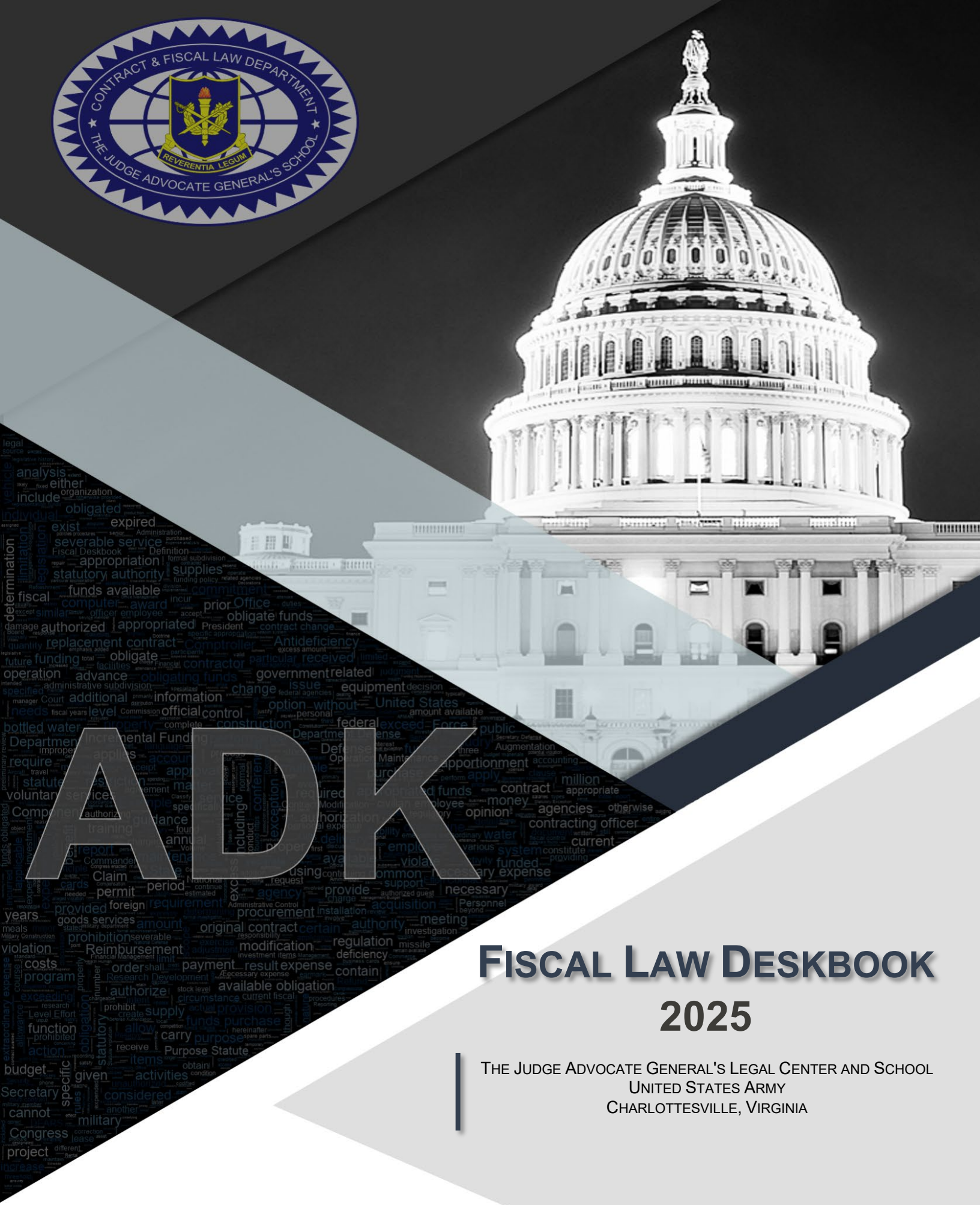

FISCAL LAW DESKBOOK
2025

THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL
UNITED STATES ARMY
CHARLOTTESVILLE, VIRGINIA

PREFACE

As with previous editions of the Fiscal Law Deskbook, the faculty in the Academic Department Contract and Fiscal Law (ADK) takes this body of work and updates it with the passing of new laws, promulgation of new regulations and directives, and/or publication of new implementing guidance. Moreover, we periodically review and refine the content to ensure it continues to meet the professional needs of our intended audience: Judge Advocates and civilian attorneys serving the Federal Government. While our goal is to maintain the highest standards of accuracy, we acknowledge that errors or omissions may inadvertently occur. We actively encourage our readers to engage with us critically. If you identify any areas that require attention or clarification, please reach out to us at matthew.b.firing.mil@army.mil. We welcome constructive feedback and are committed to initiating thoughtful discussions on any issues raised. If your assessment leads to a substantive change in the content, we will gratefully acknowledge your valuable contributions in the preface of the subsequent edition. This collaborative approach underscores our dedication to continuous improvement, ensuring that the Fiscal Law Deskbook remains a dynamic resource that empowers legal professionals with the most up-to-date and reliable information in this crucial domain.

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

Fiscal law encompasses laws, regulations, and policies governing how federal agencies can obligate and expend funds appropriated to them by Congress. It is a realm where the constitutional principle of separation of powers, envisioned by the Framers, manifests in the daily operations of the federal government. The U.S. Constitution grants Congress the power of the purse - the exclusive authority to raise revenue and appropriate funds. Fiscal law enables this constitutional prerogative by strictly limiting agency spending to purposes, time periods, and amounts prescribed by congressional appropriations. The correct understanding and application of fiscal law safeguard the constitutional balance of powers. All federal personnel must remain cognizant that fiscal law derives its authority directly from the supreme law of the land.

A. Constitutional foundations.

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."1

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, 321 (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

1 Congress has exerted this power several ways, such as through annual appropriations and through a series of permanent statutes.

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. Five years after the Civil War, 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. 31 U.S.C. § 1102.

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. G-26 [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. See 31 U.S.C. § 1552.

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. G-24. All obligations that an agency incurs must be supported by documentary evidence and must be properly recorded. See 31 U.S.C. § 1501.

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. G-7.

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 (2021), § 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. G-11. *See, e.g.*, 41 U.S.C. § 11 (Feed and Forage Act); DoD FMR, vol. 3, ch. 19, para. 190205D (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. *Principles of Fed. Appropriations Law*, 4th Edition, Chapter 2, p. 2-54, GAO-16-464SP (2016) [hereinafter The GAO Red Book].

2. An authorization act does not provide budget authority. That authority stems from the appropriations act. The GAO Red Book, ch. 2, p. 2-55.

3. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.

4. Although there is no statutory requirement for authorizations, certain situations may require an authorization. For example, 10 U.S.C. § 114(a) states that no funds may be appropriated for military construction, military procurement, and certain related research and development unless funds therefor have been specifically authorized by law.

F. Appropriations Act.

1. An appropriations act is the most common form of budget authority. DoD FMR, Glossary, p. G-6.

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. The GAO Red Book, ch. 2, p. 2-23.

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. https://www.gao.gov/about/what-gao-does/

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 37-100-25, *The Army Management Structure for Fiscal Year 2025*, provides a detailed breakdown of Army accounting classifications. The following is an example of a fund cite (the reference column reflects which DFAS Manual 37-100-25 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 combined appropriation is entitled Weapons Procurement)**	**17*1109 (The Marine Corps has one combined procurement code)**	**57*3020**	**N/A**
Procurement, Weapons & Tracked Vehicles	**21*2033**			**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 FY2020 would be depicted as 2102020.

** 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://fiscal.treasury.gov/files/fast-book/fastbook-september-2018.pdf

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**. The GAO Red Book, Ch. 3, p. 3-9.

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). The GAO Red Book, Ch. 5, p. 5-3.

3. An agency must obligate funds within the **amounts** appropriated by Congress and formally distributed to or by the agency. The GAO Red Book, Ch. 6, p. 6-4.

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* The GAO Red Book, Ch. 3, p. 3-9 – 3-14.

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 carryout 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.

The GAO Red Book, Ch. 3, p. 3-14. *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. The GAO Red Book, Ch. 5, p. 5-11 to 5-15.

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. 3.3 (Oct. 2023).

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. 3, ch. 8 (Aug. 2023).

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. 1.2.1 (May 2023).

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. 1.2.1. (May 2023).

c. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342. *See also*, DoD FMR, vol. 14, ch. 2, para. 1.2.1. (May 2023).

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. DoD FMR, Glossary, p. G-5 to G-7.

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. For this reason, Army policy requires reporting such over obligations.

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.

One source of motivation for learning and accurately advising clients on fiscal law matters, as least for members of the Department of Defense (DoD), comes from the DoD's Financial Management Regulation (FMR), Volume 14: "Administrative Control of Funds and Antideficiency Act (ADA) Violations." In that regulation, the Under Secretary of Defense (Comptroller) mandates that DoD commanders, supervisors, and managers must be aware of the ADA, related funding statutes, types of violations, and causes of violations.[2] Drawing a sense of mission from this mandate, it is the hope that this deskbook will help legal professionals obtain a level of fiscal law mastery so that the organizations they advise can accomplish their missions while adhering to the constitutional and statutory framework governing the use of public funds.

[2] DoD 7000.14., Financial Management Regulation, Volume 14, Chapter 2, Paragraphs 4.1.2 and 4.1.2.1.

CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

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CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. REFERENCES.

A. Constitutional and Statutory.

1. U.S. Constitution, Art. I, § 9.

2. 31 U.S.C. § 1301. The Purpose Statute.

3. Department of Defense Appropriations Acts and National Defense Authorization Acts. Annual legislation found at: https://www.congress.gov/ orhttps://whs-mil.libguides.com/dodappropriationslaws ..

B. Department of Defense and Service Regulations.

1. The DoD and each of the services have a website containing electronic copies of most of their regulations.

a. DoD Regulations: https://www.esd.whs.mil/DD/DoD-Issuances/

b. Army Regulations: https://armypubs.army.mil/

c. Air Force Regulations: http://www.e-publishing.af.mil/. In particular, *see* Air Force, Instruction (AFI) 65-601, Budget Guidance and Procedures (29 January 2021).

d. Navy Regulations https://www.secnav.navy.mil/doni/navyregs.aspx

e. Marine Corps Regulations: http://www.marines.mil/News/Publications/ELECTRONICLIBRARY.aspx

f. Joint Publications: http://www.jcs.mil/Doctrine/.

C. Locating Pertinent Statutes.

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

Example: Statutes pertaining to DoD are typically found in Title 10. 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. 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.

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

D. Additional References.

1. In addition to the above websites that compile all agency regulations into one location, there are various other websites that contain regulations and/or guidance specific to the fiscal arena. These include:

a. GAO, Principles of Federal Appropriations Law, 4th ed., 2016 rev., GAO-16-464SP (Washington, D.C.: Mar. 2016). Commonly referred to as, and hereinafter *the Red Book.* found at: https://www.gao.gov/legal/appropriations-law/red-book.

b. 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.

c. Office of Management and Budget (OMB) Cir. No. A-11, Preparation, Submission, and Execution of the Budget (July 2024), found at: https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf

d. DOD 7000.14-R, Financial Management Regulations, hereinafter *DOD FMR*, found at: https://comptroller.defense.gov/fmr.aspx. The DOD FMR establishes requirements, principles, standards, systems, procedures, and practices needed to comply with statutory and regulatory requirements applicable to the DoD.

e. Defense Finance and Accounting Service (DFAS) selected links to reference material, found at: https://www.dfas.mil/dfasffmia/relatedwebsites/. 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 (e.g., the Indianapolis office provides services to the Army).

2. Pentagon Digital Library, found at: https://www.whs.mil/library/. A resource for the DoD that contains reference material relating to the military, law and legislation, government, history, international affairs, and management and leadership. The site offers quick links to DoD Appropriations and Authorizations, legislative history, and DoD budget resources.

3. JAGCNET. https://www.jagcnet2.army.mil. Those individuals with a Common Access Card may conduct a search of the text of all publications contained within the JAGCNET library of publications.

4. Contract and Fiscal Law videos and Webinars. Common Access Card access required to videos and webinars produced by the Contract and Fiscal Law Academic Department, TJAGLCS.

5. The Far and Beyond Podcast. https://tjaglcs.army.mil/FAR-and-Beyond. Also available on spotify, apple podcasts, or anywhere else you get your podcasts.

II. CONSTITUTIONAL AND STATUTORY FOUNDATION.

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." *United States 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. Necessary Expense Doctrine. The GAO applies a three-part test (a.k.a. the "three-part purpose test") to determine whether an expenditure is a "necessary expense" of a particular appropriation, which is to say, whether the expenditure complies with 31 U.S.C. § 1301(a), The Purpose Statute. (*See* Section IV).

D. The purpose framework: An expenditure complies with Constitutional and statutory controls from a purpose standpoint if there is either express statutory authority or when the Necessary Expense Doctrine is satisfied.

III. THE APPROPRIATIONS ACTS.

A. An appropriation is statutory permission "to incur obligations and to make payments out of the Treasury for specified purposes."[1] 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.[2]

B. Congress passes on an annual basis, twelve appropriations acts.[3] Some of these acts provide appropriations to a single agency, while others provide appropriations to multiple agencies.[4] 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

[1] A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS, p.13, GAO-05-734SP (September 2005).

[2] *Id.* at 70; *see also infra*, Chapter 5: Obligations.

[3] Occasionally, instead of twelve 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.*, Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47 [hereinafter *2024 Further CAA*]. In 2024, the Congress passed two separate Consolidated Appropriations Acts, with DoD Appropriations appearing in both.

[4] The Red Book, 2-17 to 2-19.

5. Energy and Water Development and related agencies

6. Department of State, Foreign Operations, and related programs

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 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]

[5] *See infra,* Chapter 9: Continuing Resolution Authority. Additionally, there was no apporpirations act passed in FY 25, but a full-year continuing resolution. Full-Year Continuing Appropriations and Extensions Act, 2025, H.R.1968, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/1968/text.

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

A. Conceptualizing Purpose. The Purpose Analysis Flowchart[6] is a useful visual tool to conceptualize purpose issues.

B. Appropriations, generally. In each of the annual appropriations acts devoted to DoD (not including Military Construction), Congress grants multiple appropriations for different types of purchases that DoD needs to make to successfully execute its mission.[7]

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.[8] Generally, there are three possible answers to this question: (a) a *different* U.S. Government (USG) agency; (b) a foreign government, military, or population; or (c) the agency (e.g., the JA's unit).

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.[9]

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

[7] *See e.g.*, Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, Div. A (Division A houses the Department of Defense Appropriations Act, providing over 50 separate appropriations to DoD).

[8] 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.

[9] *See infra*, Chapter 6: Interagency Acquisitions.

2. Operational Funding: Operational funding fiscal law applies whenever the primary beneficiary of the purchase is a foreign government, foreign military, or foreign population. Operational funding is a specialized area of fiscal law and is explored later.[10]

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.[11] Generally, Operation and Maintenance (O&M) and Military Personnel appropriations finance expenses; Procurement and Military Construction appropriations finance investments; and Research, Development, Test, and Evaluation, Base Realignment and Closure, and Family Housing appropriations finance both expense and investment costs.[12]

1. Expenses are "the costs incurred to operate and maintain [the DoD], such as . . . services, supplies, and utilities."[13] For most practitioners facing purpose questions, expenses are normally financed with ***Operation and Maintenance (O&M)[14] appropriations.*** *See* DOD FMR, vol. 2A, ch. 1, para. 2.1.3.3. Common examples of expenses include:

a. Services;

[10] *See infra*, Chapter 10: Operational Funding.

[11] 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 infra*, Chapter 3: Time.

[12] DoD FMR, vol. 2A, Ch. 1, paragraph 2.1.3.3.

[13] *Id.* at 2.1.2.1.

[14] A common acronym for Army-Specific O&M is OMA, Operation and Maintenance, Army.

b. Supply items that will be consumed in the *current* period;[15]

c. Civilian employee labor;

d. Rental charges for equipment and facilities;

e. Fuel;

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

g. Utilities.[16]

2. Investments are "costs that result in the acquisition of, or an addition to, end items."[17] 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.[18] ***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). . . ."[19]

[15] In a prior version of Vol. 2A Chapter 1, the DoD Financial Management Regulation 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.

[16] DoD FMR, vol. 2A, Ch. 1, paragraph 2.1.4.1.

[17] *Id.*, at 2.1.2.2.

[18] *Id.*, at 2.1.2.2., and 2.1.4.2.

[19] Id. at 2.1.4.2.1.

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 investments 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."[20]

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."[21]

3. Construction is the creation of a complete and usable facility, or a complete and usable improvement to an existing facility.[22] 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 usable facility or a complete and usable improvement to an existing facility. Construction is funded using Construction Funding rules and is a specialized area of fiscal law explored in detail later.[23]

[20] Id. at 2.1.4.2.4.

[21] Id. at 2.1.4.3.1.

[22] *See* 10 U.S.C. § 2801; *see also infra*, Chapter 8: Construction Funding.

[23] *See infra*, Chapter 8.

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 . . . ."[24] 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 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 . . . ."[25] 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 expenses required to operate the force. For most DoD units and organizations, O&M is the only type of appropriation they can access without higher level approval.

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 . . . ."[26] 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.

[24] 2024 Further CAA, Div. A, Title I.

[25] *Id.* at Div. A., Title II.

[26] *Id.* at Div. A, Title IV.

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 (discussed below).[27]

a. Ammunition Procurement. Used for "construction, procurement, production, and modification of ammunition, and accessories therefor; specialized equipment and training devices; expansion of public and private plants, including ammunition facilities authorized by section 2854 of title 10, United States Code, and the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction prosecuted thereon prior to approval of title; and procurement and installation of equipment, appliances, and machine tools in public and private plants; reserve plant and Government and contractor-owned equipment layaway; and other expenses necessary for the foregoing purposes . . . ."[28]

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 . . . ." [29]

(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.[30]

[27] *Id.* at Div. A, Title III.

[28] *Id.*

[29] *Id.*

[30] *See infra*, Chapter 2, Section VI.

