.

(2) The expense falls within an authorized funding category. *See* Department of the Army Financial Management Guidance for Contingency Operations, 28 June 2012.

b. The OCO appropriation generally contains several subdivisions similar to the base appropriation (O&M, MILCON, etc.). The use of OCO O&M requires additional analysis. This analysis focuses on incremental costs, which are costs the Army has incurred as the result of a contingency operation. Therefore, expenditures are funded with OCO O&M appropriations if they involve combat or direct combat support operations in the specified geographic areas, and are costs the Army would not have incurred absent the contingency operation.

2. Commander's Emergency Response Program (CERP): 2017 NDAA §1211; 2017 CAA §9005

a. Purpose:

(1) Afghanistan:

(a) authorizes United States military commanders *in Afghanistan* to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within their areas of responsibility; and

(b) provides an immediate and direct benefit to the people of Afghanistan.”

(2) Afghanistan/Iraq/Syria:

(a) Authority for payments to redress injury and loss: CERP funds are available for “ex gratia payments for damage, personal injury, or death that is incident to combat operations of the Armed Forces in Afghanistan, Iraq, or Syria.”

(b) Notice Requirement. The SECDEF shall, upon each exercise of the authority of payments for redress, submit to the congressional defense committees a report setting forth 1) the amount that will be used for the payments; 2) the manner in which claims for payments shall be verified; 3) the officers or officials who shall be authorized to approve claims for payments; and 4) the manner in which the payments shall be made.

b. Implementing Guidance: DoD FMR vol 12, ch. 27 (Note: the current version is from January 2009—practitioners must ensure that guidance in the FMR, until updated, does not conflict with the most recent legislation.)

(1) Specific Purposes, Afghanistan: includes, but not limited to:

(a) water & sanitation, food production & distribution, agriculture/irrigation, electricity, healthcare, education, telecommunications, economic, financial mgmt improvements, transportation,

- (b) rule of law & governance, civic clean-up, civic support vehicles, repair civic & cultural facilities, other humanitarian reconstruction projects, battle damage, condolence payments, temporary contract guards for critical infrastructure.⁴⁷
- (2) Specific Prohibitions:
 - (a) direct or indirect benefit to US or coalition military forces; goods/services/funds to national armies; entertainment; purchase of firearms/ammo/UXO;
 - (b) rewards; duplicative services; salaries/pensions for government employees; Psychological Operations; direct support for individuals or individual businesses.
- c. Time: 1 year DA O&M funds; authorization for the CERP program has been extended to December 31, 2018.
- d. Amount:
 - (1) FY2017: \$5,000,000
 - (a) NDAA § 1211: Extended authorization of \$5,000,000 to FY17 & FY18.
 - (b) 2017 CAA §9005: \$5,000,000 DA O&M
 - (c) In FY2014, Congress included a requirement that the DoD, in consultation with the DoDIG, SIGAR, SIGIR, and the GAO submit a comprehensive report on the lessons learned and best practices for the execution of CERP to Congress.
- e. Approval Authority: as designated by theater specific policy in Afghanistan. Authority is tiered by level of command and dollar amount.

⁴⁷ Exhaustive list is contained in DoD FMR vol 12, chap. 23 para 270104. Contains DoD guidance for CERP and primarily assigns administration responsibilities, defines proper CERP projects, and specifies accountability procedures.

f. Limitations:

- (1) No CERP project, to include any ancillary or related elements of the project, may be in excess of \$2,000,000.
- (2) Projects \geq \$500,000:
 - (a) Require 15 days prior written notice to Congressional Defense Committees of:
 - (i) Location, nature, purpose of proposed project, including how it is intended to directly benefit the people of Afghanistan
 - (ii) Budget and implementation timeline
 - (iii) Sustainment plan
- (3) Construction: DoD FMR para 270102 no longer includes the concept of “build” and instead focuses on “reconstruction” and “restore.” However, it specifically indicates that this does not limit efforts to restore previous conditions/structures in Afghanistan. Judge Advocates should look to the most recent version of the MAAWS-A CERP SOP when in theater for more specific guidance on the extent of construction authorized using CERP.

g. Practitioner’s Notes:

- (1) The focus is on small-scale projects that immediately assist the local population and are sustainable. Small-scale would generally be considered less than \$500,000 per project according to the DoD FMR. The current MAAWS-A CERP SOP defines small-scale a generally less than \$50,000.
- (2) Urgent is defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of a local commander, calls for immediate action.
- (3) Immediate is currently defined in the MAAWS-A CERP SOP, 05 Nov 2016, as projects completed within 90 days.

- (4) Section 1201 of the 2012 NDAA contains authority for the Secretary of Defense to waive any other provision of law that would prohibit, restrict, limit, or otherwise constrain exercise of the CERP authority. In the past, SECDEF has waived certain requirements of the FAR as well as the Foreign Claims Act (FCA). As Congress repealed CERP authority in previous versions of the NDAA, practitioners should look for new waiver authorities before assuming that the certain FAR provisions or FCA do not apply.
- (5) Historical Information: CERP was originally funded with seized Iraqi assets.⁴⁸ The Coalition Provisional Authority (CPA) accounted for the seized funds, administered, and distributed the funds to U.S. Commanders in Iraq for “reconstruction assistance” to the Iraqi people.⁴⁹ Congress first appropriated funds under CERP for both Iraq and Afghanistan in the FY 2004 ESAA.

3. Rewards Program: 10 U.S.C. § 127b

- a. Purpose: to allow the military to pay monetary rewards to people as a reward for providing U.S. Government personnel with information or nonlethal assistance (NOT a weapons buyback) that is beneficial to:
 - (1) An operation or activity of the armed forces conducted outside the U.S. against international terrorism; or
 - (2) Force protection of the armed forces or of allied forces participating in a combined operation.
- b. Time: Permanent authority, most recently amended by 2016 NDAA §1042.
- c. Amount: An individual award cannot exceed \$5 million

⁴⁸ See CJTF-7 FRAGO 89; see also Memorandum, The President to the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003).

⁴⁹ CJTF-7 FRAGO 89. *Id.* The Coalition Provisional Authority (CPA) initially defined reconstruction assistance as “the building, repair, reconstruction, and reestablishment of the social and material infrastructure in Iraq.” The CPA provided approximately \$78.6M for over 11,000 projects, such as financial management improvements, restoration of the rule of law and governance initiatives, day laborers for civic cleaning projects, and purchase or repair of civic support vehicles.

- d. Approval Authority: By statute, SECDEF is the primary approval authority. (Secretary of State concurrence required over \$2M)
Also by statute, SECDEF may delegate this authority as follows:
 - (1) To the Deputy, SECDEF or an Under SECDEF without further redelegation; and
 - (2) To the CCDR authority to approve individual awards not in excess of \$1M. The CCDR may further delegate this authority, but only for rewards up to \$10,000. However, the CCDR may delegate to his deputy commander or to a direct subordinate commander full reward approval authority, but only with SECDEF delegated Under SECDEF approval.

- e. Practitioner's Notes:
 - (1) Implemented in DoD FMR vol 12, ch 17.
 - (2) Not a weapons buy-back program.
 - (3) U.S. citizens, U.S. officers/employees, or employees of a contractor of the U.S. are not eligible to receive rewards.
 - (4) Theater regulations will provide delegation amounts to subordinate commanders. Practitioners must note that the dollar thresholds are subject to both legislative and policy changes frequently.

- 4. Afghanistan Security Forces Fund (ASFF): currently in 2018 NDAA § 1521
 - a. Purpose: to provide assistance, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and *funding*.
 - b. Time/Amount: 2017 CAA: \$4,262,715,000 (avail. thru 30 Sep 2018)
 - c. Approval Authority: Commander, Combined Security Transition Command-Afghanistan (CSTC-A)

d. Limitations:

- (1) No ASFF can be obligated without congressional notification. As part of the budget request, the annual Justification Book (commonly referred to as the J-Book) provides Congress with budgetary notice of ASFF spend plans. During the Fiscal Year, periodic Financial Activity Plans (FAPs) provide actual congressional notification. Subsequent to these congressional notifications/FAPs and 15 days notice, ASFF is incrementally released from Office of Management Budget to CSTC-A to obligate what was notified accordingly.
- (2) The Afghanistan Resources Oversight Council (AROC) must approve all annual service requirements over \$50,000,000 and any non-standard equipment request over \$100,000,000.
- (3) No construction or infrastructure program or project may be funded if U.S. military or civilian personnel (or their representatives) cannot safely access the program or project.⁵⁰ In general, the safe access requirement to a program or project in Afghanistan may be waived depending on the cost of the program or project.⁵¹

e. Practitioner Notes:

- (1) These funds are an exception to the general rule that no funds shall be used to provide training or advice to police, prisons, or other law enforcement forces or military training for any foreign government.
- (2) Security Forces of Afghanistan: those forces under the control of the GIRoA.
 - (a) Afghan National Army (ANA),
 - (b) Afghan National Police (ANP),

⁵⁰ This applies to all expenditures and obligations within Afghanistan, not just ASFF. *See* NDAA for FY17, Section 1216.

⁵¹ *Id.* (providing various waiver approval levels). As a matter of policy the only Ministries eligible for ASFF are the Ministry of Defense and Ministry of Interior.

(c) Afghan Local Police (ALP)

5. Authority to Provide Assistance to Counter ISIS: FY15 NDAA § 1236 (as amended by 2018 NDAA § 1222)

a. Purpose: to provide assistance, including training, equipment, logistics support, supplies, and services, stipends, facility and infrastructure repair and renovation, small-scale construction, and sustainment, to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces with a national security mission.

b. Time/Amount:

(1) Funding is available in the amount of \$1,269,000,000 from FY18 DoD OCO funds. The previous funding source – Iraq Train and Equip Funds – expired on 30 Sep 2017.

(2) Assistance under this authority extends through 31 Dec 2019.

c. Approval Authority: SECDEF in coordination with SECSTATE

(1) Authority for approval and use of available funds has been delegated and practitioners must check local delegations to determine who is authorized to approve expenditures under this authority.

d. Limitations:

(1) Provision of assistance must be for the purposes of:

(a) Defending Iraq, its people, allies, and partner nations from the threat posed by the Islamic State of Iraq and the Syria (ISIS) and groups supporting ISIS; or

(b) Securing the territory of Iraq.

- (2) Small-scale construction of temporary facilities must cost less than \$4,000,000.⁵²
- (3) The aggregate amount of construction, repair, and renovation projects carried out under this section in any fiscal year may not exceed \$30,000,000.⁵³
- (4) No construction, repair, or renovation project costing more than \$1,000,000 may be carried out unless approved in advance by the Commander of U.S. Central Command.⁵⁴
- (5) Cost-sharing requirements. Not more than 60% of the funds may be obligated or expended until 40% of the amount authorized to be appropriated has been contributed by other countries and not until 15 days after the date SECDEF certifies the amounts to Congress. This requirement is waivable by SECDEF under certain conditions.

(a) Does not apply to assistance provided directly to “covered groups” in accordance with the authority granted by FY16 NDAA § 1223.

(i) Covered groups: Kurdish Peshmerga and Sunni tribal security forces, or other local security forces, with a national security mission.

e. Practitioner Notes:

- (1) This authorization requires vetting in addition to Leahy vetting:
 - (a) Assessment for associations with terrorist groups or groups associated with the Government of Iran; and
 - (b) Commitments from the elements to promote respect for human rights and the rule of law.

⁵² NDAA for FY18, §1222.

⁵³ *Id.*

⁵⁴ *Id.*

(2) This authorization was previously known as “Iraq Train and Equip.”

6. Syria Train and Equip: FY 15 NDAA § 1209 (Authority to Provide Assistance to the Vetted Syrian Opposition) (as amended by FY 18 NDAA § 1223)

a. Purpose: To provide assistance to appropriately vetted elements of the Syrian opposition and other appropriately vetted Syrian groups and individuals, including the provision training, equipment, supplies, stipends, construction and repair of training and associated facilities, and sustainment.

b. Amount: No funds have been specifically appropriated for this authority. A reprogramming or transfer request for funds must be submitted to the congressional defense committees to carry out activities authorized under this authority.

(1) FY 17 CAA authorized the use of up to \$980,000,000 of funds appropriated to Counter the Islamic State of Iraq and the Levant.

c. Time: This authority expires on 31 December 2018.

d. Approval Authority: SECDEF in coordination with SECSTATE

e. Limitations:

(1) Provision of assistance must be for the purposes of:

(a) Defending the Syrian people from attacks by ISIS, and securing territory controlled by the Syrian opposition;

(b) Protecting the United States, its friends and allies, and the Syrian people from the threats posed by terrorists in Syria;

(c) Promoting the conditions for a negotiated settlement to end the conflict in Syria.

- (2) Small-scale construction of temporary facilities must cost less than \$4,000,000.⁵⁵
- (3) The aggregate amount of construction and repair projects carried out under this section in any fiscal year may not exceed \$10,000,000.⁵⁶
- (4) No construction or repair project costing more than \$1,000,000 may be carried out unless approved in advance by the Commander of U.S. Central Command.⁵⁷
- (5) Not an authorization for the introduction of U.S. Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.
- (6) None of the funds may be used for the procurement or transfer of man portable air defense systems.

f. Practitioner Notes:

- (1) The term “appropriately vetted” means, with respect to elements of the Syrian opposition and other Syrian groups and individuals:
 - (a) Assessments of such elements, groups, and individuals for associations with terrorist groups, Shia militias aligned with or supporting the Government of Syria, and groups associated with the Government of Iran. Such groups include, but are not limited to, ISIL, Jabhat al Nusrah, Ahrar al Sham, other al-Qaeda related groups, and Hezbollah; and
 - (b) A commitment from such elements, groups, and individuals to promoting the respect for human rights and the rule of law.

⁵⁵ NDAA for FY18, §1223.

⁵⁶ *Id.*

⁵⁷ *Id.*

7. Foreign Security Forces: Authority to Build Capacity⁵⁸: 10 U.S.C § 333⁵⁹
(as amended by FY 18 NDAA § 1204b)

(1) Purpose: Authorizes SECDEF to conduct or support a program or programs to provide training and equipment to the national security forces of one or more foreign countries for the purpose of building the capacity of such forces to conduct one or more of the following

(a) Counterterrorism operations;

(b) Counter-weapons of mass destruction operations;

(c) Counter-illicit drug trafficking operations;

(d) Counter-transnational organized crime operations;

(e) Maritime and border security operations;

(f) Military intelligence operations;

(g) Operations or activities that contribute to an international coalition operation that is determined by the Secretary to be in the national security interest of the United States.

(2) Types of Support Authorized: may include the provision and sustainment of defense articles, training, defense services, supplies (including consumables), and small-scale construction.

(3) Required Elements: Programs must include elements that promote:

(a) Observance of and respect for the law of armed conflict, human rights and fundamental freedoms, and the rule of law and civilian control of the military; and

⁵⁸ Sec. 1241, FY17 NDAA repealed 10 U.S.C. § 2282 on 19 Sep 2017. The authorities authorized by §2282 are assumed into 10 U.S.C. §333, “Foreign Security Forces: Authority to Build Capacity.”

⁵⁹ Effective 19 Sep 2017 pursuant to Sec. 1241, FY17 NDAA.

(i) To meet this requirement, SECDEF must certify, prior to the initiation of the program, that DOD is already undertaking, or will undertake, human rights training that includes a comprehensive curriculum on human rights and the law of armed conflict, as applicable, to such security forces.

(b) Institutional Capacity Building

(i) To meet this requirement, SECDEF must certify, prior to the initiation of the program, that DOD is already undertaking, or will undertake, a program of institutional capacity building with appropriate institutions of the foreign country that is complementary to the program. The purpose of this is to enhance the capacity of the foreign country to exercise responsible civilian control of the forces.

(4) Time: 1 year DoD O&M funds

(5) Approval Authority: SECDEF with SECSTATE concurrence and 15 day prior Congressional notification.

(a) In addition to concurrence, the SECDEF and SECSTATE must jointly develop, plan, and implement the program.

(b) Notices required by the statute must also be prepared in coordination with SECSTATE.

(6) Practitioner Notes:

(a) May not use the program to provide support that is otherwise prohibited by law, including 10 U.S.C. § 362.

(b) Sustainment support may not be provided for a period in excess of five years unless the notice on the program contains a written justification as specified in the statute and a plan to transition the sustainment support.

(c) Availability of funds across fiscal years. Amounts available in a fiscal year to carry out the authority may be used for programs under that authority that begin in such

fiscal year and end not later than the end of the second fiscal year thereafter.

8. Support of Special Operations to Combat Terrorism: 10 U.S.C. §127e⁶⁰

(1) Purpose: To provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by U.S. SOF combating terrorism.

(2) Time: 1 year DoD O&M funds

(3) Amount: \$1,000,000 annually

(4) Approval Authority: SECDEF (may not be delegated)

(a) Requires the concurrence of the relevant Chief of Mission assigned to the country where the forces, groups, or individuals supporting U.S. SOF are located prior to disbursing funds.

(b) SECDEF must notify congress not later than 15 days before making funds available to initiate support of an approved operation or changing the funding level by \$1M or an amount equal to 20% of such funding level (whichever is less) or, when extraordinary circumstances exist, within 48 hours of use.

VI. PROPERTY DISPOSAL

A. Overview of DoD Property Disposal.

1. Statutory authority is required for any transfer or sale of government owned or purchased property, particularly if transferred to a foreign military, government, or population. Although the overarching principles of the Federal Property and Administrative Services Act apply to both real

⁶⁰ This authority was formerly established under Section 1208 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (108 P.L 375; 118 Stat. 2086). Section 1203, FY17 NDAA repealed Sec. 1208, FY05 NDAA and codified the former authority at 10 U.S.C. §127e. Prior to this amendment, the annual amount appropriated was approximately \$85,000,000.

and personal property, this outline will focus on personal property disposition.

2. An understanding of the statutorily mandated processes for the disposition of excess personal property is necessary to properly evaluate the authority for a proposed disposition. Generally speaking, the mandated processes involve reutilization, transfer, donation, and sale (R/T/D/S), and if none of these are possible, abandonment/destruction (A/D) through “donation” or disposal contracts. The order in which these processes are executed and the priority assigned to potential requisitioners or transferees is also mandated. Thus, reutilization screening within the DoD must occur before the property can be considered for transfer, donation, or sale. Similarly, transfer to federal civilian agencies must be ruled out before property can be offered for sale. No property can be put on a disposal contract unless it is not eligible for a “higher priority” process, or the opportunities for such transfers have been exhausted, and the property is not wanted by a qualified⁶¹ higher priority transferee.
3. The operational funding framework is useful in determining proper statutory authority for disposal of DoD property. Specifically to identify the proper authority and process for property transfer, judge advocates must determine who is receiving the property, what is the property classification, when will the property be transferred, where will it be transferred, and why will it be transferred. The following is an overview of (1) the general authority related to property disposal, (2) the process variations involved in planning for property disposition within contingency operations. Although specific guidance changes frequently in the operational environment, the basic framework of disposition and transfer authorities has been in place for decades.

B. General Authority and Mechanism for Disposal of DoD Property – 40 U.S.C. § 501-574 and 701 et seq.

1. Purpose:

- a. To give the Administrator, GSA the responsibility for management of U.S. Government owned property, to include procurement, storage, use, and disposition.⁶²

⁶¹ Due to regulatory limitations on certain types of property, especially defense articles, release of many items are restricted to specified transferees such as military requisitioners.

⁶² The Secretary of Defense may exempt itself for national security purposes (see § 501).

- b. Within the DoD, the disposal authority has been delegated to the Defense Logistics Agency (DLA) Disposition Services (formerly known as Defense Reutilization and Marketing Service – DRMS)⁶³ to establish a standardized process for the disposal of durable (investment item) DoD property (including military equipment) purchased with appropriated funds.
- c. For property located overseas, Agency heads are given responsibility for management of property owned by their Agency subject to the requirement that such use and disposition be consistent with US foreign policy (*see* 40 USC §701).
- d. Relevant Statutory and Regulatory Definitions:⁶⁴
 - (1) Surplus: excess property that is no longer required to meet the needs or responsibilities of *any* federal agency.
 - (2) Excess: property that is not required to meet the needs of the federal agency that initially procured the property, but may be required by other federal agencies. For example, with respect to DoD property, “excess” means property no longer needed by **any** DoD component. However, note that individual service regulations will define “excess” as property no longer needed by that individual service component, thus warranting turn-in to Disposition Services. From a statutory perspective; however, property is not “excess” unless it is not required by a component or activity within that Agency.
 - (3) Disposal: the reutilization, transfer, donation, sale, abandonment, or destruction of excess and surplus federal government property.
 - (4) Foreign Excess Property: excess property that is not located in the States of the United States, the District of

⁶³ With respect to disposition of excess DoD property located within the United States, Disposition Services derives its statutory authority from a delegation of disposal authority to the Secretary of Defense by the Administrator of the GSA. Disposition Services is a subordinate element of the DLA; subsequent delegations within the DoD result in Disposition Services having responsibility for disposal of excess property. With respect to foreign excess personal property, the statute provides Agency heads with the responsibility for property disposition. *See* 40 USC §701. Again, several delegations from the Secretary of Defense to DLA to Disposition Services result in the latter’s responsibility for property disposal.

⁶⁴ 40 U.S.C. § 102

Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands.⁶⁵ Foreign excess personal property is simply the subset of foreign excess property that is “personal” or “moveable” rather than consisting of real property. FEPP includes all personal property held by the Agency regardless of property class or type.

- (5) Reutilization: when an element of a federal agency receives ownership of, and reuses, federal government property that was initially procured by another element of the same federal agency. Within DoD, “reutilization” means transfer to another military service or DoD component or transfer under a program that has top level priority (Priority 1) per statutes applicable to DoD property.
- (6) Transfer: when a federal agency receives ownership of federal government property that was initially procured by another federal agency. Within DoD such transfers are referred to as Federal Civilian Agency (FCA) transfers.
- (7) Donation: when surplus federal government property is given to authorized state governments/agencies, or to a small group of designated private organizations.
- (8) Property: limiting definition which excludes certain real property and also expressly excludes certain military items such as “naval vessels that are battleships, cruisers, aircraft carriers, destroyers, or submarines.” Likewise, it excludes “records of the Government.”
- (9) Usable Sales: sales of federal government property to the general public (usually via auctions) for full use in the manner originally intended.
- (10) Scrap Sales: sales of federal government property to the general public (usually via auctions) for use of the components.

⁶⁵ 40 USC §102.

- (11) Abandoned: federal government property without any private or public value.⁶⁶
- (12) Destroyed: federal government property that may not be sold or abandoned must be destroyed. In cases where property is not appropriate to be transferred to other parties, or there are no eligible parties interested in a no cost transfer/abandonment, the Agency must pay for property destruction of the material. Hazardous and non-recyclable wastes are examples of such properties.

2. Limitations:

- a. The disposal procedure chosen for a specific piece of government property must conform to all DoD and U.S. government (USG) statutory and regulatory restrictions. For example, although Disposition Services may “abandon” some types of government property, it may not “abandon” an article that is a defense article (for example: a nuclear warhead), because this would violate statutory and regulatory procedures for the disposal of such items. Similarly, in order to effect a specific type of disposition transaction, opportunities for any higher priority transfer or disposition must have been exhausted or properly waived. For example, before competitive sales to the public can be undertaken, screening for potential reutilization, transfer or donation transactions must have been performed and failed to identify a potential recipient for the property. Before transfer or donation of FEPP to a foreign government, world-wide DoD screening must fail to produce results unless the requirement to screen the property has been waived at the ASD, (L&MR) level.⁶⁷
- b. Property is requisitioned on an “as is/where is” basis.⁶⁸

⁶⁶ Proper procedures for abandonment and destruction are found in Department of Defense Manual (DoDM) 4160.21, Vol. 2, Defense Materiel Disposition: Property Disposal and Reclamation. *See also* DRMS-I 4160.14, chapter 8 for environmental compliance rules.

⁶⁷ DoDM 4160.21, Vol. 2, Enclosure 4.

⁶⁸ *See* DRMS-I 4160.14.

- c. Non-DoD requisitioners and purchasers must pay for all costs related to Packaging, Crating, Handling, and Transportation (PCH&T) of the property. PCH&T costs include the costs of inspection of the items by other USG agencies whenever the items re-enter the United States from their OCONUS locations.

3. Practitioner Notes:

- a. Disposition Services co-locates its subordinate Disposition Services Officers (formerly DRMO's) with DoD units world-wide, usually at the post/installation level or the CJTF (Division) level in contingency environments.
- b. DLA Disposal Process: In accordance with statutorily mandated processes, Disposition Services assigns the following four priorities to government elements requesting Disposition Services –managed property (*See* DRMS-I 4160.14):
 - (1) Priority 1 – Reutilization: Initial 14-day window where DoD property that is turned into disposition services may only be requisitioned by another DoD component or designated non-DoD “Special Programs” such as the DoS Foreign Military Sales program.⁶⁹
 - (2) Priority 2 – Transfer: the next 21-day window where property not reutilized during priority 1 phase may be requisitioned by another USG agency.
 - (3) Priority 3 – Donation: the next 5-day window where property not transferred to another USG agency may be donated to an approved state government or organization.
 - (4) Priority 1-3 “Final Screening”: the 2-day window where property not donated undergoes a final screening and “last chance” requisition window for all priority 1-3 components, agencies, and approved governments and organizations.
 - (5) Priority 4 – Sales: window of time where property not requisitioned during priority 1-3 periods may be now sold to the general public via “usable sales” or “scrap sales.”

⁶⁹ Other special programs include Computers for Schools (Dep. Of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

Property with military capabilities must be demilitarized to be eligible for sale. If unable to demilitarize, the property must be destroyed.

- (6) Abandonment or Destruction: property not requisitioned during priorities 1-4 may now be abandoned or destroyed. Abandonment includes the “donation in lieu of abandonment” process for property utilizing the Economy formula which essentially provides that property may be given away when efforts at sale have failed or the cost of its care and handling incident to sale would exceed any estimated proceeds. This is a “cost avoidance” principle. However, ordinary limitations on transfer apply precluding release of such items as defense articles or hazardous waste to the public.

C. Foreign Excess Personal Property (FEPP) – 40 U.S.C. 701(b)(2)(B).

1. Purpose: an overview of requirements and transfer

- a. Authorizes the head of an executive agency to “dispose of foreign excess property in a manner that conforms to the foreign policy of the United States.”⁷⁰
- b. This law has received recent attention and application, as the U.S. continues drawdown in Afghanistan. Practitioners of fiscal law are often asked about “retrograde” operations, a term that loosely encompasses the process of transferring equipment.⁷¹
- c. The statutory and regulatory guidance applies to FEPP regardless of whether it is generated in the “installation” (i.e., bases under arrangements with foreign states) or “operational” setting (i.e., contingency operations).
 - (1) The processes are the same as for excess property generated stateside. That is, “reutilization, transfer,

⁷⁰ DoDM 4160.21, Vol. 2, Enclosure 4 provides DoD guidance on FEPP disposal.

⁷¹ Army Doctrine Reference Publication 3-0 defines “retrograde” as a defense task. Many operators and fiscal attorneys use this term when referring to the property disposition process. The term as it is used in the context of property transfer in Afghanistan, does not squarely fit within the doctrinal definition. Judge Advocates should ensure they understand the actual command intent with regard to a “retrograde” operation in order to avoid confusion.

donation, sale, abandonment/destruction” unless screening waivers apply. These processes apply as policy guidance set forth in Agency regulation, rather than statutory mandate.

- (2) There is greater ability to vary screening and reutilization processes in the operational setting in order to meet operational needs or due to resource limitations. In Afghanistan, for example, fragmentary orders set forth the multi-step screening and reutilization process that applied before usable property could be transferred to the host nation or turned into DLA Disposition Services as unserviceable excess. Although the screening time frames and methods varied from what DoD property would undergo in CONUS, the statutory requirements with respect to priority of requisitioners/transferees were maintained.
- d. Prior to conducting public sales of surplus property on the local economy, coordination of an agreement with the host nation authorizing sales of DoD excess property or the approval of DoS must be obtained.⁷² When DoD brings property into the territory of the host nation, it does so “duty free.” The later transfer or sale of excess property to private parties in the host nation ordinarily triggers the incidence of import taxes or duties as the property loses its “tax exempt” status. There may be other restrictions related to the entry of used property on the local economy which also need to be addressed.
 - e. “Retrograde” or “re-set” are not truly property “disposal” processes as they are not actions involving “excess” property. Instead the terms refer to property management processes or actions taken to return “non-excess” property to its pre-deployment location or to re-set it to another setting for continued future use by a DoD entity or military service. Property not selected for retrograde or re-set may be declared “excess” by the owning unit or service and, assuming no higher priority transfers are available may become eligible for transfer to a foreign government for the following purposes. Judge Advocates should ensure that they understand the actual command intent with regard to “retrograde.”⁷³

⁷² See DoDM 4160.21, Vol. 2, Enclosure 4.

⁷³ F.M. 3.0 defines “retrograde” as a defense task involving “movement away from the enemy. This includes delays, withdrawals, and retirements.” Many operators and fiscal attorneys use this term incorrectly when referring to the

- (1) As a “donation of medical supplies to a non-profit medical or health organization” in accordance with 40 USC 703;
- (2) In “exchange for substantial benefits or the settlement of claims,” in accordance with 40 USC 704(b)(2)(B), if approved by the ASD for Logistics & Material Readiness; or
- (3) As a donation in lieu of abandonment in accordance with 40 USC 704(b)(3) and DoD 4160.21-M, ch. 8 where the economy formula requirements are met.