(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 aircraft, equipment, including ordnance, ground handling equipment, spare parts, and accessories . . . ."[31]

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 accessories . . . ."[32]

e. Other Procurement: There is also a residual catch-all procurement appropriation entitled "Other Procurement" which is used for investment items that are not purchased with the more specific Procurement appropriations, including "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 . . . .",[33] and could include investment items that cost more than the expense/investment threshold.[34] The *Other Procurement, Army*, appropriation is referred to as OPA by practitioners.

[31] 2024 Further CAA, Div. A, Title III.

[32] *Id.*

[33] *Id.*

[34] *See infra*, Chapter 2, section V, F.

5. Military Construction (MILCON). Used for "acquisition, construction, installation, and equipment of temporary or permanent public works, military installations, facilities, and real property . . . ."[35] MILCON appropriations come from the Military Construction Act, which may be a separate appropriation act or included in a consolidated appropriations act.

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 . . . ."[36] 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 dictating 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.[37]

1. The current threshold is $350,000.[38]

[35] Consolidated Appropriations Act, 2024, Pub. L. No. 118-42 at Div. A., Title I. The MILCON appropriations for fiscal year 2024were included in the first consolidated appropriations act, where the other DoD appropriations discussed above were included in the second.

[36] *Id.*

[37] 2024 Further CAA, Div. A, Title VIII, § 8039. The expense/investment threshold had been $250,000 from 2004 until 2023. *See* Dep't of Defense Appropriations Act, FY 2004, Pub. L. 108-87, Sec. 8040.

[38] Since 2008, Congress has permitted an increase to $500,000 for Combatant Commanders engaged in contingency operations overseas upon SECDEF approval.. 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. CENTCOM has historically received approval to use the $500,000 threshold in support of contingency operations.

2. As a result of this congressional authority, two appropriations are equally available to fund investment items with a unit cost of $350,000 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 FMR, DoD elected the respective appropriation (O&M or Procurement),[39] but with distinctions depending on the type of investment item.[40] The chart below summarizes DOD's election:[41]

<table>
<tr><th colspan="6">Expense/Investment Cost Determination</th></tr>
<tr><th>Is the item a</th><th>If</th><th>Then</th><th>If</th><th>Then</th><th>If</th><th>Then</th></tr>
<tr><td rowspan="3">Centrally Managed/ Asset Controlled Item?</td><td rowspan="3">Yes</td><td rowspan="3">Is this item purchase from DWCF*?</td><td rowspan="2">Yes</td><td rowspan="2">Is the item part of a full funding effort?**</td><td>Yes</td><td>Classify as Investment</td></tr>
<tr><td>No</td><td>Classify as Expense</td></tr>
<tr><td>No</td><td>Classify as Investment</td><td colspan="2" rowspan="3"></td></tr>
<tr><td rowspan="2"></td><td rowspan="2">No</td><td rowspan="2">Is the unit cost more than $250,000</td><td>Yes</td><td>Classify as Investment</td></tr>
<tr><td>No</td><td>Classify as Expense</td></tr>
<tr><td colspan="7">* Defense Working Capital Funds, see infra V.F.4.
** 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.</td></tr>
</table>

[39] The DoD's elections are summarized in the DOD FMR, vol. 2A, para. 2.1.6.

[40] Although Congress increased the expense/investment threshold to $350,000 in the 2023 CAA, the FMR did not receive an accompanying update reflecting the increased threshold amount. Accordingly, OUSD(C) released interim guidance regarding the Department's authorization to utilize the increased threshold, effective until such time as the FMR is amended. *See* Memorandum, *OUSD(C) Interim Guidance Regarding Increased Threshold for Determination of Expense and Investment Costs*, 2 March 2023.

[41] DOD FMR, vol. 2A, para. 2.1.6..

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. Operation and Maintenance appropriations should not be used to procure centrally-managed items that are budgeted for in procurement appropriations. 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.[42] 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 Analysis and the Expense/Investment Threshold. When determining whether an investment item falls below the expense/investment threshold, agencies must consider the "system" concept.[43] All items in a system are considered a single unit and their cost aggregated. 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. The system concept does not apply to the purchase of expense items which are purchased with O&M regardless of cost.

1. 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.[44]

2. 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.

[42] DOD FMR, vol. 2A, ch. 1, para. 1.7.2.54; *see also infra*, Chapter 7: Revolving Funds.

[43] DOD FMR, vol. 2A, ch. 1, para. 2.1.4.1.6. Note that the updated value of the expense investment threshold has not been reflected in the FMR, *see supra* 40.

[44] *Id*.

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

4. Example 1: An agency is acquiring 200 stand-alone computers and the cost for each is $2200 (total $440k). Computers are considered investment items, but the appropriate pot of money depends on how the computers will be used. If they are to be used independently from one another, or even if they will be networked, but primarily used independently from one another, then they are not part of a system, and the cost is not aggregated. O&M funds may be used because each $2200 purchase falls below the $350k expense/investment threshold. If the primary purpose is for the computers to be interdependent and used all together, then they are considered a system and the total cost must be aggregated. That means the total cost is $440k, which exceeds the $350k expense/investment threshold. Procurement funds must be used.

5. Example 2: Another agency is acquiring 200 stand-alone computers, 200 docking stations, and 200 software packages, meant to be used as 200 computer packages. The cost of each is $1,600 per computer (total $320,000), $100 per docking station ($20,000), and $500 per software package ($100,000) (for a grand total of $440k). The analysis is:

   a. The appropriate color of money for the purchase of the 200 computers, docking stations, and software packages is determined by deciding whether the primary function of the computers is to operate as independent workstations (e.g., 200 separate systems at $2,200 per computer, docking station, and software bundle, which falls below the expense/investment threshold) or as part of a larger system (as aggregated, $440k exceeds the $350k expense/investment threshold).

   b. 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. General Fund Enterprise Business System (GFEBS). GFEBS is a Web-based enterprise resource planning system that implements the Army's financial management system. GFEBS replaces or absorbs more than 80 legacy accounting and asset management systems to standardize business processes and transactional input across the Army.[45]

I. Earmarks. An earmark occurs when Congress designates a portion of an appropriation for a particular purpose by way of legislative language within the appropriation.[46]

1. Ceiling Earmarks: A "ceiling" earmark means the DoD may not spend more than the stated amount for the designated purpose but may spend less than that. For example, in the 2023 CAA, Congress provided the DoD $52,599,0068,000 in the Defense-Wide O&M appropriation. Within this appropriation, Congress specified that, "not more than $2,981,000 may be used for the Combatant Commander Initiative Fund . . . "[47]

2. Floor Earmarks: A "floor" earmark means the DoD must spend at least that amount for the designated purpose, but may spend more. For example, in the 2024 Further CAA, Congress provided the Defense Security Cooperation Agency with $380,000,000 from the Defense-Wide O&M appropriation for reimbursement to Jordan, Lebanon, Egypt, Tunisia, and Oman for enhanced border security, of which "not less than $150,000,000 shall be for Jordan."[48]

[45] General Fund Enterprise Business System, Who We Are, https://www.peoenterprise.army.mil/programs/gfebs.

[46] *See* A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (September 2005).

[47] 2024 Further CAA, *supra* note 3, at Title II.

[48] *Id*. at Title VIII, § 8110.

V. "NECESSARY EXPENSE" DOCTRINE.

A. The Purpose Statute does not require every expenditure to be expressly specified in an appropriations act. That is not possible or feasible. Congress, by implication, authorizes an agency to incur expenses that are necessary for the accomplishment of an appropriation's purpose. "[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 . . . ."[49] "***Where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object .*** . ." [50]

B. The GAO applies a three-part test (a.k.a. the "**three-part purpose test**") to determine whether an expenditure is a "necessary expense" of a particular appropriation:[51]

1. The expenditure must bear a reasonable, logical relationship to the purpose of the appropriation to be.

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.

[49] GAO Red Book, p. 3-15.

[50] Comptroller General McCarl to Maj. Gen. Anton Stephan, commanding officer, District of Columbia Militia, A-17673, 1927 U.S. Comp. Gen. LEXIS 95 (Mar. 25, 1927); *see also*, U.S. Commodity Futures Trading Commission-Availability of the Customer Protection Fund, B-321788, (Aug. 8, 2011); To The Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (Oct. 29, 1962); Department of Homeland Security – Use of Management Directorate Appropriations, B-307382, 2006 U.S. Comp. Gen. LEXIS 138 (Sept. 5, 2006).

[51] *E.g.*, Matter of Daniel K. Inouye Asia-Pacific Ctr. for Sec. Studies, B-333691, 2022 U.S. Comp. Gen. (Feb. 8, 2022).

C. 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.[52]

1. A necessary expense does not have to be the only way, or even the best way, to accomplish the object of an appropriation.[53] However, a necessary expense must be more than merely desirable.[54]

2. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations.[55] 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."[56]

D. Election Doctrine. If you have two equally available appropriations and neither appropriation is more specific, then the agency may choose which appropriation to use.[57]

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[52] *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 (Oct. 17, 1991).

[53] Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (May 13, 1955).

[54] Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (June 19, 1989).

[55] *See* Customs and Border Protection—Relocation Expenses, B-306748, 2006 U.S. Comp. Gen. LEXIS 134 (July 6, 2006).

[56] Implementation of Army Safety Program, B-223608, 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

[57] *See* discussion *supra* VI.B.

VI. 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.[58]

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.[59]

2. General appropriations may not be used as a back-up for a more specific appropriation.[60]

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.[61]

[58] 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).

[59] Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).

[60] Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940); Architect of the Capitol – Payment for Electrical and Security Improvements, B-306284, 2006 U.S. Comp. Gen. LEXIS 5 (Jan. 5, 2006).

[61] Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941); Dep't of the Navy – Settling Claims on Fraudulently-Endorsed Checks, B-2422666, 72 Comp. Gen. 295 (Aug. 31, 1993).

B. If there are two appropriations equally available:

1. The agency may choose either appropriation, and the agency's discretion is generally not questioned.[62]

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. The election is binding even after the chosen appropriation is exhausted.63

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.64

62 Payment of SES Performance Awards of the R.R. Ret. Board's Office of Inspector Gen., B-231445, 68 Comp. Gen. 337 (1989); Dep't of Homeland Security – Use of Management Directorate Appropriations, B-307382, 2006 U.S. Comp. Gen. LEXIS 138 (Sep. 5, 2006); Secretary of Agric., A-96689, 18 Comp. Gen. 285, 292 (Sept. 30, 1938).

63 *See* Funding for Army Repair Projects, B-272191, 1997 U.S. Comp. Gen. LEXIS 399 (Nov. 4, 1997); Honorable Clarence Cannon, B-139510 (May 13, 1959) (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

64 *See* Funding for Army Repair Projects, B-272191, 1997 U.S. Comp. Gen. LEXIS 399 (Nov. 4, 1997); *See also* 10 U.S.C. § 166a, para. d (Combatant Commander Initiative Funds are in addition to amounts otherwise available for an activity).

VII. OTHER WAYS LEGISLATION MAY IMPACT THE USE OF AN APPROPRIATION (LEGISLATIVE PROHIBITIONS & LIMITATIONS).

A. Interpreting Language within an Appropriation.

1. Within appropriations, Congress often provides specific direction as to how an appropriation may be used. For example, language in the "Ammunition Procurement, Army"[65] narrowly defines the purposes for which the Army may use that appropriation and the appropriation may only be used for those particular purposes. The Army could not, for example, use it to pay the salaries of military service members, even those who carry out the ammunition procurement. Likewise, the Army could not use funds from this appropriation to buy engines for attack helicopters.

2. By contrast, the language in the "Operation and Maintenance, Defense-Wide" appropriation is not so specific. Rather, it broadly prescribes the purposes of that particular appropriation. Therefore, the DoD can use the appropriation: to pay various unspecified expenses related to the "operation and maintenance" of the DoD (i.e. *logically related* to the appropriation), not covered by a more specific appropriation, and not otherwise prohibited.

B. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency.[66] 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.

65 *See infra,* IV.E.4.a.

[66] GAO Red Book, p. 2-54.

2. Example: 10 U.S.C. § 111 establishes the Department of Defense as an executive department. Various statutes within 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 is a federal law that establishes, continues, or modifies a federal program. Under house and senate rules, authorizations are prerequisites for Congress to appropriate budget authority for programs. Congress generally passes a new National Defense Authorization Act for each fiscal year.[67]

2. By statute, Congress has created certain situations in which it *must* pass an authorization as well as 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 first authorizing the appropriation, as such a statute is "essentially a congressional mandate to itself."[68]

3. An authorization law *does not* provide budget authority. Budget authority is the authority to obligate money and disburse funds from the treasury. However, authorizations do outline how funds should be spent as well as how funds may be spent once funds are appropriated.

a. Congress may choose to place limits in an authorization on the amount of appropriations it may subsequently provide.

[67] *E.g.*, National Defense Authorization Act for Fiscal Year 2025, Pub. L. No., 118-159.

[68] GAO Red Book, p. 2-56.

b. Alternatively, Congress may also authorize the appropriation of "such sums as may be necessary" for a particular program or function. Example:, Congress provided as follows:

Section 3(e) of the Radiation Exposure Compensation Act (42 U.S.C. 2210 note) is amended to read as follows: ''(e) APPROPRIATION. — (1) IN GENERAL.— There are appropriated to the Fund, out of any money in the Treasury not otherwise appropriated, for fiscal year 2002 and each fiscal year thereafter through fiscal year 2011, ***such sums as may be necessary***, not to exceed the applicable maximum amount specified in paragraph (2), to carry out the purposes of the Fund.[69]

c. When there are potentially conflicting statutes, the general rule regarding statutory construction is "that statutes should be construed harmoniously so as to give maximum effect to both whenever possible."[70]

d. 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. Before a statute is considered replealed, however, the "intention of the legislature to repeal must be clear and manifest."[71]

e. Differences in Amount. In general, Congress enacts authorization acts before it enacts appropriation acts. Application of the above rules will therefore usually result in an 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 $30,529,232,000 to the Army for Operation and Maintenance, but

[69] In National Defense Authorization Act for Fiscal Year 2002 Section 1063 of the (emphasis added).; *see generally*, GAO Red Book, 2-54 to 2-79.

[70] Reduction of District of Columbia Superior Court's Appropriations, B-258163, 1994 U.S. Comp. Gen. LEXIS 746 (Sept. 29, 1994).

[71] 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).

later actually appropriated $31,072,902 to the Army. The Army may spend the entire $31,072,902 for Operation 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 only appropriated $1,984,391,000 for aircraft procurement. The Army may only spend the lower amount that was appropriated.

f. 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.[72] 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.

[72] *See generally*, GAO Red Book, p. 2-65.

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.[73]

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."[74] Legislative history will not generally override clear language in a statute.[75]

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[73] *See* Permanency of Weapon Testing Moratorium Contained in Fiscal Year 1986 Appropriations Act, B-222097, 65 Comp. Gen. 588 (May 22, 1986) (indicating that a restriction applicable to "this Act or any other Act" does not indicate futurity).

[74] Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005).

[75] Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); ANGUS Chem. Co., B-227033, 87-2 CPD ¶ 127 (Aug. 4, 1987) (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, 92-2 CPD ¶ 30 (July 20, 1992) (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, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (Oct. 1, 1975) (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).

3. Legislative history also may not support an otherwise improper expenditure.[76]

VIII. OTHER DOCUMENTS IMPACTING THE USE OF AN APPROPRIATION (REGULATORY/POLICY PROHIBITIONS & LIMITATIONS).

A. Budget Request Documentation.

1. Agencies are required to justify their budget requests.[77]

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).

[76] Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, 1992 U.S. Comp. Gen. LEXIS 1104 (Sept. 1, 1992) (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).

[77] OMB Cir. No. A-11, Preparation, Submission, and Execution of the Budget (August, 2023).

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 (OMB) 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. Practitioners may find it helpful to review the budget request documents. If the budget request documents specifically included the proposed expenditure, and funds were appropriated without conditions bearing on that expenditure, the more likely it is proper

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: https://comptroller.defense.gov/Budget-Materials/

c. The Army's budget materials can be found at: https://www.asafm.army.mil/Budget-Materials/

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: https://www.secnav.navy.mil/fmc/Pages/Fiscal-Year-2025.aspx

f. The National Aeronautic and Space Administration's (NASA) budget materials can be found at: https://www.nasa.gov/budgets-plans-and-reports/

g. The Federal Aviation Administration's budget can be found at: https://www.faa.gov/about/budget/

h. The Environmental Protection Agency's budget materials can be found at https://www.epa.gov/planandbudget/cj

i. The Department of the Interior's budget materials can be found at: https://www.doi.gov/budget

B. Agency Regulations.[78]

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.[79]

[78] *See generally*, GAO Red Book, p. 1-66 to 1-74.

[79] Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001). *But see,* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) holding that courts need not, and under the Administrative Procedure Act (APA) may not, defer to an agency's interpretation of the law simply because a statute is ambiguous; overruling Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

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 further restrict their ability to procure commercially-prepared business cards. The Army requires a general officer or SES to approve the commercial procurement of business cards and also stipulates additional detailed requirements (e.g., no customized embossing or engraving).[80]

4. By regulation, the DOD has assigned most types of expenditures to a specific appropriation.[81]

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.

IX. TYPICAL QUESTIONABLE EXPENSES.

A. Clothing. "Generally, it is the responsibility of the employee to report to duty properly clad to carry out his responsibilities."[82] 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. [83]

[80] *See e.g.*, AR 25-38, The Army Printing and Distribution Program, para. 3-6 (14 June 2021); AFI 65-601, vol. 1, table 1-1 (22 June 2022); and Department of the Navy Financial Management Policy Manual, pvol. 2., ch. 3, 010203, 14 (July 2020).

[81] *See, e.g.* DOD 7000.14-R, Vol.1, Ch. 1, and DFAS-IN Manual 37-100-**(the fiscal year release, e.g., 37-100-23 released in 2023), The Army Management Structure. The manual is reissued every fiscal year.

[82] Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828 (Oct. 3, 2002).

[83] *See*, IRS Purchase of T-Shirts, B-240001.2, 71 Comp. Gen. 145 (Jan. 9, 1992). The IRS paid for Combined Federal Campaign t-shirts for employees who donated five dollars or more per pay period. "[W]here an agent of the government procures goods or services in contravention of a statutory prohibition or in the absence of statutory authority, the government cannot be legally obligated to make payments to those who have provided the goods or

1. Statutorily-Created Exceptions. Congress has created some instances in which it is permissible to use appropriated funds to purchase clothing, like buying uniforms for civilians, certain safety and protective equipment.[84]

2. Opinions and Regulations. Some exceptions have been outlined in agency regulation or GAO opinions, such as tuxedo rentals, safety equipment, and civilian uniforms.[85]

services. *See Hooe v. United States*, 218 U.S. 322, 334 (1910); B-237148 at 2. Further, equitable doctrines such as quantum meruit and promissory estoppel provide no basis on which the government may pay for unauthorized goods or services. *See Office of Personnel Management v. Richmond*, 110 S. Ct. 2465 (1990); *The Floyd Acceptances*, 7 Wall. 666, 680 (1868). The use of equitable doctrines to justify unauthorized payments would render the appropriations clause of the Constitution a nullity." (emphasis added).

[84] *See* 5 U.S.C. § 7903 (authorizing purchase of special clothing protecting personnel from 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); 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). *See also*; 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).

[85] *See, e.g.,* White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (July 6, 1992) (authorizing tuxedo rental or purchase for official duties); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (Nov. 30, 1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120305 (discussing vouchers for civilian uniform allowances); AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees (9 July 2021).

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.[86] Though this prohibition does not apply to expenses of an employee of the government carrying out an official duty, food is generally considered a personal expense.[87] There are a variety of exceptions:

1. Non-severable cost of food. GAO-sanctioned an 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.[88]

2. Limited "Light Refreshments" Exception. The "light refreshments" exception has changed over the years.

   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.[89]

[86] *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.

[87] *See* Depart't 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).

[88] *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).

[89] *See* Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 U.S. Comp. Gen. LEXIS 224 (Jan. 27, 2003).

b. In 2005, GAO somewhat reversed its 2003 decision, authorizing the use of appropriated funds for light refreshments, even for individuals *NOT* in travel status, under certain criteria90 Despite GAO's permissive opinion, the ***DoD is bound by more restrictive rules***, as required by the DoJ OLC.[91]

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.[92] Therefore 31 U.S.C. § 1345 prohibits conference attendees, who are from the local Permanent Duty Station (PDS) area, from utilizing "light refreshment exception."

d. 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. This limitation applies to conference attendees from the PDS, whereas attendees in travel status may utilize the "light refreshment" exception discussed in the 2005 NIH opinion. Because of other exceptions relating to military members, the OLC opinion may impact the ability of a civilian, who is not in a travel status, to utilize the authority granted in 5 U.S.C. § 4110 (permits gov't to pay for expenses of attending certain meetings).

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.

[90] National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 03, 2005) ("NIH opinion").

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

[92] *Id.*

b. Food at Meetings and Conferences.

(1) 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." As this authority is based on 5 U.S.C. § 4110, it does not apply to military members (it applies only to civilian employees).

(2) Costs of Attendance by Military Members at Meetings and Conferences. Joint Travel Regulation (JTR), ch. 2, para. 020305, 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.

(3) 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.[93] For purposes of this exception, the conference or meeting ***must not be purely internal government business meetings/ conferences***.[94] This authority does not specifically authorize agencies to pay the expenses, including food, of **non-**governmental employees.

(4) 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."[95]

(a) As part of the decision, the GAO applied the same 5 U.S.C. § 4110 criteria to "formal conferences," but also required sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and stated that the conference must involve ***topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants***.

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

[94] 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, 64 Comp. Gen. 406, 408 (Mar. 22, 1985).

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

(b) The OLC opinion may impact the ability of an agency to utilize this authority.[96]

(c) Army Regulation 1-50, Army Conference Policy (29 March 2024) sets down bright line rules for conferences. Under these standards, it is much harder to pay for ***any*** food at an approved conference.

c. Food at Training Event. Under 5 U.S.C. § 4109 (applicable to civilian employees), and 10 U.S.C. § 7013 (applicable to service members), the government may provide meals when it is "necessary to achieve the objectives of a training program."[97]

(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.[98]

(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.[99]

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[96] *See* Section IX.B.2.c above.

[97] *See* U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mar. 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, 2003 U.S. Comp. Gen. LEXIS 224 (Jan. 27, 2003), (including a discussion of providing food to civilians and military members, how travel status does not affect one's ability to accept food under this exception)).

[98] *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 (civilian employee attendance).

[99] *See* U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mar. 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,

(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.[100]

(4) The training exception was often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. Specifically, "(1) Is the food part of a formal program intended by the agency to advance EEO objectives and to make the audience aware of the cultural or ethnic history being celebrated? (2) Does the food provided constitute a meal, or is it a sample of the food of the culture offered as part of the larger program to serve an educational function?"[101]

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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).

[100] *See* Corps of Eng'rs – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (May 12, 1993) (determining that quarterly managers meetings of the Corps did not constitute "training").

[101] U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program, B-301184 (Jan. 15, 2004) ("samplings" of food cannot amount to a full buffet lunch and must be related to the culture being celebrated). *See also,* Army – Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982); AFMAN 65-605, vol. 1, para. 4.28.1 (26 Aug. 2012). *However,* review current policy guidance regarding use of official resources in support of DEI and cultural awareness events. *See* Executive Order 14151, "Ending Radical and Wasteful Government DEI Programs and Preferences," Executive Order 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," Memorandum from the United States Office of Personnel Management, subject: Further Guidance Regarding Ending DEIA Offices, Programs and Initiatives (5 Feb. 2025), and Memorandum from the Secretary of Defense, subject: Cultural Awareness Months (7 Feb. 2025).

d. Food at Civilian Award Ceremonies. 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.[102] Generally, 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 (Oct. 2020). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (17 Sept. 2020).

e. Food at Military Award Ceremonies. 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, meaning food may not be provided as part of a military awards ceremony. However, in the unlikely event of a ceremony honoring military recipients of **cash awards** under 10 U.S.C. §1124 (Military Cash Awards), food may be provided because § 1124 does contain the "incur necessary expenses" language. However, military cash awards are very rare. Therefore, for the vast majority of military awards ceremonies food may ***not*** be purchased with appropriated funds.

4. Food paid for with "Emergency and Extraordinary Expense" funds. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors.[103]

[102] 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 (July 21, 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 . . . .").

[103] *See* discussion *infra* Part XI.

C. Bottled Water. Bottled water generally does not materially contribute to an agency's mission accomplishment. It is therefore generally a personal expense. Common exceptions include:

1. Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is unwholesome or unpotable.[104]

2. 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.[105]

3. 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.[106]

4. Bottled Water as a Condition of Employment – not an exception. 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.[107]

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[104] *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).

[105] Dept. of the Army – Use of Appropriations for Bottled Water, B-310502, 2008 U.S. Comp. Gen. LEXIS 38 (Feb. 4, 2008). *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).

[106] Dept. of the Army – Use of Appropriated Funds for Bottled Water, B-324781 (Dec 17, 2013).

[107] 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); AFMAN 65-605, vol. 1, para. 5.41, (31 March 2021)(discussing the same); AR 30-22, para. 5-19 (17 July 2019) (discussing purchasing bottled water in the context of a deployment /contingency operation).

6. Water Coolers. As distinguished from the water itself, agencies may use appropriated funds to purchase water coolers as "Food Storage Equipment" (see discussion in paragraph D, 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 precedent[108] 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.[109] 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."

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 local 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.[110]

[108] *See e.g.*, Central Intelligence Agency – Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (Jun. 26, 1997) (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).

[109] *See* Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004).

[110] Department of Commerce—Disposable Cups, Plates, and Cutlery, B-326021 (Dec. 23, 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.

1. However, 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, and may not be paid for with appropriated funds. 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."[111]

a. Federal Supply Schedule Exception. If the desired equipment is available on the Federal Supply Schedule, the agency may use appropriated funds to purchase it if certain conditions are present.[112]

[111] Equal Employment Opportunity Commission – Special Equipment for Handicapped Employees, B-203553, 63 Comp. Gen. 115 (Dec. 14, 1983) (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, 84-2 CPD ¶ 194 (July 23, 1984) (allowing reimbursement for air purifiers to be used in common areas, thus benefiting the needs of all building occupants).

[112] *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, the agency needed to provide its 6'6 330lb employee with office furniture, and had exhausted other reasonable measures to purchase a less expensive chair).

b. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, 29 U.S.C.S. § 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.[113] Thus, agencies may purchase equipment for its ***qualified handicap employees*** as a reasonable accommodation.[114]

c. Exercise and Gym equipment. Equipment used in a mandatory physical conditioning program is principally for the benefit of the government and is not considered for "recreational" or "personal" use.[115] Agency limitations may apply. Physical exercise costs incident to a mandatory program necessitated by the demands of designated positions could be paid as a necessary expense without the need to rely on 5 U.S.C. § 7901 (permitting establishment and cost of health service programs, including equipment).[116]

[113] *See* 29 C.F.R. 32.3 ("Definitions").

[114] *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 (Dec. 14, 1983) (agency could not purchase air purifier for person with allergies because the person did not meet the regulatory definition of a handicapped individual).

[115] Matter of: Department of Interior -- Purchase of Physical Exercise Equipment, B-211404, 63 Comp. Gen. 296 (Apr. 17, 1984); *see also*, Matter of: National Park Service--Physical Fitness Program, B-218840, 1985 U.S. Comp. Gen. LEXIS 571 (Sept. 6, 1985) (costs of gym equipment for mandatory physical fitness requirements considered a necessary expense).

[116] 63 Comp. Gen. 296 (1984); *see also* GAO Red Book p. 3-202.

F. Entertainment. Entertaining people generally does not materially contribute to an agency's mission performance. As a result, entertainment expenses are considered to be a personal expense.[117] There are limited exceptions.[118]

1. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency.[119]

2. Agengies are authorized to use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs.[120] However, see discussion *supra* note 101.

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.[121]

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[117] *See* HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (Feb. 3, 1989); Navy Fireworks Display, B-205292, 82-2 CPD ¶ 1 (Jun. 2, 1982) (determining fireworks to be unauthorized entertainment); Liability of Alexander Tripp, B-304233, 2005 U.S. Comp. Gen. LEXIS 158 (Aug. 8, 2005) (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).

[118] *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 (July 12, 1989) (discussing authority to conduct "interpretive demonstrations" at the 1988 Annual Golden Spike Railroader's Festival).

[119] *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 (Mar. 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).

[120] *See* IX.B.4.C, above. Internal Revenue Serv. – Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (Mar. 10, 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, 1999 U.S. Comp. Gen. LEXIS 211 (Jul. 21, 1999) (Int'l Trade Comm'n funds were available to pay for musical performance at cultural awareness event, subject to time limits on reimbursement).

[121] *See* Department of State & Gen. Serv. Admin – Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (Nov. 17, 1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (Aug. 22, 1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government

H. Business Cards. Under a "necessary expense" analysis, the GAO has sanctioned the purchase of business cards for agency employees.[122] The 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.[123]

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 prohibited government phones in personal residences because their use was subject to great abuse.[124]

employee proper); *But see* The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (Mar. 20, 1985) (determining that postage for Christmas cards and holiday greetings letters were not a proper expenditure because they were for personal convenience). *See also* AFMAN 65-605, vol. 1, para. 5.18.2 (31 March 2021); 41 C.F.R. § 101.26.103-2 (2003) governs the purchase of 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).

[122] *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").

[123] *See, e.g.*, Forest Serv. – Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (June 6, 1989); *See* Section IX.H for a discussion on the more restrictive agency regulations on purchasing business cards.

[124] *See* 31 U.S.C. § 1348; Centers for Disease Control and Prevention – Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-2620 96-1 CPD ¶ 180 (Apr. 8, 1996) (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 (July 26, 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.[125] 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.[126]

2. Exception for Data Transmission Lines. If the phone will be used to transmit data, the above prohibition does not apply.[127]

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.[128]

[125] *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 (Mar. 7, 1989) (telephone in temporary quarters of National Park Service employee allowed, using same rationale).

[126] *See* 10 U.S.C. § 1588(f).

[127] *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).

[128] *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); Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, 2003 U.S. Comp. Gen. LEXIS 240 (Mar. 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.[129]

5. Educating public via tweet not a valid use of funds. The Secretary of Energy wrote a guest column for a media outlet criticizing the Patient Protection and Affordable Care Act. The same day DoE's public affairs office tweeted "Time to discard the burdens and costs of Obamacare: @SecretaryPerry" and linked to the Secretary's column. GAO found that DoE's appropriation was not available for the purpose of informing the public about health care and so the tweet violated the purpose statute.[130]

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.[131] Where the fine itself is not reimbursable, related legal fees are similarly non-reimbursable.[132]

1. Exception Based Upon "Necessary Expense" Rule.

a. 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.[133]

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[129] *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.[129].

[130] U.S. Department of Energy--Tweet Concerning the Secretary of Energy's Guest Column on Health Care, B-329373 (Jul. 26, 2018).

[131] Alan Pacanowski - Reimbursement of Fines for Traffic Violations, B-231981, 1989 U.S. Comp. Gen. LEXIS 635 (May 19, 1989).

[132] In the Matter of Attorney's Fees in Traffic Offense, B-186857, 57 Comp. Gen. 270 (Feb. 9, 1978) (employee charged with reckless driving).

[133] *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 (Nov.

b. If a fine or penalty imposed upon an employee or contractor personally for an action attributable to the agency/government at large, over which the employee/contractor has no control, and the government is not immune from the type of fine imposed, the employee/contractor may be reimbursed for having paid the fine.[134]

2. Agencies may also pay fines imposed upon the agency itself if Congress waives sovereign immunity.[135]

K. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. "An officer or employee of the government has upon his own shoulders the duty of qualifying himself for the performance of his official duties and that if a personal license is necessary to render him competent therefor, he must procure it at his own expense."[136] 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.[137]

1. GAO Sanctioned Exception — appropriated funds may be used to pay for a license or certificate when it primarily benefits the government and is not for the purpose of qualifying an employee for his position.[138]

27, 1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).

[134] The Honorable Ralph Regula, B-250880, 1992 U.S. Comp. Gen. LEXIS 1279 (Nov. 3, 1992) (discussing when fines imposed on Government employees driving Government vehicles may not be personal expenses); *but see* Matter of: Reimbursement of Selective Service Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (Dec. 31, 1990) (discussing contractual indemnification agreements).

[135] *See*, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).

[136] A. N. Ross, Federal Trade Commission, B-29948, 22 Comp. Gen. 460 (Nov. 7, 1942) (fee for admission to Court of Appeals not payable).

[137] *See*; Colonel Dempsey, B-277033, 1997 U.S. Comp. Gen. LEXIS 410 (Jun. 27, 1997) (fee for a state physician's license and Drug Enforcement Administration certifications are not payable, even where advantageous for the Government). *But see* AFMAN 65-605, vol. 1, para. 5.42 (payment for *certain* licenses and certificates, where not used to qualify individuals for employment, allowed).

[138] Air Force—Appropriations – Reimbursement for Costs of Licenses or Certificates, B-252467, 73 Comp. Gen. 171 (June 3, 1994) (approving payment of licenses necessary to comply with state-established environmental

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."[139] 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.[140] In 2006, the military received similar authority at 10 U.S.C. § 2015. However, this authority may not be used to pay the expenses of a member to obtain professional credentials that are a prerequisite for appointment in the armed forces.

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.[141]

standards); 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); Dept. of the Army – Availability of Funds for Security Clearance Expenses, B-307316, 2006 U.S. Comp. Gen. LEXIS 144 (Sep. 7, 2006) (costs associated with a servicemember renouncing foreign citizenship in order to obtain security clearance are allowable).

[139] Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at 5 U.S.C. § 5757 (applies to civilian employees).

[140] *See* AFMAN 65-605, vol. 1, para. 5.42. *But see* Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (Aug. 20, 2004) (prohibiting payment for an employee's membership in a professional association not required for licensing).

[141] 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 may use appropriated funds to pay for awards provided the purchase is in accordance with statutory authority and implementing agency regulation. Agencies generally may not use their appropriated funds to purchase "mementos" or personal gifts, and the line between a gift and an award is not always clear.[142] Congress has enacted various statutory schemes permitting agencies to give awards. 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."[143]

a. The Army has implemented this statute in AR 600-8-22, Military Awards (19 February 2024). 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."[144]

[142] *See* EPA Purchase of Buttons and Magnets, B-247686, 72 Comp. Gen. 73 (Dec. 30, 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, 96-2 Com. Gen. Proc. Dec. ¶ 131 (Dec. 28, 1995) (disallowing the purchase of baseball caps where there was no direct link to the purpose of the appropriation established).

[143] 10 U.S.C. § 1125.

[144] *See* AR 600-8-22, para. 11-2b.

d. These awards could be made in the form of a coin, a trophy, a plaque, loving cups, badges, buttons and "similar objects" that represent the type of achievement or contest."[145] Principle HQADA officals and ACOM, ASCC, and DRU commanders are responsible for procurement and administration of their respective coin programs, and authorize their subordinate award authorities to use appropriated funds as required.[146]

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. Sommerkamp, *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.[147]

[145] AR 600-8-22, para 11-3.

[146] *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 (Apr. 10, 1992) (belt buckles may be purchased as awards for the annual "Peacekeeper Challenge").

[147] *See generally* AFPD 36-28, Awards and Decorations Programs, (24 May 2021); SECNAVINST 3590.5A, Award of Trophies and Similar Devices in Recognition of Accomplishments (2 Feb. 2018). *See also* AFMAN 65-605, vol. 1, para. 5.21.

2. Awards for Civilian Employees. Congress has provided agencies with various authorities to pay awards employees.[148] 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, Volume 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (February 2024). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (17 Sept. 2020).

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. Agency regulations each expressly permit non-cash awards. The GAO has sanctioned the giving of non-cash awards to civilian employees.[149] As discussed *supra B.3.d*, 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 generally 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.

[148] *See* Chapter 45 of Title 5 of the U.S. Code.