2. Time/Amount for “Substantial Benefits” FEPP Transfers:

- a. Implemented by delegation memorandum in response to specific requests. Often such authorities provide “blanket” authority for a certain period or as long as certain conditions apply in the operational setting. OEF requests have focused on transfers of FEPP incident to a FOB closure or transfer, and transfers of FEPP in situations that do not involve a base closure.
- b. Current monetary limit for property value for a single base closing or transferring of a FOB in Afghanistan is \$30,000,000.⁷⁴
- c. Approval Authority Levels for individual property transfer amount is tiered by rank and designated in delegation memorandum. Current approval authority levels for individual property transfers in Afghanistan (Note: monetary value is based on depreciated value):
 - (1) \$0 - \$75,000: O-5 Level Commander
 - (2) \$75,000.01 - \$500,000: O-6 Level Commander

property disposition process. Instead of effecting a disposal, retrograde involves the management of property that will be retained somewhere by a component of the DoD.

⁷⁴ See Memorandum, Alan F. Estevez, Principal Deputy to the Assistant Secretary of Defense for Logistics and Material Readiness, to Deputy Commander Support, US Forces, Afghanistan, Subject: Request to Adjust Tiered Delegation of Authority for Foreign Excess Personal Property (FEPP) in Afghanistan (16 JUL 2013).

- (3) \$500,000.01 - \$30,000,000: Commander, United States Forces-Afghanistan (USFOR-A) or Deputy Commander for Support, USFOR-A
- (4) \$30,000,000.01 and above: ASD (L&MR)

3. Practitioner Notes:

- a. “FEPP is a distinct category of property not to be confused with “excess and surplus.”⁷⁵ This distinguishing definition is important to practitioners, as the process required by law and statute for “excess and surplus” and “FEPP” may be different. The disposal process outlined in section B above is statutorily mandated for “excess and surplus” property. However, per DoD disposal policy, the standard R/T/D/S processes should also apply to the management and disposition of FEPP unless waivers have been obtained.
 - (1) Screening waivers are often granted in conjunction with the grant of specific FEPP transfer authority in the operational setting. This is often due to system and resource limitations for federal civilian agency and state agency screening in the operational setting.
 - (2) Judge Advocates involved in “retrograde” operations (return of property that will remain under DoD control) and transfer (for purposes of disposal under 40 USC chapter 7 or security assistance under Title 10) should understand that transfers under the FEPP program will also affect procedures for property accountability under AR 735-5. This regulation explains, among other topics, the methods to account for and remove government property on the “property book” of a military unit.
- b. To date, there have been numerous memoranda that authorize FEPP transfers in Afghanistan. These memoranda initially involved transfers authorized under 40 USC 704(b)(3) and currently pursuant to 40 USC 704(b)(2)(B).
 - (1) Based on various requests from the theater or combatant command, the authorizations have increased the value of property to be transferred, how the values were calculated.

⁷⁵ DoDM 4160.21, Vol. 2, Enclosure 4, para. 1.b.

Types of property involved, added eligible transferees, added locations from which property could be transferred, and increased transfer justification and documentation requirements. Judge Advocates should ensure that they are operating with the most current authorization if engaged in FEPP in these environments.

- (2) The transfer authorities cited in Title 40 are “disposition” based and do not authorize the transfer of defense articles. “Security Assistance” based authorities must be used to properly justify the transfer of defense articles.

- D. Excess Defense Articles (EDA) Transfers: See section VII.C.2.(c) *infra*.
- E. Afghanistan Defense Articles and Services Transfer: 2013 NDAA § 1222 (current extension at 2018 NDAA § 1211)
 1. Purpose: to transfer defense articles from DoD stocks and to provide defense services in connection with the transfer to the military and security forces of Afghanistan to support the efforts of those forces in restoring and maintaining peace and security
 2. Time: authority expires Dec. 31, 2018.
 3. Amount: aggregate replacement value of articles transferred and services provided may not exceed \$250,000,000 (value of Excess Defense Articles transferred under Foreign Assistance Act do not count against this amount)
 4. Approval Authority: Secretary of Defense with concurrence of Secretary of State. Prior to the exercise of this authority, SECDEF must provide a report on the plan for disposition of equipment in Afghanistan to appropriate congressional committees.

VII. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS (TITLE 22)

- A. Introduction
 1. General Rule: The Department of State (DoS) has the primary responsibility to establish policy and conduct Foreign Assistance on behalf

of the USG– even during U.S. Military Operations.⁷⁶ The legal authority for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.⁷⁷

2. Foreign assistance encompasses any and all assistance to a foreign nation, including Security Assistance (assistance to the internal police forces and military forces of the foreign nation), Development Assistance (assistance to the foreign government in projects that will assist the development of the foreign economy or their political institutions), and Humanitarian Assistance (direct assistance to the population of a foreign nation, including disaster relief).
3. Human Rights and Foreign Assistance.
 - a. The “Leahy Amendment,” first enacted in the 1997 Foreign Operations Appropriation Act (DoS Appropriations Act)⁷⁸ prohibits the USG from providing funds to the security forces of a foreign country if the DoS has credible evidence that the foreign country or its agents have committed gross violations of human rights unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.
 - b. This language is usually found in yearly DoD Appropriations Act and is now codified at 10 U.S.C. § 362, prohibiting the DoD from using appropriated funds for any training, equipment, or other assistance for a unit of a foreign security force if the SecDef has credible information that the unit has committed a gross violation of human rights. The SecDef, after consulting with SecState, may waive this prohibition if the Secretary determines that the waiver is required by extraordinary circumstances.

B. Framework for DoS Foreign Assistance Authorizations and Appropriations

1. As the primary agency responsible for foreign assistance, the DoS, (through its Director for Foreign Assistance (DFA)) and USAID have

⁷⁶ See HBA, *supra* note 1.

⁷⁷ The Director of U.S. Foreign Assistance within the Department of State is charged with directing U.S. foreign assistance in accordance with foreign policy objectives. Information can be found at <http://www.state.gov/f/index.htm>.

⁷⁸ See Pub. L. No. 105-118, Foreign Operations, Export Financing, and Related Programs Appropriations Act, section 570, “Limitation on Assistance to Security Forces.”

identified five broad strategic goals to shape and sustain a peaceful, prosperous, just, and democratic world: (1) Strengthen America’s economic reach and positive economic impact; (2) Strengthen America’s foreign policy impact on our strategic challenges; (3) Promote the transition to a low-emission, climate-resilient world while expanding global access to sustainable energy; (4) Protect core U.S. interests by advancing democracy and human rights and strengthening civil society; and (5) Modernize the way we do diplomacy and development.⁷⁹

2. Funding these objectives involves multiple funding sources. A complete review of all DoS funding sources and initiatives for foreign assistance is beyond the scope of what Judge Advocates will encounter in the military operating environment. Therefore, this outline will focus on those DoS foreign assistance authorizations and appropriations that interface with DoD operations.
3. “The Players”: Administering and performing foreign assistance missions under DoS policy and funding authority involves multiple agencies and/or departments. Of primary importance for Judge Advocates are:
 - a. DoS: assists the President in formulating and executing the foreign policy and relations of the United States of America. The Director, U.S. Foreign Assistance coordinates foreign assistance programs of both DoS and the United States Agency for International Development (USAID).⁸⁰
 - b. USAID: reports to and serves under the “direct authority and foreign policy guidance” of the Secretary of State. USAID administers the bulk of bilateral economic aid, including disaster relief, economic growth, global health, and food assistance. USAID appropriations are generally included under the DoS Title within the current CAA.
 - c. DoD:

⁷⁹ See *State-USAID Joint Strategic Goal Framework*, U.S. DEP’T OF STATE, <https://www.state.gov/documents/organization/223997.pdf> (last visited Mar. 15, 2017). Each of these goals contain several objectives.

⁸⁰ United States Agency for International Development (USAID) is an independent federal government agency that receives overall foreign policy guidance from the Secretary of State. USAID was created by Executive Order after the enactment of the 1961 Foreign Assistance Act and became an independent agency in 1999.

- (1) Defense Security Cooperation Agency (DSCA): DoD organization charged with implementing multiple DoS funded and controlled security assistance programs involving transfer of defense articles⁸¹ and services.⁸²
 - (2) Military Departments and Combatant Commanders: execute many of the programs implemented by DSCA.
4. Accessing the DoS Appropriations and Authorizations. For the deployed unit, properly coordinating for access to the DoS/USAID appropriations and authorizations becomes critical. In a non-deployed environment, a DoD unit would normally coordinate with the Defense Security and Cooperation Agency (DSCA) and follow the procedures of the Security Assistance Management Manual (SAMM).⁸³
 5. Within this narrowed framework, DoS authorizations and appropriations for conducting foreign assistance that interact with DoD may be grouped into three general subcategories consistent with DoS objectives: (1) Peace & Security Assistance, (2) Governing Justly & Democratically, and (3) Humanitarian Assistance.

C. Peace & Security Assistance (SA).

The majority of interaction of DoD with the DoS SA programs falls under the authorizations within The Foreign Assistance Act of 1961 (FAA)⁸⁴ and The Arms Export Control Act of 1976 (AECA).⁸⁵ Congress frequently amends these Acts in the annual DoS and DoD appropriation acts. Judge Advocates may find it beneficial to consider these programs in two general subcategories: reimbursable and U.S.-financed.

⁸¹ See 22 U.S.C. § 2403 (defining “defense article” and “defense service”). The term “defense article” includes any weapon, weapons system, munition, aircraft, vessel, boat, or other implement of war; any property, installation, commodity, material, equipment, supply or goods used for the purposes of furnishing military assistance; any machinery, facility, tool, material, supply, or other item necessary for the manufacture, production, processing, repair, servicing, storage, construction, transportation, operation, or use of any article previously listed; or any component or part of the articles listed. *Id.*

⁸² 22 U.S.C. § 2403(f) (defining defense service as including “any service, test, inspection, repair, publication, or technical or other assistance or defense information used for purposes of furnishing military assistance, but does not include military educational and training activities under chapter 5 of part II [22 USCS §§ 2347 et seq.]”).

⁸³ DSCA implements those security assistance programs involving the transfer of defense articles or services. Regulatory guidance can be found in Defense Security Cooperation Agency (DSCA) Manual 5105.38-M, “Security Assistance Management Manual,” [hereinafter SAMM], available at <http://www.samm.dsca.mil/>.

⁸⁴ 22 U.S.C. § 2151 et seq.

⁸⁵ 22 U.S.C. § 2751 et seq.

1. Reimbursable Security Assistance

a. Foreign Military Sales (FMS) - 22 U.S.C. § 2761 (AECA §§ 21-27).

(1) Purpose: Contracts or agreements between an authorized foreign purchaser and the U.S. for the sale of DoD defense articles, services, and training from existing stocks or new procurements for the purpose of internal security, legitimate self-defense, participation in regional/collective arrangements consistent with the UN charter, or to enable foreign military contribution to public works and civic action programs.

(2) Time/Amount: FMS is a “Revolving Fund,” with the intent of being self-funded. As such, no annual appropriation is required.

(a) DoS is authorized to charge an administrative fee to the foreign purchasing nation for each “case” (sale) to reimburse the U.S. for administrative costs.

(b) This fee allows DoS to generate the funds necessary to reimburse the appropriate DoD account via an Economy Act transaction, or other reimbursement authority in another statute.

(c) Unless an exception applies under the statute, payment must be made in advance of delivery of the defense article/service and must be made in U.S. dollars.

(3) Approval Authority:

(a) Countries or international organizations are only eligible for FMS transactions if the POTUS makes a determination of their eligibility.⁸⁶ DoS then determines whether an FMS case is approved. Current eligibility criteria:

⁸⁶ SAMM, Table C4.T2 contains a list of current eligibility status for Countries and International Organizations.

- (i) Furnishing of defense articles / services must strengthen U.S. security and promote world peace.
 - (ii) No re-transfers without Presidential consent.
 - (iii) No use of articles / services for purposes other than for which furnished, unless consent of the President has first been obtained.
 - (iv) Recipient must maintain security of such article.
- (b) The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on behalf of DoS via the Defense Security Cooperation Agency (DSCA). Practitioners can find additional information on this implementation in the Security Assistance Management Manual (SAMM) chapters 4-6 as well as online at <http://www.samm.dsc.mil/>.
- (4) Limitations:
- (a) The military equipment, weapons, ammunition, and logistics services, supplies, and other support must conform to the restrictions of the DoS International Traffic in Arms Regulations (ITARs).⁸⁷
 - (b) ITAR-designated Significant Military Equipment (SME) may only be purchased via the FMS, and may not be purchased via the Direct Commercial Sales (DCS) program. (See *infra*, V.C.1.c.).
- b. Foreign Military Lease Program (FML)- 22 U.S.C. § 2796-2796a (AECA §§ 61-62).
- (1) Purpose: Authorizes leases of Defense articles to foreign countries or international organizations provided there is a

⁸⁷ 22 CFR part 121

compelling foreign policy and national security reason for lease rather than sale.

(2) Time/Amount:

- (a) The leases generally occur on a reimbursable basis. The U.S. may, however, provide foreign nations loans and/or grants via the DoS Foreign Military Financing Program (*See infra*, III. C. 1.).
- (b) The lessee must pay in U.S. dollars all costs incurred by the U.S. in leasing, to include depreciation.
- (c) Leases must be for a fixed duration not to exceed 5 years.

(3) Practitioner's Notes: DSCA executed program on behalf of DoS.

c. Direct Commercial Sales (DCS) Program - 22 U.S.C. § 2778

- (1) Purpose: Authorizes eligible governments to purchase defense articles or services directly from defense contractors.
- (2) Time/Amount: DoD is not involved in the management of the sale from the contractor to the foreign nation.
- (3) Practitioner Notes:
 - (a) A DoS review and "export license" is required from the Directorate of Defense Trade Controls before the contractor may provide the products to the foreign nation.⁸⁸
 - (b) Some Significant Military Equipment (SME) must be purchased through FMS.

⁸⁸ See ITAR part 123 for regulatory procedures for licensing to export defense articles.

2. U.S. Financed DoS Security Assistance.

a. Foreign Military Financing (FMF) Program - 22 U.S.C. §2763 (AECA § 23); 22 U.S.C. § 2311 (FAA Part II, Ch. 2).

(1) Purpose: to finance, through grants or loans, the acquisition of defense articles, services, and training (through the FMS/FML or DCS programs) by friendly foreign countries to strengthen U.S. security and foreign policy.

(2) Time: 1 year period of availability.⁸⁹ Loaned funds must be repaid over a period not to exceed 12 years unless otherwise approved by Congress.

Amount: FY 2016 CAA appropriated \$4,737,522,000 (note: there are additional caveats and instructions on use).

(3) Practitioner's Notes:

(a) Responsibility of the Asst. Sec. for Political-Military Affairs/ Under Sec. for Arms Control & International Security.

(b) DSCA executed program on behalf of DoS.

(c) U.S. financing through Foreign Military Financing (FMF- discussed *infra* section V.C.2.a) is only approved on a limited case-by-case basis.⁹⁰

b. Presidential Drawdowns- Foreign Assistance Act of 1961 and Special Legislative Authorities.

Directives by the President pursuant to the FAA or other special legislation for DoD to transfer on-hand defense articles and services (including military education and training) to a foreign country, their military their military or security services, or the

⁸⁹ Sec. 7011 of 2010 CAA (Pub. L. No. 111-117), provides that if such funds are initially obligated before the expiration of period of availability, they shall remain available for an additional 4 years.

⁹⁰ See "Defense Security Cooperation Agency Guidelines for Foreign Military Financing of Direct Commercial Contracts," August 2009.

foreign civilian population. The items need not be “surplus” or “excess.”

- (1) Emergency Drawdown Authority - 22 U.S.C. § 2318(a)(1)⁹¹
 - (a) Purpose: for unforeseen emergencies requiring immediate military assistance to a foreign country or international organization that can't be addressed under AECA or any other law.
 - (b) Time/Amount: defense articles and services of an aggregate value of up to \$100,000,000 in any fiscal year.
 - (c) Limitations: Requires presidential determination (PD) and prior congressional notification (CN).

- (2) Nonemergency Drawdown Authority - 22 U.S.C. § 2318(a)(2).⁹²
 - (a) Purpose: for international narcotics control, disaster relief, antiterrorism assistance, nonproliferation assistance, and migration and refugee assistance.
 - (b) Time/Amount: articles and services of an aggregate value of up to \$200,000,000 from any agency of the U.S. in any fiscal year.
 - (i) Of that amount, not more than \$75M may come from DoD resources;
 - (ii) not more than \$75M may be provided for counternarcotics; and
 - (iii) not more than \$15M to Vietnam, Cambodia and Laos for POW/MIA accounting.

⁹¹ Foreign Assistance Act (FAA) § 506(a)(1)

⁹² FAA § 506(a)(2)

- (c) Limitations: Drawdowns supporting counternarcotics and refugee or migration assistance require PD 15-day prior CN.⁹³
- (3) Peacekeeping Operations Drawdown Authority - 22 U.S.C. § 2348a(c)(2).⁹⁴
 - (a) Purpose: provision of commodities and services from *any* federal agency for unforeseen emergencies related to peacekeeping operations and other programs in the interest of national security.
 - (b) Time/Amount: of an aggregate value up to \$25,000,000 in any fiscal year.
 - (c) Limitations: Requires PD and prior CN.
 - (4) Special Legislation Drawdown Authorities.
 - (a) Iraq Liberation Act of 1998 - Pub.L. No. 105-338, 112 Stat. 3178 (Oct. 31, 1998).
 - (i) Purpose: defense articles from the stocks of DoD, defense services of DoD, and military education and training for Iraqi democratic opposition organizations.
 - (ii) Time/Amount: may not exceed \$97 million.⁹⁵
 - (iii) Limitations: requires 15 day prior CN.

⁹³ 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).

⁹⁴ FAA § 552(c)(2).

⁹⁵ President Bush subsequently directed \$92 million in drawdown assistance in 2002. See, Presidential Determination No. 03-06, 67 Fed. Reg. 78,123 (Dec. 23, 2002). Unique to drawdowns, Congress subsequently appropriated \$63.5M reimbursement for IFSA drawdown support. See, Sec. 1309 of the FY03 Emergency Wartime Supplemental Appropriation.

- (b) Afghanistan Freedom Support Act of 2002 – 22 U.S.C. § 7532.
 - (i) Purpose: Presidential authority to drawdown defense articles and services, and military education and training for the Government of Afghanistan and other eligible foreign countries/ international organizations.⁹⁶ The assistance may also be provided by contract.
 - (ii) Time/Amount: of an aggregate value not to exceed \$550,000,000. Amounts appropriated for reimbursement of this authority increase this limitation on aggregate value.⁹⁷

c. Excess Defense Articles (EDA) - 22 U.S.C. § 2321j.

- (1) Purpose: to offer, at reduced or no cost, lethal and non-lethal defense articles declared as excess by the Military Departments to foreign governments or international organizations in support of U. S. national security and foreign policy objectives.
- (2) Time/Amount: the aggregate current market value of EDA transferred in a fiscal year may not exceed \$500,000,000.
 - (a) Prior to sale, the value of the item may be depreciated.
 - (b) EDA may be purchased by foreign nations, or they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program. While both sales and grants are authorized, sales are rarely conducted under this authority – grants are the primary type of transfer.

⁹⁶ This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act.

⁹⁷ For example, Congress also provided \$165M reimbursement for the AFSA Drawdown. See Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.

- (c) DoD procurement funds may not be expended in connection with the transfer.

(3) Limitations:

- (a) Must notify Congress 30 days prior to transfer of any SME or EDA valued at \$7,000,000 or more.
- (b) Generally, DoD funds may not be expended for packing and transport of EDA. As an exception, where DoS determines it is in the U.S. national interest, no-cost space available transportation is authorized for countries receiving less than \$10M FMF or IMET in any fiscal year, and the total weight of the transfer does not exceed 50,000 lbs.

(4) Practitioner Notes:

- (a) EDA are those defense articles no longer needed and declared excess by the U.S. Armed Forces (including the Coast Guard).⁹⁸ The determination of excess is made by Defense Logistics Agency (DLA) Disposition Services.
- (b) Articles must be drawn from existing stocks of DoD (for purposes of EDA, the Coast Guard is considered part of DoD).
- (c) Transfer of articles must not have an adverse impact on military readiness.
- (d) DSCA executed program on behalf of DoS.

d. Complex Crises Fund (CCF) –FY 2016 CAA.⁹⁹

⁹⁸ SAMM, paragraph C11.3.1

⁹⁹ DoS Executive Budget Summary, Function 150 & Other International Programs, available at <http://www.state.gov/documents/organization/135888.pdf>.

- (1) Purpose: support programs and activities to prevent or respond to emerging or unforeseen foreign challenges and complex crises overseas.
 - (2) Time: Available until expended.
 - (3) Amount: \$10,000,000
 - (4) Limitations: Not available for lethal assistance or to respond to natural disasters.
- e. International Military Education & Training (IMET) - 22 U.S.C. §§ 2347-2347d.
- (1) Purpose: program to fund the military training of foreign soldiers and certain related civilian personnel¹⁰⁰ at U.S. military schools in order to:
 - (a) Encourage effective relationships and understanding between the U.S. and foreign countries to further international peace and security;
 - (b) Improve ability of participating countries to utilize their resources for greater self-reliance; and
 - (c) Increase awareness of internationally recognized human rights.
 - (2) Time/Amount: FY 2017 CAA appropriates \$110,300,000 available for the fiscal year.
 - (a) Of this amount, \$6,000,000 remains available until September 30, 2018.

¹⁰⁰ Foreign civilians who are not members of the government may only be provided training under this authority if it (1) would contribute to responsible defense resource management, (2) foster greater respect for and understanding of the principle of civilian control of the military, (3) contribute to cooperation between military and law enforcement personnel with respect to counternarcotics efforts, and (4) improve military justice procedures in accordance with internationally recognized human rights.

- (b) Reimbursement should be sought for provided IMET.
 - (3) Practitioner Notes: DSCA executed program on behalf of DoS. Guidelines can be found in the SAMM, chapter 10.¹⁰¹
- f. Peacekeeping Operations (PKO) - 22 USC § 2348
- (1) Purpose: necessary expenses for PKO in furtherance of the national security interests of the United States, to include enhancing the capacity of foreign civilian security forces.
 - (2) Time: 1 year funds.
 - (3) Amount: FY 2016 CAA appropriated \$135,041,000.
 - (4) Practitioner's Notes: current focus for these programs is in Africa. Judge Advocates assigned to the AFRICOM area of responsibility should be familiar with DoS PKO programs for which DoD provides military expertise and assistance. One such initiative is the Global Peace Operations Initiative (GPOI). No funds may be used in Africa to support any military training or operations that include child soldiers.

D. Governing Justly & Democratically

DoS and USAID finance a number of Governing Justly & Democratically programs, including: Rule of Law and Human Rights, Good Governance, Political Competition and Consensus Building, and Civil Society. Several of these programs do involve DoD. The most prominent funding sources for these programs are the Economic Support Fund (ESF) and the Bureau of International Narcotics and Criminal Law Enforcement (INCLE), both of which provide DoS funds to Provincial Reconstruction Teams in Iraq and Afghanistan, and important element for development and the Rule of Law. Judge Advocates are often key participants in the Rule of Law mission while deployed and should be familiar with the interagency aspect of funding such missions.

¹⁰¹ The Defense Institute of Security Assistance Management operates the IMET for DSCA and maintains an online database of procedures and programs, *available at* <http://www.disam.dsca.mil/itm/>.

1. Economic Support Fund (ESF), 22 USC §2346.

a. Purpose: to advance U.S. interests by helping countries meet short and long-term political, economic, and security needs. In other words, the primary function is to build the governance capacity of a foreign country.¹⁰²

b. Time: generally 2 year period of availability.

Amount: 2017 CAA: \$1,041,761,000 (available until 30 Sep 2018)

c. Limitations:

(1) Under §2346(e), these funds may NOT be used for military or paramilitary purposes.

(2) These funds are sometimes earmarked for certain countries within the appropriations act. They are not exclusively for Afghanistan.

(3) No ESF (or INCLE) may be used to assist the Government of Afghanistan until the Sec. of State, in consultation with the Administrator of USAID, certifies and reports to appropriations committees several key factors concerning corruption.

(4) Funds should also be used to the maximum extent practicable to emphasize participation of women.

d. Practitioner Notes: ESF OCO funds are often used to fund PRT's and Rule of law activities.

2. International Narcotics and Criminal Law Enforcement (INCLE) Funds - 22 USC §2291.

a. Purpose: to “furnish assistance to any country or international organization . . . for the control of narcotic and psychotropic drugs

¹⁰² USAID is the Agency primarily responsible for expenditure of these funds.

and other controlled substances, or for *other anticrime purposes*.”¹⁰³

b. Time: generally 2 year period of availability.

Amount: FY 2017 CAA: \$889,664,00 available through 30 September 2018.

c. Practitioner Notes:

(1) The DoS Bureau of International Narcotics and Criminal Law Enforcement (INL) has a broad mandate to “work[] to keep Americans safe at home by countering international crime, illegal drugs, and instability abroad. INL helps countries deliver justice and fairness by strengthening their police, courts, and corrections systems.”¹⁰⁴

E. Humanitarian Assistance.

1. DoS and USAID are the U.S. agencies designated as the lead to provide humanitarian assistance in response to emergencies and natural disasters overseas. Judge Advocates should be generally aware that DoS/USAID has authority and appropriations to fund humanitarian assistance from several different accounts. These accounts include, but are not limited to: Development Assistance Funds, the Economic Support Fund, and International Disaster Assistance Funds.
2. Although DoS/USAID have the primary responsibility and are appropriated funds to carry out humanitarian assistance, DoD possesses the logistics infrastructure and may be called upon to assist with transport and provision of supplies and aid (see VI.D.).¹⁰⁵

VIII. CONCLUSION.

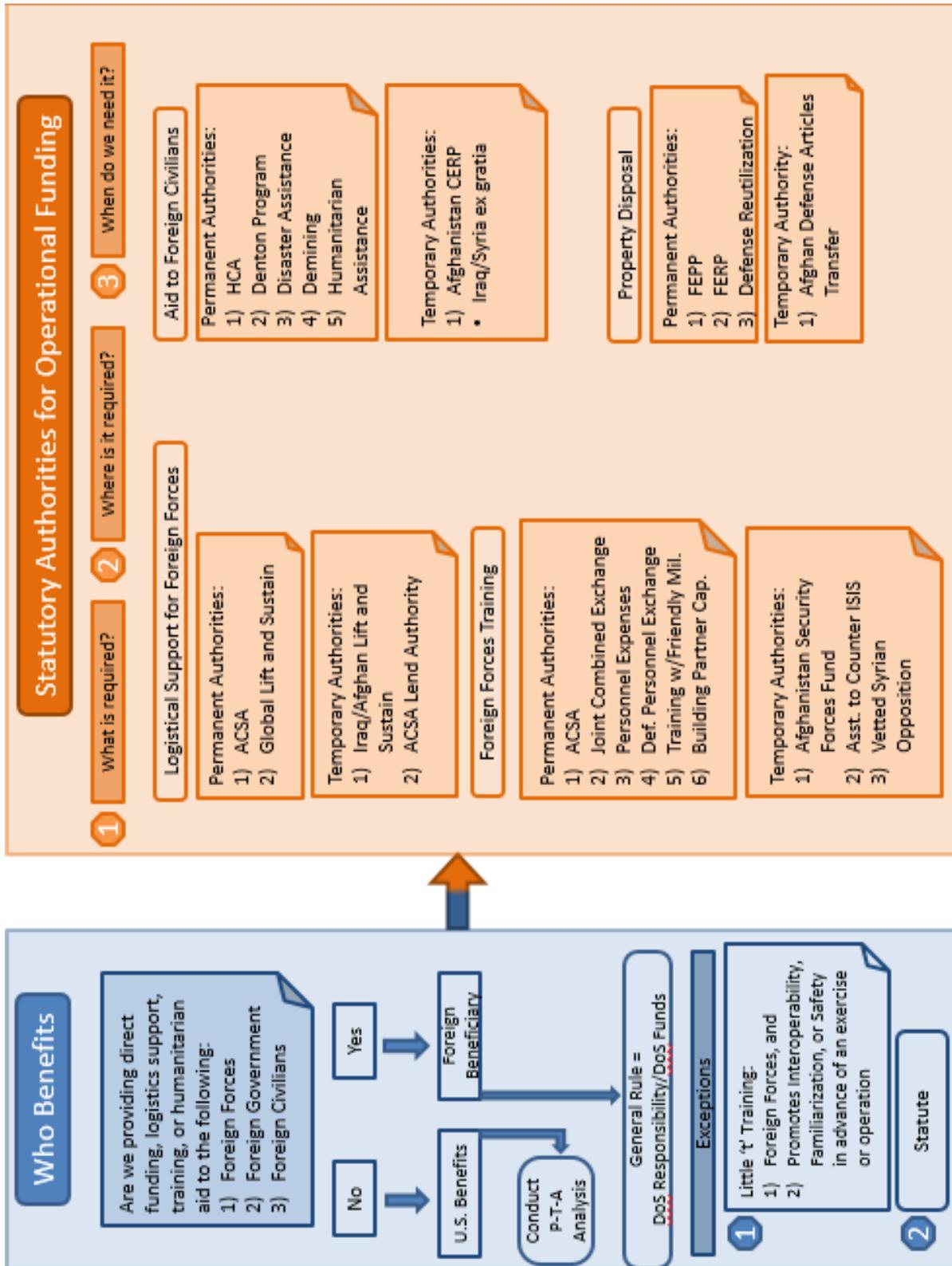
¹⁰³ 22 U.S.C. § 2291 (a) (emphasis added).

¹⁰⁴ See U.S. DEP’T OF STATE, BUREAU OF INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS (INL), <https://www.state.gov/j/inl/> (last visited March 15, 2017).

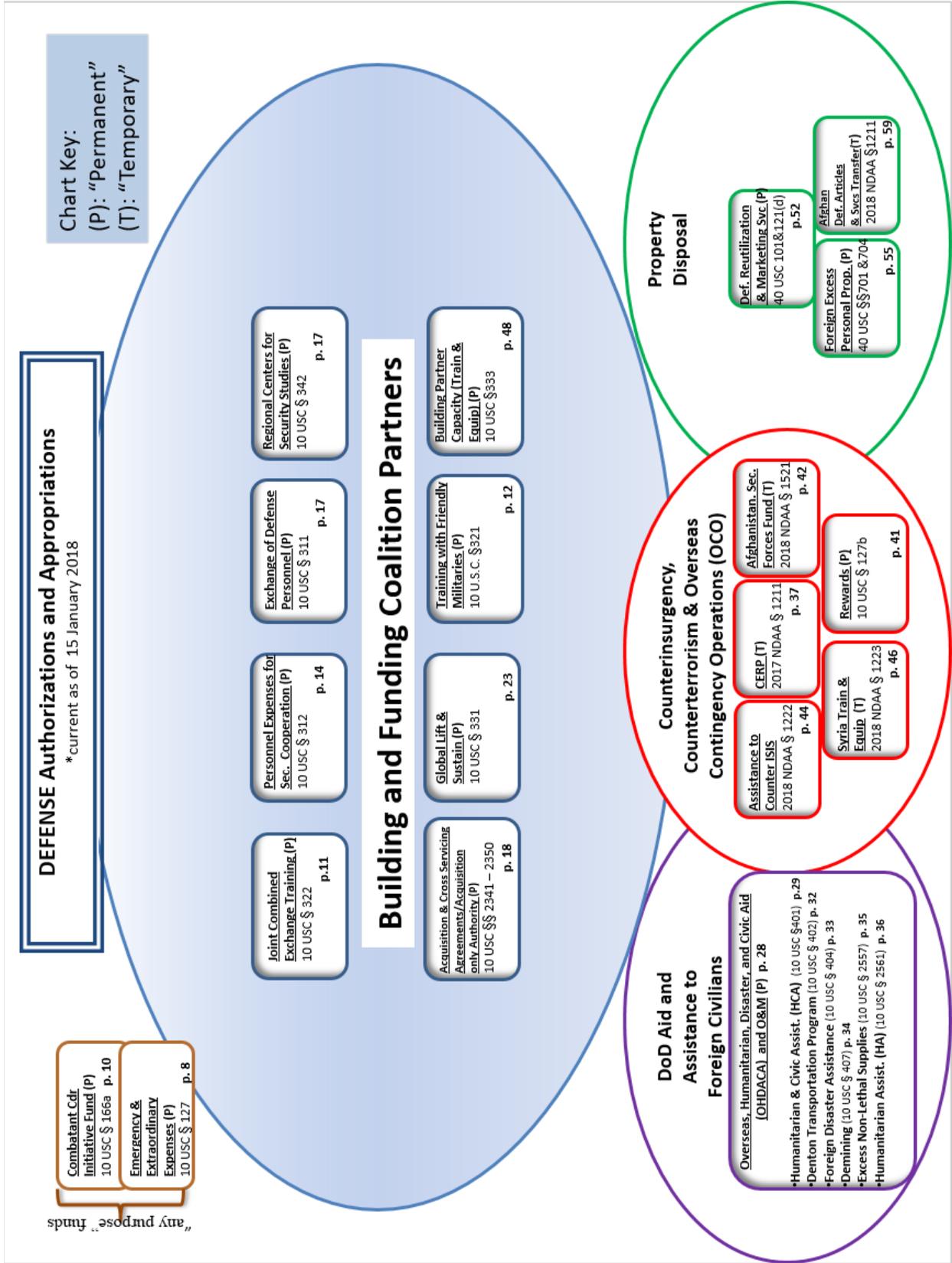
¹⁰⁵ DoS exceptional requests to DoD for Humanitarian and Disaster Assistance are initiated and coordinated through the Office of International Security Operations (falling within the Under Secretary for Arms Control and International Security’s Bureau of Political-Military Affairs). See <http://www.state.gov/t/pm/iso/c21542.htm#dos-ihada> (last accessed March 15, 2017).

- A. The Department of State, and not the Defense Department, is primarily responsible for all foreign assistance.
- B. Department of Defense funds foreign assistance, including security and humanitarian assistance, by statutory exception only.
- C. Practitioners must find either permanent (usually Title 10) or temporary statutory authority for the Department of Defense to fund foreign assistance, unless a limited exception of “little t” training applies to the operation.

APPENDIX A: OPERATIONAL FUNDING ANALYSIS FLOW CHART



APPENDIX B: DOD FUNDING SOURCES



CHAPTER 11:



THE JUDGMENT FUND

CHAPTER 11

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

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CHAPTER 11

FUNDING JUDGMENTS, AWARDS, AND SETTLEMENTS

I. REFERENCES.

- A. 31 U.S.C. § 1304 (providing a permanent appropriation from which to make payments for compromise settlements, awards, and judgments).
- B. 41 U.S.C. § 7108 (authorizing payment of claims under the Contract Disputes Act from the Judgment Fund).
- C. Treasury Financial Manual (TFM) 6-3100, vol I, Certifying Payments and Recording Corresponding Intragovernmental Receivables in the Federal Government's Judgment Fund (Apr. 2009) [hereinafter TFM 6-3100]. Available at <http://tfm.fiscal.treasury.gov/v1/p6/c310.pdf>.
- D. General Accounting Office, *Principles of Fed. Appropriations Law*, vol. III, ch. 14, GAO-08-978SP (3d ed. 2008) [hereinafter GAO Red Book].
- E. DoD Regulation 7000.14-R, *Financial Management Regulation*, vols. 3 & 10 [hereinafter DoD FMR]. <http://comptroller.defense.gov/FMR/fmrvolumes.aspx>.
- F. Defense Finance and Accounting Service--Indianapolis Reg. 37-1, Finance and Accounting Policy Implementation [hereinafter DFAS-IN 37-1]. Available at <http://www.asafm.army.mil/offices/BU/Dfas371.aspx?OfficeCode=1200>.
- G. Army Federal Acquisition Regulation Supplement, pt. 5133.212-98 [hereinafter AFARS].
- H. Air Force Instr. 65-601, vol I, Budget Guidance And Procedures (16 August 2012) [hereinafter AFI 65-601].

II. DEFINITIONS.

- A. Judgment. A judgment is a “decision issued by a court . . . that resolves a case, as far as that court is concerned, by ruling on the issue in that case.” *See* Ralph C. Nash et al., *The Government Contracts Reference Book*, p. 305 (4th ed., 2013).
- B. Consent Judgment. A consent judgment (or “consent decree”) is a judgment issued by a court in which the court sanctions an agreement reached by the parties.
- C. Settlement. A settlement is an administrative determination that disposes of a claim. *See e.g.*, 10 U.S.C. § 2731 (defining the verb to “settle” as to “consider, ascertain, adjust, determine, and dispose of a claim, whether by full or partial allowance or by disallowance”).
- D. Compromise Settlement. A compromise settlement is an “agreement reached by the parties involving mutual concessions.” *GAO Red Book*, vol. III, ch. 14, 14-34 (citing 38 Op. Att’y Gen. 94, 95-96 (1933)).
- E. Award. An award is a decision issued by an administrative board such as the Boards of Contract Appeals.
- F. Unexpired Appropriation (Unexpired Account). An appropriation account available for obligation during the current fiscal year (current funds). *See* DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.
- G. Expired Account or Appropriation. An appropriation or fund account in which the balances are no longer available for incurring new obligations because its period of availability has ended, but which retains its fiscal identity and remains available to adjust and liquidate previous obligations. *See* 31 U.S.C. § 1553(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.
- H. Closed (or Canceled) Account or Appropriation. An appropriation that is no longer available for any purpose. An appropriation is closed/canceled five years after the end of its period of availability. *See* 31 U.S.C. § 1552(a); DoD FMR, Glossary; DFAS-IN 37-1, Glossary; AFI 65-601, vol I, Glossary.

III. OBLIGATION OF FUNDS FOLLOWING AGENCY-LEVEL SETTLEMENT OF A CONTRACT CLAIM. Generally, obligate funds using the same obligation rules that are used for normal contract changes. *See* DFAS-IN 37-1, Table 8-6, paras. 13-14; *see also supra* Chapter 3, *Availability of Appropriations as to Time*; Chapter 5, *Obligating Appropriated Funds*.

- A. If the settlement relates to an **in-scope contract change** (the “relation-back theory”), that settlement should be funded from the appropriation cited on the original contract. *See* DoD FMR, vol. 3, ch. 8, para. 080306.B, E; DFAS-IN 37-1, Table 8-7, para. 4; 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. *Recording Obligations Under EPA Cost-Plus-Fixed-Fee Contract*, B-195732, 59 Comp. Gen. 518 (1980); *To the Adm’r, Small Bus. Admin.*, B-155876, 44 Comp. Gen. 399 (1965); *Comptroller Gen. Warren to the Sec’y of the Navy*, B-22324, 21 Comp. Gen. 574 (1941).
1. If the appropriation that was used to fund the original contract has expired, it may still be used to obligate against the settlement, subject to agency restrictions. *See* DoD FMR, vol. 3, ch. 8, para. 080306.B, E; 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; *see also* DoD FMR, vol. 3, ch. 10, para. 100304.
 2. If the appropriation that was used to fund the original contract has expired (and is not yet closed) but is exhausted, a consent judgment is required with payment of that judgment from the Judgment Fund and reimbursement using current funds. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.98 (c)(2)(iv) (contracting officer must contact ASA (FM&C) for authorization prior to entering into a consent judgment).
 3. If the appropriation that was used to fund the original contract has closed/canceled, current funds must be obligated. *See* 31 U.S.C. § 1553; AFI 65-601, vol. I, para. 6.4.1.1, and Figure 6.1; AFARS 5133.212.90-9(b) and (c)(2)(iv). However, the total amount of such charges to the current account may not exceed an amount equal to one percent of the total appropriations for that account. 31 U.S.C. § 1553(b)(2).

- B. If the settlement relates to an **out-of-scope change**, fund it from appropriations available for current obligation. *See* DoD FMR, vol. 3, ch. 8, para. 080306.C-E; AFI 65-601, vol. I, para. 6.3.8 and Figure 6.1.

IV. OBLIGATION OF FUNDS FOLLOWING A JUDGMENT OR AWARD.

- A. If the agency has current funds available, pay the judgment/award using current funds (not the Judgment Fund). *See* AFARS 5133.212.98(d).
- B. If insufficient current funds are available, the Judgment Fund must be used to pay the judgment/award. *See* AFARS 5133.212.98(b). The Contract Disputes Act requires the agency to reimburse the Judgment Fund from its operating appropriations current at the time of judgment/award. 41 U.S.C. § 7108(c). *See also* DoD FMR, vol. 3, ch. 8, para. 080402.F; AFI 65-601, vol. I, para. 6.3.6.7.1; DFAS-IN 37-1, Table 8-6, para. 15.

V. BACKGROUND BEHIND THE NEED FOR AND CREATION OF THE JUDGMENT FUND.

- A. The Appropriations Clause (Article I, § 9, cl. 7) prohibits the withdrawal of funds from the Treasury absent an appropriation. This Constitutional requirement applies to both the executive branch and the judiciary. *See Collins v. United States*, 15 Ct. Cl. 22, 36 (1879) (holding that the Appropriations Clause does not prohibit the incurrence of legal liabilities through issuance of a judgment, but likewise does not authorize the withdrawal of money to satisfy that judgment).
- B. Judgments can be satisfied through one of the following methods:
 - 1. A specific appropriation covering a specific judgment;
 - 2. A general appropriation covering multiple or a class of judgments; or
 - 3. An authorization from Congress to use existing appropriations.

- C. The Judgment Fund was established in 1956 to alleviate the need for specific authorizing and/or appropriating legislation following each successful claim against the United States thereby reducing or eliminating the amount of interest successful claimants would receive pending such legislation. *See* H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

VI. THE JUDGMENT FUND. 31 U.S.C. § 1304.

- A. **General Concept of the Fund.** The primary purpose behind the Judgment Fund is to establish a permanent appropriation, which would allow the prompt payment of judgments and compromise settlements, thereby reducing the cost to the Government of post-judgment interest. *See United States v. Varner*, 400 F.2d 369 (5th Cir. 1968); H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1957).

- B. **Characteristics.**

- 1. **Permanent and Indefinite.** The Judgment Fund is “standing authority” to access and disburse appropriations from the Treasury. The Judgment Fund has no fiscal year limitations, nor are there any limits with respect to the amount of funds available. Consequently, there is no requirement that Congress appropriate or “replenish” the Fund either annually or at any other time. 31 U.S.C. § 1304(a).
- 2. **Applicability.** Only those judgments, awards, and compromise settlements that are statutorily specified are eligible for payment out of the Judgment Fund. 31 U.S.C. § 1304(a)(3), (b), and (c); *see also GAO Red Book*, vol. III, ch. 14, 14-32. These statutorily specified judgments, awards, and compromise settlements consist of the following:

- a. **Judgments:**

- (1) A United States District Court judgment made pursuant to 28 U.S.C. § 2414;
 - (2) A Court of Federal Claims judgment made pursuant to 28 U.S.C. § 2517 or 41 U.S.C. § 7108(a); and

- (3) 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 interest of the United States.

b. **Awards (administrative adjudications) made pursuant to:**

- (1) The Federal Tort Claims Act (28 U.S.C. § 2672);
- (2) The Small Claims Act (31 U.S.C. § 3723);
- (3) The Military Claims Act (10 U.S.C. § 2733);
- (4) The Foreign Claims Act (10 U.S.C. 2734);
- (5) The National Guard Claims Act (32 U.S.C. § 715);
- (6) The National Aeronautics and Space Act of 1958 (51 U.S.C. § 20113); and
- (7) The Contract Disputes Act of 1978 by a Board of Contract Appeals (41 U.S.C § 7108(b)).

c. **Compromise Settlements.** When Congress created the Judgment Fund in 1956, it initially did not permit payment out of the fund for compromise settlements. In the late 1950s, 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:

- (1) Compromise settlements negotiated by the Department of Justice (DOJ) to dispose of actual or imminent litigation (28 U.S.C. § 2414); and

(2) 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.” *Christian v. United States*, 49 Fed. Cl. 720, 727 (2001), *rev’d in part on other grounds*, 337 F.3d 1338 (Fed. Cir. 2003). 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 not to 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 Be Provided For Otherwise.** One of the fundamental tenets 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 compromise settlement. 31 U.S.C. § 1304(a)(1). *See, e.g., Lieutenant Colonel Hervey A. Hotchkiss*, B-249060.2, 1993 U.S. Comp. Gen. LEXIS 1070 (Oct. 19, 1993) (unpub.) (because 10 U.S.C. §§ 2733(d) and 2734(d) otherwise provide the funding source for \$100,000 on a Military Claims Act settlement, the Judgment Fund may only be used to pay that portion of any settlement in excess of \$100,000); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block--Payment of Judgment*, B-202083, 62 Comp. Gen. 12, 14 (1982) (because the HUD's Special Risk Insurance Fund was available to pay a housing contractor's judgment, the Judgment Fund was unavailable). *See also* S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961) (the Judgment Fund can pay settlements only to the extent that agency appropriations are not otherwise available); 31 U.S.C. § 1304(a)(3)(D) (the Judgment Fund may be used to make payment only on that portion of any claim settlements in excess of the amount the agency is capable of paying from its appropriations when the claim arises under the Military Claims Act, the Foreign Claims Act, the National Guard Claims Act, or the National Aeronautics and Space Act of 1958).

a. The issue of whether funds are “otherwise provided for” centers on whether, as a matter of law, a specific appropriation exists to cover the judgment and not on whether there are sufficient funds in the account to cover payment of the judgment. *The Honorable Strom Thurmond*, B-224653, 66 Comp. Gen. 157, 160 (1986); 22 Op. Off. Legal Counsel 141 (1998). *See also GAO Red Book*, vol. III, ch. 14, 14-39 (The agency's only recourse in this situation is to seek additional appropriations from Congress, as it would have to do in any other deficiency situation. For judgments legally payable from agency appropriations, the amount and time limitations imposed on that appropriation apply just as with any other expenditure from that appropriation.)

- b. **Source-of-Funds Determination.** In every case, there is only one proper source of funds with which to make payment, and therefore no election to be made. If agency funds are available, the Judgment Fund is not. Conversely, if the Judgment Fund is the proper source, then agency funds may not be used to pay the judgment. *GAO Red Book*, vol. III, ch. 14, p. 14-40. *See* 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made); *See, e.g., In the matter of Payment of Judgments under Back Pay Act and Title VII of Civil Rights Act*, B-178551, 58 Comp. Gen. 311 (1976) (the Air Force erred by charging agency appropriations rather than Judgment Fund in paying a court judgment resulting from the Back Pay Act).

VII. ACCESS TO JUDGMENT FUND UNDER THE CONTRACT DISPUTES ACT.

- A. **The Contract Disputes Act (CDA) of 1978.** Prior to 1978, monetary awards by the boards of contract appeals were payable from agency appropriations only. The CDA requires that awards by the boards of contract appeals be treated in a manner similar to federal court judgments. 41 U.S.C. § 7108.
 1. Any monetary judgment against the United States must be paid in accordance with the procedures applicable under the Judgment Fund statute. *See* DoD FMR, vol. 10, ch. 12, paras. 120208-10.
 2. The agency must reimburse the Judgment Fund for any payment made by the agency using the Fund. *See* 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210; DFAS-IN 37-1, Table 8-6, para. 15; AFI 65-601, vol. I, para. 6.3.6.7.1.
- B. **Consent Judgments.** The Judgment Fund is generally not available to pay agency settlements (*i.e.*, settlements between the contracting officer and the contractor). One way to work around this restriction is for the agency and the contractor to stipulate or consent to an entry of award based upon the terms of the settlement. *See* DoD FMR, vol. 10, ch. 12, para. 120208.B; AFARS 5133.212.98 (c)(2)(iii); *See, e.g., Casson Constr. Co.*, GSBCA No. 7276, 84-1 BCA ¶ 17,010. The Army policy, however, is that personnel must provide prior notification to DA of their intent to enter into a consent judgment and must also determine whether sufficient non-closed funds are available. *See* AFARS 5133.212.98 (c)(2)(iii) (contracting officer must contact ASA (FM&C) for authorization prior to entering into a consent judgment).

C. **Compromise Settlements.** The Judgment Fund will provide necessary appropriations for compromise settlements reached by the DOJ. *See* 31 U.S.C. § 1304(a); 28 U.S.C. § 2677; 28 U.S.C. § 2414 (compromise settlements “shall be settled and paid in a manner similar to judgments in like causes, and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements.”).

D. **Reimbursement of the Judgment Fund.**

1. The CDA requires the agency to reimburse the Judgment Fund. 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 120210. In 2002, the Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002 (5 U.S.C. § 2301) was enacted. This Act requires agencies to reimburse the Judgment Fund for payments arising out of discrimination or whistleblower causes of action. *See* DoD FMR, vol. 3, ch. 8, para. 080403.
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. The affected DoD Components first must determine what appropriation(s) originally funded the portion of the contract that led to the claim and subsequent judgment. Second, the Judgment Fund must be reimbursed with funds available for the same purpose that were current at the time of the judgment provided by Title 41, U.S.C. 612. Expired appropriations that were current at the time of the judgment should be used to reimburse the Judgment Fund. If insufficient unobligated balances exist in the expired appropriation or the account has closed, use authority of 31 U.S.C. § 1553 to charge the current appropriation available for the same purpose or obtain a special supplemental appropriation from Congress. If more than one appropriation is involved in the monetary judgment, then the reimbursement is prorated against those appropriations. *Id.*; *see also* DoD FMR, vol. 3, ch. 8, para. 080402.B (if the funds were current at the time of judgment, they may be used even if they are expired by the time reimbursement is made); *Bureau of Land Management--Reimbursement of Contract Disputes Act Payments*, B-211229, 63 Comp. Gen. 308, 312 (1984); S. Rep. No. 95-1118, 95th Cong., 2nd Sess. 33 (1978) (indicating that forcing “agencies to shoulder the responsibility for interest and payment of judgment brings to bear on them the only real incentives available to induce more management involvement in contract administration and dispute resolution.”).
4. Prompt reimbursement of the judgment fund is enforced by the Treasury Judgment Fund Branch who sends a letter requesting reimbursement within 15 days of paid claim confirmation. DoD FMR, vol. 3, ch. 8, para. 080402.C. Within 30 days of receipt of notice for reimbursement, payment to the Treasury Financial Management Service (FMS) is due. *Id.* Component quarterly balances are posted at the following website <http://fms.treas.gov/tma/contract.html>.
5. For reimbursements greater than \$1 million, DOD agencies must first obtain approval from their respective comptrollers. *See* DoD FMR, vol. 3, ch. 8, para. 080304.F

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. § 7109; *Servidone Constr. Corp. v. United States*, 931 F.2d 860, 862-63 (Fed. Cir. 1991).

1. Interest on CDA claims is calculated as simple interest according to rates established by the Department of Treasury pursuant to the Renegotiation Act. FAR 33.208(b); *ACS Constr. Co. v. United States*, 230 Ct. Cl. 845 (1982). *See also A.T. Kearney, Inc.*, 86-1 BCA ¶ 18,613 at 93,509 (interest tolled by contractor's unreasonable delay in processing claim).
2. Claims that exceed \$100,000 must be accompanied by a CDA certification to be considered a valid claim. FAR 33.201; FAR 52.233-1.
3. Claims accompanied by defective CDA certifications accrue interest from the date of receipt by the contracting officer or 29 October 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate. FAR 33.208(c).

F. **Payment of Attorney Fees.** The general rule is that each party pays its own legal expenses. The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A), 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).

1. **Substantially Justified.** A plaintiff is not entitled to an award under the EAJA if “the position of the United States was substantially justified.” “The Government bears the burden of showing that its position was substantially justified.” *Freedom, N.Y., Inc. v. United States*, 49 Fed. Cl. 713, 717 (2001) (citing *Helper v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999)). “[S]ubstantially justified” means “‘justified in substance or in the main’—that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Government’s “position” includes “both the underlying agency action that gave rise to the civil litigation and the arguments made during the litigation itself.” *DGR Assocs., Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012) (citations omitted). This standard does not raise a presumption that the Government’s conduct was not substantially justified just because it lost the case. *See Scarborough v. Principi*, 541 U.S. 401, 415 (2004). As then-Judge Roberts stated, the law does not even require that the Government establish that it entered litigation with a “substantial probability of prevailing.” *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1173 (D.C. Cir. 2005) (quoting *Spencer v. NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983)). Rather, a presiding court is to look at the totality of the Government’s conduct and “make a judgment call whether the government’s overall position had a reasonable basis in both law and fact.” *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). *See 360Training.com, Inc. v. United States*, 111 Fed. Cl. 356 (2013) (granting EAJA motion for attorney fees and expenses incurred in successful bid protest, including attorney fees incurred in unsuccessful motions during protest, except for fees associated with an ultimately unsuccessful government motion to dismiss for lack of jurisdiction (because the jurisdictional issue was one of first impression) and fees associated with related district court litigation by another protester).
2. Attorney fees awarded under the EAJA are not payable from the Judgment Fund. Instead, the agency must use funds current at the time of the judgment or award. *See* 5 U.S.C. § 504(d); DoD FMR, vol. 10, ch. 12, para. 120203; DFAS-IN 37-1, Table 8-6, para. 16.

- G. The Judgment Fund may be used to pay certain costs to the prevailing party in litigation, *see* 28 U.S.C. §§ 1920 and 2412(d); for example, court fees and compensation for court-appointed experts.
- H. Access to EAJA funds is not automatic; eligibility is limited by factors such as the party's net worth. *See* 28 U.S.C. § 2412(d).

VIII. CERTIFICATION.

- A. **Requirement for Certification.** As discussed above, in order to qualify for payment an award or judgment must be final, require payment of specific sums of money, and may not be legally payable from another source of funds. Before payment may be made from the Judgment Fund, judgments and administrative awards must be "certified" as having met these prerequisites. Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)); *see also* 31 U.S.C. § 1304(a)(2).
- B. **Who Performs the Certification.** When the Judgment Fund was initially established, Congress gave this "certification" responsibility to GAO, but then later decided to transfer the responsibility to OMB effective June 30, 1996. *See* Legislative Branch Appropriations Act, 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (1995) (codified at 31 U.S.C. § 501 note, (2000)). Shortly thereafter, certification responsibility was given to the Secretary of the Treasury. *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, tit. II, § 202(m), 110 Stat. 3826, 3843 (codified at 31 U.S.C. § 1304(a)(2) (2000)). The Secretary of the Treasury has delegated this responsibility to the Department of the Treasury's Bureau of the Fiscal Service.
- C. **Mechanics of the Certification Process.** 31 C.F.R. § 256.
 - 1. The "responsible agency" must submit a request for payment to the FMS which certifies that the request complies with all prerequisites to qualify for payment under the Judgment Fund statute. A "responsible agency" is either the agency responsible for defending the United States in federal courts (typically the DOJ), or the agency authorized to settle the claim (*e.g.*, the contracting officer may settle appeals before the board of contract appeals). *See* Treasury Financial Manual 6-3100, § 3125.

2. Prescribed forms. See TFM 6-3100, § 3125. Unless made through the Judgment Fund Internet Claims System (JFICS), all payment requests require submission of FMS Form 194, *Judgment Fund Transmittal*, FMS Form 196, *Judgment Fund Award Data Sheet*, and FMS Form 197, *Judgment Fund Voucher for Payment*. These required forms are available on the Financial Management Service's Judgment Fund website, <https://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/forms.htm>
3. Detailed guidance on the procedures for submitting requests for payment is located at http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/judgementFund_home.htm ; the Treasury's regulations at 31 C.F.R. Part 256, *Obtaining Payments from the Judgment Fund and Under Private Relief Bills* (see the website at <http://www.fiscal.treasury.gov/fsservices/gov/pmt/jdgFund/regulations.htm>); and at Treasury Financial Manual 6-3100.

IX. FUNDS RECEIVED FROM THE CONTRACTOR.

- A. **General Rule.** Funds received from an outside source (*e.g.* other than through the appropriations process) must be deposited in the General Fund of the United States Treasury, as required by the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See *supra* Chapter 2, *Availability of Appropriations as to Purpose*, Section IX (Augmentation of Appropriations & Miscellaneous Receipts).
- B. **Exceptions.** Congress has given federal agencies several exceptions to the Miscellaneous Receipts Statute, but unfortunately these exceptions are scattered throughout the United States Code and public law. In addition, GAO has recognized a limited number of non-statutory exceptions. For a comprehensive overview of the Miscellaneous Receipts Statute and its exceptions, see Major Timothy D. Matheny, *Go On, Take the Money and Run: Understanding the Miscellaneous Receipts Statute and Its Exceptions*, ARMY LAW., Sep. 1997, at 31. The exceptions include some situations in which funds may be received from contractors and retained and used by the agency:

1. **Replacement Contracts.** One of the GAO recognized exceptions to the Miscellaneous Receipts Statute allows an agency “to retain recovered excess procurement costs to fund replacement contracts.” *See Bureau of Prisons -- Dispositions of Funds Paid in Settlement of Breach of Contract Action*, B-210160, 62 Comp. Gen. 678 (1983). Thus, if an agency obtains funds from an original contractor through a judgment, award, or settlement based upon defective workmanship or due to a default termination, the agency may “retain the amount of funds necessary to reprocur the goods or services that would have been provided under the original contract” but any “excess money will be considered miscellaneous receipts and must be deposited into the Treasury.” *Id.*

2. **Refunds.** If an agency is entitled to a refund from a contractor due to a payment made in error, an overpayment, or an adjustment for previous amounts disbursed, the general rule is that agency must credit such refund to the appropriation originally charged with the related costs, regardless of whether the appropriation is current or expired. *See Secretary of War*, B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944).

3. **False Claims Act (FCA) Recoveries.** If an agency obtains a damage award or settlement pursuant to the FCA, it may “retain a portion of monetary recoveries received under an FCA judgment or settlement as reimbursement for false claims, interest, and administrative expenses.” *See Federal Emergency Management Agency -- Disposition of Monetary Award Under False Claims Act*, B-230250, 69 Comp. Gen. 260, 264 (1990). If “treble damages and penalties are collected pursuant to the statute, those funds must be deposited as miscellaneous receipts.” *Id.*

X. CONCLUSION.

CHAPTER 12:



REPROGRAMMING AND TRANSFER AUTHORITY

CHAPTER 12

REPROGRAMMING AND TRANSFER

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CHAPTER 12
REPROGRAMMING AND TRANSFER

I. INTRODUCTION. Upon completing this instruction, the student will understand:

- A. The difference between reprogramming and transferring funds.
- B. The procedural rules involved in reprogramming funds.
- C. The special rules involved in reprogramming for military construction purposes.