[149] *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, 1997 U.S. Comp. Gen. LEXIS 105 (Mar. 4, 1997) (deciding that food vouchers may be given to civilian employees as awards).

M. Use of Office Equipment. Governed by the Joint Ethics Regulation, DOD 5500.07-R , 2-301(Change 7, Nov. 17, 2011); DOD Directive 5500.07, Standards of Conduct (Nov. 29, 2007); 5 C.F.R. § 2635; and 5. C.F.R. Part 3601 (available at https://dodsoco.ogc.osd.mil/Ethics-Program-Resources/Ethics-Laws-and-Regulations/).

N. Use of Government Property by the National Guard and Reserve Componenets. The use of government property to respond to National Guard and Reserve matters is authorized with certain restrictions.[150] 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.[151]

[150] 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.

[151] *See also* CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, RESERVE OFFICERS ASS'N L. REV., May 2001 (providing a good overview of this authority).

O. Expenditures for New or Additional Duties. 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, current appropriations may be charged? Test: Are the new duties sufficiently related to the purpose of a previously enacted appropriation?[152]

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."

[152] The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (June 22, 1984); Director, Nat'l Sci. Found., B-158371, 46 Comp. Gen. 604 (Jan. 10, 1967).

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).[153]

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.

[153] U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (Dec. 17, 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 (June 9, 1986); Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373.2, 64 Comp. Gen. 370 (June 30, 1988).

b. Augmenting an appropriation by retaining government funds received from another source violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b).[154] Expending the retained funds generally violates the constitutional requirement for an appropriation.[155]

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."[156] 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.[157] 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.[158]

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[154] *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 (May 11, 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 (July 12, 1988) (noting that 31 U.S.C. § 3302 ***only applies to monies received***, not to other property or services).

[155] *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 (June 9, 1988).

156 *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).

[157] *See* DoD FMR, Vol. 11A, Ch. 18.

[158] *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.[159]

4. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States.[160]

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.[161]

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.

[159] *See* 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (Feb. 10, 1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960). *See also* DoD FMR, Vol. 3, Ch 19 for policies and procedures.

[160] 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 (Feb. 26, 1988); National Park Serv. – Disposition of Performance Bond Forfeited to Gov't by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (June 20, 1985) (forfeited bond proceeds to fund replacement contract).

[161] *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)

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."[162] The U.S. Army Claims Service has taken the position that such recoveries should be credited to the installation's operation and maintenance account.[163]

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.[164]

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. 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.[165]

11. Host nation contributions to relocate armed forces within a host country.[166] These contributions may only be used for costs incurred in connection with the relocation.

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[162] 42 U.S.C. § 2651.

[163] *See* Affirmative Claims Note, *Lost Wages under the Federal Medical Care Recovery Act*, ARMY LAW., Dec, 1996, at 38.

[164] *See* DOD FMR, Vol. 12, Ch. 14, para. 1402 for policies and procedures.

[165] 10 U.S.C. § 2575; *See* DoD FMR, Vol. 12, Ch. 25, para. 250201 for policies and procedures.

[166] 10 U.S.C. § 2350k.

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."[167]

13. Conference Fees. In response to a GAO decision that prohibited the retention of conference fees without specific statutory authority, [168] 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.[169]

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.[170]

[167] *See* DoD FMR, Vol. 10, Ch. 2, para. 020302 for policies and procedures.

[168] 10 U.S.C. § 2262. *See* National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005)

[169] This statutory authority has been implemented in DoD FMR vol. 12 ch. 32 (May 2022).

[170] *See* DoD FMR, Vol. 2B, Ch. 13.

C. 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.[171]

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. Policy and procedures for refunds can be found in DOD FMR, Vol. 3, Ch. 15, para. 150355.[172]

[171] Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (Sept. 28, 1983).

[172] *See also* Department of Justice – Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (July 19, 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 (Dec. 6, 1982); Appropriation Accounting Refunds and Uncollectables, B-257905, 96-1 Comp. Gen. Proc. Dec. ¶ 130 (Dec. 26, 1995) (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.[173]

c. Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts.[174]

d. Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired.[175] This rule applies to refunds in the form of a credit.[176]

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.[177]

[173] Federal Emergency Mgmt. Agency – Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (Feb. 16, 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).

[174] Defense Logistics Agency – Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (Dec. 11, 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).

[175] Accounting for Rebates from Travel Mgmt. Ctr. Contractors, B-217913.3, 73 Comp. Gen. 210 (June 24, 1994); To the Sec'y of War, B-40355, 23 Comp. Gen. 648 (Mar. 1, 1944).

[176] *See* Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-174, GAO-06-382SP (3d ed. 2006); Appropriation Accounting—Refunds and Uncollectables, B-257905, 96-1 CPD ¶ 130 (Dec. 26, 1995) (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

[177] Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (July 12, 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.[178]

5. Non-reimbursable Personnel Details.

   a. The Comptroller General has held that non-reimbursable agency details of personnel to other agencies are generally unallowable.[179]

   b. Exceptions.

      (1) A law authorizes nonreimbursable details.[180]

      (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.[181]

      (3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means.[182]

[178] The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (Oct. 10, 1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).

[179] Department of Health and Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (Mar. 20, 1985); The Hon. Robert W. Houk, B-247348, 1992 U.S. Comp. Gen. LEXIS 837 (Jun. 22, 1992).

[180] *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); 50 U.S.C. § 3049 (non-reimbursable detail of other personnel to an element of the intelligence community funded through the National Intelligence Program).

[181] Details to Congressional Comm'ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334 (Apr. 11, 1988).

[182] Dep't 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 (E&E) 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.[183]

C. Appropriations Language.

1. For DoD, Congress provides E&E funds as a separate item in the applicable operation and maintenance appropriation.

Example: In FY 2024, 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, $58,604,854,000: *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 E&E funds. If Congress does not specifically grant an agency E&E funds, that agency may not use other appropriations for such purposes.[184]

[183] *See* Act of March 3, 1795, 1 Stat. 438.

[184] *See* HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (Feb. 3, 1989).

D. Statutory Background.

1. 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 . . . ."[185]

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.[186]

[185] 10 U.S.C. § 127.

[186] *See*, e.g., 22 U.S.C. § 2671 (authorizing the State Department to pay for "unforeseen emergencies").

E. Regulatory Controls. E&E 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 (please note that this list non-exhaustive as Combantant Commands may also have additional corresponding or applicable policy):

1. Official Representation (Protocol). This subset of E&E 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.[187]

a. DoD Publications: DoD Instruction 7250.13, Use of Appropriated Funds for Official Representation Purposes (22 May 2023).

b. Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (17 Nov 2023).

c. Air Force Regulation: AFI 65-603, Official Representation Funds: Guidance and Procedures (29 Apr. 2020).

d. Navy Regulation: SECNAVINST 7042.7L, Guidelines for the Use of Official Representation Funds (30 June 2020).

2. Criminal Investigation Activities. This subset of E&E 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 Mar. 2020).

b. Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations Program (1 Jul. 2019).

[187] *See* DoD FMR, Vol. 10, Ch. 12, para. 120319.

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 (29 June 2020).

b. Air Force Regulation: AFI 71-101, vol. 4, Counterintelligence (2 July 2019); AFI 65-603, para. 2.3.

c. Please note, pursuant to Section 1057 of the NDAA for FY 2020, DoD components must use Defense Intelligence and Counterintelligence Expense (DICE) authority instead of E&E authority under 10 U.S.C. § 127 for all Military Intelligence Program (MIP) funded intelligence and counterintelligence (CI) activities for intelligence and CI objects of a confidential, extraordinary, or emergency nature.[188]

4. Procedures for Use of Official Representation Funds.

a. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests (e.g., foreign dignitaries) to maintain U.S. and DoD standing and prestige.[189] Official courtesies and ORF-related expenses are listed in AR 37-47, para 2-1a, including ,refreshments, and related disposable supplies for certain events; official communications, entertainment, etc.

[188] Department of Defense Intstruction 5205.86, Defense Intelligence and Counterintelligence Expense Authority, June 22, 2023.

[189] *See, e.g.*, DoDI 7250.13; AR 37-47, paras. 2-1 and 2-2.

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 $480.00.[190]

(2) If the guest is from within the DoD and is one of the specified individuals listed in DoDI 7250.13, para 3.1a then the command may present him or her with only a memento valued at no more than $100.00.[191] however, the Army limits this amount to $50.00.[192] ORF will not be used to purchase gifts or mementos of any kind for presentation to, or acceptance by, DoD personnel not identified in AR 37-47 para. 2-3b(2).[193]

c. Levels of expenditures. DoDI 7250.13, para. 2-7, establishes approval authorities for ORF expenditures not exceeding $100,000 per event; Army Regulation prohibits spending in excess of $35,000 per event (an entire visit by an authorized guest constitutes one event for purposes of this threshold).[194]

d. Prohibitions on Using Official Representational Funds.[195]

[190] *See* DODI 7250.13, para 3.4.a(1)(i)(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 updated by GSA in GSA Bulletin FMR B-54 (April 25, 2023)).

[191] DoDI 7250.13, para 3.4.a(2)(j);

[192] AR 37-47, para. 2-4c.

[193] AR 37-47, para. 2-9f.

[194] AR 37-47, para. 2-4b.

[195] DoDI 7250.13, paras. 3.1..f. and 3.4.a(2); AR 37-47, para. 2-10; AFI 65-603, para. 8.2; SECNAVINST 7042.7L, Encl. 5, para. 4.

(1) Any use not specifically authorized by regulation requires Service Secretary approval as an exception to policy.[196]

(2) Some examples that require the Secretarial approval are:[197]

(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

[196] AR 37-47, para. 2-10; AFI 65-603, para. 8.2.15.

[197] *See* AR 37-47, para. 2-10.

(i) Repair, maintenance, and renovation of DoD facilities.

e. Approval and accounting procedures.[198]

(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.[199]

(5) Legal review.

5. Community Relations and Public Affairs Funds.[200] Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

[198] AR 37-47, Chapter 3; AFI 65-603, para 8; SECNAVINST 7042.7L, Encl. 3.

[199] AR 37-47, para. 3-1b(2).

[200] AR 360-1, Ch. 3 and Ch. 5, para. 5-1 (8 Oct. 2020).

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 (e.g., 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, you may be able to then locate the underlying statutory authority.

Example: I need to know when I can use appropriated funds to support my post chaplain. AR 165-1, Chaplain Activities in the United States Army, para. 1-17f (5 February 2024) contains cross-references to 10 U.S.C. §§ 1789 and 7217. 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: https://www.gao.gov/legal/appropriations-law-decisions/red-book. The main volumes are supplemented 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. Congress has enacted a statutory requirement for DoD to have an authorization act each year. The National Defense Authorization Act (NDAA) provides additional guidance on the limitations of the use of appropriated funds. As with appropriations acts, one can use Westlaw or congress.gov to conduct research on authorization acts.

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.

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 specifically 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 V of this chapter for an overview of this test.

2. If your research uncovers an agency level regulation that addresses your intended purchase, 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 express authorization from Congress in the form of legislation.

3. It is 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 is also 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* Parts VII and VIII of this chapter.

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 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.

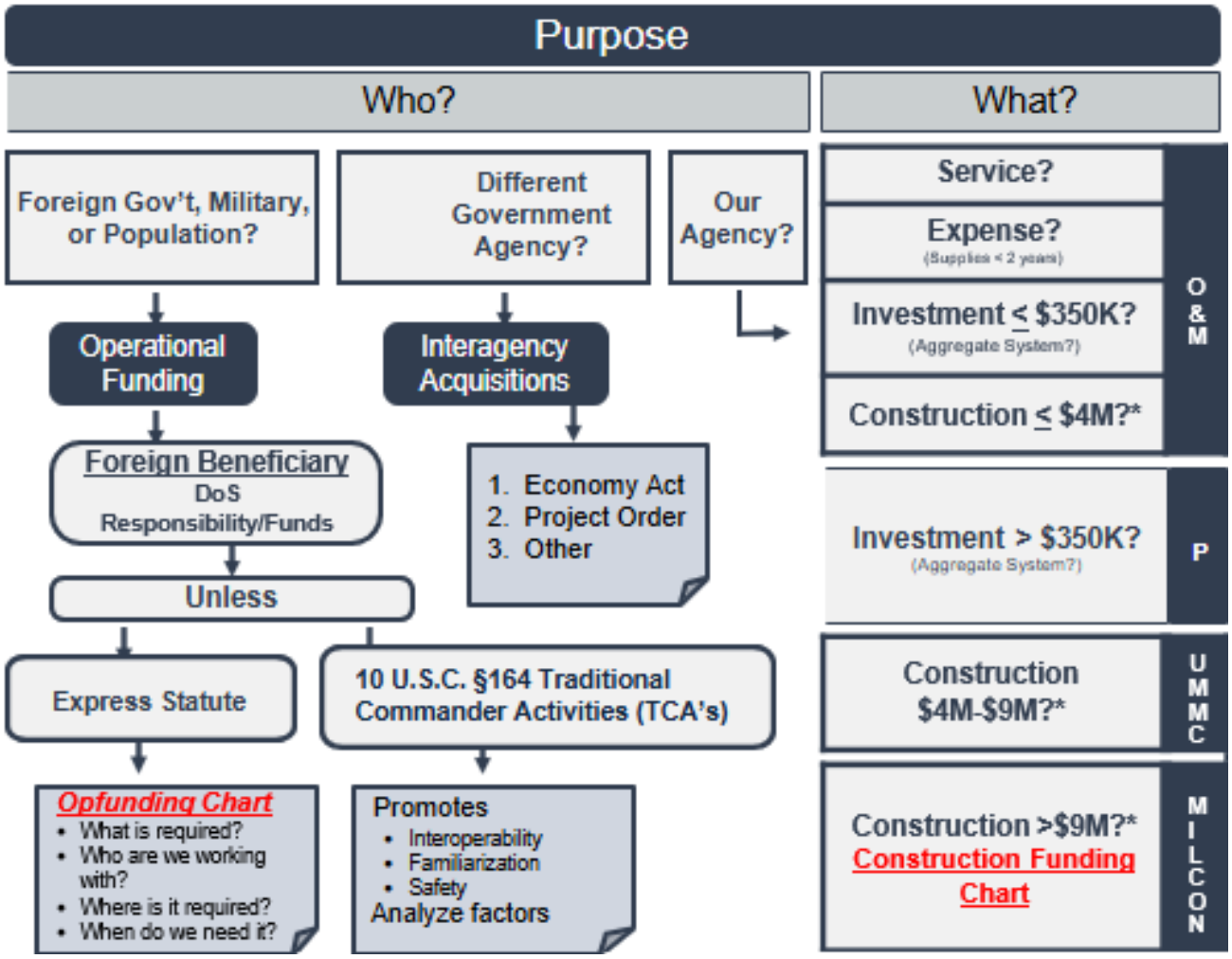
2. Note: you may have to run alternate searches utilizing synonyms for your topic (e.g., if someone wants to know whether "T-shirts" may be purchased, you may have to look under "Clothing," "Uniforms"). If you know the underlying statutory authority, you can also use it as your keyword (e.g., plug in "10 U.S.C. § 2246" or "10 U.S.C. 2246" or "10 USC 2246" as your search term).

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

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APPENDIX A 45

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

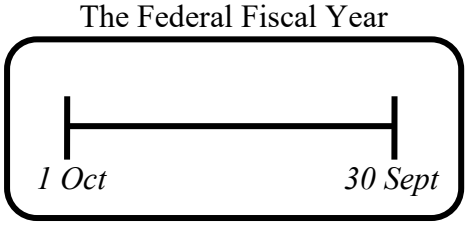
D. The general rules concerning use of expired appropriations.

II. KEY DEFINITIONS.

A. **Appropriation or Appropriations Act**. An appropriations act is the most common form of budget authority. It provides legal authority for federal agencies 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, Clause 7 of the U.S. Constitution, which provides, "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." The DoD typically receives its appropriations in a DoD Appropriations Act (DoDAA) or Consolidated Appropriations Act (CAA).

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. An authorization act either (1) describes legislation enacting new program authority, that is, authorizing the program, or (2) describes legislation authorizing an appropriation. Authorizing legislation does not provide budget authority, which stems only from the appropriations act itself. GAO Glossary, at 15. The DoD's typical authorizing legislation is the National Defense Authorization Act (NDAA).

C. **Fiscal Year (FY).** The Federal Government's fiscal year runs from 1 October through 30 September. 31 U.S.C. § 1102. This fiscal year governs the use of appropriated funds and is referenced throughout this chapter. Fiscal Year 2025 started on 1 October 2024 and ends on 30 September 2025.



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 on 1 October 1976 for FY 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 (PoA)**. 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(a); DoD FMR Vol. 14, Ch. 2, para. 1.2.2.2.

2. The annual DoD Appropriations Act typically contains the following provision: "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly so provided herein." See, e.g., Further Consolidated Appropriations Act, 2024, Pub. L. No. 117-378, § 8003.

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, Preparation, Submission, and Execution of the Budget, § 20.4(c) (2024). See Section IV, 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; DOD FMR, Vol. 3, Ch. 15, para. 3.3.1. 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. See DOD FMR, Vol. 3, Ch. 15, para. 3.3.1.

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. 3.3.1. 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. The Air Force uses AF Form 9 as a fund cite authorization document.

3. Who. A commitment document must be signed by a person authorized to reserve funds; i.e., the official responsible for administrative control of funds for the affected subdivision of the appropriation. This helps ensure that the subsequent entry of an obligation will not exceed available funds. DOD FMR, Vol. 3, Ch. 15, para. 3.3.1. See Service regulations for additional guidance, such as AF 65-601V2, 29 Jan 21, and DFAS-IN 37-100.

4. What. Activities may commit funds only to acquire goods, supplies, and services that meet the bona fide need 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. DOD FMR, Vol. 3, Ch. 8, para. 2.1.

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 (awards) 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. See also OMB Circular No. A-11, at section 20.5.

2. General Rules.

   a. An obligation must be definite and certain. GAO Redbook, Appropriations Law, Vol. II, pg. 7-3. Generally, the type of transaction 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. 3.2.

   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. 3.4.1.

   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. 3.4.1.1.

   e. Generally, obligate current funds when the government incurs an obligation (incurs a liability). DOD FMR, Vol. 3, Ch. 8, para. 3.4.1. Some exceptions, include bid protests, replacement contracts for contracts that have been terminated for default (and in some cases terminated for convenience), and "in-scope" contract changes arising from a provision in the original contract. See Sections VI and VII for more discussion on these exceptions.

   f. An improper recording of funds does not create a contractual right, Integral Systems v. Dept. of Commerce, GSBCA 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; 31 U.S.C. § 1501; DOD FMR, Vol. 3, Ch.8, para. 3.1.

(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. 3.1. 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, Anti-Deficiency 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(c).

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 logically related 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 specific meaning 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.

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. 3.4.1.

[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.

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, Vol. 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, at 5.

2. The *Bona Fide* Needs Rule applies only to appropriations with limited periods of availability for obligation. The *Bona Fide* Needs Rule does not apply to no-year funds. GAO Redbook, Appropriations Law, Annual Update, Mar. 2015, at 5-1-5-2; see also Severable Services Contracts, B-317636, 21 Apr. 2009.

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. (18 Apr. 1995); To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 (1953); DoD FMR Vol. 14, Ch. 2, para. 1.2.2.2.

4. **History**: "The *bona fide* need rule initially appeared in 1789. From what can be gleaned from the sparse legislative history, the intent of the Congress was to instill a sense of fiscal responsibility in the newly formed United States departments and agencies. The Congress wanted the balance of appropriations not needed for a particular year's operations to be returned to the Treasury so that it could be reappropriated the following year in accordance with the Congress's current priorities. Of even more importance to the Congress today, a limited period of availability means that after that period has expired an agency has to return to the Congress to justify continuing the program or discuss how much is needed to carry on the program at the same or a different level." *Hon. Beverly Byron*, B-235678, Comp. Gen. (Jul 30, 1990).

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. 3.1.

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); see also, GAO Redbook, Appropriations Law, Vol. 1, at 5-5. In this case, the National Endowment of the Arts' 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. U.S. Small Business Administration—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum, B-321640, (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 begin 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.

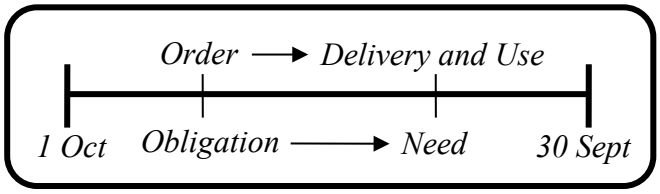
3. Consider any Exceptions. Congress and the GAO have, for different types of acquisitions, provided various exceptions that may allow the agency to treat the acquisition as a *bona fide* need of the current year.

D. **Supplies**.

1. Generally, the *bona fide* need for a supply is determined by when the government actually requires (when it will be able to use or consume) 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 the 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. 3.4.1.

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 (or needs to make an order now in order to receive the supply in time for it to arrive when it will be required) 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). An agency will also have a "current requirement" when, although they couldn't use the item now, they need to order it now in order to receive the item at the time the agency will require its use.

(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.

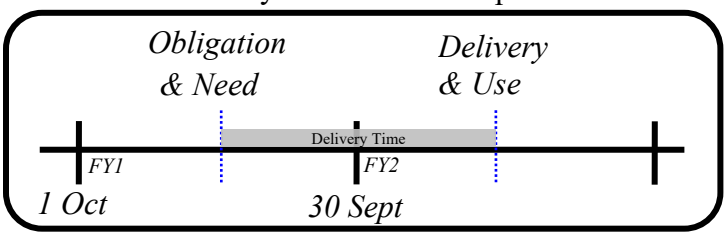
(c) If the government directs the contractor to withhold delivery until after the next fiscal year, the DoD FMR states there is not a *bona fide* need for the item until next fiscal year, so next year's fiscal funds must be used. DoD FMR Vol. 3, Ch. 8, para. 3.4.1.3.

(d) There is no requirement that the government pay increased delivery charges to ensure delivery before the end of the FY.

(e) The procurement must not be for standard, commercial items available from another 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. 3.4.1.2.

(3) Example: If the normal lead-time for delivery of an item is 45 days, an obligation of FY 2025 funds is appropriate for a delivery on or before a required delivery date of 14 November 2025. (Remember: 1 October 2025 is the beginning of FY 2026, so 14 November 2025 is in FY 2026). This represents the *Bona Fide* Need of FY 2025. However, if the government directs the contractor to withhold delivery until after 14 November 2025, there is not a *Bona Fide* Need for the item in FY 2025 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2026.

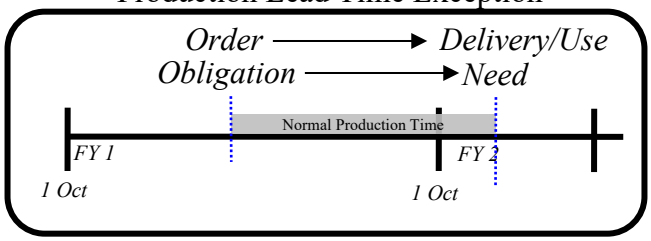
Delivery Lead Time Exception



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 of the supply. 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. 3.4.1.2.

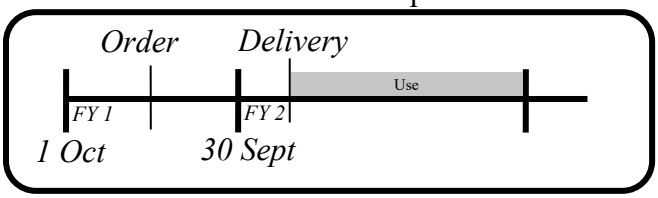
Production Lead Time Exception



(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 FY25 for a supply not required until FY26 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 FY25; 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.

Stock-Level Exception



(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 FY25, 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 FY25, annual FY25 funds were obligated, but many of the aids were not distributed and used until FY26. 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 FY25, so FY25 funds could be obligated even though the aids were not used until FY26. 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 FY25 ended, then FY26 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 1,000 slide rules but bought 5,800 at the end of FY84 by obligating FY84 money. They only used 1,500 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, under this exception, agencies may not "create stock" for supplies not needed in FY25. An agency may not obligate funds when it is apparent from the outset that there will be no requirement until FY26.

(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 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 *bona fide* 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**.

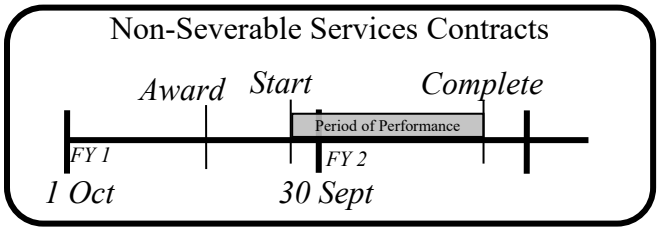
1. General Rule: The *bona fide* need for services does not arise until the services are rendered. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). Thus, in general, services must be funded with funds current as of the 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 at 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. 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 into 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 million 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:

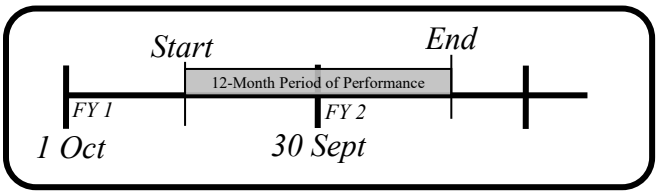
a. A service is severable if it can be separated into components that independently meet a need of the government. These services are continuing and recurring in nature.

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.

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. § 3133 (formerly 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. § 3133. Note: this authority was previously located at 10 U.S.C. § 2410a but was renumbered to 10 U.S.C. § 3133 by the FY2021 NDAA, Pub. L. No. 116-283, § 1809(d), 134 Stat. 3388, 4161 (2021). Similar authority exists for non-DOD agencies. 41 U.S.C. § 3902. Note: 41 U.S.C. § 3902 was previously located at 41 U.S.C. § 253l but was renumbered to 41 U.S.C. § 3902 by Pub. L. No. 111-350, § 3, 124 Stat. 3677, 3774, 3857 (2011).

12-Month Severable Services Contracts



(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 (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 (e.g., if it clearly calls for a single 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 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); 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 delivery/indefinite quantity (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, using the statutory exception for severable services at 41 U.S.C. § 3902. 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. 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 starting the first month of FY90 properly funded with FY89 funds); Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-233243, Aug. 3, 1989.

b. Some multiple course trainings 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 treated similarly 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 2022 because a brigade is deploying on 20 December 2022 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 2023 and the contract should be awarded in FY 2023 using FY 2023 funds. Accordingly, use of FY 2022 funds under these facts violates the *Bona Fide* Needs Rule. Note: this assumes the construction project is properly funded under single-year O&M-type funds.

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. 3.5.

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. § 3133 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 (multi-year budget authority) 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, Preparation, Submission, and Execution of the Budget, § 20.4(c) (2024). See also DOD FMR, Vol. 3, Ch. 13, para. 3.2.1.1.2.

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

   (1) Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA): 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. Full Funding of Procurement Programs. A budgeting rule that requires the total estimated cost of a military useable end item be funded in the fiscal year in which the item is procured. Under the full funding policy, the entire procurement cost of a weapon or piece of military equipment is to be funded in the year in which the item is budgeted. An end item budgeted in a fiscal year cannot depend upon a future years funding to complete the procurement. There are two general exceptions listed in the DOD FMR. DOD FMR, Vol. 2A, Ch. 1, para. 2.2 (010202). See Section IX below for a more robust discussion.

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 2025 RDT&E Army Appropriation (Pub. L. No. 118-364), which is available for obligation until 30 September 2025, may be obligated for the needs of FY 2025 and 2026; it is not available for the needs of FY 2027.

   b. The statutory severable services exception, 10 U.S.C. § 3133, 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. A key feature of revolving funds distinguishes them from annual appropriations: the 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. Because of this feature, revolving funds are permanent appropriations. [Testimony before the Subcommittee on Oversight and Investigations, Committee on Veterans Affairs, House of Representatives: *Revolving Funds*, Statement by Julia C. Matta, Deputy General Counsel, January 17, 2024] The GAO has ruled that the *bona fide* needs rule does not apply to "no-year" funds. Small Business Administration, B-152766, 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" or "park" 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 involve 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. Parking funds in the GSA Information Technology Fund was a possible violation of the Anti-Deficiency 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 was obligated without defining USARCS' needs and without establishing a *bona fide* need for tasks relating to the personnel claim's software development project, the torts and affirmative claims software development project, and the acquisitions of hardware and software. $2.8 million of these funds was "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]

b. **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 online 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 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?**

[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 could have exercised better control over administrative costs by partnering with larger Army contracting offices. *Id*. at pp. 10-11.

(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 (FY2). GSA cited to a statute for inter-agency acquisitions, 31 U.S.C. § 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 would not be finalized 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 agency's 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 either in its original analysis or in its correspondence with 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. 6.3 (030603).

C. If the servicing agency does not award the contract before the end of the fiscal year, the funds expire as provided by 31 U.S.C. § 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)).

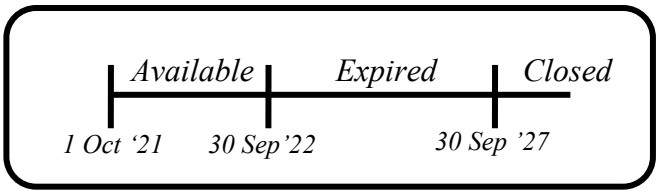
VII. USE OF EXPIRED/CLOSED APPROPRIATIONS.

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 record, adjust, and liquidate obligations properly chargeable to the account. 31 U.S.C. § 1552(a); 31 U.S.C. § 1553(a).

Appropriation Life-Cycle (1-Year Fund)



3. **Closed Appropriation**. An appropriation that is no longer available for any purpose. An appropriation is "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. Expired appropriations are no longer available for new obligations. 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 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. 3.2. 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).

c. 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. 3.6.

(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. 3.7.

d. 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. 3.7.

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(a). See also DOD FMR, Vol. 3, Ch. 10, para. 3.3.1 and DOD FMR, Vol. 3, Ch. 15, para. 4.7.

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. 3.3.1.

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. 3.3.3.

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 unexpired unobligated balance of the current appropriation available for the same purpose; or

(3) One percent (1%) of the total original amount appropriated to the current appropriation being charged. 31 U.S.C. § 1553(b)(2); DOD FMR, Vol. 3, Ch. 10, para. 3.3.4.

c. Under an equity theory, if a suit is filed prior to a fund's expiration, a federal court can enjoin the expiration of that fund to allow for the payment of a judgment. National Ass'n of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977). However, if budget authority has lapsed before suit is brought, there is no underlying congressional authorization for the court to preserve, so a court cannot create or reactivate that expired fund. Id. at 588-89.

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 their period of availability:

1. Contract Modifications;

2. Bid Protests;

3. Terminations for Default; and

4. Terminations for Convenience (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. 6.11. 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. Department of the Army, Fort Carson—Application of *Bona Fide* Needs Rule to Contract Modification, B-332430 (Sep. 28, 2021) ("[A] modification to a firm-fixed-price contract that is within the scope of the original contract may result in an increase to the contract price. Where such a price increase arises from and is enforceable under a provision in the original contract, the agency must obligate the price increase against appropriations available when the contract was originally executed, not against appropriations available when it made the modification.").

(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, Vol. 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, the 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) Generally, a contract change is 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. Krygoski Const. Co., Inc. v. U.S., 94 Fed.3d 1537 (Fed. Cir. 1996); H.G. Properties A. LP v. U.S., 68 Fed. App'x. 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 (1987); 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, para. 3.6.

(b) $25 million in one FY without notice to Congress and a 30-day 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. 3.7.

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-240726.6 (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 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 FY1977, 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 $8.1 million for the viewers. In FY1978, the Army exercised an option to purchase an additional 285 viewers, obligating FY1978 funds. By FY1981, there was a cost underrun for the original order (it cost less than $8.1 million to produce the 509 viewers). GAO opined that the Army could not use surplus FY1977 funds in a succeeding fiscal year to purchase 48 additional viewers. Even though the Army had a *bona fide* need for 557 viewers in FY1977, the Army chose not to obligate for 557 viewers in that FY. Any increased quantities in FY1981 are a *bona fide* need of FY1981. 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." DOD FMR, Vol. 3, Ch. 8, para. 3.6.3.

(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 . . . [H]owever, 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." DOD FMR, Vol.3, Ch. 8, para. 3.6.3.

(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-224702.2, 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 10 U.S.C. § 3133 would relate back to the funds initially placed on the contract. See GAO Redbook, Vol. I, Appropriations Law, at 5-34, n.20.

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, Dec. 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, Jul. 30, 1990; Funding for Air Force CPFF Level of Effort Contract, B-277165, Jan. 10, 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 GAO, or in the Court of Federal Claims (COFC). 31 U.S.C. § 1558; FAR 33.102(c).

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 replacement contract, even if they otherwise would have expired. The agency must award the replacement 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, Ch. 10, para. 3.8; 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).

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, paras. 3.8, 3.10.

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," but any excess damages beyond those for re-procurement, completion, and support and administrative (e.g., punitive damages) constitute miscellaneous receipts that must be deposited with the U.S. Treasury. Settlement of Faulty Design Dispute, B-220210, 65 Comp. Gen. 838 at *4-7 (Sept. 8, 1986); see also Department of the Interior—Disposition of Liquidated Damages Collected for Delayed Performance, B-242274 (Aug. 27, 1991) (liquidated damages received from terminated contract may not be used to pay for increased costs to related contracts that are not replacement contracts).

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. 3.8.3.

2. Exceptions. Funds originally obligated may be used in a subsequent fiscal year to fund a replacement contract if the original contract was terminated for convenience as a result of a:

   a. Court order;

   b. Determination by a contracting officer that the contract award was improper due to explicit evidence the award was erroneous and the determination is documented with appropriate findings of fact and of law; 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. 3.8.3.3; Funding of Replacement Contracts, B-232616, Dec. 19, 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 contract is terminated for default or convenience, then the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions (and the above conditions if a termination for convenience):

   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, Ch. 10, para. 3.8.4.2

   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. 3.8.

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, paras. 1.7.2.28, 2.2 (010202). 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 a 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. 1.7.2.28.

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. 2.2.2.1.

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, paras. 2.2.1.2, 2.2.2.2.

4. The DOD full funding policy is not statutory. Violations of the full funding policy do not necessarily violate the Anti-Deficiency Act. Newport News Shipbld'g and Drydock Co., B-184830, Feb. 27, 1976, 76-1 CPD ¶ 136 (holding option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).

B. Incremental Funding of Major Defense Systems. The efficient production of major defense systems has necessitated two general exceptions to the full funding policy. There are two general exceptions to the full funding policy: one permits the use of Advance Procurement (AP) funding for components or parts of an item that have long production lead times; the other permits advance procurement funding for economic order quantity (EOQ) procurement, which normally occurs in programs that have been approved for multiyear procurements (MYP). DOD FMR, Vol. 2A, Ch. 1, paras. 2.2.1.2, 2.2.2.2; DFARS 217.172.

1. Advance Procurement (Long Lead-time Items). Advance procurement requests for long lead-time items shall be limited to the end items in major procurement appropriations. Long lead-time procurements shall be for components, parts, and material whose lead-times are greater than the life of the appropriation (3-5 years). In some circumstances, Advance Procurement is also warranted when items have significantly longer lead-times than other components, parts, and material of the same end item or when efforts must be funded in an advance procurement timeframe in order to maintain a planned production schedule. For new development programs, the planned production schedule should be based on a full funding basis without the use of long lead material. Planning the program content this way provides additional flexibility should development delays arise. When advance procurement is part of the program, however, the cost of components, material, parts, and effort budgeted for advance procurement shall be relatively low compared to the remaining portion of the cost of the end item. Each budget request for advance procurement shall represent, at a minimum, the termination liability associated with the total cost of the long lead-time components, material, parts, and effort for which the advance procurement request is being made. The termination liability should not cover the cost of the end item budgeted in the following fiscal year(s). The full cost of components, material, parts, and effort included in the advance procurement request should be budgeted in the FYDP consistent with full funding procedures. DOD FMR, Vol. 2A, Ch. 1, para. 2.2.3.3; DFARS 217.172.