II. REFERENCES.

- A. Annual Department of Defense Appropriations Act and Conference Report (or equivalent).
- B. 31 U.S.C. § 1532 (Transfer Statute) “An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn and credited is available for the same purpose and subject to the same limitations provided by the law appropriating the amount. A withdrawal and credit is made by check and without a warrant.”
- C. DOD Regulation 7000.14-R, Financial Management Regulation, vol. 2A, ch. 1 (updated Oct. 2008); vol. 3, chs. 3 (Feb. 2015), 6 (Sep. 2015), and 7 (Mar. 2011) [hereinafter DOD FMR] available at: <http://comptroller.defense.gov/FMR.aspx>
- D. Defense Financial and Accounting Service - Indianapolis 37-1, Finance and Accounting Policy and Implementation, ch. 3, para. 0306 (Mar. 2017) available at: <https://www.asafm.army.mil/dfas.aspx?doc=37-1>.
- E. Air Force Instruction 65-601, Volume I, ch. 2, para. 2.3, Budget Guidance and Procedures (16 August 2012) available at: <http://www.e-publishing.af.mil>.
- F. Department of Navy, NAVSO P-1000, Financial Management Policy Manual, ch. 1, pt. D (October 2017) available at: <http://www.finance.hq.navy.mil/fmc/>

- G. U.S. Government Accountability Office, Principles of Federal Appropriations Law, 2-38 to 2-46 (4th ed., ch. 2, Mar. 10, 2016) [hereinafter GAO Principles of Fed. Appropriations Law] available at: <http://www.gao.gov/legal/redbook/redbook.html>
- H. Office of Management and Budget, Circular No. A-11, Preparation, Submission, and Execution of the Budget (Jul. 2017) available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/a11_current_year/a11_2017.pdf.

III. DEFINITIONS.

- A. **Reprogramming.** Reprogramming is the use of “funds in an appropriation account for purposes other than those contemplated at the time of appropriation.” DOD FMR, vol. 2A, ch. 1, para. 010107.B.51 (Oct. 2008). Specifically, when an agency reprograms funds, it is moving funds within an appropriation (i.e. from one “budget activity” to another “budget activity”). Frequently—although not always—reprogramming is accomplished by notice to, or approval by, the appropriate Congressional committees.
- B. **Transfer Authorities.** “Annual authorities provided by the Congress via annual appropriations and authorization acts to transfer budget authority from one appropriation or fund account to another.” DOD FMR, vol. 2A, ch. 1, para. 010107.B.58 (Oct. 2008). Transfer authority exists in the annual appropriation/authorization acts as well as in permanent legislation. In contrast to reprogramming (which moves funds within a single appropriation), when an agency transfers funds, it is moving funds from one appropriation to another appropriation. Transfers often require notice to the appropriate Congressional committees. Some transfers even require the approval of OMB or the President. DOD FMR, vol. 3, ch. 3, para. 030202 (Feb. 2015). OMB Circular No. A-11, Sec. 20.4 (2016).

IV. TRANSFERS DISTINGUISHED FROM REPROGRAMMING

- A. **Transfers.** GAO, Principles of Fed. Appropriations Law, p. 2-38.
 - 1. Transfers shift money between appropriations.

2. There are generally three types of transfers:
 - a. Transfers between accounts within the same agency, e.g., Operation and Maintenance account to Military Personnel account;
 - b. Transfers between agencies, e.g., Department of Defense to Department of State; and
 - c. Transfers to/from fixed “earmarks,” e.g., where Congress includes an “earmark” for a specific purpose within a general appropriation. Matter of John D. Webster, B-278121, 98-1 CPD ¶ 19.

3. Transfers require statutory authority. 31 U.S.C. § 1532; The Honorable Peter Hoekstra, B-279886, 1998 WL 229292 (C.G.).

- a. 31 U.S.C. § 1532 prohibits transfers without statutory authority. This statute provides:

An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law. Except as specifically provided by law, an amount authorized to be withdrawn is available for the same purpose and subject to the same limitations provided by the law appropriating the amount.¹

- b. Generally speaking, there are two types of transfer authority: general and specific.

- (1) General Transfer Authority. General Transfer Authority is provided in either appropriations acts or in permanent legislation.

¹ Several GAO decisions have interpreted 31 U.S.C. § 1532 to mean that unless a particular statute authorizing the transfer provides otherwise, transferred funds are subject to the same purpose and time limitations applicable to the donor appropriation—the appropriation from which the transferred funds originated. GAO, Principles of Fed. Appropriations Law, p. 2-42, 2-43. So, if funds from a one-year appropriation were transferred into a five-year appropriation, the transferred funds would be available only for one year. Nevertheless, the annual DOD appropriation acts typically provide a number of exceptions to this rule, thereby authorizing the donor appropriation to assume the “fiscal identity” of the appropriation into which it is transferred.

- (a) Typically, Congress provides general transfer authority to DOD in its annual appropriations acts. Often, transfer authority is found in authorization acts as well. See, e.g., Consolidated Appropriations Act FY 2017, Pub. L. No. 115-31, § 8005 (2017) [hereinafter FY 16 DOD Appropriations Act].
 - (b) Some transfer authority is contained in permanent legislation. See, e.g., 7 U.S.C. § 2257 (authorizing transfers between Department of Agriculture appropriations in an amount not to exceed seven percent of the “donor” appropriation).
 - (c) DOD must notify Congress promptly of all transfers made pursuant to the General Transfer Authority. DOD FMR, vol. 3, ch. 3, para. 030202 (Feb. 2015); FY 16 DOD Appropriations Act, § 8005.
- (2) Specific Transfer Authority. Congress can authorize or direct the movement of funds to support specific programs. See, e.g., FY 16 DOD Appropriations Act, Title VI, Defense Drug Interdiction and Counter-Drug Activities. This provision allows the transfer of more than \$1B to appropriations for military personnel of the reserve components to carry out counter-drug activities.
- c. The prohibition against transferring funds without statutory authority applies even though the transfer is intended as a temporary expedient and the agency contemplates reimbursement. To the Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).
 - d. An unauthorized transfer also violates the purpose statute, 31 U.S.C. § 1301(a), and constitutes an unauthorized augmentation of the receiving appropriation.

- (1) Exception. 31 U.S.C. § 1534 authorizes an agency to charge one appropriation for an 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). Amounts must be available in both the benefitting and benefited appropriations, and reconciliation must take place within the fiscal year.

e. Examples of transfers

- (1) **General Transfer Authorities**

- (a) Transfers from Working Capital Funds. Normally, in the annual DOD Appropriation Act, there is broad authority to transfer a specified amount of funds from the DOD working capital funds to any DOD Appropriation (except to the military construction appropriation).²
- (b) Transfers from the Army Operation and Maintenance Appropriation. A recurring provision in the annual DOD Appropriation Acts gives the Secretary of Defense the authority to transfer funds from the Army's operations and maintenance appropriation.³

² For example, section 8005 of the FY 17 Consolidated Appropriations Act permits DOD to transfer up to \$4.5B from DOD's working capital funds to any DOD appropriation (except the military construction appropriation) "for military functions" so long as the Secretary of Defense notifies Congress.

³ For example, section 8069 of the FY 17 Consolidated Appropriations Act permits the Secretary of Defense to transfer up to \$76M from the Army's operation and maintenance appropriation to any other DOD appropriation for "other activities of the Federal Government."

(2) **Specific Transfer Authorities**

- (a) Military Pay. There is a recurring provision in the DOD Appropriations Acts concerning transferring funds from DOD-wide O&M to appropriations for military pay.⁴
 - (b) RDT&E and Procurement. There is a recurring provision in the DOD Appropriation Acts concerning transferring funds from an RDT&E appropriation to a procurement appropriation.⁵
 - (c) DOD Pilot Mentor Protégé Program. There is a recurring provision in the DOD Appropriation Acts concerning the transfer of funds appropriated to the DOD for the Pilot Mentor Protégé Program.⁶
4. Generally, proposals to exercise transfer authority should be submitted formally to the DOD Comptroller for processing. DOD FMR, vol. 3, ch. 3, para. 0304.

⁴ Section 8055 of the FY 17 Consolidated Appropriations Act authorizes the transfer of up to \$30,000,000 from the DOD-wide operations and maintenance appropriation to any other DOD appropriation which is made available for the pay of military personnel. The purpose of this authorization to transfer funds is to reimburse other DOD appropriations for the costs of supporting non-DOD programs pursuant to 10 U.S.C. § 2012.

⁵ Section 8072 of the FY 17 Consolidated Appropriations Act authorizes the transfer up to \$601M from the RDT&E-Defense-wide appropriation (originally designated for the Israeli Cooperative Programs) to any of the DOD appropriations “available for the procurement of weapons and equipment.”

⁶ Section 8016 of the FY 17 Consolidated Appropriations Act authorizes the transfer of funds appropriated for the Pilot Mentor Protégé Program to any other DOD appropriation for the specific purpose of implementing “the Mentor-Protégé Program developmental assistance agreement” under this authority. The purpose of this program is to assistance small businesses by providing incentives to large businesses to partner with small businesses in performing government contracts. See Section 831 of the National Defense Authorization Act for Fiscal Year 1991, Pub.L. No 101-510).

B. **Reprogramming.** See generally, GAO, Principles of Fed. Appropriations Law, p. 2-29.

1. There are a variety of reasons that agencies move funds within an appropriation. Former Deputy Secretary of Defense William H. Taft IV stated:

The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements.⁷

2. In contrast to transfers, “reprogramming” shifts money within an appropriations account. (For more detailed information about reprogramming actions, see Section V. of this outline.)
 - a. There is no change in the total amount available in the appropriations account.
 - b. Reprogramming is not a request for additional funds, but rather, it is a reapplication of funds.
3. When Congress appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions on the expenditure of the funds. LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.

⁷ Reprogramming Action Within the Department of Defense: Hearing Before the House Armed Services Committee (Sept 30, 1985) (remarks prepared for delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, unprinted).

4. Subdivisions of an appropriation contained in the agency's budget request or in conference or committee reports are not legally binding upon the department or agency concerned, unless they are specified in the appropriations act itself. Newport News Shipbldg. and Dry Dock Co., B-184830, 55 Comp. Gen. 812 (1976).⁸
5. Reprogramming is based on minimal congressional and legislative guidance. "Though agencies generally have authority to reprogram funds, Congress may limit this authority."⁹ There are some general limitations to reprogramming:
 - a. Agencies must comply with the requirements of 31 U.S.C. § 1301;
 - b. Agencies must check appropriations acts for statutory prohibitions to proposed reprogramming; the DOD Appropriations Act usually sets out broad guidelines; and
 - c. Agencies must follow their internal policies and procedures. For DOD, there are detailed procedures located in the DOD FMR, vol. 3, ch. 3 and 6.
6. Items eligible for reprogramming. Congress, in the annual appropriation act, typically states that DOD may submit actions only for higher priority items, based on unforeseen military requirements, than those for which the funds were originally appropriated. See FY 17 Consolidated Appropriations Act, § 8005.
7. Items ineligible for reprogramming. Annually, Congress prohibits DOD from submitting reprogramming actions for items for which funds have previously been requested from, but denied by, Congress. See e.g., FY 17 Consolidated Appropriations Act, § 8005. GAO has stated that in the absence of a similar statutory provision, a reprogramming that has the effect of restoring funds deleted in the legislative process is okay. See Propriety of LEAA Funding of Urban Crime Prevention Program, B-195269, Oct. 15, 1979.

⁸ Since the 2009 NDAA, Congress has added funding tables to the authorization act, so that the conference reports have the legal force of law. See e.g., NDAA 2009, P.L. 110-417, § 1005 (14 Oct. 2008) (the first joint explanatory statement). Each year since that time, the NDAA has included funding tables, usually at Division D.

⁹ GAO, Principles of Fed. Appropriations Law, p. 2-45.

8. **All DOD reprogramming actions must be approved by the DOD Comptroller.** Additionally, some reprogramming actions require notice to or approval by the appropriate congressional subcommittees. DOD FMR, vol. 3, ch. 6 and 7. Regarding the routing of requests, “Military Departments must submit proposed DD 1415 [reprogramming] actions formally by memorandum addressed to the USD(C) from the Assistant Secretary (Financial Management and Comptroller) of the Military Department.” DOD FMR, vol. 3, ch. 6, para. 060407.

V. REPROGRAMMING TYPES

- A. **Reprogramming Actions Requiring Prior Approval of Congressional Committees.** DOD FMR vol. 3, ch. 6, para. 060401, A-F. See also Conference Report accompanying annual DOD appropriations acts.
 1. If a DOD Component (i.e., Army, Air Force, Navy, or Marines) wants to reprogram funds (requiring Congressional approval), then the Component Comptroller will forward a formal request to the DOD Comptroller explaining the details of the reprogramming request. The DOD Comptroller will forward the request to Congress for consideration (the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee). The DOD Comptroller will receive letters from each of these committees and will notify the Component Comptroller if its request has been approved or disapproved. If the request is denied, then the Component Comptroller will not reprogram the funds.
 2. The following types of reprogramming requests require Congressional approval:
 - a. Any reprogramming that involves an item designated as a Congressional special interest item;
 - b. Any increase in the procurement quantity of a major end item, such as an individual aircraft, missile, naval vessel, tracked combat vehicle, and other weapon or torpedo and related support equipment;

- c. Any reprogramming action that involves the application of funds which exceed thresholds agreed upon by the congressional committees and DOD:
- (1) Military Personnel: cumulative increases in a budget activity¹⁰ of \$10 million or more.
 - (2) Operation and Maintenance: net changes in a budget activity of \$15 million or more.
 - (3) Procurement: cumulative increases for any program year of \$20 million or more (or 20 percent of the appropriated amount, whichever is less); cumulative decreases for any program year of \$20 million or more (or 20 percent of the appropriated amount, whichever is less).
 - (4) Research, Development, Test, and Evaluation (RDT&E): cumulative increases for any program year of \$10 million or more in an existing program element (or 20 percent of the appropriated amount, whichever is less); cumulative decreases for any program year of \$10 million or more (or 20 percent of the appropriated amount, whichever is less).
 - (5) Additional sub-activity thresholds as specified by Congress.¹¹

¹⁰ “Budget activities” are defined as categories within each appropriation and fund accounts that identify the purposes, projects, or types of activities financed by the appropriation or fund. DOD FMR, vol. 3, ch. 6. For an example of budget activities, see the Joint Explanatory Statement of The Committee of Conference for the FY 2016 Consolidated Appropriations Act, which breaks down the budget activities in some detail. For example, prior appropriations acts required approval if the Air Force wanted to perform a reprogramming action in its Military Personnel, Air Force appropriation by moving \$15 million from one budget activity to another budget activity (because it exceeded the \$10 million threshold for the military personnel appropriation).

¹¹ See e.g. Explanatory Statement for the FY 2009 DOD Appropriations Act, listing multiple sub-activities (such as Army Land Forces Depot Maintenance), for which transfers out of the sub-activity in excess of \$15M require Prior Approval Reprogramming; DOD FMR vol. 3, ch. 6, para. 060401.D.2.

- d. New Starts: a program, subprogram, modification, project or subproject not previously justified by DOD and funded by Congress is considered a “new start.” Congressional committees discourage the use of reprogramming to initiate new starts. Congress normally states in the annual DOD Appropriations Acts that before funding any new start, the requester must first notify the Secretary of Defense and Congress.¹² For specific notification and approval procedures, see DOD FMR, vol. 3, ch. 6, para. 060401.E;
- e. Termination of programs that result in elimination of certain procurement programs and subprograms and RDT&E elements, projects, and subprojects. DOD FMR, vol. 3, ch. 6, para. 060401.E; and
- f. Most fund shifting/movements that make use of general transfer authority.¹³ But see DOD FMR, vol. 3, ch. 6, para. 060401.C, for exceptions.

B. “Internal” Reprogramming. DOD FMR, vol. 3, ch. 6, para. 060402.

- 1. “Internal” reprogramming actions are not, technically, formal reprogramming actions (as the name would suggest). Internal reprogramming actions, instead, are “audit-trail type actions processed within the Department to serve various needs.” DOD FMR, vol. 3, ch. 6, para. 060402.

¹² See e.g., FY 17 Consolidated Appropriations Act, § 8075 (“None of the funds provided in this Act shall be available for obligation or expenditure through a reprogramming of funds that creates or initiates a new program, project, or activity unless such program, project, or activity must be undertaken immediately in the interest of national security and only after written prior notification to the congressional defense committees.”).

¹³ Note that DOD uses a “Reprogramming Action” form (DD 1415-1) to accomplish both reprogrammings and transfers. There are different forms for internal (DD 1415-3) reprogramming actions (again, a term which includes those actions ‘using transfer authority’), versus those that require prior approval (1415-2). Thus, the wording of the FMR can be confusing in that it uses the terms “reprogramming” and “transfer” in the same section when referring to this process. For example, the FMR’s reprogramming chapter states that reprogramming actions that “use general transfer authority” require Congressional approval. Bottom line, beware the distinction between “reprogramming” as defined in this outline, and a “reprogramming action” as used in the FMR. *See e.g.* DOD FMR, vol 3, ch. 6, para. 060401C (Sep. 2015).

2. Internal reprogrammings fall into three general categories:
 - a. Reclassification Actions. Actions involving a reclassification or realignment of funds within budget activities or within budget line items/program elements. These reclassifications do not involve any change in the substance of the program and the funds will be used to for the same purposes originally contemplated when submitted to Congress;
 - b. Transfer Appropriations.¹⁴ “Transfer accounts” are appropriations with funding that will be transferred to other appropriations for execution. Reprogramming to or from transfer accounts is generally permissible without relying upon statutory authority such as the general transfer authority. Examples of transfer accounts include: Overseas Contingency Operations Transfer Fund and Foreign Currency Fluctuations, Defense; and
 - c. Procurement Quantities. Approval to increase quantities of major end items where Congress has specified that approval is not required.
3. Technically, funding changes within program elements are not regarded as “reprogramming.” The Honorable Roy Dyson, House of Representatives, B-220113, 65 Comp. Gen. 360 (1986).
4. Internal reprogrammings are not subject to dollar thresholds.
5. Internal reprogrammings do not require prior congressional approval or notification. Such actions are audit-trail type actions processed within DOD Secretary of Defense, Comptroller.

C. Below Threshold Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 0608.

1. Below threshold reprogrammings are those reprogramming actions that do not exceed the thresholds, identified above in this outline at paragraph V.A.2.c, either individually or when combined with other below-threshold reprogramming actions.

¹⁴ The language of the DOD FMR refers to “transfer appropriations” in the chapter on reprogramming, which it then describes as reprogramming actions related to transfer accounts. *See* DOD FMR, vol 3, ch. 6, para. 060402.B.

2. Below-threshold reprogramming actions “provide DOD Components with the discretionary flexibility to realign, within prescribed limits, congressionally approved funding to satisfy unforeseen, higher priority requirements.” DOD FMR, vol. 3, ch. 6, para. 060801. Additionally, such reprogramming actions are minor actions that do not require congressional approval. When the DOD Components accomplish these reprogramming actions, they measure these actions “cumulatively” over the course of the appropriation’s period of obligation.
3. For example, the Army could accomplish a below-threshold reprogramming of funds in its Military Personnel, Army appropriation by moving funds from one budget activity (i.e. Pay and Allowances, Officer) to another (i.e. Pay and Allowances, Enlisted), so long as the total amount was less than \$10 million.
4. Congress performs oversight through the DOD’s semi-annual submission of its DD 1416, Report of Programs.

D. Letter Notifications. DOD FMR, vol. 3, ch. 6, para. 060403.

1. Letter notifications apply to the initiation and termination of certain projects, including some below-threshold procurements.
2. Notification to the appropriate committees requires a 30-day automatic hold on funds. The reprogramming action may be implemented 30-days after notification if no objection is received.

E. Intelligence Related Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 0606.

1. Generally, the same rules apply to reprogramming intelligence resources as provided for other reprogramming actions under DOD FMR, vol. 3, ch. 6, para. 060602.
2. Some special rules do apply:
 - a. Actions reprogramming DOD appropriations that impact the National Foreign Intelligence Program are subject to additional guidelines.

- b. The Office of the Director of National Intelligence issues specific guidance on processing certain intelligence reprogramming actions and on below-threshold determinations. DOD FMR, vol. 3, ch. 6, para. 0606.

VI. MILITARY CONSTRUCTION REPROGRAMMING. DOD FMR, vol. 3, ch. 7.

A. **General.** The congressional subcommittees concerned with the appropriation and authorization of military construction and family housing funds have agreed that, in executing approved programs, some flexibility is required in adjusting approved funding levels to comply with new conditions and to effectively plan programs to support assigned missions. Departmental adjustments or reprogrammings may be required for a number of reasons including but not limited to:

1. Responding to emergencies;
2. Restoring or replacing damaged or destroyed facilities;
3. Accommodating unexpected price increases; and
4. Implementing specific program provisions provided for by Congressional committees.

B. **Procedures.** DOD FMR, vol. 3, ch. 7.

1. Proposed military construction action must be approved by the DOD comptroller before submission to the appropriate congressional committees. In many cases, the DOD comptroller is simply required to notify Congress (vice obtain approval) and then wait a certain period of time; if Congress does not act upon the notification, then DOD may proceed with the reprogramming action.
2. While most military construction reprogramming actions must be submitted to Congress, there are some “below threshold” actions that may be approved at the DOD comptroller level.

C. Authority

1. Approval by Congress Required Prior to Reprogramming (partial list):

- a. Any increase exceeding 25% of the reprogramming base (originally approved, or subsequently approved project value) or \$2M—whichever is less—to MILCON projects and family housing new construction projects, or family housing improvement projects (exceeding \$2M base value), or for which the base has been increased or decreased by a previously approved action.
- b. For any increase, regardless of amount, to a MILCON project that has been previously reduced in scope by Congress in acting on the appropriation.
- c. To increase the amount appropriated for UMMC.
- d. To increase the amount appropriated for architectural and engineering service and contraction design.
- e. For any Base Realignment and Closure (BRAC) projects.
- f. For any family housing project relocation project to be accomplished by 10 U.S.C. § 2827.

2. Notice to Congress is Required¹⁵ Prior to Reprogramming (partial list):

- a. 10 U.S.C. § 2803. Provides permanent authority to obligate and reprogram up to \$50 million annually for emergency construction if a project is:
 - (1) Not otherwise authorized by law;

¹⁵ DOD FMR, vol 3, ch. 7, para. 070302 includes these statutory provisions in the list of actions requiring “Prior Approval Reprogramming”. These statutes only require notice to (vice “approval” by) the appropriate congressional subcommittees. The FMR requires the use of “Prior Approval Reprogramming” for both notification and approval actions.

- (2) Vital to national security or to the protection of health, safety, or the quality of the environment; and
 - (3) So urgent that waiting until the next budget submission would be inconsistent with national security, or the protection of health, safety or environmental quality.¹⁶
 - b. 10 U.S.C. § 2854. Provides permanent authorization for the repair, restoration or replacement of facilities (including a family housing unit) damaged/destroyed due to natural disasters. If the estimated cost of the project exceeds the UMMC threshold (i.e., \$2 million), the Secretary concerned must notify the appropriate committees of Congress.¹⁷
3. Approval by (or Notice to) Congress is *NOT Required* Prior to Reprogramming.
 - a. When none of the criteria listed in the DOD FMR, Vol 3, ch 7 apply (to require Congressional approval).
 - b. Some specific examples when Congressional approval not required:
 - (1) For projects utilizing Environmental Restoration, Defense funds authorized under 10 U.S.C. § 2810;

¹⁶ The Secretary of Defense must submit a written report (“*notify*” only) to the appropriate committees of Congress on this decision. This report must include (1) the justification for the project and the cost estimate, (2) the justification for carrying out the project using this section, and (3) a statement of the source of the funds to be used to carry out the project. The project may then be carried out only after the end of the 21-day waiting period beginning on the date that the notification is received by the congressional committees, or if earlier, the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium.

¹⁷ The Secretary of Defense must *notify* the appropriate committees of Congress in writing of this decision. This notice must include (1) the justification for the project and the cost estimate, (2) the justification for carrying out the project using this section, and (3) a statement of the source of the funds to be used to carry out the project. The project may then be carried out only after the end of the 21-day waiting period beginning on the date that the notification is received by the congressional committees, or if earlier, the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium.

- (2) When a DOD Component takes action to reprogram funds between or among family housing operations and maintenance account;
- (3) For any project being completed with expired funds for valid upward adjustments of pre-existing commitments;
- (4) When none of the criteria listed in DOD FMR, vol. 3, ch 7, para. 070302 apply.

D. Restrictions on Reprogrammings. DOD FMR, vol. 3, ch. 7.

1. DOD will not submit a request for reprogramming:
 - a. For any project or effort that has not been authorized, unless permitted under 10 U.S.C. §§ 2803, 2854 or 2853;
 - b. For any project or effort that has been denied specifically by Congress; or
 - c. To initiate programs of major scope or base realignment actions, where Congress has not authorized such efforts.
2. DOD Comptroller sends MILCON reprogrammings (which require congressional notification or approval) to the House and Senate Armed Services Committees and the House and Senate Appropriations Committees.
 - a. Generally, committee review process is non-statutory.
 - b. An agency generally will observe committee review and approval procedures as part of its informal arrangements with the various committees, although they are not legally binding. GAO, Principles of Fed. Appropriations Law, p. 2-25.

VII. CONCLUSION

- A. Note the differences between reprogramming and transferring funds.
- B. There are special rules involved in reprogramming for military construction purposes.

CHAPTER 13:



NON- APPROPRIATED FUNDS

CHAPTER 13

NONAPPROPRIATED FUNDS

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CHAPTER 13

NONAPPROPRIATED FUNDS

I. INTRODUCTION.

“What we have today is a \$10 billion governmental entity which employs almost a quarter of a million people in 12,000 activities worldwide . . . without legislative authority.”

- Congressman Dan Daniel,
Chairman, MWR Panel of the House Armed Services Committee, 1982

II. REFERENCES

- A. 10 U.S.C. § 2783, Nonappropriated Fund Instrumentalities: Financial Management and Use of Nonappropriated Funds.
- B. DOD 7000.14-R, DOD Financial Management Regulation, Volume 13, Nonappropriated Funds Policy and Procedures (July 2013).
- C. DOD Instruction (DODI) 1000.15, Procedures and Support for Non-Federal Entities Authorized to Operate on DOD Installations (October 24, 2008).
- D. DODI 1015.10, Military Morale, Welfare and Recreation (MWR) Programs (Change 1, May 6, 2011).
- E. DODI 1015.11, Lodging Policy (Change 1, November 15, 2011).
- F. DODI 1015.12, Lodging Program Resource Management (October 30, 1996).
- G. DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare and Recreation (MWR), and Armed Services Exchange Category C Revenue-Generating Activities (March 11, 2004).
- H. DODI 1015.15, Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources, October 31, 2007 (Change 1, March 20, 2008).

- I. DODI 1330.21, Armed Services Exchange Regulations, July 14, 2005.
- J. Army Regulation (AR) 165-1, Army Chaplain Corps Activities, June 23, 2015.
- K. AR 215-1, Morale, Welfare and Recreation Programs and Nonappropriated Fund Instrumentalities, 24 September 2010.
- L. AR 215-4, Nonappropriated Fund Contracting, 29 July 2008.
- M. AR 215-7, Civilian Nonappropriated Funds and Morale, Welfare and Recreation Activities, 26 January 2001.
- N. AR 215-8 / Air Force Instruction (AFI) 34-211(I), Army and Air Force Exchange Service Operations, 11 July 2017.
- O. Air Force Instruction (AFI) 34 -101, Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility, 28 March 2013.
- P. Air Force Instruction (AFI) 34-201, Use of Nonappropriated Funds, 17 June 2002.
- Q. AFIMAN 64-302, Nonappropriated Fund (NAF) Contracting Procedures, 8 November 2016.
- R. AFI 65-106, Appropriated Fund Support of MWR and Nonappropriated Fund Instrumentalities, 6 May 2009 (Guidance Memorandum 2016-01 to AFI 65-106 3 March 2017).
- S. SECNAVINST 1700.12A, Operation of Morale, Welfare and Recreation Activities, 15 July 2005.
- T. SECNAVINST 5401.2A, Establishment, Management, and Control of NAFIs and Financial Management of Supporting Resources, 21 January 2004.
- U. BUPERSINST 1710.11C, Operation of MWR Programs, 25 July 2001 (with Change 1, dated 31 March 2003).

V. MCO 1700.26C, Appointing Order for the Marine Corps MWR Policy Review Board, 22 September 1994.

W. MCO P1700.27B W Change 1, MCSS Policy Manual, 9 March 2007.

III. DEFINITIONS

A. Nonappropriated Funds (NAFs).

1. What are NAFs?

- a. NAFs are monies which are not appropriated by the Congress of the United States. These funds are separate and apart from funds that are recorded in the books of the U.S. Treasury (i.e., appropriated funds or APFs). NAFs shall be administered only through the auspices of a nonappropriated fund instrumentality (NAFI).
- b. Within the Department of Defense (DOD), NAFs come primarily from the sale of goods and services to military and civilian personnel and their family members, and are used to support Morale, Welfare, and Recreation (MWR), lodging, and certain religious and educational programs.
- c. NAFs are government funds used for the collective benefit of military personnel, their family members, and authorized civilians. DOD 7000.14-R, Financial Management Regulation, Volume 13, Chapter 1, para. 010213; see also DODI 1015.15, para. 4.