2. Economic Order Quantity (EOQ) Procurement. EOQ may be used only in connection with multiyear procurement. It is the general policy of the Department of Defense not to create unfunded contract liabilities for EOQ procurements. Rather, funding for EOQ procurements shall be included in advance procurement budget requests unless an exception to the general policy is granted by the USD(Comptroller). The EOQ procurement may satisfy procurement requirements for no more than the number of program years covered by the multiyear procurement contract. Unless it would be more effective to fully fund the EOQ, or the USD(Comptroller) has granted an exception to the general policy to allow inclusion of EOQ costs in a cancellation clause, the advance procurement funding for an EOQ procurement shall cover, at a minimum, the estimated termination liability of the EOQ procurement. DOD FMR, Vol. 2A, Ch. 1, para. 2.2.3.4.; see also 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. 2.14 (010214).

2. Contract Provisions.

a. An incrementally funded cost-reimbursement contract contains FAR 52.232-22, Limitation of Funds as prescribed in FAR 32.706-2(b). 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.

3. 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. § 3501; 10 U.S.C. § 3531.

1. Multi-year contracts are 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. 2.3 (010203).

2. 10 U.S.C. § 3501 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. § 3501; DFARS 217.172; DOD FMR, Vol. 2A, Ch.1, para. 2.3 (010203).

3. Similar authority at 10 U.S.C. § 4851 (formerly 10 U.S.C. § 2531)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. § 3531; 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 (h)(3). 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 (h)(4).

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 synopsized 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. FAR 17.207

c. The government must have funds available. FAR 17.207

d. The contract must contain the "Availability of Funds" clause. FAR 32.703-2, FAR 52.232-18. 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. However, any specified minimum quantities must be ordered in the initial fiscal year. FAR 32.703-2(b)(1).

2. Use of the Availability of Funds clause (FAR 52.232-19) is mandatory if the contract is funded by annual appropriations and is to extend beyond the initial FY. FAR 32.706-1(b).

3. The government obligates funds for each delivery order using funds available for obligation at the time the government issues the order.

XI. CONCLUSION

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**.

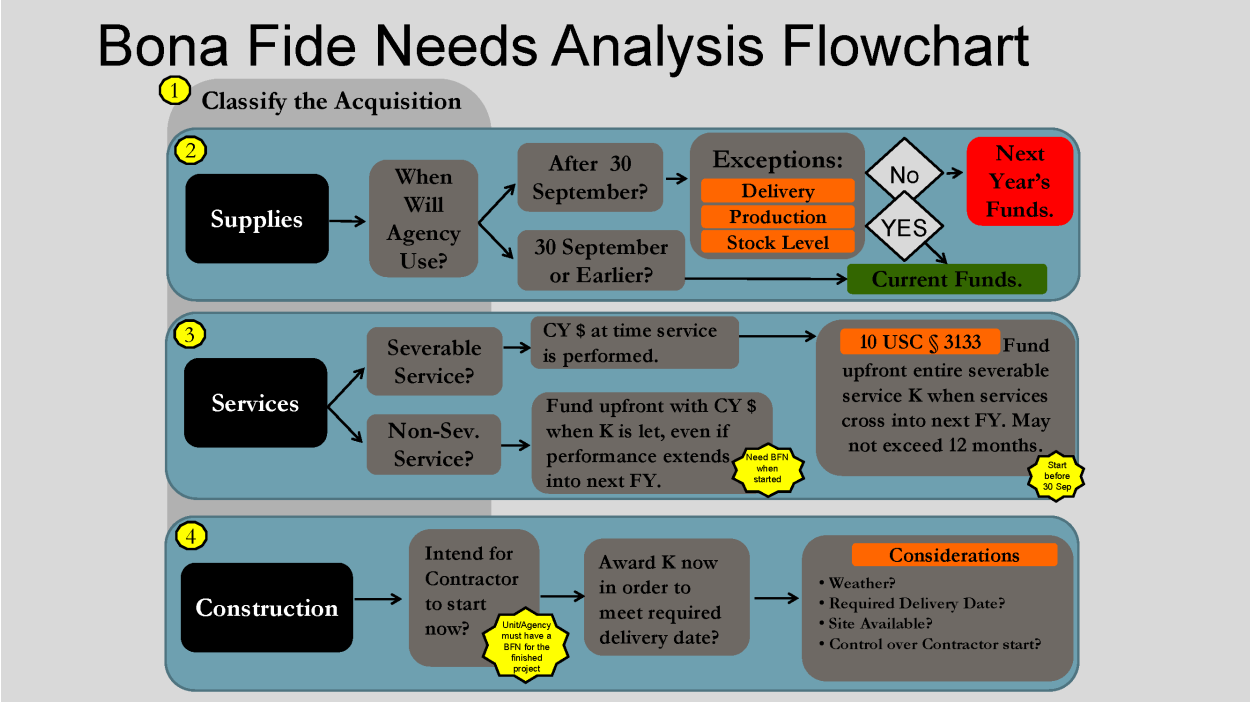
b. Severable services are funded in the FY during which they are **performed**, unless 10 U.S.C. § 3133 applies.

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 used 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

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CHAPTER 4

THE ANTIDEFICIENCY ACT

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II. REFERENCES

A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in advance of or in excess of appropriations).

B. 31 U.S.C. § 1342 (prohibiting acceptance of 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 (August 2023) [hereinafter OMB Cir. A-11], available at https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf.

F. DoD Regulation 7000.14-R, Financial Management Regulation, [hereinafter DoD FMR] available at https://comptroller.defense.gov/FMR.aspx.

G. Department of Navy, NAVSO P-1000, Financial Management Policy Manual (July 2020) [hereinafter DON FMPM], available at https://www.secnav.navy.mil/fmc/Documents/CurrentFMPM.pdf.

H. PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, U.S. GOVERNMENT ACCOUNTABILITY OFFICE [hereinafter Red Book], Third Edition, Volume II, Chapter 6, (February 2006), available at https://www.gao.gov/assets/210/202819.pdf.

I. PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ANNUAL UPDATE, U.S. GOVERNMENT ACCOUNTABILITY OFFICE [hereinafter Red Book Annual Update], Third Edition, Volume II, Chapter 6, (March 2015), available at https://www.gao.gov/assets/670/668991.pdf.

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

III. BACKGROUND

A. History

1. The original Anti-Deficiency Act (ADA) was enacted in 1870 (16 Stat. 230, 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. 1214, 1257) and in 1906 (34 Stat. 27, 48-49) 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. 595, 783), and in 1957 (71 Stat. 426, 440) for the purpose of strengthening the apportionment procedures and the agency control procedures. *See* Red Book, vol. II, 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. *See* 31 U.S.C. § 1341(a)(1)(A) (emphasis added);

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

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]." *See* 31 U.S.C. § 1517(a) (emphasis added); 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, that officer 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 appropriation 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.

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

4. Application of the ADA is very broad:

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. Red Book, vol. II, 6-37. 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, the DoD applies the ADA by regulation to "[a]ctivity/commanding officers, directors, budget officers, or fiscal officers. . . [as well as] Information Technology specialists, program managers, facility engineers, and acquisition personnel" because of their special responsibility or position. *See* DoD FMR, vol. 14, ch. 3, para. 6.3.3.11.

IV. THE ANTIDEFICIENCY ACT'S FISCAL CONTROLS

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

1. The ADA imposes <u>two</u> fiscal controls at the **appropriations** level. These controls prohibit obligating and expending appropriations (1) "*in excess of*" the amount available in an appropriation or (2) "*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 it 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,*

[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).

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 year 2002 the Air Force embarked upon an obligation of over $300 million against its Missile Procurement appropriation, for replacement of Minuteman guidance systems. Unfortunately, the funds weren't available at the time of obligation, resulting in an ADA violation. Although this was technically a violation of 31 U.S.C. § 1517, it shows that the services have all run afoul of the ADA.[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]

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.*

[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).

(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]

(3) As a more recent example, in 2019 the GAO determined that the Department of the Treasury violated 31 U.S.C. § 1341 in excess of nearly $36 million.[5]

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.[6]

(2) Thus, if the DoD Appropriations Act provides $40B in the Army O&M appropriation, then the "amount available" for obligation is $40B.[7] As obligations are made against this appropriation, the amount available for new obligations declines.

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[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* US Government Accountability Office, Fiscal Year 2019 Antideficiency Act Reports Compilation, available at https://gao.gov/products/D21671.

[6] *See* Red Book, vol. II, 6-84.

[7] For example, the FY 2019 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; $40,145,482,000: *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.

Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, P.L. 115-249, 132 Stat. 2981, 2984.

(3) Earmarks[8] may also limit the "amount available" in a particular appropriation. Thus, if an earmark establishes a maximum amount that may be obligated for a specific purpose, 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 that violate specific statutory restrictions on obligations or spending.[9] However, in 2007, the Department of Justice's Office of Legal Counsel (OLC) issued a memorandum concluding that a violation of a spending restriction that Congress enacted in a permanent statute does not violate the Antideficiency Act because the prohibition is not "in an appropriation."10

[8] 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. Note that under a "not to exceed" earmark, "the agency is not required to spend the entire amount on the object specified." *Id.* at 6-28. 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.*

[9] *See also* Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences (April 5, 2007) (opinion from Department of Justice requiring these ADA violations to have to be contained within the actual appropriation vice organic legislation). The DoD has not adopted this approach.

[10] Memorandum Opinion for the General Counsel, Environmental Protection Agency, *Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, OLC Opinion, Apr. 5, 2007, at 1.

f. Regarding 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). Examples of recurring statutory restrictions:

(1) "None of the funds appropriated or otherwise made available in this Act may be used to transfer any individual detained at United States Naval Station Guantánamo Bay, Cuba, to the custody or control of the individual's country of origin, any other foreign country, or any other foreign entity except in accordance with section 1034 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114–92) and section 1035 of the National Defense Authorization Act for Fiscal Year 2019 (Public Law 115–232)."[11]

(2) None of the funds made available to the DoD 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.[12]

[11] FY 2019 DoD Appropriations Act , Sec. 8101. *See also Department of Defense-Compliance with Statutory Notification Requirement,* B-326013 (August 21, 2014).

[12] 10 U.S.C. § 362.

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

3. The **"In Advance Of"** Prohibition. An officer or employee may not involve the government in a contract or obligation for the payment of money **before** an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987)(*explaining* that a 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 FY1, an Army contracting officer awarded a contract obligating FY2 Army O&M funds for an FY2 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.[13]

(1) So, if Congress passes the FY 2023 DoD Appropriations Act on 29 September 2022, then as of 30 September 2022 the funds contained in this appropriation are still not available because it is not yet 1 October 2022 (and the President has not yet signed the act). If an Air Force contracting officer awarded a contract on 30 September 2022 obligating FY 2023 Air Force O&M funds for a FY 2023 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.

[13] *See* Red Book, vol. I, 5-9. *See generally* Red Book, vol. II, 6-146.

(2) Likewise, if Congress passes the FY 2023 DoD Appropriations Act on 1 October 2022 (FY 2023) 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 2022 obligating FY 2023 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, 6-147. *See also* Chapter on Continuing Resolution Authority of Fiscal Law Deskbook for discussion of exceptions during a funding gap.[14]

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 <u>if authorized by law</u>.

a. The statute must specifically authorize entering into a contract i*n 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 i*n excess of* or *in advance of* an appropriation.

c. Exceptions:

[14] In February 2019, the GAO provided testimony to Congress about the ADA and funding gaps. *See* Testimony before the Subcommittee on Interior, Environment, and Related Agencies, Committee Appropriations, House of Representatives--Application of the Anti-Deficiency Act to a Lapse in Appropriations, B-330720, (February 6, 2019).

(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 the DoD, this authority is limited by regulation to "emergency circumstances" which are 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).

(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. §§ 2829, 3501, 3531; 41 U.S.C. § 3903. *See also* FAR subpart 17.1; DFARS subpart 217.1; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (*determining* 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. §§ 3501 and 3531 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. § 3531 was enacted specifically in response to a request from the Air Force following the GAO's "Wake Island" decision.[15] 10 U.S.C. §§ 3501 and 3531 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.

(3) 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).

[15] 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. § 3531. *See* Red Book, vol. II, 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. However, the contract is binding in all respects; it is just that the availability of funding is a condition precedent to Government's obligation to pay (the notice of which then triggers the Contractor's duty to perform).

(4) 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.[16]

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 through its web-based system (*see* OMB Cir. A-11, § 120). With regard to DoD, the OMB generally apportions funds on a quarterly basis (i.e. four times per year). 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; 31 U.S.C. § 1513(b). 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:

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

(1) Military and civilian pay increases;

(2) Laws enacted after budget submission which require additional expenditures; or

(3) Emergencies involving life or property.

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).[17, 18]

[17] 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).

[18] 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.

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, if you consider that an apportionment is statutorily defined as essentially a schedule for spending, then spending ahead of schedule understandably equates to a violation (even more so when it is the Executive who determines the schedule; so you're getting ahead of your own schedule). More importantly, service regulations prohibit the practice. *See* DoD FMR vol.3, ch. 13, para 3.3.1 ("An apportionment is legally binding, and obligations and expenditures (disbursements) that exceed an apportionment are a violation of" the ADA). *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). Finally, GAO's Red Book 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.

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, § 150.

b. DoD FMR, vol. 14, ch. 1.

2. Administrative Subdivision of Funds. OMB Cir. A-11, § 150; DoD FMR, vol. 3. There are two kinds of Administrative Subdivision of Funds: Formal and Informal:

   a. **"Formal" Administrative Subdivisions** (i.e. Allotments, Suballotments, and Allocations). These are formal administrative subdivisions prescribed by 31 U.S.C. § 1513(c) (through a system mandated 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). These distributions do not create formal administrative subdivisions. The Army uses the same DA Form 1323 to distribute an allowance, but the form is called a Fund Allowance System (FAS) document for this type of distribution. The authority for these comes from 31 U.S.C. § 1513(d).

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).[19]

[19] 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).

b. So, if a Navy contracting officer awarded a contract obligating FY 2022 O&M Navy funds which exceeds a formal subdivision (of FY 2022 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.

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 lead to a violation of the Antideficiency Act (31 U.S.C. § 1341 or § 1517), but not all Purpose Statute violations are 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).[20] *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 June 2020 update to the DoD FMR changed the two-part ADA corrections test to a three-part ADA corrections test. Specifically, the DoD FMR provides, if sufficient amounts were available in the proper account for the proper fiscal year at the time of the obligation, and the amount is properly recorded as an obligation, then the use of the wrong appropriation (purpose) or a prior fiscal year's funds which have expired (time limitation) generally will not result in an ADA violation. DoD FMR, vol. 14, ch. 2, para. 1.2.3.

2. Common "Purpose Statute" Violations - O&M Funds.

[20] The GAO has stated:

a. There is a limitation of $4,000,000 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. 2.1.1 (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 $350,000. *See* FY 2023 Appropriations Act, Pub. L. No. 117-328, Sec. 8039. Use of O&M in excess of this threshold is a "Purpose" violation and may trigger an Antideficiency Act violation.

3. The GAO's concept of "correcting" a Purpose Statute violation (thereby avoiding an ADA violation) is not new. *See* 16 Comp. Dec. 750 (1910); 4 Comp. Dec. 314 (1897).

4. "Correcting" a Purpose Statute violation. Despite violating the Purpose Statute, officials **can** avoid an ADA violation if *all three* of the following conditions are met:

> 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 prohibition 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 (1984).

a. **Proper funds** (the proper appropriation, the proper year, the proper amount) **were available[21] at the time of the erroneous obligation**

b. **Proper funds were available during the entire period from the time of obligation until the time of correction**; and

c. **Proper funds were available** (the proper appropriation, the proper year, the proper amount) **at the time of correction**.

5. Funding Correction

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. 3, para. 030403.E.1.

b. For example, if the Air Force obligated Air Force, O&M funds for a construction project with a funded cost of $4.5 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 all three 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. 3, para. 4.3.4.

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.

[21] 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).

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 both "within the scope" of the original contract **and** are executed pursuant to a clause in the original contract (i.e., the change is an "antecedent liability"), for example an equitable adjustment clause, 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 three-part Correction Test. The GAO outlines an exception to this rule, in cases of cost-reimbursement contracts.[22] Moreover, if the appropriation initially obligated by contract is exhausted or closed, current year funds must be used. *See* 31 U.S.C. § 1553.

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 an ADA violation because this violation cannot pass the ADA three-part test (if the "proper funds" are future year funds, it is impossible to pass the first prong of the ADA two-part test—that "proper funds were available at the time of the erroneous obligation"). Note that this analysis differs if you in-appropriately obligated *future* year funds for a *current* year need – in that case you *may* be able to correct with ADA's three-part test.

[22] Redbook, vol. 1, ch. 5, 5-36

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 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. Congress may then enact a deficiency appropriation or authorize the agency to pay the over obligations out of current appropriations; however, 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 U.S.C. § 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). However, 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. § 3861 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 funds received from outside sources (a.k.a. "augmentation") and spends those funds, 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 <u>improperly augmented</u> 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. The prohibition of voluntary services dates back to 1884.[23] 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 an 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*.

[23] 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.*

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 https://www.gao.gov/assets/600/590633.pdf.

(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 Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June 2007.

3. Acceptance of voluntary services does not create a legal obligation on 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. Examples of some types of voluntary services authorized by law:

a. 5 U.S.C. § 583 (agency may accept voluntary services in support of alternative dispute resolution);

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 did not apply); 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 pursuant to statutory authority (*e.g.*, 10 U.S.C. § 2601(a)(2)(A) and (b) – although care is due regarding the specific limitations on services therein). To do so, the individual donor of services must execute a written agreement in advance of the performance of said services 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; 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 "binding oral waivers" the GAO concluded such waivers were not adequate gratuitous service agreements. Such agreements must be in writing. Department of the Treasure-Acceptance of Voluntary Services, B-324214 (January 27, 2014).

3. An employee may *not* waive compensation (via a gratuitous services agreement) if a statute (*e.g.*, 10 U.S.C. § 10212) 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. 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). *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)(9).

   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. *See* 31 U.S.C. § 1349(b). Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(a).

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 to action under the [UCMJ]." DoD FMR, vol. 14, ch. 3, para. 9.2.1.3. Civilian employees may be disciplined by "written/oral counseling, written/oral admonishment or reprimand, reduction in grade, suspension from duty without pay, or removal from office." DoD FMR, vol. 14, ch. 3, para. 9.2.1.2.

3. **Good faith or mistake of fact does not relieve an individual from responsibility for a violation under this section**. *See* DoD FMR, vol. 14, ch. 3, para. 9.3.1.4. Factors such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline.

B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519. A **knowing and willful violation** of the Antideficiency Act is a Class E felony. Punishment may include a $5,000 fine, confinement for up to two years, or both. *See also* DoD FMR, vol. 14, ch. 3, para. 9.2.2.2. For military personnel, criminal penalties may include Article 15 punishment or trial by Courts-Martial. *Id.*

X. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Cir. A-11, Section 145; DoD FMR, vol. 14, ch. 3.

A. Reporting Suspected Violations. The DoD FMR contains the primary (DoD) guidance regarding the investigation and reporting of ADA violations. According to the FMR, "[w]ithin two weeks of discovering a potential violation of the ADA, an initial report must be prepared by the activity holding funds that were allegedly misused." DoD FMR, vol. 14, ch. 3, para. 2.2.2. Once completed, initial reports must be submitted through activity/command channels to the applicable Office of the Assistant Secretary of the Military Department for Financial Management and Comptroller, Combatant Commands, or the Senior Financial Manager for other Department of Defense (DoD) Agencies and Field Activities (referred herein as DoD Component). DoD FMR, vol. 14, ch. 3, para. 2.2.3. Upon receiving the report, the DoD Component "must evaluate the initial report for validity and completeness. If this evaluation determines a suspected violation may have occurred, the DoD Component must assign a case number for tracking purposes and direct the initiation of a preliminary review." DoD FMR, vol. 14, ch. 3, para. 2.3.[24]

[24] A preliminary review may be initiated by OUSD(C) or recommended by oversight entities, such as the GAO, DoD Office of Inspector General, military department auditing agencies, or even organizations external to a DoD Component. *See* DoD FMR, vol. 14, ch. 3, para. 030407 and 030408.

B. Investigations

1. **Initial Discovery and Review** – Upon discovery of a potential ADA violation, agencies must inquire into the potential violation. DoD FMR, vol. 14, ch. 3, para 2.2.2. "Within two weeks of discovering a potential violation of the ADA, an initial report must be prepared by the activity holding the funds that were allegedly misused." This initial review must determine whether a suspected violations may have occurred, regardless of whether it is presumed to be curable. Note potential cures in the initial report. *Id.*

2. **Initial Report** – Initial reports are not determinations of responsibility for causing the potential ADA violations. They serve as notification "that a suspected violation may have occurred." DoD FMR, vol. 14, ch. 3, para 2.2.4. The initial report will be evaluated for validity and completeness. *Id.* at para 2.3. The report must contain the following, to the extent the information is available and pertinent to the issue at hand:

   a. Accounting classification of funds allegedly misspent;

   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 the alleged violation;

   e. Nature of the alleged violation;

   f. Date the alleged violation occurred and date discovered;

   g. Means of discovery; and

   h. Description of the facts and circumstances of the case.[25]

[25] If the suspected violation involves a potential voluntary services ADA violation, items a. and c. may be omitted.

The initial report must be submitted through activity/command channels to the applicable Office of the Assistant Secretary of the Military Department for Financial Management and Comptroller, Combatant Commands, or the Senior Financial Manager for other Department of Defense (DoD) Agencies and Field Activities, referred to in the FMR as DoD Component. DoD FMR vol. 14, ch. 3, para 2.2.3.

3. **Preliminary Review –** The first step in the investigation process is a preliminary review. This review "gathers facts and establishes by adequate evidence whether an uncorrectable deficiency has occurred." DoD FMR, vol. 14, ch. 3, para. 4.1.1. To help ensure accurate findings, independence, and impartiality during the review, an investigator who is trained in fiscal or appropriations law shall be selected from an organization external to the organization being reviewed, which should be documented accordingly. *Id.* at para 4.2.

   a. Completion of the preliminary review is required within **4 months** from the date it was directed. DoD FMR, vol. 14, ch. 3, para. 3.1.1.

   b. The preliminary review should focus on the potential violation, not on identifying responsible officials or recommending corrective actions. *See*, DoD FMR, vol. 14, ch. 3, para 4.1.1.

   c. A legal review must accompany the findings of the preliminary review. The preliminary review and legal review must be forwarded for approval from the applicable DoD Component (coordinated with the applicable Component's General Counsel). If the DoD Component decides that no ADA violation exists, the preliminary report completes the required ADA investigation. *See* DoD FMR, vol. 14, ch. 3, para. 4.6.

4. **Formal investigation –** On the other hand, if the DoD Component involved determines that there is a potential violation, then a formal investigation must opened by DoD's Deputy Chief Financial Officer. DoD FMR, vol. 14, ch. 3, para 6.1.1.

a. When a preliminary review finds a violation of the ADA, a formal investigation must be opened and "[t]he violation must be reported to DCFO within 2 weeks of the determination." DoD FMR, vol. 14, ch. 3, para. 6.1.1. The formal investigation must be completed **within nine months** from the date it was directed. DoD FMR, vol. 14, ch. 3, para. 3.1.2.

b. The purpose of the formal investigation it to determine "the event(s) that 'more likely than not' caused the potential violation, the responsible individual(s), and action(s) being taken to ensure that a similar violation does not reoccur." DoD FMR, vol. 14, ch. 3, para. 6.1.2.

c. An investigating officer (IO), trained in fiscal or appropriations law, must be appointed. The appointing official at the DoD Component level "unless the Component delegates this authority to a senior activity/commander or director of the organization assigned responsibility for conducting the investigation." *See* DoD FMR, vol. 14, ch. 3, para. 6.2.1. Historically this has meant that the Army Command/Air Force MAJCOM commander approves and appoints an adequately trained and qualified individual(s) to serve as formal investigator(s).[26] A final report on the violation must reach the DCFO within **14 months** from the date the formal investigation began. DoD FMR, vol. 14, ch. 3, para. 3.1.5.

d. The IO's report (ROI) 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 their 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?

[26] The IO for a formal investigation may have also conducted the preliminary review. *See* DoD FMR, vol. 14, ch. 3, para. 030602.

(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. 3, para. 030603.C.12.

e. 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. 3, para. 030603..

C. Establishing Responsibility

1. Responsibility for a violation is fixed at the moment the improper activity occurs, e.g., over-obligation, over-expenditure, etc.

2. A responsible individual(s) is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. IOs assign responsibility by determining which acts or omissions were proximate causes of the violation. *See* DoD FMR, vol. 14, ch. 3, para. 030603. Reports may name commanders, budget officers, or finance officers because of their positions if they failed to exercise their responsibilities properly. *See* DoD FMR, vol. 14, ch. 3, para. 030603. *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. 3, para. 030603. Generally, "[t]he responsible official is usually the highest-ranking individual in the decision-making process with actual or constructive knowledge of the actions taken and awareness of the possible risks." DoD FMR, vol. 14, ch. 3, para. 030603. However, the impropriety or questionable nature of actions leading to violations should also be considered. *See* To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.

D. Submission of the Final Report to Office of the Undersecretary of Defense (Comptroller) (OUSD(C))

1. At the conclusion of the formal ADA investigation, the IO shall submit an electronic copy of the final ROI to the DCFO. *See* DoD FMR, vol. 14, ch. 3, para. 03100.

2. OUSD(C) 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. 3, para. 030301. 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 (ROI). DoD FMR, vol. 14, ch. 3, figure 3-5.

   a. Appropriation(s) allegedly exceeded;

   b. Where violation(s) occurred;

   c. Name and location of activity issuing the fund authorization;

   d. Amount of the violation (provide a total and breakdown, if applicable);

   e. Date violation(s) occurred;

   f. Type of violation(s) (provide the section(s) of Title 31 violated);

   g. Effect of violation(s) on next higher level of funding;

   h. Name and position of the responsible individual(s);

i. Signed statement(s) of responsible individual(s);

j. Date(s) and description of how violation(s) was discovered;

k. Cause and circumstances surrounding violation(s);

l. Evidence of willful intent to violate;

m. Disciplinary action taken;

n. Corrective action taken;

o. Administrative control of funds;

p. Component or agency coordination; 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* https://www.gao.gov/legal/appropriations-law-decisions/resources. 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 https://www.gao.gov/legal/appropriations-law-decisions/resources.

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 actions.

3. Obligation rules forbid protests, contract changes, contract terminations, litigation, and miscellaneous other circumstances.

II. REFERENCES

A. 31 U.S.C. § 1501, Documentary evidence requirement for Government obligations (the "Recording Statute").

B. Office of Management and Budget Circular A-11, Preparation, Submission and Execution of the Budget, (Aug. 2023) [hereinafter OMB Cir. A-11].

C. Government Accountability Office, Principles of Federal Appropriations Law, Vol. II, Ch. 7, Obligation of Appropriations (3rd ed. 2006) and annual updates (Mar. 2015).

D. Government Accountability Office, A Glossary of Terms Used in the Federal Budget (Sep. 2005) [hereinafter GAO Glossary].

E. Department of Defense, DOD Financial Management Regulation, Vol. 1, General Financial Management Information, Systems and Requirements, Appendix A, Object Classification; Vol. 3, Budget Execution – Availability and Use of Budgetary Resources, Ch.8, Standards for Recording and Reviewing Commitments and Obligations; Vol. 5, Disbursing Policy, Ch.1, Purpose Organization, and Duties; Vol. 14, Administrative Control of Funds and ADA Violations, Ch.1, Administrative Control of Funds [hereinafter DOD FMR].

F. Federal Acquisition Regulation (FAR) Parts 2, 32, and 52

G. Defense Federal Acquisition Regulation Supplement (DFARS) Part 232

III. IMPORTANT DEFINITIONS

A. Commitment. A commitment is an administrative reservation of allotted funds, or of other funds, in anticipation of their obligation. Since an obligation equal to or less than the commitment may be incurred without further recourse to an authorizing official, commitments are required for some appropriations and are permissible for others. A commitment, when recorded in the accounting records, reduces the allotment's available fund balance. A commitment document must be signed by a person authorized to reserve funds, i.e., the official responsible for administrative control of funds for the affected subdivision of the appropriation. This helps ensure that the subsequent entry of an obligation will not exceed available funds. DOD FMR, vol. 3, Ch. 15, para. 3.3 (Feb. 2022); GAO Glossary, p. 32.

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 Anti-deficiency 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. DOD FMR, vol. 3, Ch. 8, para. 3.1 (Aug. 2023); GAO Glossary, p. 70; 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.

C. Current Appropriation. An appropriation whose availability for new obligations has not expired under the terms of the applicable appropriations act. See GAO Redbook, Vol. I, pages 2-14 to 2-15.

D. Expired Appropriation. An appropriation that is no longer available to incur new obligations, although it may still be available for recording, adjusting, and liquidating obligations properly chargeable to that appropriation. See GAO Redbook Vol. I, pages 2-14 to 2-15; 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. See GAO Redbook Vol. 1, page 1-37 and Chapter 5; 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. FAR 2.101.

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. 31 U.S.C. § 3528; *see also* DOD FMR, vol. 5, Ch. 1, para. 3.3.2 (Jul. 2021), vol. 5, Ch. 5, para. 3.4 (Nov. 2022); GAO Redbook, Vol. II, pages 9-13 to -14, 9-88 to -101.

B. Fund Manager. Individual within a command who manages 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.

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; Contracting Officers obligate funds on behalf of the federal government. FAR 2.101.

V. ACCOUNTING FOR COMMITMENTS.

A. General Rules.

1. DOD and OMB have agreed to use commitment accounting procedures for military construction (MILCON); research, development, test, and evaluation (RDT&E); 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. 3.3.3. (Feb. 2022).

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. 3.3.1 (Feb. 2022). 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. 2.1 (Aug. 2023).

[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.

3. Commitment accounting helps ensure that the subsequent entry of an obligation will not exceed available funds. DOD FMR, vol. 3, Ch. 15, para. 3.3.1 (Feb. 2022). Issuing a commitment authorizing obligations in excess of an appropriation or formal subdivision of funds could result in violations of the Anti-deficiency Act. *See* 31 U.S.C. § 1341.

4. Officials and/or Activities can 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. 2.1 (Aug. 2023).

5. Outstanding commitments must be closed or cancelled as of 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. 3.3.6 (Feb. 2022).

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

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. 2.1 (Aug. 2023). 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 these changes are substantial, there is a risk that the goods and services procured under the contract no longer align with the purpose for which funds were committed and certified by the Authorizing Official as available and suitable for the purpose set forth in the purchase request's information. To mitigate this risk, Authorizing Officials must conduct an automated pre-award validation with the contract issuing organization. This check will validate that committed funds remain available and suitable for the draft award's intended purpose. This check must also ensure that the data in the accounting and procurement systems are sufficiently aligned so as to facilitate line item traceability between commitments and obligations and to facilitate payment. The structure must support posting obligations and line items with different accounting treatments that must be segregated. This transaction may be performed via the Global Exchange system using system agnostic data standards. DOD FMR, vol. 3, Ch. 8, para. 2.4 (Aug. 2023).

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, but only in the amount of the maximum liability stated. The maximum liability amount may be required by other regulations to be limited to the costs that the contractor may incur pending execution of a definitive contract. In that case, the estimated amount of the definitive contract, over and above the obligation recorded under the letter contract or letter of intent, must be carried as an outstanding commitment, pending execution of the definitive contract. If the letter stipulates that awarding of the definitive contract is dependent upon a congressional appropriation, then no funds are available to commit and no commitment may be recorded. DOD FMR, vol. 3, Ch. 8, para. 2.3.4 (Aug. 2023).

b. Open End Contracts and Option Agreements. An authorization to incur an obligation under an open-end contract or option agreement (when neither the items nor quantities are specified but are to be the subject of subsequent orders) must be recorded as a commitment only when the amount estimated is reasonably firm. The existence of a specific dollar amount in the procurement directive or request does not make the dollar amount reasonably firm. Rather, the required quantities and the quality specification must have been determined by competent authorized personnel so that reasonable prices may be estimated. An example is a planning estimate for spare parts. While it is known that an initial complement of spare parts will be acquired, the specification and quantity still must be determined. Experienced personnel can estimate an amount useful in planning, but this amount is not reasonably firm. The amount is recordable as a memorandum "initiation," but not as a commitment. DOD FMR, vol. 3, Ch.8, para. 2.3.5 (Aug. 2023).

c. Contract Modifications or Engineering Changes. An authorization to execute engineering change orders during the course of performance of a contract may be recorded as a commitment upon the basis of a stated cost limitation even though the scope and amount of such changes are not yet defined and require specific approval of the person authorizing the procurement (or another designee) before the execution of the change orders. In such circumstances, however, it may be necessary to revise the authorization (and the recorded commitment) in light of subsequent events, including change orders actually placed. DOD FMR, vol. 3, Ch. 8, para. 2.3.6 (Aug. 2023).

d. Intra-Governmental Requisitions and Orders. Record commitments for Intragovernmental requisitions and orders using Fiscal Service (FS) Form 7600B, Department of Defense (DD) Form 448, Military Interdepartmental Purchase Request (MIPR), or other digital equivalent Federal Intragovernmental Data Standard. DoD requisitions and orders are recorded as commitments prior to the entry in the Government Invoicing (G-Invoicing) system. DOD FMR, vol. 3, Ch. 8, para. 2.3.7 (Aug. 2023).

e. Multi-year Contracts. Do not record contingent liabilities for multi-year contracts with cancellation charges, i.e., when it is necessary for the government to cancel the contract for reasons other than contractor liability, until it becomes necessary to cancel the contract and the contractor is notified. DOD FMR, vol. 3, Ch. 8, para. 2.3.8 (Aug. 2023).

f. Commercial Purchase Cards. Establish commitments in amounts no less than the periodic purchase limits authorized for commercial purchase cards. Establish commitments for each distinct line of accounting. Advance reservations of funds are used in conjunction with purchases made using purchase cards. Advance reservations of funds are established by the resource manager (or equivalent), in conjunction with the assigned Purchase Card Program agency program coordinator and must be considered when setting office and cardholder purchase limits. The use of advance reservations of funds will ensure positive funds control precluding expenditures from exceeding obligations. DOD FMR, vol. 3, Ch.8, para. 2.3.9 (Aug. 2023); *see also* Office of Management and Budget Circular A-123, Appendix B (Aug. 27, 2019), and the DoD Government Charge Card Guidebook (Jun. 3, 2020) for additional guidance.

g. Imprest Funds.[2] Record as a commitment before funds are advanced to the imprest fund cashier. DOD FMR, vol. 3, Ch.8, para. 2.3.1 (Aug. 2023).

h. Contingent Liabilities.

[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. 9.1 (Jul. 2023), but see DFARS 213.305-3(d)(iii)(A) (allowing for DOD to use imprest funds for humanitarian or peacekeeping operations as defined in 10 U.S.C. 3015.

(1) With regard to fiscal law, a contingent liability represents a variable for price or quantity increases that cannot be recorded as a valid obligation. DOD FMR, vol. 3, Ch. 8, para. 2.3 (Aug. 2023). Examples of these include:

(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, para. 2.3.2.3 (Aug. 2023).

(2) Commitments of contingent liabilities should be recorded in an amount that is conservatively estimated to be sufficient to cover the additional obligations that will likely 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 an audit. DOD FMR, vol. 3, Ch. 8, para. 2.3.3 (Aug. 2023).

VI. OBLIGATION OF FUNDS.

A. General Rules.

1. Purpose. 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. Time. 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. 3.4.1 (Aug. 2023). The period of availability applies to the obligation of funds, not the liquidation of the obligation by the disbursement of payment (expenditure). DOD FMR, vol. 3, Ch. 8, para. 3.1 (Aug. 2023). 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. 3.4.1.1 (Aug. 2023).