2. NAFs are Government funds subject to controlled use. All DOD personnel have a fiduciary responsibility to use NAFs properly and prevent waste, loss, mismanagement, or unauthorized use. Violators are subject to administrative and criminal sanctions. See 10 U.S.C. § 2783 (Appendix A to this outline); see also DODI 1015.15, para. 4.7.

3. NAFs are audited.

- a. Comptroller General. The Comptroller General has statutory authority to audit the operations and accounts of each nonappropriated fund and related activities authorized or operated by the head of an executive agency to sell goods or services to United States government personnel and their dependents. 31 U.S.C. § 3525; see, e.g., Nonappropriated Funds, Opportunities to Improve DoD's Concessions Committee, GAO/NSIADF/AIMD-98-119, April 30, 1998.
- b. Agency and Inspector General Audits. The Services must audit NAFs. See DODI 1015.15, paras. 5.7.6, 6.18; DOD 7000.14-R, Financial Management Regulation, Volume 13, Chapter 1, para. 010501; AR 215-1, Chapter 18.

B. Nonappropriated Fund Instrumentalities (NAFIs).

1. NAFIs are DOD organizational and fiscal entities supported in whole or in part by NAFs. They act in their own name to provide or assist the Secretaries of the Military Departments in providing MWR programs for military personnel, their families, and authorized civilians. DODI 1015.15, paras. 4.2, E2.13.
2. NAFIs are established and maintained individually or jointly by two or more DOD components. As a fiscal entity, it maintains custody and control over its NAFs, equipment, facilities, land, and other assets. It enjoys the legal status of an instrumentality of the United States. It is not incorporated under state laws. DODD 1015.15, para. 4 and Enclosure E2.13; AR 215-1, Glossary.
3. The DOD classifies NAFIs into one of six program groups to assure uniformity in the establishment, management, allocation and control of resource support. DODI 1015.15, para. 6.1.1.1. These program groups include Military MWR programs, Armed Service Exchange programs, Civilian MWR programs, Lodging Program Supplemental Mission Funds, Supplemental Mission Funds, and Special Purpose Central Funds. DODI 1015.15, paras. 6.1.1.1.1 to 6.1.1.1.6.

4. Within each Program Group, NAFI activities are further classified into one of three funding categories: Category A—Mission Sustaining Activities, Category B—Basic Community Support Activities, and Category C—Revenue-Generating Activities. These funding categories are the basis of APF and NAF funding authorizations for a particular NAFI activity. DODI 1015.15, para. 6.2.1.
5. In Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942), the Supreme Court concluded that post exchanges were an integral part of the War Department and enjoyed whatever immunities the Constitution and federal statutes provided the Federal Government. Accordingly, a California law that levied taxes on fuel sold to a Post Exchange was found inapplicable to those sales.

C. MWR programs (formerly MWR activities).

1. Programs (exclusive of private organizations) on military installations or on property controlled (by lease or other means) by a military department or furnished by a DOD contractor that provide for esprit de corps, comfort, pleasure, contentment, as well as mental and physical productivity of authorized DOD personnel. AR 215-1, Glossary.
2. They include recreational and leisure-time programs, self-development programs, resale merchandise and services, or general welfare programs outlined in AR 215-1. AR 215-1, Glossary.
3. The Army Morale, Welfare, and Recreation (MWR) Program is a quality-of-life program that directly supports readiness by providing a variety of community, Soldier, and Family support programs, activities, and services. Included are social, fitness, recreational, educational, and other programs and activities that enhance community life, foster Soldier and unit readiness, promote mental and physical fitness, and generally provide a working and living environment that attracts and retains quality Soldiers. AR 215-1, para. 1-8.
4. The range of MWR programs offered at Army garrisons is based on the needs of authorized patrons who work and reside there. Programs are managed by garrison commanders within the framework of authorized and available APFs and NAFs. AR 215-1, para. 1-8.

D. MWR Unit Funds.

1. Separate Unit Funds. Generally, separate unit MWR funds are not authorized for installation units. Separate funds may be established, managed, and administered at the unit level for isolated active duty units or reserve component units or personnel performing annual training. One coordinating garrison provides NAF support to surrounding units. AR 215-1, Chapter 6.
2. Unit Activities Funds. Upon IMCOM region direction, units attached to an installation may nonetheless receive direct monetary NAF support through the garrison MWR operating entity. Garrison commanders may determine the amount of NAF support. Such support will be applied equitably to all units or personnel within the installation. NAF support provided to installation units is referred to as “unit activities” and will be accounted for within the garrison MWR operating entity. AR 215-1, para. 6-1.
3. The Air Force has Special Morale and Welfare (SM&W) authority which allows use of NAFs to fund expenditures considered necessary to contribute to the overall morale and welfare of the military community. AFI 34-201, Chapter 12.
4. The Navy has unit recreation funds which are available to tenant commanders for financing special expenditures in order to enhance unit identity and promote retention. The funds should not be used solely for parties and picnics, although the purchase of alcoholic beverages is authorized but discouraged. Funds can also be used for emblematic, recognition and reception related items for advancement, award and reenlistment ceremonies. With approval of the host installation CO, occasional fund-raising, e.g., hot dog sales and chili cook-offs, can be conducted to supplement unit recreation funds. BUPERSINT 1710.11C, para. 406.

IV. MANAGEMENT OF MWR PROGRAMS.

- A. Army. AR 215-1, Chapter 1-8: “The Army MWR program is a quality-of-life program that directly supports readiness by providing a variety of community, Soldier, and Family support programs, activities, and services.”

1. The Army MWR program is executed through the auspices of Non-Appropriated Fund Instrumentalities (NAFIs). Each one is established by the Secretary of the Army, often in coordination with other branches. An example of this coordination is the joint Army and Air Force Exchange Service (AAFES) (see AR 215-8 / AFI 34-211(I)).
2. The Commander, Installation Management Command (IMCOM) and the Assistant Chief of Staff for Installation Management (ACSIM) manage the Army-wide MWR program as specified in AR 215-1.
3. The Commander, Family Morale, Welfare and Recreation Command (FMWRC) develops the overall guidance, standards, and procedures to implement specifically approved MWR programs. Additionally, FMWRC is responsible for the administration and use of all nonappropriated funds used to fund MWR programs and activities, to include NAF-funded construction and procurement.
4. Garrison Commanders implement the local programs with guidance from IMCOM and FMWRC, to include planning, managing, and funding MWR programs at their respective installations. They ensure local programs adhere to DOD/HQDA policies and regulations and develop annual budgets for the use of their local NAF resources.
5. A number of forums exist for the management and oversight of MWR programs. They include:
 - a. The Soldier and Family Readiness Board of Directors (SFR BOD), a strategic forum combining the former Installation Management Board of Directors and the Morale Welfare and Recreation Board of Directors. Co-Chaired by the Secretary of the Army and the Chief of Staff of the Army, the SFR BOD provides the Army's senior executive leadership with a strategic forum in which to guide the fulfillment of the Army Family Covenant and to maintain Soldier and Family readiness in a time of persistent conflict. Various committees provide input to the SFR BOD as outlined in AR 215-1, Appendix B, to include review and approval of NAF construction projects.
 - b. The Soldier Family Readiness Executive Committee (EXCOM) is a 3-star working group designed to review issues and proposals for presentation to the SFR BOD.

- c. The Soldier Family Readiness Working Group (SFRWG) is a Colonel-level forum that develops and reviews issues and proposals for presentation to the EXCOM and SFR BOD.
- d. The Capital Investment Review Board (CIRB) reviews and prioritizes construction projects funded with NAF on behalf of the EXCOM.

6. NAFI Councils.

- a. A governing body of active duty Soldiers or civilian employees appointed or elected to assist in the management of each NAFI and represent MWR activity patron interests. The governing council is a decision-making body that exercises general supervision for the commander and directs specific actions in the management of the NAFI. The non-governing council is a review body that recommends and reports to the commander on general or specific matters concerning the management of the NAFI.¹ AR 215-1, Glossary.
- b. Councils are required for separate garrison NAFIs and garrison MWR operating entities. AR 215-1, para. 3-17.

B. Air Force. AFI 34-201, Chapter 2.

- 1. The Secretary of the Air Force gives the authority to administer NAFs and NAFIs to the Chief of Staff of the Air Force (CSAF). The Air Force MWR Advisory Board provides recommendations to the CSAF on broad issues affecting policy, management, and oversight of NAFs, NAFIs, and MWR programs.
- 2. Major Commander (MAJCOM):
 - a. Approves the establishment of base and isolated unit NAFIs;

¹ Non-governing councils may also include military retirees and family members.

- b. Supervises all NAFIs within the command and administers command-level NAFIs; and
 - c. Appoints a NAF council and finance and audit committee to help administer and supervise command-level NAFs.
 - 3. Installation Commander (wing commander or equivalent):
 - a. Requests MAJCOM approval to establish base-level NAFIs; and
 - b. Appoints a custodian for each NAFI and appoints a NAF council.
 - 4. At base level, the resource management flight chief (RMFC) acts as single custodian of all NAFIs serviced by the NAF accounting office with the exception of base restaurant and civilian welfare fund NAFIs, and in some instances, NAFIs at remote and isolated locations.

C. Navy.

- 1. The Navy has a Morale, Welfare and Recreation Division (PERS-65), composed of nine branches, located in Millington, TN.
- 2. Chaired by the Vice Chief of Naval Operations, a MWR/Navy Exchange (NEX) Board of Directors (BOD) makes major policy and business decisions for both programs.
- 3. COMNAVPERSCOM is the immediate superior in command of the MWR program manager.
- 4. The Navy MWR NAF activities are regionalized.

D. Marine Corps.

- 1. The Personal and Family Readiness Division, under the staff cognizance of the Deputy Chief of Staff for Manpower and Reserve Affairs, is responsible for providing Service policy and resources to support commanders in executing quality Personal and Family programs.

2. The MWR Policy Review Board makes recommendations on major MWR policy matters to the Assistant Commandant of the Marine Corps. Marine Corps Order 1700.26C.
3. Other MCSS Activities. MCO P1700.27B, Appendix B.
 - a. Created in 1999 as part of transformation from MWR to Marine Corp Community Services (MCCS); Funded entirely with APFs.
 - b. Examples:
 - (1) Personal Readiness and Community Support: Exceptional Family Member; Life Skills Management; New Parent Support; Personal Financial Management; Suicide Prevention.
 - (2) Counseling Services: Clinical Counseling; Marriage and Family Counseling; Family Advocacy, Victim Advocacy.
 - (3) Lifelong Education..

V. CASH MANAGEMENT, BUDGETING, SOURCES OF NAFI REVENUE, AND RESOURCE MANAGEMENT.

A. NAFI Cash Management. AR 215-1, para. 16-5.

1. All NAFIs are required to generate sufficient cash and a positive net income before depreciation which, when coupled with existing funds, will permit the NAFI to fund all of its operating and capital requirements, with the exception of major construction, which is funded by the Army MWR Fund (AMWRF).
2. Each NAFI must produce adequate revenues to cover operating and capital requirements while maintaining a cash to debt ratio between 1:1 and 2:1 (total cash divided by current liabilities).

B. NAFI Budgeting.

1. The basis for garrison MWR planning is the MWR 5-year plan. Updated annually, the 5-year plan is the management tool for justifying program elements and using resources. AR 215-1, para. 15-1. Each annual budget is submitted with the 5-year MWR plan to the applicable IMCOM Region. Annual budgets must comply with specific instructions and procedures issued annually by FMWRC. AR 215-1, para. 16-13. Budgets must contain a garrison commander's narrative that includes, at a minimum:
 - a. A description of current operations, including goals and objectives reflected in the budget; and
 - b. Significant changes from previous years approved budget and actual operations. AR 215-1, para. 16-13.
2. IMCOM Regions will review and approve installation and community budgets and forward consolidated budgets to FMWRC. AR 215-1, para. 16-14.

C. Revenue Sources and Resource Management Structure.

1. Garrison MWR Operating Entity. AR 215-1, para. 5-9.
 - a. Group of MWR programs offered at an installation that fall within the garrison commander's responsibility (previously referred to as the "installation MWR fund).
 - b. Garrison-level NAFs are primarily generated by local sales of goods and services and user fees and charges.
 - c. Forms an integral part of the IMCOM Region single MWR fund. NAFs generated by each garrison level MWR program are pooled into the IMCOM region single MWR fund and allocated to MWR programs based on garrison priorities.
2. Region Single MWR Funds. AR 215-1, para. 5-8.

- a. Separate region NAFI that consolidates all garrison funds within the region, as well as centralized functions for the garrisons within the region, such as procurement, financial management, civilian personnel, and marketing.
 - b. The region single-fund management will provide oversight of garrison MWR operating entities. When necessary, region single-fund management may subsidize unprofitable garrison MWR operating entities, to include cross-leveling funds of MWR fund NAFIs within or among the regions.
3. The Army MWR Fund (AMWRF)
- a. The AMWRF is the Army central NAF managed by the U.S. Army Family and Morale Welfare Recreation Command (FMWRC) that provides up to 90% of funds for approved NAF major construction and supports other Army-wide MWR programs.
 - b. AMWRF acts as the successor-in-interest to all IMCOM Regional Single MWR Funds. AR 215-1, para. 16-3.
 - c. Resources for the AMWRF are primarily derived from dividends paid from the AAFES and from interest earned from the temporary investment of funds that have been programmed but not yet spent. AR 215-1, para. 16-8.
 - d. AMWRF resources are devoted primarily to funding NAF major construction (NAFMC) and other program investments. Any garrison entity or IMCOM region contribution to a NAF construction project will be withdrawn from the garrison entity or IMCOM region bank account as bills on the project are paid. AR 215-1, para. 16-11.
 - e. All capital purchases and minor construction (CPMC) will be financed from local installation and/or IMCOM Region resources. AR 215-1, para. 16-12.
4. Supplemental Mission Funds. AR 215-1, para. 5-10.

- a. Supplemental mission funds/NAFIs are quality of life adjuncts to APF mission programs other than those recognized as MWR programs.
- b. The generation and expenditure of supplement mission NAFs is restricted to the purposes of the supplemental mission fund/NAFI. Supplemental mission NAFs will not be used to subsidize MWR programs, nor will NAFs generated by MWR programs be used to subsidize supplemental mission funds/NAFIs.
- c. Some supplemental mission funds/NAFIs are consolidated within the IMCOM region single MWR fund and some are established as separate NAFIs.
 - (1) Examples of supplemental mission funds accounted for within the IMCOM region single MWR fund:
 - (a) Army Community Services (see AR 608-1).
 - (b) Fees paid by customers for veterinary services (see AR 40-905).
 - (2) Examples of supplemental mission NAFIs excluded from consolidation into the IMCOM region single MWR fund:
 - (a) Army Lodging Funds
 - (b) Fisher House Funds
 - (c) Overseas vehicle registration funds

VI. FUNDING SUPPORT OF MWR PROGRAMS.

- A. DOD NAFIs are classified into one of six program groups to assure uniformity in the establishment, management, allocation and control of resource support. DODI 1015.15, para. 6.1.1.1; AR 215-1, paras. 3-1 to 3-6. The program groups are:

1. Program Group I—Military MWR Programs, to include child development and recreational lodging programs.
2. Program Group II—Armed Services Exchange Programs.
3. Program Group III—Civilian MWR programs. DODD 1015.8.
4. Program Group IV—Lodging Program Supplemental Mission Funds.
5. Program Group V—Supplemental Mission Funds.
6. Program Group VI—Special Purpose Central Funds, such as NAF employee life and health insurance, and NAF risk management.

B. Funding Standards. MWR programs are dual funded and rely on a mix of appropriated (APF) and nonappropriated (NAF) funds. The DOD basic standard, regardless of category, is to use APFs to fund 100 percent of costs for which MWR programs are authorized. AR 215-1, para. 5-1. NAFs are used to supplement APF shortfalls or fund activities not authorized APF support. See generally AR 215-1, Chapter 5, Section III.

1. NAFs are generated primarily by sales, fees, and charges to authorized patrons.
2. APFs are provided primarily through operations and maintenance and military construction appropriations.

C. APF Support of MWR. Appendix D to AR 215-1 contains the specific areas of support that Army commanders may fund with APFs. Attachment 2 to AFI 65-106 contains similar guidance for Air Force Management and Funding.

1. APF support can be direct, indirect, or common. AR 215-1, para. 5-1.

a. *Direct APF Support.* Generally limited to Category A and B MWR programs. Includes support or expenses incurred in the management, administration, and operation of MWR programs or common support functions. It includes those costs that directly relate to, or are incurred by, the operation of the MWR facilities.

b. *Indirect APF Support.* All MWR programs receive and are authorized indirect APF support which is historically provided to all installation facilities and functions. Such support mutually benefits MWR and non-MWR. E.g., health, safety (police and fire), security, grounds and facility maintenance and repair.

c. *Common MWR Support.* APF support to fund the management, administration, and operation of more than one MWR program or category, where such support is not easily or readily identifiable to a specific MWR program or to solely Category C MWR programs. E.g., central accounting office, civilian personnel office, central procurement.

d. *Support Agreements.* NAFIs and installation support elements will enter into agreements on the type of support required and resources to be expended. When the service is not authorized APFs, but the support element provides the service, the NAFI reimburses the Government for the service based upon the support agreement. AR 215-1, para. 5-1f.

2. MWR Categories. AR 215-1, para. 3-7; DODI 1015.10, Encl. 5. These Fund support for MWR programs depends on the **funding category** of the activity, which is based on the relationship of the activity to readiness factors and the ability of the activity to generate revenue. There are **three primary funding categories** of MWR programs. They are:

a. *Category A - Mission Sustaining Activities*. activities are deemed essential to meeting the organizational objectives of the Military Services. Commanders must fund these activities almost entirely with APFs. Exceptions include instances where appropriated fund support is prohibited by law, or when the use of NAF is essential for the operation of a facility or program.

(1) Examples of Category A activities:

- (a) Libraries and Information Services;
- (b) Recreation Centers;
- (c) Movies (free admission: overseas and isolated/remote locations);
- (d) Parks, picnic areas, barbecue pits, pavilions, game fields, playgrounds;
- (e) Sports (individual, intramural, unit);
- (f) Gymnasiums, field houses, pools for aquatic training, and other physical fitness facilities;
- (g) Armed Forces Professional Entertainment Program Overseas; and
- (h) Better Opportunities for Single Soldiers.

b. *Category B - Community Support Activities.* These activities provide community support systems that help to make military bases temporary hometowns for a mobile military population. They receive a substantial amount of APF support, but can generate NAF revenue. The DOD goal is to fund these programs with a minimum of 65% APFs.

(1) Examples:

- (a) Arts and Crafts;
- (b) Bowling centers (12 lanes or less);
- (c) Child, Youth, and School services;
- (d) Information, ticketing, and registration services; and
- (e) Outdoor recreation programs, such as archery ranges, beach facilities, garden plots, hunting/fishing areas, marinas without retail sales or private boat berthing, outdoor recreation checkout centers.

c. *Category C - Revenue-Generating Activities.* These activities have less impact on readiness, and are capable of generating enough income to cover most of their operating expenses. They receive very limited APF support.

(1) Remote or isolated sites approved by Congress.

- (a) Category C MWR programs at sites designated as remote or isolated receive APFs on the same basis as Category B MWR programs.

- (b) AF regulations generally authorize Category B-level APF support for Category C activities at approved remote and isolated locations, except for AAFES equipment and supplies, or equipment used for generating revenue, or for providing a paid service (such as point of sales systems, bowling center pinsetters, golf carts, slot machines). AFI 65-106, para. 3.1.

(2) Examples of Category C Revenue-Generating Activities:

- (a) Armed Forces Recreation Centers;
- (b) Bingo;
- (c) Bowling centers (over 12 lanes);
- (d) Golf courses and associated operations;
- (e) Outdoor recreation, including cabin/cottage operations, rod and gun activities, skiing operations, stables, flying activities; and
- (f) Military clubs.

d. *Supplemental Mission NAF Accounts* do not support and are not part of the MWR program, but are established to provide a NAF adjunct to APF mission activities. AR 215-1, para. 5-10; AFI 65-106, para. 2.2. Examples include:

- (1) Army Community Services (ACS);
- (2) Veterinary services;
- (3) Fisher House funds;
- (4) Vehicle registration funds;

- (5) Fort Leavenworth U.S. Disciplinary Barracks funds; and
- (6) USMA funds.

VII. USE OF NONAPPROPRIATED FUNDS.

- A. The use of NAFs is limited. AR 215-1, para. 5-13.
 - 1. In all cases, NAFs are used judiciously and not as a matter of convenience.
 - 2. NAFs are not to be commingled with APFs and are managed separately, even when supporting a common program. AR 215-1, para. 4-1 (a).
 - 3. NAFs are returned to authorized patrons by providing needed MWR services and capital improvements. AR 215-1, para. 13, discusses authorized uses of NAFs. AR 215-1, Appendix D, lists expenses that should be funded with NAFs and APFs.
 - 4. Prices, user fees, and charges are structured to meet cash management goals for sustainment of a NAFI and its operations, to cover capital requirements and overhead expenses, and to satisfy budget requirements for support of other MWR programs dependent upon the NAFI. AR 215-1, para. 12-8.
 - 5. Funds from supplemental mission NAFIs support only the requirements for which they were established. AR 215-1, paras. 5-10, 5-13; see also Aaron v. United States, 27 Fed. Cl. 295 (1992) (class action suit challenging excess vehicle registration fees used to fund MWR programs); GAO Report to the Chairman, Subcommittee on Defense, Committee on Appropriations, House of Representatives, B-238071, Army Housing Overcharges and Inefficient Use of On-Base Lodging Divert Training Funds, Sep. 1990 (finding improper the Army's use of profits from housing TDY soldiers for the benefit of MWR programs).
- B. In the Navy, nonappropriated MWR funds will be expended on official MWR programs and facilities on a equitable basis to achieve a balanced, adequate MWR program. BUPERSINT 1710.11C, para. 416.

1. The emphasis should be placed on MWR programs that benefit the greatest number of eligible patrons. BUPERSINT 1710.11C, para. 416.
 2. MWR NAF funds are authorized only for those purposes related to the official MWR program. BUPERSINT 1710.11C, para. 420.
- C. NAFs may NOT be used to:
1. Accomplish any purpose that cannot withstand the test of public scrutiny or which could be considered a waste of Soldiers' dollars, AR 215-1, para. 4-13a, or unauthorized activities, AFI 34-201, para. 4.2.27 (cross referencing AFI 34-101).
 2. Accomplish any prohibited purpose listed in AR 215-1, para. 5-14, which contains a detailed listing of NAF prohibitions. See also AFI 34-201, para. 4.2 (listing prohibited expenditures for Air Force NAFs); BUPERSINST 1710.11C, para. 420 (listing prohibited expenditures for Navy MWR funds).
 3. Pay costs of items or services authorized to be paid from APFs when APFs are available. AR 215-1, para. 4-13b; AFI 34-201, para. 4.2.1. Exceptions to this policy in the Army include:
 - a. When the appropriate official certifies in writing that APFs cannot satisfy the requirement (AR 215-1, para. 5-14b);
 - b. When functions, programs, and activities to be funded with NAFs are integral to the functions for which the NAFI was established (AR 215-1, para. 5-14b); and
 - c. When the DOD MWR Utilization, Support and Accountability (USA) policy applies.
 4. Support private organizations. AR 215-1, para. 4-13c; AFI 34-201, para. 4.2.22.

5. Contract with Government personnel, military or civilian, except as authorized in AR 215-4. (Para. 1-21 of that regulation provides that contracts are authorized with government employees and military personnel so long as such contracts are non-personal services contracts funded entirely with NAFs. Examples include contracts for sports officials and instructors and arts and crafts). AR 215-1, para. 5-14n.
 6. Support non-MWR functions. Army regulations specifically prohibit use of NAFs for any expense for a retirement ceremony, command representation, or other specific benefit for select individuals or groups. AR 215-1, para. 5-14i. However, the Air Force allows the use of NAFs to fund change of command ceremonies on a “modest” basis, as established by MAJCOM commanders. AFI 34-201, para. 12.4.8.
 7. Purchase personal items such as memo pads or greeting cards, including personalized memo pads to be used at work. In the Air Force, this extends to business cards. AR 215-1, para. 5-14k; AFI 34-201, para. 4.2.17.
- D. In the Air Force, NAFs may NOT be used for the following activities (see AFI 34-201 for other restrictions):
1. Supporting programs or personnel attending functional or professional courses. AFI 34-201, para. 4.2.2.
 2. Offices, work areas, waiting areas, or special interest groups that are not primarily concerned with MWR programs, e.g., legal offices. AFI 34-201, para. 4.2.3.
 3. Loans to individuals, AFI 34-201, para. 4.2.7.
 4. Purchasing land, AFI 34-201, para.4.2.20.
 5. Buying portraits of senior Air Force leaders, AFI 34-201, para.4.2.21.
- E. In the Navy, NAFs may not be used for the following activities (see BUPERSINST 1710.11C for other restrictions):

1. Command receptions or for expenses of similar functions incident to the official activation, deactivation or realignment of a command, para. 420l;
2. For support of aero or sky diving clubs, para. 420o;
3. To subsidize recycling programs, para. 420q;
4. For support of religious programs, para. 420s;
5. For recognition awards, incentive awards, rating badges, wing insignias, and similar items not related to MWR program (except for unit funds), para. 420u; and
6. For support of activities, and programs unrelated to MWR purposes (crash kits, “welcome aboard” gifts, and retirement/farewell gifts), para. 420v.

VIII. FUNDING PROGRAMS FOR CONSTRUCTION.

- A. APF support for construction of MWR facilities is generally determined by the category of the MWR activity.
- B. Construction to support MWR programs are funded either from APF or NAF construction programs as specified in AR 215-1, Appendix E. Requirements associated with category A programs will be funded from APF construction programs; generally, those for category B and C programs will be funded from NAF construction programs unless other specified in AR 215-1, Appendix E. AR 215-1, para. 15-4b.
- C. For a discussion of the NAF construction program and APF v. NAF funding, see AR 215-1, Section II (Construction Planning).

IX. NAF FISCAL ISSUES.

- A. Contingency Operations.

1. MWR programs are mission essential to combat readiness. They contribute to successful military operations by promoting individual physical and mental fitness, morale, unit cohesion, and esprit de corps, and by alleviating mission-related stress. Joint Pub 1-0, Joint Personnel Support, 31 May 2016, Chapter 2, para 3b(10) (discussing planning and execution of MWR in a contingency setting).
 2. MWR support for contingency operations will be funded by Service component commands through appropriated funds. AR 215-1, para. 9-1*b*.
- B. DOD MWR Funding Policy. DOD has several funding policies designed to give MWR managers funding flexibility.
1. MWR Utilization, Support, and Accountability (USA) Program—AR 215-1, para. 5-2.
 - a. Applicable to MWR entities not participating in the Uniform Funding and Management Program.
 - b. Allows garrison commanders and APF and NAF resource managers to execute a memorandum of agreement to use NAFs to provide APF-authorized services in support of MWR programs, with subsequent payment to the NAFI/entity for these services from APFs.
 - c. May be used to finance personnel services, supplies, furniture, fixtures and equipment, routine maintenance, and other operating expenses of MWR programs (Program Group I), the exchange service (Program Group II), Stars and Stripes (Program Group V), and the U.S. Military Academy mixed-funded athletic or recreational extracurricular programs (Program Group V). MWR USA may not be used for construction.
 - d. NAFIs must keep an accounting of the funds. The MWR USA program will not be used to extend the availability of APFs. If the NAFI will not obligate the funds before they expire, the NAFI must return the funds for obligation elsewhere.
 2. Uniform Funding and Management (UFM) Program, AR 215-1, para. 5-3.

- a. UFM is the merging of APFs and NAFs for the purpose of providing MWR support services under a single set of rules and procedures in order to reduce duplication of cost and provide better visibility on MWR program costs.
- b. Under the program, APFs are expended using NAF rules for MWR programs authorized APF support to promote efficiencies. The purpose is to facilitate procurement of property and services for MWR, management of employees used to carry out the programs, and financial reporting and management.
- c. The practice of UFM results in no increase or decrease to the funding of MWR. It is an alternate means of execution.
- d. UFM Involves:-
 - (1) Preparation of a MOA between the APF resource manager and MWR manager outlining the APF authorized MWR service to be performed by the NAFI location, the APF funding, and the up-front payment schedule.
 - (2) The MOA serves as the basis for creating the APF obligation and forwarding the money to the NAFI.
 - (3) MWR management employs NAF rules and procedures in execution of the services authorized APF and funded via the MOA.
 - (4) Expenditures authorized APF and paid in accordance with the UFM process are recorded in a specially coded department on the NAF financial statement.
 - (5) At year-end, the MWR expenses authorized APF must equal or exceed the UFM income. Any recorded expenses excess to the amount of APF provided as a result of the MOA are termed APF shortfall.

C. Use of NAF employees to perform APF functions.

1. An example is using a NAF contracting officer to perform APF contract actions.²
2. This constitutes augmentation of appropriations and violates the Antideficiency Act.
3. Use of APF employees to perform NAF functions beyond those which are authorized violates the Purpose Statute and the Antideficiency Act.

D. Golf Courses.

1. Unless the DOD golf course is located outside the United States or designated as a remote and isolated location, APFs may not be used to equip, operate, or maintain it. 10 U.S.C. § 2491a; see also Prohibition on Use of APF for Defense Golf Courses, B-277905, Mar. 17, 1998 (APFs cannot be used to install or maintain “greywater” pipelines on an Army golf course).

E. MWR patronage eligibility.

1. See DODI 1015.10, Encl. 4, table 1. Programs are established primarily for military personnel, but 28 categories of authorized patrons are listed in Table 6-1 of AR 215-1, Chapter 6. Before expanding the patron base for MWR usage, consider such things as congressional and regulatory requirements, and the effect on customer service. MWR programs may be opened up to additional guests under limited circumstances. See AR 215-1, para. 7-2.

F. Public Private Ventures (PPV).

1. Private sector built, operated, and maintained facilities or services on installations in exchange for discounted fees and/or an equitable return to the garrison MWR operating entity. FMWRC is the sole Army agency authorized to award MWR PPV contracts. See DODI 1015.13; AR 215-1, para. 15-12.

² Note that this does not include acquisitions accomplished through UFM or MWR USA. Congress statutorily authorized both of these funding mechanisms.

2. In order to meet MWR requirements, installations may identify activities that are unavailable through normal funding sources and that may be met by the private sector. The FMWRC negotiates and executes all Army PPV contracts, and coordinates with the Corps of Engineers who leases the land under the authority of 10 U.S.C. § 2667. The contractor builds and operates the facility at its expense, and the garrison MWR operating entity receives a percentage of gross revenue.
3. PPVs require approval/coordination with Service MWR headquarters and an extensive local survey prior to approval. Congress notified by DOD.

G. Advertising.

1. MWR programs communicate their presence and availability of goods and services they offer to as many potential patrons as they can. The advertising will not reflect adversely on the DOD, the Army, other DOD components, or the Federal Government. DODI 1015.10, Encl. 12, para. 1; AR 215-1, para. 11-1.
2. MWR programs and other NAFIs may sell space for commercial advertising in any NAFI/entity media. DODI 1015.10, Encl. 12, para. 1; AR 215-1, para. 11-2.
 - a. Advertising will be rejected if it undermines or appears to undermine an environment conducive to successful mission performance and preservation of loyalty, moral, and discipline. AR 215-1, para. 11-2(b)(1).
 - b. Advertising will not contain anything in it that might be illegal or contrary to DOD or Army Regulations. AR 215-1, para. 11-2(b)(2).
 - (1) Discrimination;
 - (2) Prohibition against soliciting membership in private groups;
 - (3) Endorsement of political positions; partisan political items, or political advertisements;

- (4) Favoring one group over another; or
- (5) Games of chance, including casinos and Indian tribe gaming.

H. Commercial Sponsorship.

1. Commercial sponsorship is a contractual agreement between the military and the sponsor. The military provides access to its advertising market, and the sponsor provides support to an event. DODI 1015.10, Encl. 11; AR 215-1, para. 11-6.
2. Commercial Sponsorship is either solicited or unsolicited and is only authorized for support of DOD MWR programs listed at Enclosure 11 of DODI 1015.10. Commercial sponsorship is not authorized for military open house programs. AR 215-1, para. 11-7.
3. All commercial sponsorship agreements must be in writing and **MUST** receive legal review prior to entering the agreement and prior to signature of the parties. AR 215-1, para. 11-9.
 - a. Provisions for termination of agreements, force majeure (e.g. acts of God), and assignment will be included in the agreement.
 - b. The commercial sponsorship will certify in writing that sponsorship costs will not be chargeable in any way to any part of the Federal Government.
4. The Army will not solicit commercial sponsorship from companies in the tobacco, beer, or alcoholic industries. AR 215-1, para.11-11b.
 - a. Unsolicited sponsorship may be accepted.
 - b. A responsible use campaign (beer, alcohol) and the Surgeon General's warning (tobacco) will be incorporated in any print media.

5. Officials responsible for procurement or contracting will not be directly or indirectly involved with the solicitation of commercial sponsors. AR 215-1, para. 11-13.

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 (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).

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CHAPTER 14:



LIABILITY OF ACCOUNTABLE OFFICERS

CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

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CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES.

- A. 10 U.S.C. § 2773a (authorizing DOD to hold accountable officials liable).
- B. 31 U.S.C. § 3325 (requiring certifying officers within DOD).
- C. 31 U.S.C. § 3527 (specifying when the Comptroller General may relieve other accountable officers from liability).
- D. 31 U.S.C. § 3528 (specifying when the Comptroller General may relieve certifying officers from liability).
- E. Dep't of Defense Reg. 7000.14-R, Financial Management Regulation, Volume 5, Disbursing Policies and Procedures [hereinafter DOD FMR, Vol. 5], *available at* <http://comptroller.defense.gov/fmr>.
- F. Principles of Federal Appropriations Law [hereinafter "GAO Redbook"], Third Edition, Volume II, Chapter 9 (Liability and Relief of Accountable Officers).
- G. DFAS-IN (Defense Finance and Accounting Service-Indianapolis) Reg. 37-1, Finance and Accounting Policy Implementation, *available at* <http://www.asafm.army.mil/secretariat/document/37-1reg/37-1reg.asp>.

II. TYPES OF ACCOUNTABLE OFFICERS.

- A. Definitions.
 - 1. An accountable officer is any government officer or employee who by reason of his or her employment is responsible for or has custody of government funds. See Relief from Liab. for Erroneous Payments from U.S. Bankr. Court's Registry Fund, B-288163, June 4, 2002; Lieutenant Commander Michael S. Schwartz, USN, B-245773, May 14, 1992 (unpub.); Mr. Charles L. Hartgraves, B-234242, Feb. 6, 1990 (unpub.).

2. The DOD refers to this broad universe of persons as “accountable officials.” The term “accountable official” is used in 31 U.S.C. 3527 to refer to the class of officers or employees of an agency who are pecuniarily liable for repayment of losses or deficiencies of public money, vouchers, checks, securities, or records. Such officials are appointed using DD Form 577 (Appointment/Termination Record - Authorized Signature). Only officers and employees of an agency are eligible for appointment as accountable officials. DOD FMR, Vol. 5, Ch 1, para. 010303. Examples of “accountable officials” include: Disbursing Officials (DO); Deputy DOs, Cashiers, Change Fund Custodians, Collection Agents, Certifying Officers; Departmental Accountable Officials (DAO); Disbursing Officers; Imprest Fund Cashiers; and Paying Agents. Under certain circumstances, foreign employees of DoD can be accountable officials. Dep’t of Defense Accountable Officials – Local Nationals Abroad, B-305919, Mar. 27, 2006.
3. “Pecuniary Liability” is “Personal financial liability for fiscal irregularities of accountable officials as an incentive to guard against errors and theft by others, as well as protect the government against errors and dishonesty by the officers themselves.” DoD FMR, Definitions.
4. Any government officer or employee, military or civilian, who handles government funds physically, even if only once or occasionally, is “accountable” for those funds while they are in his or her **custody**. Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (1992); Finality of Immigration & Naturalization Serv. Decision on Responsibility of Accountable Officer for Physical Losses of Funds, B-195227, 59 Comp. Gen. 113 (1979).
5. Absent statutory authority, agency officials who are not designated as accountable officers are not personally liable for **illegal, improper, or incorrect payments**. Veteran Affairs – Liab. of Alexander Tripp, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005) (concluding that certain acts of an “approving official” did not carry financial responsibility); Dep’t of Def. – Auth. to Impose Pecuniary Liab. by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).

B. Certifying Officers, Disbursing Officers and Other Accountable Officers, and Departmental Accountable Officials. In general terms, accountable officers fall into several broad categories. First, certifying officers are typically responsible for authorizing payments; yet, they do not have custody of public funds. Second, disbursing officers, their agents, and other accountable officers such as collections agents, are responsible for making payments and collecting funds. These accountable positions are typically authorized to have custody of funds. Additionally, government employees may become accountable officers by virtue of the fact that they (even occasionally) become custodians of federal funds. Last, within DOD, certain individuals comprise a third category of accountable officials. Departmental Accountable Officials (DAO) are those officials that provide information or data that is subsequently relied upon by a certifying officer. See GAO Redbook, Vol. II, 9-11; DOD FMR, Vol.5, Ch. 2 and Glossary.

1. Certifying Officer. A certifying officer is a government officer or employee whose job is or includes certifying vouchers for payment. GAO Redbook, Vol. II, 9-13. A certifying officer differs from other accountable officers in that the certifying officer does not have physical custody of government funds. Certifying Officer liability is established by 31 U.S.C. § 3528.

a. Within DOD, a certifying officer is defined as an “individual designated to attest to the correctness of statements, facts, accounts, and amounts appearing on a voucher, or other documents.” DOD FMR, Glossary. DOD Certifying Officers must be appointed in writing on a DD Form 577. DOD FMR, Vol. 5, Ch. 1, para. 010303.

b. Certification is “the act of attesting to the legality, propriety and accuracy of a voucher for payment” as provided for in 31 U.S.C. §3528. DOD FMR, Vol. 5, Definitions.

c. Certifying officers perform inherently governmental functions and therefore must be Federal Government employees. DOD FMR, Vol. 5, Ch. 1, para. 010303 B.

2. Disbursing Officials. Generally, a disbursing officer “is an officer or employee of a federal department or agency, civilian or military, designated to disburse moneys and render accounts in accordance with laws and regulations governing the disbursement of public funds.” GAO Redbook, Vol. II, 9-14. The DOD FMR lists various additional positions including collections officers and other agents who are specifically appointed and who are authorized to have custody of government funds. DOD FMR, Vol. 5, Ch. 1, para. 010303.
 - a. Disbursing Officer (DO). “An officer or employee of a Federal Department, Agency or Corporation designated to disburse moneys and render accounts according to laws and regulations governing the disbursement of public moneys.” DOD FMR, Glossary. A “Deputy DO” (DDO) may be appointed to act in the name of the DO. All DO and DDO appointees must be U. S. citizens. See generally 31 U.S.C. § 3321; DOD FMR, Vol. 5, Ch. 2.
 - b. Disbursing Agents. A disbursing agent is an agent of the DO who is NOT a DDO. Disbursing agents typically operate disbursing offices that are geographically separated from the DO’s office. Unlike DO’s and DDO’s, disbursing agents cannot sign or issue US Treasury checks. DOD FMR, Vol. 5, Ch. 2, para. 020702.
 - c. Cashier. Appointed to perform limited cash-disbursing functions or other cash-handling operations to assist a finance officer or other subordinate/assistant of the finance officer. Cashiers disburse, collect, and account for cash, and perform other duties as required concerning the receipt, custody, safeguarding and preparation of checks. DOD FMR, Vol. 5, Ch. 2, para. 020703.C; Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997) (disbursing officer and his subordinate cashiers are jointly and severally liable for loss of funds and must separately petition for relief).
 - d. Paying Agents. 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 or certifying officers. DOD FMR, Vol. 5, Ch.2, para. 020704.

- e. Collection Agents. Collection agents receive funds generated from activities such as hospitalization fees and other medical facility charges, rentals, and other charges associated with housing, reproduction fees, and other similar functions. DOD FMR, Vol. 5, Ch. 2, para. 020705.
 - f. Change Fund Custodians. A change fund custodian receives a change fund from the parent disbursing office and uses it to make change for sales transactions. DOD FMR, Vol. 5, Ch. 2, para. 020706.
 - g. Imprest Fund Cashiers. Imprest fund cashiers make authorized cash payments for purchases of materials and non-personal services, maintain custody of funds, and account for and replenish the imprest fund as necessary. DOD FMR, Vol. 5, Ch. 2, para. 020706. Imprest Funds are generally not authorized for DOD activities, but there are exceptions for contingency and classified operations. In most cases, the government purchase card is the vehicle used to make micro-purchases. DOD FMR, Vol. 5, Ch. 2, para. 020901; FAR 13.305.
3. Departmental Accountable Officials (DAO). A DAO is an “individual who provides certifying officers information, data, or services that the certifying officers rely upon directly in certifying vouchers for payment.” DOD FMR, Vol. 5, Ch. 5, para. 050305. See also, 10 U.S.C. § 2773A (Departmental Accountable Officials); DOD FMR, Vol. 5, Ch. 5 para. 050305. DAOs must also be appointed in writing on a DD Form 577. DOD FMR, Vol. 5, para. 050401. Pecuniary liability for DAOs is established by 10 U.S.C. § 2773A.

III. LIABILITY OF ACCOUNTABLE OFFICERS.

A. Certifying Officers.

- 1. A certifying officer:
 - a. Is responsible for the correctness of the facts recited in the certificate, or otherwise stated on the voucher or supporting papers;
 - b. Is responsible for the correctness of computations on the voucher;

- c. Is responsible for the legality of the proposed payment under the appropriation or fund cited on the voucher;
- d. Is to ensure there is a legal obligation to pay (e.g., a contract);
- e. Is to ensure the payee has fulfilled the prerequisites to payment (e.g., an invoice, receiving report);
- f. Is accountable for any payment:
 - (1) Determined to be prohibited by law,
 - (2) Determined to be illegal, improper, or incorrect because of an inaccurate or misleading certificate, or
 - (3) Determined to not represent a legal obligation under the appropriation or fund involved, unless payment is recovered by collection or offset from the payee or another source. 31 U.S.C. § 3528; DOD FMR, Vol. 5, Ch. 5, para. 050304.
- g. Certifying officers are accountable for illegal, improper, or incorrect payments made as a result of their certifications *even though they may have relied on information, data, or services of other departmental accountable officials*. “A critical tool that certifying officers have to carry out this responsibility is the power to question, and refuse certification of, payments that may be improper.” Mr. Jeffery Elmore-Request for Relief of Financial Liability, B-307693 (Apr. 12, 2007); but see, National Institute of Food and Agriculture – Biotechnology Risk Assessment Grant Payment, B-322898 (May 24, 2012) (stating that “[i]ncluded in the certifying officer’s burden is questioning items on the face of vouchers or supporting documents that simply do not look right” but then concluding that a “certifying officer’s statutory liability does not extend to the exercise of discretion and judgment [] resid[ing] with agency program officials.”).

3. Disbursing officers are accountable for illegal, improper, or incorrect payments and for errors in their accounts even though they may have relied on deputies, agents, or cashiers who caused the errors. DOD FMR, Vol. 5, Ch. 2, para. 0210.

C. DoD Departmental Accountable Officials.

1. Previously, DOD FMR purported to impose pecuniary liability on “accountable officials” as a matter of policy. “Accountable officials” were defined as personnel “who are designated in writing and are not otherwise accountable under applicable law, who provide source information, data or service (such as a receiving official, a cardholder, and an automated information system administrator) to a certifying or disbursing officer in support of the payment process.” The rationale was (and is) that it is extremely difficult for any single official to ensure the accuracy, propriety, and legality of every payment, and that therefore certifying officers and disbursing officers, as a practical matter, must rely upon information provided by others in performing this difficult task.
2. The GAO held, however, that this regulatory imposition of financial liability against such persons was improper because, unlike certifying officers and disbursing officers, there was no statutory basis for imposing liability against “accountable officials,” and agencies may impose pecuniary liability against someone only if there is a statutory basis for doing so. Dep’t of Def. – Auth. to Impose Pecuniary Liab. by Regulation, B-280764, 2000 U.S. Comp. Gen. LEXIS 159 (May 4, 2000).
3. The 2003 Defense Authorization Act, codified at 10 U.S.C. § 2773a, has since provided that statutory authority. Section 2773a states that departmental accountable officers may be held financially liable for illegal or erroneous payments resulting from their negligence. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, §1005, 116 Stat 2458, 2631-32 (2002).
4. The DOD FMR now provides that DAOs “may be held pecuniarily liable under 10 U.S.C. 2773a(c) for illegal, improper or incorrect payment resulting from information, data, or services they negligently provide to certifying officers; and upon which the certifying officers relied to certify payment vouchers.” Any liability is joint and several with that of any other officer or employee of the United States or member of the uniformed services who is also pecuniarily liable for such loss. 10 USC § 2773a(c) (3); DOD FMR, Vol. 5, Ch. 5, para. 050701.C.

5. DAOs are designated by DD Form 577 and are notified in writing of the designation and of their pecuniary liability for all illegal, improper or incorrect payments that result from negligent performance of their duties. DOD FMR, Vol. 5, Ch. 1, para. 010303.
6. The GAO looked at the DOD practice of hiring foreign local nationals as DAOs and found no specific authority that restricted DOD from appointing such employees who were paid from appropriated funds. The GAO, however, questioned the wisdom of appointing DAOs who potentially could be shielded from liability by host nation law. Dep't of Def. Accountable Officials – Local Nat'ls Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006); *see also*. DoD FMR, Vol. 5, Ch 1, Para 010303.D.

D. “Possessory” Accountable Officers.

1. Someone who has custody of funds is an accountable officer even though he or she is not a certifying or disbursing officer. Those entrusted with funds are liable for **any and all** losses. This liability is based on the broad responsibilities imposed by 31 U.S.C. § 3302, which requires government officials or agents in custody of government funds to keep the funds safe. See, e.g., B-220492 (holding that an ATF special agent in possession of a “flash roll” used in undercover activities, was an accountable officer and was strictly liable for the funds in his custody even though the funds were stolen from the glove compartment of his car, which he parked in a high-crime area).
2. DOD does not use the term “Possessory” Accountable Officers, but defines Accountable Officials to include deputy disbursing officers, agents, cashiers and other employees who by virtue of their employment are responsible for or have custody of government funds. DOD FMR, Vol. 5, Ch. 6, para. 060101.
3. There is no liability limitation for these accountable officers, though they may be granted relief if warranted by the facts. Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990) (holding that although Secret Service agent was an accountable officer by virtue of his employment and custody of government funds, the facts regarding his hotel room break-in and burglary supported granting relief).

E. The Nature of Accountable Officer Liability.

1. Accountable officers (with the exception of departmental accountable officials – see paragraph 5 below) are strictly liable for losses or erroneous payments of public funds. A series of very old cases recognized two exceptions to the strict liability rule: 1) overruling necessity (e.g. acts of God); and 2) public enemy, however subsequent cases rendered these exceptions extremely limited. *United States v. Prescott*, 44 U.S. (3 How.) 578 (1845); *United States v. Thomas*, 82 U.S. (15 Wall.) 337 (1872); *Serrano v. United States*, 612 F.2d 525 (Ct. Cl. 1979); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969); GAO Redbook, Vol. II, Ch. 9, para. B.1a.
2. Accountable officers are in effect, “insurers” of public funds in their custody or for which they are otherwise responsible. Ms. Bonnie Luckman, B-258357 (Jan. 3, 1996) (refusing to grant relief to an imprest fund cashier who arguably did not lose any funds, but could not account for a number of purchases due to lost supporting documentation).
3. Liability arises by operation of law at the moment a physical loss occurs or an erroneous payment is made. Fault or negligence on the part of the accountable official does not excuse this legal liability. However, the lack of fault or negligence may provide a basis for relief from the obligation to repay the loss. Relief does not excuse the legal liability, but rather is a separate process that may take fault or negligence into consideration to the extent authorized by the governing statute. If relief is granted, the duty to repay is excused. 31 U.S.C. §§ 3527, 3528; Mr. David J. Bechtol, B-271608, 1996 U.S. Comp. Gen. LEXIS 333 (June 21, 1996); Captain John J. Geer, Jr., B-238123, 70 Comp. Gen. 298 (Feb. 27, 1991); Mr. Anthony Dudley, B-238898, 70 Comp. Gen. 389 (Apr. 1, 1991); Sergeant Charles E. North--Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586 (July 11, 1990); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974); DoD FMR, Vol. 5, Ch. 6.
4. Certifying officers and disbursing officers are automatically liable when a “fiscal irregularity,” i.e., physical loss or erroneous payment, occurs. A fiscal irregularity creates the “presumption of negligence” on the part of the certifying or disbursing officer. This presumption shifts the burden to the accountable official to prove, during the relief process, that he or she was either not negligent or not the proximate cause of the irregularity. DoD FMR, Vol. 5, Ch. 5, para. 050701.

5. DAOs are not subject to the presumption of negligence, but may be held liable for an illegal, improper, or incorrect payment that results from their fault or negligence and may be either individual or joint and severally liable with that of other officers or employees of the U.S. or members of the uniformed services who are also pecuniarily liable for those losses. 10 U.S.C. § 2773a(c); Dep't of Def. Accountable Officials – Local Nat'l's Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006); DoD FMR, Vol. 5, Ch. 5, para. 050701.C.

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.
2. Upon request, the Comptroller General will decide any question involving:
 - a. A payment the disbursing official or the head of the agency proposes to make; or
 - b. A voucher presented to a certifying official for certification.
3. As of April 2005, DOD does not recognize the statutory authority of the Comptroller General to shield DOD personnel from financial liability by issuing advance decisions on the use of appropriated funds. DOD FMR, Vol. 5, Ch. 1, para. 010801 (April 2005 version).
 - a. An old version of DOD FMR, Vol. 5, Ch. 1, para. 010802.E explained:

While an opinion of the CG [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the CG to relieve Executive Branch Officials from liability (*i.e.*, 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the CG, as an agent of Congress, may not exercise Executive power, and does

not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch.

DOD FMR, Vol. 5, Ch. 1, para. 010801 (April 2005 version); Memorandum, Department of Justice, to Department Employees, subject: Legality of and Liability for Obligation and Payment of Government Funds by Accountable Officers (DOJ Order 2110.39A) (15 Nov. 1995).

- b. The 1995 DOJ memorandum was based on a 1991 DOJ Office of Legal Counsel opinion which concluded that the statutes were unconstitutional insofar as they purport to empower the Comptroller General to relieve Executive Branch officials from liability. Memorandum for Janis A. Sposato, General Counsel, Justice Management Division, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Comptroller General's Authority To Relieve Disbursing and Certifying Officials From Liability (Aug. 5, 1991).
- c. The April 2005 DOD action in changing DOD FMR consistent with the DOJ opinion followed similar action initiated by the Department of Treasury in 2004. Memorandum, U.S. Department of Justice, Office of the Assistant Attorney General, to U.S. Department of Treasury General Counsel, subject: Response to Department of Treasury (28 Jan. 2004).
- d. The current version of the DOD FMR deleted this explanation and history. It provides a means to request advance decisions, but those decisions do not go beyond DOD. See section IV.B. below. DOD FMR, Vol. 5, Ch. 12.

B. Advance Agency Decisions.

- 1. **For DOD**, a disbursing officer, certifying officer, or head of an agency, may seek an advance decision on the propriety of any prospective payment from an authorized official enumerated in the current version of DoD FMR, Vol. 5, Ch. 12, para. 120103.
 - a. Such advance decisions will effectively “shield” the employee from liability in that DoD will not seek to recover a payment from the employee if the appropriate authorized official issued an opinion advising that the payment could legally be made.

- b. The DoD FMR cautions however, that these advance decisions are not applicable to payments already made, or to hypothetical cases. Further, advance decisions are conclusive only regarding the particular payment involved. DoD FMR, Vol. 5, Ch. 12.
- c. DoD FMR, Vol. 5, Ch. 12 directs employees to the following responsible offices for advance decisions:
 - (1) Use of appropriated funds: Deputy General Counsel (Fiscal), Office of the Secretary of Defense
 - (2) Military members' pay, allowances, travel, transportation, retired pay, and survivor benefits: Deputy General Counsel (P&HP), Office of the Secretary of Defense
- d. Requests for advance decisions are submitted through the General Counsel of the DoD component or of DFAS, to the Deputy General Counsel (Fiscal) (DoD (DCG(F))) for determination. The DoD FMR provides that an "appropriate General Counsel may return cases involving entitlement questions [which] have been clearly decided authoritatively, with a determination that no advance decision is necessary." DoD FMR, Vol. 5, Ch. 12, para. 120301.

C. Relief of Non-DoD Certifying Officers. 31 U.S.C. § 3528(b).

- 1. The Comptroller General may relieve a certifying officer from liability if:
 - a. The officer based the improper certification on official records and the officer did not know, or reasonably could not have known, that the information was incorrect. 31 U.S.C. § 3528(b)(1)(A); Relief of Accountable Officer Sally V. Slocum – Am. Embassy, Brazzaville, Rep. of the Congo, B-288284.2, 2003 U.S. Comp. Gen. LEXIS 223 (Mar. 7, 2003); or

- (2) The loss or deficiency was not the result of fault or negligence of the officer or agent. Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992).
 - b. The loss or deficiency was not the result of an illegal or incorrect payment; *and*
 - c. The Comptroller General agrees with the decision of the head of the agency. 31 U.S.C. § 3527(a).
 2. The Comptroller General has delegated to agency heads the authority to resolve physical losses or deficiencies when a loss is less than \$3,000. U.S. Gov't Accountability Office, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.9.C, *available at* <http://www.gao.gov/assets/80/76194.pdf>; Mr. Frank Palmer, B-252809, 1993 U.S. Comp. Gen. LEXIS 485 (Apr. 7, 1993); Mr. Thomas M. Vapniarek, B-249796, 1993 U.S. Comp. Gen. LEXIS 248 (Feb. 9, 1993); Mr. Melvin L. Hines, B-247708, 72 Comp. Gen. 49 (Nov. 3, 1992). This delegation is limited, however, with respect to improper payments. GAO Redbook, Vol. II, p. 9-40.
 3. Alternatively, the Comptroller General may authorize reimbursement of amounts paid by the responsible official as restitution.
- F. Relief of DOD Certifying Officers for Illegal, Incorrect, or Improper Payments.
1. 31 U.S.C. § 3527(b)(1)(B) provides that the Comptroller General shall relieve a certifying officer of the “armed forces” for an illegal, improper, or incorrect payment resulting from an inaccurate or misleading certificate, provided the Secretary of Defense, after taking a diligent collection action, finds that the criteria of 31 U.S.C. § 3528(b)(1) are satisfied (see section IV.C. above). The Comptroller General determined that “armed forces” under the statute refers to the Army, Navy, Air Force, and Marines but not to defense agencies. Mr. Jeffrey Elmore, B-307693, 2007 U.S. Comp. Gen. LEXIS 70 (Apr. 12, 2007) (concluding that GAO had authority to consider a request for relief submitted under 3527(b) from an employee of the Defense Logistics Agency (DLA)).
 2. The DoD FMR, Vol. 5, Ch. 6, para. 060202, defines illegal, incorrect, or improper payments as “erroneous” payments, which include:

- a. Any payment that should not have been made or that is an incorrect overpayment under statutory, contractual, administrative, or other legally applicable requirement; or
 - b. Any payment to an ineligible recipient, any payment for an ineligible service, any duplicate payment, payment for services not received, and any payment that does not account for credit for applicable discounts.
3. The DoD FMR requires all relief requests to be determined by DoD. DoD FMR, Vol. 5, Ch. 6, para. 060101 (“The decision by the Secretary of Defense to grant or deny relief is binding.”).
4. The Secretary of Defense has delegated authority to the Director, DFAS or his designee, to make the required determinations and to grant or deny relief. DOD FMR, Vol. 5, Ch. 6, sec. 060101. Currently, that authority has been re-delegated to the Director, Strategy, Policy and Requirements (DFAS-ZP).
5. The standard for relief of certifying officers under 31 U.S.C. § 3528 (and also DOD FMR, Vol. 5, Ch. 6, para. 060604.B):
 - a. The certification was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or
 - b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment.

6. The Comptroller General may deny relief when the Comptroller General decides that the head of the agency did not diligently carry out efforts to recover the payment. 31 U.S.C. § 3528(b)(2). 31 U.S.C. § 3527(b)(1)(B) incorporates these determinations within the Secretary of Defense's findings. It further provides that the "finding of the Secretary involved is conclusive on the Comptroller General." 31 U.S.C. § 3527(b)(2). This language would appear to preclude the Comptroller General from denying relief based on failure to diligently pursue a collection action if there is an appropriate DoD finding to the contrary. In light, however, of GAO's decision described above (that "armed forces" under 31 U.S.C. § 3527 do not include defense agencies (see Mr. Jeffrey Elmore, B-307693)), it is unclear if the Comptroller General can deny relief to DOD certifying officers outside the Army, Navy, Air Force, and Marines.

G. Relief of **DOD** Disbursing Officers for Illegal, Incorrect, or Improper Payments.

1. The statute provides that the Comptroller General shall relieve an accountable officer of the armed forces who makes an improper, illegal, or incorrect payment, if, after taking diligent collection action, the Secretary of Defense finds that:
 - a. The payment was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or
 - b. The obligation was incurred in good faith; no law specifically prohibited the payment; and the U.S. Government received value for payment. 31 U.S.C. § 3527(b)(1)(B); 31 U.S.C. § 3528(b)(1). See generally Mr. David J. Bechtol, B-272615, 1997 U.S. Comp. Gen. LEXIS 270 (May 19, 1997).
2. DoD FMR, Vol. 5, Ch. 6, para. 060604.A. provides only this simplified two-prong standard for relief of a disbursing official in a case of erroneous payment:
 - a. The payment was not the result of bad faith or lack of reasonable care; and
 - b. Diligent collection efforts by the disbursing officials and the agency were made.

3. Apparently, the reason DoD FMR does not include the first prong of the statutory standard (that the payment was based on official records and the official did not know, and by reasonable diligence/inquiry, could not have discovered, the correct information) is because the DoD FMR specifically states that disbursing officers for need not take any action for erroneous payments that are properly certified. DoD FMR, Vol. 5, Ch. 6, para. 060501.B.2.
4. The Secretary of Defense has delegated authority to the Director, DFAS or his designee, to make the required determinations and to grant or deny relief. DOD FMR, Vol. 5, Ch. 6, sec. 060101. Currently, that authority has been re-delegated to the Director, Strategy, Policy and Requirements (DFAS-ZP).

H. Relief of **DOD** Disbursing Officers and Accountable Individuals for Physical Losses.

1. The statute provides that the Comptroller General shall relieve a disbursing official of the armed forces who is responsible for the physical loss or deficiency of public money, vouchers, or records when:
 - a. The Secretary of Defense determines that the officer was carrying out official duties when the loss or deficiency occurred;
 - b. The loss or deficiency was not the result of fault or negligence by the official; and
 - c. The loss or deficiency was not the result of an illegal or incorrect payment. 31 U.S.C. § 3527(b)(1)(A).
2. The DoD FMR, Vol. 5, Ch. 6, para. 060101, contains the identical standard and applies it to disbursing officials as well as other accountable individuals in cases of physical losses. Accordingly, this standard would also apply to other accountable officials such as DoD departmental accountable officials, deputy disbursing officers, agents, cashiers, and other employees who by virtue of their employment are responsible for and have custody of government funds.

3. Under the statute (31 U.S.C. § 3527(b)), the SECDEF finding binds the Comptroller General. For this reason, the Comptroller General does not require military departments to forward these relief determinations for approval. U.S. Gov't Accountability Office, Policy and Procedures Manual for Guidance of Federal Agencies, Title 7, § 8.10; Mr. William Duff, B-271859, 1996 U.S. Comp. Gen. 490 (Sep. 26, 1996).
- I. Relief of **DOD** Departmental Accountable Officials for Illegal, Incorrect, or Improper Payments.
1. DOD FMR, Vol. 5 does not state any standards for relief of departmental accountable officials (DAOs).
 2. However, because 10 U.S.C. § 2773a requires fault or negligence on the part of a departmental accountable official in order to subject that person to financial liability to begin with, it follows that a lack of negligence, at a minimum, will result in relief of liability.
 3. Further, as stated above and in the DOD FMR, the presumption of negligence does not apply to DAOs.
- J. Judicial Relief – U.S. Court of Federal Claims.
1. Disbursing officers. Under 28 U.S.C. § 1496, the court has jurisdiction to review disbursing officer cases.
 2. Any individual. If an agency withholds the pay of any individual, that person may request that the employing agency report the balance due to the Attorney General, who shall then initiate a suit against the individual. 5 U.S.C. § 5512(b). By doing this, the individual can get his matter heard in federal court.
 3. See GAO Redbook, Vol. II, Ch. 9, sec. E., for a description of other potential relief statutes.
- K. Legislative Relief. Private and collective relief legislation. Historically, this means of relief is what gave rise to the current regime of relief statutes (e.g. 31 U.S.C. § 3527) and is rarely used today.

V. ESTABLISHING LIABILITY.

A. DOD Required Action.

1. Before initiating collection for a loss, the appropriate agency must establish the accountable officer's liability "permanently." Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616, 622 (July 8, 1991). Liability is "permanently" established when the officer has agreed to repay the loss or the appropriate authority has denied relief.
2. The DoD FMR requires a formal investigation for all physical losses of funds or for erroneous payments induced by fraud. The commander may investigate other losses formally as well. DoD FMR, Vol. 5, Ch. 6. The dollar value of the loss will typically affect the level of formality of the investigation required. Chapter 6 provides detailed guidance on when investigations must be conducted as well as the procedures that must be followed during the investigation.

B. Statute of Limitations. 31 U.S.C. § 3526(c)(1).

1. The statute of limitations for settling accounts of an accountable officer is three years after agency accounts are substantially complete. Lieutenant Colonel S.C. Shoemake, Jr., B-239483.2, 70 Comp. Gen. 616 (July 8, 1991); Lieutenant Colonel S.C. Shoemake, Jr., B-239483, 70 Comp. Gen. 420 (Apr. 15, 1991). After this period, the account is settled by operation of law, and an accountable officer has no personal financial liability for the loss in question. Mr. John S. Nabil, B-258735, 1994 U.S. Comp. Gen. LEXIS 950 (Dec. 15, 1994); Mr. Clarence Maddox, B-303920, 2006 U.S. Comp. Gen. LEXIS 54 (Mar. 21, 2006) (statute of limitations reduced potential liability of \$1,443.22 to \$485.60).
2. "Substantially complete" means the time when, absent fraud by the officer, the agency can audit the paperwork upon which the officer based his action. Relief of Anna L. Pescod, B-251994, 1993 U.S. Comp. Gen. LEXIS 991 (Sept. 24, 1993).
3. If the loss is due to embezzlement, fraud, or other criminal activity, the three-year statute of limitations is not triggered until the loss has been discovered and reported. Steve E. Turner, B-270442.2, 1996 U.S. Comp. Gen. LEXIS 75 (Feb. 12, 1996).

4. The statute of limitations does not apply if a loss is due to fraud or other criminal acts of an accountable officer. 31 U.S.C. § 3526(c)(2).

VI. MATTERS OF PROOF.

A. Evidentiary Showing.

1. To qualify for relief from liability for a loss or deficiency under the applicable relief statutes, an accountable officer generally must prove that he was:
 - a. Acting in an official capacity; and
 - b. Was either not negligent or that his negligence did not cause the loss. 31 U.S.C. § 3527; Mr. S.M. Helmrich, B-265856, 1995 U.S. Comp. Gen. LEXIS 717 (Nov. 9, 1995).

B. The “Reasonable Care” Standard.

1. In determining whether an officer was negligent, the Comptroller General applies a “reasonable care” standard. Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (Aug. 14, 1974).
 - a. Liability results when an accountable officer’s conduct constitutes simple or ordinary negligence. Gross negligence is not required.
 - b. The standard is whether the accountable officer did what a reasonably prudent and careful person would have done to safeguard his/her own property under similar circumstances.
 - c. This is an “objective” standard. It does not vary with such factors as the level of experience or the age of the particular accountable officer concerned.
 - d. Failure to follow laws/regulations is negligent. Hence, accountable officers must familiarize themselves with applicable laws/regulations. DoD FMR, Vol. 5, ch.1, para. 010302.

2. That a loss or deficiency has occurred creates a rebuttable presumption of negligence on the part of the accountable officer. This presumption arises from the accountable officer's strict liability for any loss or deficiency. The accountable officer can rebut this presumption of negligence by presenting affirmative evidence that he exercised due care. *Serrano v. United States*, 612 F.2d 525 (Ct. Cl. 1979); Melvin L. Hines, B-243685, 1991 U.S. Comp. Gen. LEXIS 985 (July 1, 1991); Mr. Frank D. Derville, B-241478, 1991 U.S. Comp. Gen. LEXIS 1488 (Apr. 5, 1991); *To the Postmaster General*, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969). The burden is on the accountable officer seeking relief to present evidence that he or she exercised the requisite degree of care.
3. As noted previously, the DoD FMR indicates that the presumption of negligence does not apply to acts of Departmental Accountable Officials.

C. Proximate Cause.

1. If the accountable officer was negligent, the Comptroller General will consider whether the negligence was the proximate cause of the loss or deficiency. Again, however, it is the burden of the individual seeking relief to "show that some other factor or combination of factors was the proximate cause of the loss, or at least that the totality of evidence makes it impossible to fix responsibility." GAO Redbook, Vol. II, p. 9-52. The government need not prove proximate cause.
2. If negligence occurred and it was the proximate cause of the loss or deficiency, the Comptroller General may not grant relief from liability. 31 U.S.C. § 3527(a).
3. If an accountable officer was negligent, but the negligence was not the proximate cause of the loss or deficiency, the Comptroller General may grant relief under the statute. See B-201173 (Aug. 18, 1981) (granting relief to an accountable officer who negligently failed to lock a safe, but whose negligence was not the proximate cause of the loss because the safe containing the funds was in the process of being physically carried away by armed burglars when the door of the unlocked safe swung open).

VII. DEBT COLLECTION.

- A. Collection is pursuant to 31 U.S.C. §§ 3701- 3720E (Debt Collection Act) and 5 U.S.C. § 5512(a) (allowing offset against government employee or retiree pay). See 5 U.S.C. § 5514 (allowing payment by installment and limiting amount per period to 15%); 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. DoD FMR, Vol. 5, Ch. 8.

VIII. CONCLUSION.

CHAPTER 15:



FISCAL LAW RESEARCH

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FISCAL LAW RESEARCH

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CHAPTER 15

FISCAL LAW RESEARCH

I. LEGISLATION & STATUTES.

A. Appropriation Acts.

1. On an annual basis, Congress attempts to pass twelve regular appropriations acts plus one or more supplemental appropriation acts. U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-17 – 2-18, GAO-16-464SP (4th ed. 2016). <http://www.gao.gov/legal/redbook/redbook.html>
2. Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies. U.S. GOV'T U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-17 – 2-18, GAO-16-464SP (4th ed. 2016).
3. In recent years, including FY 2017, Congress has combined some or all of the appropriations into a consolidated appropriations act. *See, e.g.*, Consolidated Appropriations Act, 2017, Pub. L. No. 115-31. The 2017 Consolidated Appropriation Act was an omnibus appropriation act in which Congress consolidated eleven of the twelve appropriations acts. As of the writing of this chapter, FY 18 funding is being provided through a continuing resolution, as described below.
4. Congress occasionally funds some agencies' requirements through a series of continuing resolutions without ever passing an annual appropriation act. *See, e.g.*, Continuing Appropriations Act, 2018 and Supplemental Appropriations for Disaster Relief Requirements Act, 2017, 2017, Pub. L. No. 115-56 (funding agencies through 8 December 2017). A continuing resolution occurs when action on regular appropriation bills is not completed before the beginning of a fiscal year. To fill the funding void, a continuing resolution may be enacted in a bill or a joint resolution to provide funding for the affected agencies for the full year, up to a specified date, or until their regular appropriations are enacted. U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 13-14, GAO-05-734SP (Sept. 2005).

5. In addition to LEXISTM- and WestlawTM-based research, one can use the Library of Congress' website, [Congress.gov](http://www.congress.gov) to conduct research on legislation enacted since 1973. The Pentagon Library, available at <http://www.whs.mil/library/> also contains a list of and links to Department of Defense appropriation and authorizations acts.
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- B. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. This organic legislation provides the agency with authority to conduct the program, function, or mission and to utilize appropriated funds to do so. With relatively rare exceptions, organic legislation does not provide any money. U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-54, GAO-16-464SP (4th ed. 2016).
 - C. Authorization Act. An authorization act is substantive legislation, passed annually by Congress that authorizes the appropriation of funds for programs and activities. See U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 17, GAO-05-734SP (Sept. 2005).
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1. Although there is no general statutory requirement to have an authorization in order for an appropriation to occur, Congress statutorily created certain situations in which it must authorize an appropriation. U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-55, GAO-16-464SP (4th ed. 2016) For example, 10 U.S.C. § 114(a) states that “[n]o funds may be appropriated for any fiscal year” for certain purposes, including procurement, military construction, and/or research, development, test and evaluation “unless funds therefore have been specifically authorized by law.”

2. Under congressional rules, an authorization of an appropriation is a prerequisite to the appropriation. A point of order may be raised in either house objecting to an appropriation in an appropriation act that is not previously authorized by law. U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 15, GAO-05-734SP (Sept. 2005); U.S. GOV'T U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-55 – 2-56, GAO-16-464SP (4th ed. 2016). However, if a point of order is not raised, or is raised and not sustained, the provision, if enacted, is no less valid. GOV'T U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-55 – 2-56, GAO-16-464SP (4th ed. 2016). As a general rule, an authorization act does not provide budget authority. That authority stems from the appropriations act. Congress may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide, however.

D. Locating Pertinent Statutes.

1. The U.S. Code is broken down into titles which typically cover a given subject matter area.
 - a. Example #1: Codified statutes pertaining to the Department of Defense (DoD) are typically found in Title 10. When searching to find a codified statute dealing only with restrictions on DOD's use of its appropriations, the statute will likely be found in Title 10. Statutes dealing with all federal employees are generally found in Title 5. When searching to find a statute that might allow all agencies to use their appropriated funds to pay for employee benefits or training, with the most logical starting point would be to search Title 5.
 - b. Example #2: Statutes pertaining to the Department of State (DoS) are typically found in Title 22. Research into the field of Foreign Assistance will normally lead into Title 22 of the Code.
2. Searches can be run on either a specialized legal database, such as LEXIS™ or Westlaw™, the Government Printing Office (GPO) website, *available at* <https://www.gpo.gov/fdsys/browse/collectionUSCode.action?collectionCode=USCODE>, or Office of the Law Revision Counsel of the United States House of Representatives *available at:* <http://uscode.house.gov/browse.xhtml>.

II. THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO) AND ADVANCE AGENCY DECISIONS.

- A. The Budget and Accounting Act of 1921 established the Government Accounting Office (now the Government Accountability Office) as an investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds. *See* 31 U.S.C. §§ 701-721. The Comptroller General heads the GAO and issues legal opinions and reports to agencies concerning the availability and use of appropriated funds.
- B. In most cases, disbursing officials, certifying officials, and agency heads are entitled to advance decisions from the Comptroller General. 31 U.S.C. § 3529 (certain requests concerning functions transferred to or vested in the Director of the Office of Management and Budget must be directed to and answered by OMB or by another agency as delegated by the Director). GAO also has discretionary authority to render opinions to other individuals or organizations. *See* 1 U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 1, 1-12 to 1-17, GAO-16-463SP (2016) (discussing GAO's rendering of advanced decisions).
- C. As of April 2005, DOD does not recognize the statutory authority of the Comptroller General to shield DOD personnel from financial liability by issuing advance decisions on the use of appropriated funds. An old version of the Department of Defense Financial Management Regulation explained:
1. "While an opinion of the CG [Comptroller General] may have persuasive value, it cannot itself absolve an accountable official The Department of Justice has concluded as a matter of law that the statutory mechanism that purports to authorize the CG to relieve Executive Branch Officials from liability (i.e., 31 U.S.C. §§ 3527, 3528, and 3529) is unconstitutional because the CG, as an agent of Congress, may not exercise Executive power, and does not have the legal authority to issue decisions or interpretations of law that are binding on the Executive Branch." U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, Vol. 5, Ch. 1, para.010802.E (April 2005 version).

2. As a result of the Department of Justice’s determination, requests for advance decisions must be obtained from an authorized executive branch official. The current version of the DOD FMR deleted this explanation and history. It provides a means to request advance decisions, but those decisions do not go beyond DOD. See DOD FMR, Vol. 5, Ch. 12, para. 1203. For a description of the process to obtain advanced decisions within DOD, see Chapter 14, Liability of Accountable Officers, The Judge Advocate General’s Legal Center & School’s Fiscal Law Deskbook.

D. Authority of Comptroller General Decisions

1. The Comptroller General is an officer of the Legislative Branch. *See* *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986) (holding Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power).
2. The Attorney General has found that because GAO is part of the legislative branch, executive branch agencies are not bound by GAO legal advice and that Office of Legal Counsel (OLC) provides the authoritative interpretations of the law for the Executive Branch. Memorandum for the General Counsels of the Executive Branch, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether Appropriations May be Used for Informational Video News Releases* at 1 (Mar. 11, 2005)(“Bradbury Memo”)(citing *Bowsher*, 478 U.S. at 727-32).
 - a. Memorandum for Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division and for John D. Leshy, Solicitor, Department of the Interior, from Todd David Peterson, Deputy Assistant Attorney General, *Re: Administrative Settlement of Royalty Determinations* at n.7 (July 28, 1998)(“Although the opinions and legal interpretations of the GAO and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies or officers of the executive branch.”)
 - b. Authority of GAO Reports. *Statutory Authority to Contract with the Private Sector for Secure Facilities*, 16 Op. O.L.C. 65, 68 n.8 (1992) (“We note that while GAO reports are often persuasive in resolving legal issues, they, like opinions of the Comptroller General, are not binding on the Executive branch.”)

- c. Memorandum for Donald B. Ayer, Deputy Attorney General, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation* at 8 (Dec. 18, 1989) (“This Office has never regarded the legal opinions of the Comptroller General as binding upon the Executive.”)
- d. Conflicts. Memorandum for Joe D. Whitley, Acting Associate Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Detail of Judge Advocate General Corps Personnel to the United States Attorney’s Office for the District of Columbia and the Requirements of the Economy Act (31 U.S.C. §§ 1301, 1535)* at 2 n.2 (June 27, 1989) (“The Comptroller General is an officer of the legislative branch, and historically, the executive branch has not considered itself bound by the Comptroller General’s legal opinions if they conflict with the opinions of the Attorney General and the Office of Legal Counsel.”)

E. Decisions of the Comptroller General of the United States (Comp. Gen.).

- 1. The Government Printing Office (GPO) prints decisions of the Comptroller General. Prior to September 30, 1994, the GPO distributed written copies of selected decisions.
 - a. Hardbound volumes 1-73; volume No. 73 covers 1993-1994.
 - (1) Separate topical indices & digests from 1894 to the present.
 - (2) Contains only about 10% of total decisions issued each year.
 - (3) No legal distinction between published and unpublished decisions.
 - b. Example of citation:

Department of the Army - - Purchase of Commercial Calendars,
B-211477, 62 Comp. Gen. 48 (1983).

2. The GPO Access website,
<https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=GAOREPORTS>, contains electronic copies of decisions from October 1995 thru September 19, 2008. Documents are available as ASCII text and Adobe Acrobat Portable Document Format (PDF) files. On 19 September 2008, GPO signed a partnership agreement with GAO to provide permanent public access to the GAO Comptroller General Decisions database on the GAO website. Comptroller General decisions are now available on the GAO website at <http://www.gao.gov/legal/>.

3. The GAO website also contains electronic listings and copies of opinions issued within the past month and six months respectively. Subscriptions are available providing access to a GAO electronic alert that issues daily notifications of the reports, decisions, and opinions that GAO has issued. Registration for this service is available at <http://www.gao.gov/subscribe/index.php>.

4. Comptroller General's Procurement Decisions (CPD).
 - a. Published by West Publishing Group.

 - b. Contains every decision.

 - c. Loose-leaf reporter updated monthly.

 - d. A separate index volume with three indices.
 - (1) B-Number Index.

 - (2) Government Volume Index.

 - (3) Subject-Matter Index.

 - e. Example of citation:

F. Principles of Federal Appropriations Law (a.k.a. “The Red Book”).

1. The Government Accountability Office, Office of the General Counsel, published Volumes I, II, and III of the Third Edition in 2004, 2006, and 2008, respectively. In 2015, GAO published its annual update to the Third Edition, Volumes I, II and III. In 2016, the GAO began issuing the Fourth Edition on an iterative basis, starting with Chapter 1. The most current version of The Redbook is available at <http://www.gao.gov/legal/red-book>.
2. The Red Book serves as a detailed fiscal law guide covering those areas of law in which the Comptroller General renders decisions.
3. Example of citation:

GAO, Principles of Federal Appropriations Law, 4th ed., 2016 rev., ch. 2, § C.1, GAO-16-464SP (Washington, D.C.: Mar. 2016).

G. U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 15, GAO-05-734SP (Sept. 2005).

1. The Glossary fulfills part of GAO's statutory responsibility to publish standard terminology, definitions, classifications, and codes for federal fiscal, budgetary, and program-related information. 31 U.S.C. § 1112. The Glossary is available at <http://www.gao.gov/assets/80/76911.pdf>.
2. It is a basic reference document for the Congress, federal agencies, and others interested in the federal budget-making process.

III. BUDGET REQUESTS.

- A. Agencies are required to justify their budget requests. *See* FEDERAL OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET (July 2017), *available at* https://www.whitehouse.gov/omb/circulars_a11_current_year_a11_toc.

- B. Within DOD, Volumes 2A and 2B of the DOD Financial Management Regulation (DOD FMR) provide guidance on the documentation that must be generated to support defense budget requests. *See* U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, Vols. 2A (Oct. 2008), 2B (Sep. 2010), available at <http://comptroller.defense.gov/FMR/fmrvolumes.aspx>. These documents are typically referred to as Justification Books, with a book generated for each appropriation. Within Volumes 2A and 2B:
1. Chapter 2 deals with justification documents supporting the Military Personnel Appropriations (also known as "M documents").
 2. Chapter 3 deals with justification documents supporting the Operations and Maintenance Appropriations (also known as "O documents").
 3. Chapter 4 deals with justification documents supporting the Procurement Appropriations (also known as "P documents").
 4. Chapter 5 deals with justification documents supporting the Research, Development, Test and Evaluation Appropriations (also known as "R documents").
 5. Chapter 6 deals with justification documents supporting the Military Construction Appropriations (also known as "C documents").
- C. The budget request is originated by the actual end user of the funds and is filtered through agency command channels until it is ultimately reviewed by the Office of Management and Budget and submitted by the President as part of the federal government's overall budget request.
- D. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purpose requested, unless otherwise prohibited.
- E. Agencies generally place their past and current year budget submissions onto the web.
1. The President's overall budget materials can be found at <http://www.whitehouse.gov/omb/budget/>.

2. The Defense-wide budget materials can be found at:
<http://comptroller.defense.gov/>.
3. The Army's budget materials can be found at:
<https://www.asafm.army.mil/offices/bu/content.aspx?what=BudgetMaterials>.
4. The Air Force's budget materials can be found at:
<http://www.saffm.hq.af.mil/budget/>.
5. The Navy's budget materials can be found at:
<http://www.finance.hq.navy.mil/fmb/14pres/BOOKS.htm>.
6. The National Aeronautic and Space Administration's budget materials can be found at: <http://www.nasa.gov/about/budget/index.html>.
7. The Federal Aviation Administration's budget can be found at:
<http://www.faa.gov/about/budget/>.
8. The Environmental Protection Agency's budget materials can be found at:
<https://www.epa.gov/planandbudget/budget>.
9. The Department of the Interior's budget materials can be found at:
<http://www.doi.gov/budget/>.
10. The Department of Homeland Security's budget materials can be found at:
<http://www.dhs.gov/dhs-budget>.
11. The Department of State's budget materials can be found at:
<https://www.state.gov/s/d/rm/rls/ebs/index.htm>.

IV. AGENCY REGULATIONS.

- A. Background. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, GAO-16-464SP (2016). When Congress enacts organic legislation establishing a new agency or giving an existing agency a new function or program, it rarely prescribes exact details about how the agency will carry out that new mission. Instead, Congress leaves it up to the agency to implement the statutorily delegated authority in agency-level regulations.
- B. Deference. An agency will receive a great deal of deference when it promulgates rules and regulations interpreting statutes. Thus, if an agency regulation determines appropriated funds may be utilized for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous.
- C. Additional Restrictions. Agency-level regulations may also place restrictions on the use of appropriated funds.

Example: The GAO has determined that all federal agencies may purchase commercially prepared business cards using appropriated funds. Each of the defense services has determined it will only buy commercially prepared business cards for a very limited category of personnel. Everyone else within DOD generally must buy card stock (but can often use agency funds) and prepare their cards in-house. *See, e.g.*, U.S. DEP'T OF ARMY, REG. 25-30, THE ARMY PUBLISHING PROGRAM para. 5-7 (3 June 2015); U.S. DEP'T OF THE AIR FORCE, INSTR. 65-601, VOL. 1, BUDGET GUIDANCE AND PROCEDURES para. 4.44 (Aug. 16, 2012); Department of the Navy (Financial Management and Comptroller) Financial Policy Manual, NAVSO P-1000, 3-35 (December 2015).

- D. Researching Regulations.
 - 1. Agency Publication Websites. The DOD and many of the civilian agencies have websites containing electronic copies of most of their regulations. Unfortunately, not all agency publication websites support Boolean searches of the text of the regulations. For example, the Army website below only permits a search of the titles (not the text) of the regulations.
 - a. DOD Regulations. The Defense Technical Information Center (DTIC) provides electronic access to all DoD Regulations, Directives, and Instructions at: <http://www.esd.whs.mil/DD/>.

- b. Army Regulations. The U.S. Army Publishing Directorate (APD) provides electronic access to all Army Regulations, Directives, and Pamphlets at: <http://www.apd.army.mil/>.
- c. Air Force Regulations. The U.S. Air Force E-Publishing site provides electronic access to all Air Force Instructions, Regulations, Directives, and Pamphlets at: www.e-publishing.af.mil/.
- d. Navy Regulations. The Department of the Navy Issuances Website provides electronic access to all Navy Instructions, Publications, and Manuals at: <http://doni.daps.dla.mil/default.aspx>.
- e. Marine Corps Regulations. The Marine Corps Combat Development Command provides electronic access to all Marine Publications at:
<http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx>.
- f. Joint Publications. The Defense Technical Information Center (DTIC) provides electronic access to all Joint Publications at: http://www.dtic.mil/doctrine/s_index.html.
- g. Coast Guard Regulations. The U.S. Coast Guard Directives and Publications Division provides electronic access to all Coast Guard Directives, Instructions, and Notices at:
<http://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-C4IT-CG-6/The-Office-of-Information-Management-CG-61/About-CG-Directives-System/>.
- h. JAGCNET. Those individuals with a DOD approved CAC may conduct a search of the text of all publications contained within the JAGCNET library of publications (most DOD regulations and TJAGLCS deskbooks) at www.jagcnet.army.mil.

2. Specialized Websites. In addition to the above websites that compile all agency regulations in one location, there are other websites that contain regulations specific to the fiscal law. These include:
 - a. Department of Defense Financial Management Regulation. U.S. DEP'T OF DEFENSE, REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, *available at*, <http://comptroller.defense.gov/FMR/fmrvolumes.aspx>, establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the Department of Defense. This 16-volume set of regulations contains a very user-friendly, key word-searchable function. Much of this regulation deals with accounting practices, but there are also some fiscal policies embedded within it as well, including:
 - (1) Volume 2A, Budget Formulation and Presentation. For example, Chapter 1, General Information, provides funding policies for determining investment and expense costs.
 - (2) Volume 3, Budget Execution—Availability and Use of Budgetary Resources. For example, Chapter 8, Standards for Recording and Reviewing Commitments and Obligations, provides guidance on the proper year fund to charge for increased costs resulting from contract claims and modifications, among many other matters.
 - (3) Volume 10, Contract Payment Policy.
 - (4) Volume 11B, Reimbursable Operations Policy—Working Capital Funds.
 - (5) Volume 13, Nonappropriated Funds Policy.
 - (6) Volume 14, Administrative Control of Funds and Anti-deficiency Act Violations.
 - (7) Volume 15, Security Cooperation Policy.

b. Defense Finance and Accounting Service (DFAS) Regulations. DFAS handles the finance and accounting services for DOD. It is organized into geographic regions that are assigned a specific DOD service or organization to support (i.e. the Indianapolis office provides services to the Army). Examples of specific DFAS regulations:

- (1) DFAS-IN MANUAL 37-100-20XX, THE ARMY MANAGEMENT STRUCTURE (20XX). This regulation assigns most types of expenditures to a specific appropriation. The manual is reissued every FY (XX in the title = the appropriate FY) and is available at: <https://www.asafm.army.mil/dfas.aspx?doc=37-100>.
- (2) DFAS-IN REGULATION 37-1, FINANCE AND ACCOUNTING POLICY IMPLEMENTATION, *available at* <https://www.asafm.army.mil/dfas.aspx?doc=37-1>.

c. Defense Financial Management and Comptroller Websites. The DOD and each of the Services have a website which provide a wealth of information related to fiscal and other financial issues:

- (1) DOD Comptroller at: <http://comptroller.defense.gov/Home.aspx>.
- (2) Army Financial Management and Comptroller at: <http://www.asafm.army.mil/>.
- (3) Air Force Financial Management and Comptroller at: <http://www.saffm.hq.af.mil/>.
- (4) Navy Financial Management and Comptroller at: <http://www.finance.hq.navy.mil/FMC/>.

APPENDIX A

GOVERNMENT CONTRACT AND FISCAL LAW WEBSITES AND ELECTRONIC NEWSLETTERS

The table below contains hypertext links to websites that practitioners in the government contract and fiscal law fields use most often. If you are viewing this document in an electronic format, you should be able to just click on the web address in the second column resulting in your computer's web browser automatically opening and taking you to the requested website.

Website Name	Web Address
<u>A</u>	
ABA Legal Technology Resource Center:	http://www.abanet.org/tech/ltrc/lawlink/home.html
American Bar Association Homepage	https://www.americanbar.org
ABA Section of Public Contract Law	https://www.americanbar.org/groups/public_contract_law.html
Ability One	http://www.abilityone.gov/index.html
Acquisition Research Journal	https://www.dau.mil/library/arj/
Defense Acquisition University	https://www.dau.mil/
ACQ Web- Office of the Undersecretary of Defense for Acquisition & Tech	http://www.acq.osd.mil/
Air Force Acquisition	http://ww3.safaq.hq.af.mil/
Air Force Alternative Dispute Resolution (ADR) Program	http://www.adr.af.mil/
Air Force Audit Agency	http://www.afaaf.af.mil/
Air Force FAR Supplement	http://farsite.hill.af.mil/vmaffara.htm
Air Force Contracting Home Page	http://ww3.safaq.hq.af.mil/contracting/
Air Force Financial Management & Comptroller	http://www.saffm.hq.af.mil/
Air Force General Counsel	http://www.safgc.hq.af.mil/
Air Force Site, FAR, DFARS, Fed Reg	http://farsite.hill.af.mil/
Air Force Home Page	http://www.af.mil/

Website Name	Web Address
<u>A</u>	
Air Force Materiel Command FAR Supplement	http://farsite.hill.af.mil/archive/AFMCFARS/02-01/afmc1toc.htm
Air Force Publications	http://www.e-publishing.af.mil/
Acquisition Central	http://www.acquisition.gov/
Anti-Deficiency Act violation database - GAO	http://gao.gov/legal/lawresources/antideficiencyrpts.html
Armed Services Board of Contract Appeals	http://www.asbca.mil/
Armed Services Board of Contract Appeals Rules, EAJA and ADR procedures	http://www.asbca.mil/Rules/rules.html
Army Acquisition (ASA(ALT))	http://www.army.mil/asaalt
Army Audit Agency	http://www.hqda.army.mil/AAAWEB/
Army Corps of Engineers Home Page	http://www.usace.army.mil/
Army Corps of Engineers Legal Services	http://www.usace.army.mil/CECC/Pages/Home.aspx
AFARS – Army Federal Acquisition Regulation Supplement	http://farsite.hill.af.mil/vmafara.htm
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	https://ogc.hqda.pentagon.mil/
Army General Counsel Ethics Page	https://ogc.hqda.pentagon.mil/ethics.aspx
Army Home Page	https://www.army.mil/
Army Materiel Command Web Page	http://www.amc.army.mil/
Army Materiel Command Command Counsel	http://www.amc.army.mil/Connect/Legal-Resources/
Army Publications	https://www.apd.army.mil/
Army Program Executive Office for Simulation, Training & Instrumentation (PEO STRI)	www.peostri.army.mil

Website Name	Web Address
<u>B</u>	
Bid Protest, GAO Material Bid Protests Webpage from the American Bar Association (ABA) Public Contract Law Section Budget of the United States	http://gao.gov/legal/bids/bidprotest.html http://apps.americanbar.org/dch/committee.cfm?com=PC402000 https://www.whitehouse.gov/omb/budget
<u>C</u>	
CASCOM Home Page CECOM Center for Law and Military Operations (CLAMO) Central Contractor Registration (CCR) Civilian Board of Contract Appeals Coast Guard Home Page Code of Federal Regulations	http://www.cascom.army.mil/index.htm http://cecom.army.mil/ https://www.jagcnet.army.mil/CLAMO https://www.sam.gov/ http://www.cbca.gsa.gov/ https://www.uscg.mil http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR
Commission on Wartime Contracting Comptroller General Appropriations Law Decisions Comptroller General Bid Protest Decisions Comptroller General Legal Products Congressional Documents Congressional Record	http://www.wartimecontracting.gov/ http://www.gao.gov/legal/appropriations-law-decisions/search http://gao.gov/legal/bids/bidprotest.html http://gao.gov/legal/ https://www.congress.gov/ http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=CREC
Contract Pricing References Guides	http://www.acq.osd.mil/dpap/cpic/cp/contract_pricing_reference_guides.html
Cornell University Law School (extensive list of links to legal research sites) Court of Appeals for the Federal Circuit (CAFC) Cost Accounting Standards Board (CASB) Court of Federal Claims Court of Appeals for the Federal Circuit (CAFC) Court of Federal Claims	www.law.cornell.edu http://www.cafc.uscourts.gov/ http://www.whitehouse.gov/omb/procurement_casb www.uscfc.uscourts.gov http://www.cafc.uscourts.gov/ www.uscfc.uscourts.gov

Website Name	Web Address
<u>D</u>	
Davis Bacon Wage Determinations	http://www.wdol.gov/
DCAA – FOIA Reading Room	http://www.dcaa.mil/Home/FOIA
Defense Contract Audit Agency (DCAA)	www.dcaa.mil
DCAA Contract Audit Manual (CAM)	http://www.dcaa.mil/Home/CAM
Defense Acquisition Regulations	https://www.acq.osd.mil/dpap/dars/index.html
Directorate (the DAR Council)	
Defense Acquisition University (DAU)	http://www.dau.mil/
Defense Comptroller	http://comptroller.defense.gov/
Defense Contract Management Agency (DCMA)	http://www.dcmsa.mil/
Defense Finance and Accounting Service (DFAS)	http://www.dfas.mil/
Defense Finance and Accounting Service (DFAS) IN Manual 37-100	https://www.asafm.army.mil/dfas.aspx?doc=37-100
Defense Logistics Agency (DLA)	http://www.dla.mil/default.aspx
DPAP: Contingency Contracting	https://www.acq.osd.mil/dpap/ccap/cc/jcchb/index.html
Department of Commerce, Office of General Counsel	https://ogc.commerce.gov/
Defense Tech Info. Ctr home page	http://www.dtic.mil
Department of Energy Acquisition Guide	http://energy.gov/management/downloads/acquisition-guide-0
Department of Commerce, Office of General Counsel	https://ogc.commerce.gov/
Department of the Interior Acquisition Regulation	http://www.doi.gov/pam/programs/acquisition/pam-areg.cfm
Department of Energy Acquisition Guide	http://energy.gov/management/downloads/acquisition-guide-0
Department of the Interior Acquisition Regulation	https://www.doi.gov/pam/programs/acquisition/pam-areg
Department of Justice	http://www.usdoj.gov
Department of Navy Issuances (DONI)	http://doni.daps.dla.mil/default.aspx
Department of Veterans Affairs	http://www.va.gov
DFARS Web Page (Searchable)	https://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html
DOD Financial Management Regulations	http://comptroller.defense.gov/FMR/fmrvolumes.aspx
DOD General Counsel	http://ogc.osd.mil/
DOD Home Page	https://www.defense.gov/
DOD Inspector General (Audit Reports)	http://www.dodig.mil/
DOD Instructions, Directives and Issuances	http://www.esd.whs.mil/DD/
DOD Purchase Card Program	https://www.acq.osd.mil/dpap/pdi/pc/index.html
DOD Standards of Conduct Office (SOCO)	http://ogc.osd.mil/defense_ethics/

Website Name	Web Address
<u>E</u>	
Excluded Parties Listing System Executive Orders	http://www.sam.gov https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders
<u>F</u>	
Federal Acquisition Institute (FAI) Federal Acquisition Regulation (FAR) FAR Site (Air Force) (searchable; other procurement regulations)	http://www.fai.gov/ https://www.acquisition.gov/far/ http://farsite.hill.af.mil/
Federal Business Opportunities (FedBizOpps)	http://www.fedbizopps.gov/
Federal Legal Information Through Electronics (FLITE)	https://aflsa.jag.af.mil/php/dlaw/dlaw.php
Federal Prison Industries, Inc (UNICOR)	http://www.unicor.gov/
Federal Procurement Data System	https://www.fpds.gov
Federal Register via GPO Access	http://www.gpo.gov/fdsys/
Financial Management Regulation (DOD)	http://comptroller.defense.gov/FMR/fmrvolumes.aspx
FindLaw	http://www.findlaw.com
Fiscal Budget Process Dictionary	http://www.gao.gov/products/GAO-05-734SP
<u>G</u>	
Government Accountability Office (GAO) Appropriations Law Decisions	http://www.gao.gov/legal/appropriations-law-decisions/search
GAO Comptroller General Bid Protest Decisions	http://www.gao.gov/legal/bid-protests/search
GAO Comptroller General Decisions via GPO Access	https://www.gpo.gov/fdsys/browse/collection.action?collectionCode=GAOREPORTS
GAO Home Page	http://www.gao.gov/
Government Online Knowledge Portal	http://www.golearn.gov/
Government Printing Office (GPO)	http://www.gpo.gov
GSA Advantage	http://www.gsaadvantage.gov
<u>J</u>	
JAGCNET (Army JAG Corps Homepage)	https://www.jagcnet.army.mil/
JAGCNET (The JAG Legal Center & School (TJAGLCS) homepage)	https://tjaglcspublic.army.mil/
Joint Electronic Library (Joint Publications)	http://www.dtic.mil/doctrine/
<u>L</u>	
Library of Congress	http://www.loc.gov/index.html

Website Name	Web Address
<u>M</u>	
Marine Corps Home Page	http://www.usmc.mil
MWR Home Page (Army)	https://www.armymwr.com/
<u>N</u>	
National Aeronautics and Space Administration (NASA) Procurement	https://www.hq.nasa.gov/office/procurement/
National Industries for the Blind	www.nib.org
National Industries for the Severely Handicapped (NISH) National Industries for the Blind	http://www.sourceamerica.org/
Navy Financial Management and Comptroller	http://www.secnav.navy.mil/fmc/Pages/home.aspx
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Forms Online	https://navalforms.documentservices.dla.mil/web/public/home
Department of Navy Issuances (DONI)	http://doni.daps.dla.mil/default.aspx
North American Industry Classification System	http://www.census.gov/eos/www/naics/;
<u>O</u>	
Occupational Safety & Health Administration	https://www.osha.gov/pls/imis/sicsearch.html
Office of Federal Procurement Policy (OFPP) Guides	http://www.whitehouse.gov/omb/procurement_index_guides/
Office of Government Ethics (OGE)	http://www.oge.gov/https://www.osha.gov/pls/imis/sicsearch.html
Occupational Safety & Health Administration	
Office of Federal Procurement Policy (OFPP) Guides	https://obamawhitehouse.archives.gov/omb/procurement_default/ (as of writing, only archived site was available)
OGE Ethics Advisory Opinions	https://www.oge.gov/web/oge.nsf/OGE+Advisories/
Office of Government Ethics (OGE)	https://www.oge.gov/
Office of Management and Budget (OMB)	https://www.whitehouse.gov/omb/

Website Name	Web Address
<u>P</u>	
Pentagon Library	http://www.whs.mil/library/
Per Diem Rates Travel and Transportation Allowance Committee	http://www.defensetravel.dod.mil/
Per Diem Rates (OCONUS)	http://www.defensetravel.dod.mil/site/perdiemCalc.cfm
Producer Price Index	http://www.bls.gov/ppi/
PubKLaw Website	http://www.pubklaw.com/
Public Contract Law Journal	http://www.pclj.org/
Public Papers of the President of the United States	http://www.gpo.gov/fdsys/search/searchresults.action?st=collection:ppp
Purchase Card Program	https://www.acq.osd.mil/dpap/pdi/pc/index.html
Policy Documents (DPAP)	http://www.acq.osd.mil/dpap/pdi/pc/policy_documents.html
<u>R</u>	
Rand Reports and Publications	http://www.rand.org/publications/
Regulations / DA PAMs Army Publishing Agency	http://www.apd.army.mil/
GAO Redbook	http://gao.gov/legal/redbook/redbook.html
<u>S</u>	
Service Contract Act Directory of Occupations	http://www.dol.gov/whd/regs/compliance/wage/
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA)	http://www.sba.gov/GC/
Government Contracting Home Page	
Small Business Innovative Research (SBIR) & Small Business Technology Transfer (STTR)	https://www.sbir.gov/
Special Inspector General for Afghanistan Reconstruction	https://www.sigar.mil/
Steve Schooner, Professor GWU homepage	http://www.law.gwu.edu/Faculty/profile.aspx?id=1740
System for Award Management	http://www.sam.gov
<u>T</u>	
The Onion	http://www.theonion.com/
<u>U</u>	
UNICOR (Federal Prison Industries, Inc.)	www.unicor.gov
USA.gov	http://www.usa.gov/
U.S. Business.gov (sponsored by SBA)	http://www.business.gov
U.S. Code	http://uscode.house.gov
U.S. Congress	https://www.congress.gov/

Website Name
U.S. Court of Appeals for the Federal
Circuit (CAFC)
U.S. Court of Federal Claims

Web Address
<http://www.cafc.uscourts.gov/>
<http://www.uscfc.uscourts.gov/>

W
Where in Federal Contracting?

<http://www.wifcon.com/>

APPENDIX A

Contract and Fiscal Law Acronyms and Abbreviations

AAA	Army Audit Agency
ACA	Army Contracting Agency
ACAB	Army Contract Adjustment Board
ACAT	Acquisition Category
ACO	Administrative Contracting Officer
ACOM	Army Command
ACSA	Acquisition and Cross Servicing Agreement
ADA	Anti-Deficiency Act
ADPE	Automatic Data Processing Equipment
ADR	Alternative Dispute Resolution
ADRA	Administrative Dispute Resolution Act
AECA	Arms Export Control Act
AFARS	Army Federal Acquisition Regulation Supplement
AFFARS	Air Force Federal Acquisition Regulation Supplement
AFSA	Afghanistan Freedom Support Act
AGBCA	Department of Agriculture Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
AL	Acquisition Letter
AMWRF	Army Morale, Welfare and Recreation Fund
ANA	Afghan National Army
ANSWER	Applications and Support for Widely Diverse End User Requirements
AO	Area of Operations
AOA	Acquisition-only Agreement
AOR	Area of Responsibility
APA	Administrative Procedures Act
APCSS	Asia Pacific Center for Security Studies
APF	Appropriated Funds
AP Plan	Advanced Procurement Plan
AR	Army Regulation
ARB	Combatant Commander's Acquisition Review Board
ARC	American Red Cross
ASA (ALT)	Assistant Secretary of the Army (Acquisition, Logistics and Technology)
ASA (FM&C)	Assistant Secretary of the Army (Financial Management and Comptroller)
ASBCA	Armed Services Board of Contract Appeals
ASC	Army Sustainment Command

ASCC	Army Service Component Command
ASCP	Army Small Computer Program
ASCPA	Army Services Procurement Act
ASPM	Armed Services Pricing Manual
ASFF	Afghanistan Security Forces Fund
ASN (I&E)	Assistant Secretary of the Navy (Installations and Environment)
ASBCA	Armed Services Board of Contract Appeals
ASPA	Armed Services Procurement Act
ATO	Agency Tender Official
AWCF	Army Working Capital Fund
BAA	Buy American Act
BAA	Broad Agency Announcement
BAFO	Best and Final Offer (The newer term is Final Proposal Revision (FPR))
BCA	Board(s) of Contract Appeals
BCM	Business Clearance Memorandum
BEA	Army Business Enterprise Architecture
BOA	Basic Ordering Agreement
BOD	Beneficial Occupancy Date
BOM	Bill of Materials
BPA	Blanket Purchase Agreement
BPD	Board of Contract Appeals Bid Protest Decisions
CAA	Consolidated Appropriations Act
CAAS	Contracts for Advisory and Assistance Services
C&A	Certified and Accredited
C&S	Commodities and Services
CAF	Army Contractors Accompanying the Force
CAFC	Court of Appeals for Federal Circuit
CAP	Commercial Activities Panel/Program
CAS	Cost Accounting Standards
CASB	Cost Accounting Standards Board
CBA	Collective Bargaining Agreement
CBCA	Civilian Board of Contract Appeals
CBD	Commerce Business Daily
CCA	Contingency Construction Authority
CCH	Commerce Clearing House
CCIF	Combatant Commander Initiative Funds
CCP	Contingency Contracting Personnel
CCR	Central Contractor Registration
CDA	Contract Disputes Act

CDF	Contractors Deploying with the Force
CDRL	Contract Data Requirements List
CERP	Commander's Emergency Response Program
CFR	Code of Federal Regulations
CICA	Competition in Contracting Act
CIO	Chief Information Officer
CITP	Commercial Items Test Program
CJCS	Chairman of the Joint Chiefs of Staff
CJTF	Combined Joint Task Force
CKO	Contingency Contracting Officer (also CCO)
CLEAs	Civilian Law Enforcement Agency
CLIN	Contract Line Item Number
CM/ECF	Case Management/Electronic Case Files
CN	Congressional Notification
CNO	Chief of Naval Operations
CO	Contracting Officer
COC	Certificate of Competency
COFC	Court of Federal Claims (also CFC)
COMMITTS	Commerce Information Technology Solutions
COR	Contracting Officer's Representative
COTR	Contract Officer's Technical Representative
COTS	Commercially Available off the Shelf
CPA	Coalition Provisional Authority
CPAF	Cost Plus Award Fee Contract
CPD	Congressional Presentation Document
CPD	Comptroller General's Procurement Decisions
CPFF	Cost Plus Fixed Fee Contract
CPIF	Cost Plus Incentive Fee Contract
CPPC	Cost -Plus Percentage of Cost
CR	Continuing Resolution
CRA	Continuing Resolution Authority
CRA	Continuing Resolution Act
CRC	CONUS Replacement Center
CSF	Coalition Support Fund
CSO	Competitive Sourcing Official
CSP	Contracting Support Plan
CWAS	Contractor Weighted Average Share
CWAS-NA	Contractor Weighted Average Share- Not Applicable
CWHSSA	Contract Work Hours and Safety Standards Act
DA	Department of the Army

D&F	Determination and Finding
DAC	Defense Acquisition Circular
DA Form	Department of the Army Form
DAMS	Divide-Apply-Make-See (Approach to Pricing Adjustments)
DAPS	Documentation and Production Service
DAR	Defense Acquisition Regulation
DARC	Defense Acquisition Regulatory Council
DASA (I&H)	Deputy Assistant Secretary of the Army for Installations and Housing
DAU	Defense Acquisition University
DBA	Davis-Bacon Act
DBA	Defense Base Act
DBOF	Defense Business Operations Fund
DCA	Defense Communications Agency
DCAA	Defense Contract Audit Agency
DCAAM	Defense Contract Audit Agency Manual
DCCEP	Developing Countries Combined Exercise Program
DCMA	Defense Contract Management Agency
DCMCR	Defense Contract Management Command Region
DCO	Defense Coordinating Officer
DCS	Direct Commercial Sales
DEAR	Department of Energy Acquisition Regulation
DFARS	Defense Federal Acquisition Regulation Supplement
DFAS	Defense Finance and Accounting Service
DLA	Defense Logistics Agency
DLAAR	Defense Logistics Agency Acquisition Regulation
DLARS	Defense Logistics Acquisition Regulation Supplement
DO	Disbursing Officer
DOD	Department of Defense
DODAA	Department of Defense Appropriations Act
DODAAC	Department of Defense Activity Address Code
DOD FMR	DoD Financial Management Regulation
DODIG	Department of Defense Inspector General
DOE	Department of Energy
DOHA	Defense Office of Hearings and Appeals
DOI	Department of the Interior
DOL	Department of Labor
DOMOPS	Domestic Military Operations
DON	Department of Navy
DOS	Department of State
DOT	Department of Transportation
DOT CAB	Department of Transportation Contract Appeals Board

DPA	Delegation of Procurement Authority
DPAP	Defense Procurement and Acquisition Policy
DPRO	Defense Plant Representative's Office
DRI	Defense Reform Initiative
DRM	Director of Resource Management
DRMS	Defense Reutilization and Marketing Service
DRU	Direct Reporting Unit
DSC	Differing Site Conditions
DSCA	Defense Security Cooperation Agency
DUNS	Data Universal Numbering System
E&E	Emergency and Extraordinary
EAJA	Equal Access to Justice Act
EBCA	Department of Energy Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
EDA	Excess Defense Articles
EEE	Emergency and Extraordinary Expenses
EEO	Equal Employment Opportunity
EFT	Electronic Funds Transfer
EIT	Electronic and Information Technology
ENG BCAUS	Army Corps of Engineers Board of Contract Appeals
EO	Executive Order
EOQ	Economic Order Quantity
ESA	Enterprise Software Agreement
ESAA	Emergency Supplemental Appropriations Act for Defense and Reconstruction
ESF	Economic Support Fund
ESF	Emergency Support Functions
EVE	Equal Value Exchange
FAA	Foreign Assistance Act
FAC	Federal Acquisition Circular
FACNET	Federal Acquisition Computer Network
FAD	Fund Authorization Document
FAR	Federal Acquisition Regulation
FARA	Federal Acquisition Reform Act
FAS	Fund Allowance System
FASA	Federal Acquisition Streamlining Act
FCAA	Federal Courts Administration Act
FCCM	Facilities Capital Cost of Money
FCIA	Federal Courts Improvement Act

FCO	Federal Coordinating Officer (DOMOPS)
FedBizOpps	
(FBO)	Current Government Wide Point of Entry (Replaced CBD)
FEDCAC	Federal Computer Acquisition Center
FEDSIM	Federal Systems Integration and Management Center
FEPP	Foreign Excess Personal Property
FFP	Firm Fixed Price Contract
FHA	Family Housing, Army
FIPR	Federal Information Processing Resources
FIRMR	Federal Information Resource Management Regulation
FLSA	Fair Labor Standards Act
FMF	Foreign Military Financing
FML	Foreign Military Lease
FMR	Financial Management Regulation
FMS	Foreign Military Sales
FMS	Financial Management Service
	Foreign Operations, Export Financing, and Related Programs Appropriations Act
FOAA	Act
FOO	Field Ordering Officer
FPASA	Federal Property and Administrative Services Act
FPD	Federal Court Procurement Decisions
FPI	Federal Prison Industries AKA UNICOR
FP	Fixed Price
FPI	Fixed Price Incentive Contract
FPR	Final Proposal Revision
FP-R	Fixed Price Contracts with Price Redetermination
FP w/EPA	Fixed Price with Economic Price Adjustment Contract
FRG	Family Readiness Group
FSS	Federal Supply Schedule
FTE	Full-time Equivalent
FUSMO	Funding United States Military Operations
FY	Fiscal Year
G&A	General and Administrative
GAO	Government Accountability Office
GETA	Government Employees Training Act
GFE	Government Furnished Equipment
GFM	Government Furnished Material
GIP	Government Information Practices
GOCO	Government Owned/Contractor Operated
GOGO	Government -Owned/Government O-operated

GPC	Government Purchase Card
GPE	Government-wide Point of Entry
GPO	Government Printing Office
GSA	General Services Administration
GSAR	General Services Administration Acquisition Regulation
GSBCA	General Services Administration Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
GWAC	Government-wWide Acquisition Contract
HA	Humanitarian Assistance
HCA	Head of Contracting Agency
HCA	Humanitarian and Civic Assistance
HIDTA	High Intensity Drug Trafficking Area
HN	Host Nation
HQDA	Headquarters, Department of the Army
HRA	Human Resource Advisor
HUD BCA	Department of Housing and Urban Development Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
IAW	Inspection, Accordance and Warranty Department of Interior Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
IBCA	Appeals)
ID/IQ	Indefinite Quantity/Indefinite Delivery Contract
IDS	Individual Replacement Site
IFB	Invitation for Bids
IFF	Iraqi Freedom Fund
IGA	Intra-Governmental Acquisition
IGCE	Independent Government Cost Estimate (AKA: IGE)
IGO	International Governmental Organization
IMCOM	Installation Management Command
IMET	International Military Education and Training
INL	Bureau of International Narcotics and Law Enforcement (DOS)
INCLE	International Narcotics and Criminal Law Enforcement
IO	Investigating Officer
IP	Intellectual Property
IRO	Independent Review Officer
IRRF	Iraq Relief and Reconstruction Fund
ISFF	Iraq Security Forces Fund
ITAR	International Traffic in Arms Regulation

ITMRA	The Information Technology Management and Reform Act
ITOP	Information Technology Omnibus Procurement
J&A	Justification and Approval
JCCI/A	Joint Contracting Command Iraq/Afghanistan
JFTR	Joint Federal Travel Regulation
JOC	Job Order Contract
JRC	Joint Reception Center
JTR	Joint Travel Regulation
JWOD	Javits-Wagner-O'Day Act
K	Contract
KO	Contracting Officer
KTR	Contractor
L-H Contract	Labor-Hour Contract
L&S	Lift and Sustain
LATAM	
COOP	Latin American Cooperation
LBCA	Department of Labor Board of Contract Appeals (In 2007 this BCA was consolidated into a new Civilian Board of Contract Appeals)
LDs	Liquidated Damages
LHWCA	Longshoreman and Harbor Worker's Compensation Act
LOA	Letter of Agreement
LOA	Letter of Authorization
LOE	Level of Effort
LOGCAP	Logistics Civil Augmentation Program
LOO	Letter of Obligation
LPTA	Lowest Price Technically Acceptable
LSSS	Logistic Support, Supplies, and Services
MAAWS	Money as a Weapon System
MAC	Multi-agency contract/Multiple Award Contract
MACOM	Major Army Command. No longer used. The Army currently has Army Commands, Army Service Component Commands, and Direct Reporting Units.
MAJCOM	Major Command (Air Force)
MAS	Multiple Award Schedule
MCA	Military Construction, Army
MCCA	Military Construction Codification Act
MEJA	Military Extraterritorial Jurisdiction Act

MEO	Most Efficient Organization
MILCON	Military Construction
MILCONAA	Military Construction Appropriations Act
MILPER	Military Personnel
MIPR	Military Interdepartmental Purchase Request
MMCP	Military to Military Contact Program
MOA	Memorandum of Agreement
MPS	Military Postal System
MRS	Miscellaneous Receipts Statute
NAF	Non-Appropriated Funds
NAFI	Non-Appropriated Fund Instrumentality
NAICS	North American Industry Classification Code
NAPS	Navy Acquisition Procedures Supplement
NCD	Navy Contract Directives
NDAA	National Defense Authorization Act
NDI	Non-Developmental Item
NIB	National Industries for the Blind
NMCARS	Navy Marine Corps Acquisition Regulations Supplement
NOA	Notice of Appeal
NOK	Next of Kin
NPR	National Performance Review
NSN	National Stock Number
NTE	Not to Exceed
O&M	Operations and Maintenance
OCI	Organizational Conflicts of Interest
OCO	Overseas Contingency Operations
OFCC	Office of Federal Contract Compliance
OFDA	Office for Foreign Disaster Assistance
OFPP	Office of Federal Procurement Policy
OFPPA	Office of Federal Procurement Policy Act
OHDACA	Overseas Humanitarian, Disaster, and Civic Aid
OMA	Operations and Maintenance, Army
OMB	Office of Management and Budget
OPA	Office of Public Affairs (Embassy)
OPA	Other Procurement, Army
ORF	Official Representation Funds
ORHA	Office of Reconstruction and Humanitarian Assistance
OSD	Office of the Secretary of Defense

OUSD(C)	Office of the Undersecretary of Defense (Comptroller) Deputy Chief
DCFO	Financial Officer
PACER	Public Access to Court Electronic Records
PARC	Principal Assistant Responsible for Contracting
PCH&T	Packaging, Crating, Handling, and Transportation
PCO	Procuring Contracting Officer
PDS	Permanent Duty Station
PFA	Procurement Fraud Advisor
PPF	Partnership for Peace
PIA	Procurement Integrity Act
PIK	Payment-in-Kind
PMR	Procurement Management Review
POA	Period of Availability
POLAD DOS	US Department of State Foreign Political Advisors
PPA	Prompt Payment Act
PPV	Public-Private Ventures
PR	Purchase Request
PR&C	Purchase Request and Commitment
PRT QRF	Provincial Reconstruction Team Quick Response Fund
PTO	Patent and Trademark Office
PWD	Procurement Work Directive
PWS	Performance Work Statement
QASP	Quality Assurance Surveillance Plan
QDR	Quadrennial Defense Review
QPL	Qualified Products List
R&D	Research and Development
RCFC	Rules of the Court of Federal Claims
RDD	Required Delivery Date
RDT&E	Research, Development, Test, and Evaluation
READ	Recycling Electronics and Asset Disposition
RFI	Request for Information
RFP	Request for Proposals
RFQ	Request for Quotes
RIK	Replacement- in-Kind
RLB	Relocatable Building
RSA	Randolph Sheppard Act for the Blind
RSS	Required Sources of Supplies or Services
SAA	Supplemental Appropriations Act

SAF	Subject to the Availability of Funds
SAF/FMFA	(Deputy) Assistant Secretary of the Air Force for Financial Management, Financial Operations
SAGC	Secretary of the Army General Counsel
SAP	Simplified Acquisition Procedures
SAT	Simplified Acquisition Threshold
SAMM	Security Assistance Management Manual
SABER	Simplified Acquisition of Base Engineer Requirements
SBA	Small Business Administration
SCA	McNamara-O'Hara Service Contract Act
SCO	Servicing Contracting Office
SDN	Standard Document Number
SLA	State Licensing Agency
SLCF	Streamlined Competition Form
SM&W	Special Morale and Welfare
SOF	Special Operations Forces
SOFA	Status of Forces Agreement
SOO	Statement of Objectives
SOW	Statement of Work
SPS	Standard Procurement System
SSA	Source Selection Authority
SSEB	Source Selection Evaluation Board
SSP	Source Selection Plan
STARS	
GWAC	Multiple Award ID/IQ contract administered by GSA
T4C	Termination for Convenience
T4D	Termination for Default
TAA	Trade Agreements Act
T&E	Train and Equip
T&M	Time and Materials Contract
TCN	Third Country National
TCO	Termination Contracting Officer
TDP	Targeted Development Program
TDP	Technical Data Package
TIN	Taxpayer Identification Number
TINA	Truth in Negotiations Act
TRO	Temporary Restraining Order
UCA	Undefinitized Contract Action
UFM	Uniform Funding and Management

UMC	Unspecified Military Construction
UMMC	Unspecified Minor Military Construction
URD	Uniform Resource Demonstration
USAID	United States Agency for International Development
USARCS	United States Army Claims Service
USD (ATL)	Undersecretary of Defense (Acquisition, Technology, and Logistics)
USD(C)	Undersecretary of Defense (Comptroller)
UTSA	Uniform Trade Secrets Act
WAWF	Wide Area Work Flow
WD	Wage Determination
WDOL	Wage Determinations Online
WHA	Walsh-Healy Public Contracts Act
WHCA	War Hazards Compensation Act