3. Amount. 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. However, in instances where a definite amount is not known or cannot feasible be ascertained a best estimate should be used. DOD FMR, vol. 3, Ch. 8, para. 3.3.2.1 (Aug. 2023).

B. Contract Types. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when/how 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. 3.3.2.2 (Aug. 2023). 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 an obligation for the total amount stated in the contract when the contract is executed. DOD FMR, vol. 3, Ch. 8, para. 6.1 (Aug. 2023).

2. Fixed-Price Contracts with Escalation, Price Redeterminations, or Incentive Provisions. DOD FMR, vol. 3, Ch.8, para. 6.2 (Aug. 2023).

   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. 6.2 (Aug. 2023).

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. DOD FMR, vol. 3 Ch.8, para. 6.2 (Aug. 2023). Examples of both types below:

(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. 6.2 (Aug. 2023).

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. 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; DoD FMR, vol. 3, Ch. 8, para. 6.3 (Aug. 2023)

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, except if the cost overrun is unforeseeable in advance by the contractor. 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 provided by the contract's funded ceiling, including the fixed fee). DOD FMR, vol. 3, Ch. 8, para. 6.3 (Aug. 2023).

(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. 6.3 (Aug. 2023).

(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(3). 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. 6.3 (Aug. 2023).

(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. 6.3 (Aug. 2023).

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

   a. T&M contracts and L-H 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 of delivery or as task orders are placed. DOD FMR, vol. 3, Ch. 8, para. 6.3 (Aug. 2023).

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. DOD FMR, vol. 3, Ch. 8, para. 6.4 (Aug. 2023).

      (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 fiscal year at the time of contract award. DOD FMR. Vol. 3, Ch. 8, para. 6.4 (Aug. 2023). Note that the agency must have a valid *bona fide* need in the current fiscal year 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. DOD FMR, vol. 3, Ch. 8, para. 6.4 and 6.5 (Aug. 2023).

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 Not-To-Exceed price. 10 U.S.C. § 3372(a)(2)(A); 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. 6.7 (Aug. 2023); 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. 6.10.1 (Aug. 2023).

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. Evidence of this acceptance must be retained in the files. 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. If contract formation occurs after expiration of the period of availability of funds cited on the purchase order, the obligation must be recorded against current funds, and the purchase order contract modified accordingly. DOD FMR, vol. 3, Ch. 8, para. 6.10.2 (Aug. 2023).

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. 3.4.2.1 (Aug. 2023); 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, Jan. 10, 2000, 2000 CPD ¶ 54.

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 12 months. See 10 U.S.C. § 3133 (this authority also covers the Coast Guard).[3] Similar authority exists for non-DOD agencies. See 41 U.S.C. § 3902.[4] However, the agency must obligate the funds for the contract before the funds expire. National Labor Relations Board – Improper Obligation of Severable Service Contract, B-308026, Sept. 14, 2006 (NLRB could not modify contract period of performance to start in FY05 and obligate FY05 funds when, due to "ministerial" error, the recorded period of performance ran entirely in FY06, from 1 Oct 05 – 30 Sep 06). This statutory authority is discretionary rather than mandatory, so fund holders may split the obligation between fiscal years based on when the severable service is performed.

c. Non-Severable Services. If the services produce a single or unified outcome, product, or report, the services are non-severable. 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. 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 Non-severable 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. 3.4.2.2 (Aug. 2023).

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* DOD FMR vol. 3, Ch. 8, para. 3.4.2.1 (Aug. 2023).

[3] 10 U.S.C. § 3133 authority was previously located at 10 U.S.C. § 2410a but was renumbered to 10 U.S.C. § 3133 by the FY2021 NDAA, Pub. L. No. 116-283, § 1809(d), 134 Stat. 3388, 4161 (2021).
[4] 41 U.S.C. § 3902 was previously located at 41 U.S.C. § 253l but was renumbered to 41 U.S.C. § 3902 by Pub. L. No. 111-350, § 3, 124 Stat. 3677, 3774, 3857 (2011).

c. For severable service contracts, option years are treated as new contracts. Therefore, when the severable service contract has renewal options, record obligations for the basic period and any penalty charges for failure to exercise options at the time of award. DOD FMR vol. 3, Ch. 8, para. 3.4.2.1 (Aug. 2023).

d. Obligations related to option years should be recorded when the option is exercised.

10. Rental Agreements and Leases of Real or Personal Property. Determine the amount of the obligation by analyzing the government's rights to terminate the rental agreement or lease. Generally, obligate for one month at a time throughout the term of the rental agreement. *See generally* DOD FMR, vol. 3, Ch. 8, para. 7.0 (Aug. 2023).

(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. 7.2 (Aug. 2023).

(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. 7.3 (Aug. 2023).

(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. When the amount of rent remaining payable under the terms of the agreement is equal to the obligation recorded for the payment in the event of termination, no additional monthly obligation is recorded. DOD FMR, vol. 3, Ch. 8, para. 7.4 (Aug. 2023).

(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. 10 U.S.C. § 3133; DOD FMR, vol. 3, Ch. 8, para. 7.5 (Aug. 2023).

(5) If a domestic or foreign rental agreement is for more than 12 months, funds must be fully obligated at inception, unless the document contains a cancellation clause. DOD FMR, vol. 3, Ch. 8, para. 7.6 (Aug. 2023).

11. Intra-Governmental Requisitions and Orders Placed with DOD Components or Other U.S. Government Agencies. DOD FMR, vol. 3, Ch. 8, para. 8.0 (Aug. 2023)

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 (the "procuring agency"). The buying DoD Component records an obligation for a reimbursable order using the date and amount of acceptance by the seller activity. DOD FMR, vol. 3, Ch. 8, para. 8.1.2 (Aug. 2023).

b. Direct Citation Procurements. Direct Citation Procurements are procurements accomplished by combining the requirements of one or more DoD Components with those of the seller/servicing DoD Component. The selling DoD Component may issue one contract with separate schedules showing the quantities, prices, dollar amounts, and citation of funds of each buying DoD Component. The buying DoD Component records a direct citation order as an obligation when notified in writing that the selling DoD Component's contract or project order has been executed, or when a copy of the contract or project order is received. MIPRs or other digital equivalent used for these orders are not complete until the MIPR Acceptance is digitally or manually signed by the seller and received and signed by the buying office responsible for posting the obligation. DOD FMR, vol. 3, Ch. 8, para. 8.2 (Aug. 2023).

c. Reimbursable Orders placed with DOD components under the Project Order Statute (41 U.S.C. § 6307), or with other U.S. governmental agencies under the Economy Act (31 U.S.C. § 1535) or other authority. DOD FMR, vol. 3, Ch. 8, para. 8.3 (Aug. 2023).

(1) Project Orders. When a selling activity accepts the project order in writing, the buying activity records the obligation amount as stated in the order. DOD FMR, vol. 3, Ch. 8, para. 8.3.1. (Aug. 2023).

(2) Economy Act Orders. Requesting agencies must obligate funds when the performing activity accepts the order in writing. De-obligate 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. 8.3.2 (Aug. 2023).

(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 de-obligated 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. 8.3.3.2 (Aug. 2023) and vol. 11A, Ch. 18, para. 3.2 (Jan. 2020).

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. § 311). Record as an obligation by the requiring agency in the amount stated in the order when the order is issued.

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. § 11302(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.

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. 9.2.2 (Aug. 2023).

a. Adjust an obligation for an undelivered order placed with the stock fund activity when a change notice affecting price, quantity, or receipt of an unacceptable substitution of a like item. DOD FMR, vol. 3, Ch. 8, para. 9.3.1 (Aug. 2023).

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. 9.3.1 (Aug. 2023).

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. 3.2 (Oct. 2023).

B. Contract Changes. For the purposes of adjusting obligations, a contract change is one that requires the contractor to perform additional work; however, this term does not include adjustments to pay claims or increases under an escalation clause. 31 U.S.C. § 1553(c)(3); DOD FMR, vol. 3, Ch. 10, para. 3.4.1 (Oct. 2023). 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. 3.6.1 (Aug. 2023).

1. In-scope Changes. Charge the appropriation initially used to fund the contract.

a. Relation-Back Theory. The "relation-back theory" is based upon the rationale "that the Government's obligation under the subsequent price adjustment is to fulfill a bona fide need of the original fiscal year and therefore may be considered as within the obligation which was created by the original contract award." See Environmental Protection Agency - Request for Clarification, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 611, 82-2 CPD ¶ 491; See also The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992).

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), and which are not based on an antecedent liability enforceable by the contractor, may be charged to funds available when a contract price increase is granted by the contracting officer. See 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.

C. Limitations on use of Expired or Current Funds to adjust obligations. 31 U.S.C. § 1553(c); DOD FMR, vol. 3, Ch. 8 and Ch. 10.

1. Expired Accounts. If a contract change requires the contractor to perform new in-scope 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) (USD(C)) 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 expired. DOD FMR, vol. 3, Ch. 10, para. 3.6 (Oct. 2023).

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. 3.7 (Oct. 2023).

(1) After 30 days have elapsed following submission of the notice, in writing, the proposed obligation may be recorded unless the congressional committee notifies the USD(C) of its disapproval. DOD FMR, vol. 3, Ch. 10, para. 3.7.1 (Oct. 2023).

(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). DOD FMR, vol. 3, Ch. 10, para. 3.7.3 (Oct. 2023).

2. Current Funds otherwise chargeable to Cancelled Account. DOD FMR, vol. 3, Ch. 10, para. 3.3.3 (Oct. 2023). 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 (the unexpended balance is the sum of the unobligated balance plus the unpaid obligations of an appropriation at the time of closure/cancellation, adjusted for obligations and payments which are incurred or made subsequent to closure/cancellation, and which would otherwise have been properly charged to the appropriation except for the closure/cancellation of the appropriation). DOD FMR, vol. 3, Ch. 10, para. 3.3.4.1 (Oct. 2023); or

b. The unexpired unobligated balance of the currently available appropriation. DOD FMR, vol. 3, Ch. 10, para. 3.3.4.2 (Oct. 2023); or

c. One percent of the total original amount appropriated to the current appropriation being charged.

(1) For annual accounts, the 1% 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% 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% limitation rule. The 1% amount will not be decreased by the charges made to current appropriations for contract changes. DOD FMR, vol. 3, Ch. 10, para. 3.3.4 (Oct. 2023).

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. 8, para. 14.2.1 (Aug. 2023).

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. 8, para. 14.3 (Aug. 2023).

3. Upon recording of the obligation, the accounting office must notify the Funds Holder immediately, but not later than 10 calendar days of the obligation being recorded. DOD FMR, vol. 3, Ch. 8, para. 14.3.3 (Aug. 2023).

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 Anti-deficiency Act 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). See DOD FMR, vol. 3, Ch. 8, para. 14.3.4 (Aug. 2023).

1. The Dormant Account Review Quarterly Justification (DAR-Q) replaces the former Triannual Review to ensure obligations are recorded accurately. The DAR-Q requirement is effective for all DoD Components beginning Quarter 1, Fiscal Year 2020. This change exemplifies the Department's commitment to effective stewardship of taxpayer dollars through improved execution of budgetary resources. It also reflects the Department's continuous improvement efforts and maturation of internal controls while enabling senior leadership to provide oversight and defend budgets. DAR-Q serves as a quality control mechanism of entity-level internal control activities. In addition to providing the OUSD(C) oversight, the DAR-Q improves the Department's ability to execute all available appropriations before expiration and ensures remaining open obligations are valid and support accurate financial and budgetary reporting. *See* DOD FMR, vol. 3, Ch. 8, para. 16.1 (Aug. 2023).

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 de-obligating all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD FMR, vol. 3, Ch. 8, para. 6.12 (Aug. 2023).

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. DOD FMR, vol. 3, Ch. 10, para. 3.8.2 (Oct. 2023);

b. The agency has a continuing bona fide need for the goods or services involved. DOD FMR, vol. 3, Ch. 10, para. 3.8.1 (Oct. 2023);

c. The replacement contract is of the same size and scope as the original contract. DOD FMR, vol. 3, Ch. 10, para. 3.8.4 (Oct. 2023); 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. 3.8 (Oct. 2023). If a replacement action will result in an obligation that exceeds the remaining unliquidated obligation balance of the original contract by $4 million, the action must first be submitted to the USD(C) for approval. *See* DOD FMR, vol. 3, Ch. 10, para. 3.8.5 (Oct. 2023).

X. MISCELLANEOUS RULES OF OBLIGATION.

A. Bid Protests. 31 U.S.C. § 1558; DOD FMR, vol. 3, Ch. 8, 13.3 (Aug. 2023);

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, 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, para. 13.3.2.1 (Aug. 2023).

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, para. 13.3.2.2 (Aug. 2023).

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. 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). Although not a definitive rule, the 10-day clock for reconsideration frequently starts when the GAO issues its initial decision regarding the protest.

b. An 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 7-18; 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 Anti-deficiency 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. DOD FMR, vol. 3, Ch. 8, para. 13.4 (Aug. 2023).

D. Litigation.

1. General. As a general rule, the amount of the liability expected to result from pending litigation must 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 the purpose of determining the amount of the government's liability. In other cases, do not record an obligation until the litigation has been concluded or the government's liability finally is determined. A written administrative determination of the amount of the liability will serve as documentary evidence of the obligation. DOD FMR, vol. 3, Ch. 8, para. 13.5 (Aug. 2023).

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 payment. DOD FMR, vol. 3, Ch. 8, para. 13.8 (Aug. 2023). 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. 6.8 (Aug. 2023).

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. § 7108(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. 4.2.2 (Aug. 2023); 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.

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 improper obligations (e.g., impermissible purpose for the obligated appropriation, obligation of incorrect fiscal year fund) may lead to Anti-deficiency 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
For use of this form, see AR 37-1; the proponent agency is DA(AAFM)

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.)*	10. NAME OF PERSON TO CALL FOR ADDITIONAL INFORMATION	11. TELEPHONE NUMBER

☐ 12. LOCAL PURCHASES AUTHORIZED AS THE NORMAL MEANS OF SUPPLY FOR THE FOREGOING BY	☐ 13. REQUISITIONING DISCLOSES NONAVAILABILITY OF ITEMS AND LOCAL PURCHASE IS AUTHORIZED BY	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.

EMERGENCY SITUATION PRECLUDES USE OF REQUISITION CHANNELS FOR SECURING ITEM

14. ITEM	15. DESCRIPTION OF SUPPLY OR SERVICES	16. QUANTITY	17. UNIT	18. ESTIMATED UNIT PRICE *a*	18. ESTIMATED TOTAL COST *b*

19. ACCOUNTING CLASSIFICATION AND AMOUNT

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 ☐ NO ☐

IF YES, NUMBER OF DAYS REQUIRED

27. TYPED NAME AND GRADE OF INITIATING OFFICER	28. SIGNATURE	29. DATE
30. TELEPHONE NUMBER		

34. TYPED NAME AND GRADE OF APPROVING OFFICER OR DESIGNEE	35. SIGNATURE	36. DATE

31. TYPED NAME AND GRADE OF SUPPLY OFFICER	32. SIGNATURE	33. DATE

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CHAPTER 6

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CHAPTER 6

INTERAGENCY TRANSACTIONS

I. INTRODUCTION.

A. Key References.

1. The Economy Act of 1932, as amended, 31 U.S.C. §§ 1535-1536.

2. The Project Order Statute, 41 U.S.C. § 6307

3. Federal Acquisition Regulation (FAR) Subparts 17.5 (Interagency Acquisitions); 17.7 (Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense).

4. Defense Federal Acquisition Regulation Supplement (DFARS) Subparts 217.5 (Interagency Acquisitions); 217.7 (Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense).

5. Department of Defense Financial Management Regulation (DoD FMR), volume 11A, chapters 1-4, 6, 18.

6. Department of Defense Instruction (DoDI) 4000.19, *Support Agreements* December 16, 2020.

7. Treasury Financial Manual (TFM), volume I, part 2, chapter 4700.

8. Government Accountability Office (GAO) Principles of Federal Appropriations Law ("GAO Redbook") Vol. 3, Chapter 12

9. Army Regulation 5-9, Installation Agreements, 17 April 2018

B. Interagency Transactions: Interagency Acquisition & Support Agreements.

1. Interagency Acquisition. "The procedure by which a [federal] agency needing supplies or services (the *requesting [or ordering agency]*) obtains them through another [federal] agency (the *servicing [or performing agency]*) **by an assisted acquisition or a direct acquisition**." FAR 2.101 (emphasis added). This includes acquisitions under the Economy Act (31 U.S.C. § 1535) and Non-Economy Act acquisitions (e.g., GSA FSS, GWACs). *See* FAR 2.101.

2. Support Agreements. "A negotiated arrangement between parties to provide or receive support. With the exception of Federal Acquisition Regulation Subparts 17.5 and 17.7, Federal Acquisition Regulation-based

contracts, all federal assistance awards (e.g., grants and cooperative agreements in accordance with Chapter XI of Title 2, Code of Federal Regulations), real property transactions, and Other Transaction Agreements authorized and executed in accordance with Sections 2371, 2371b, and 2373 of Title 10, U.S.C., are not support agreements." DoDI 4000.19, *Support Agreements*, Glossary, G.2. Definitions, December 16, 2020. FAR Subparts 17.5 and 17.7 cover Interagency Acquisitions.

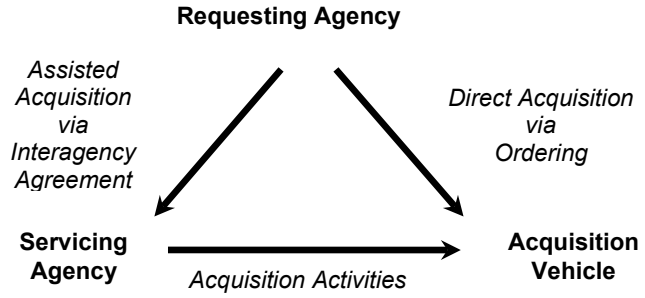
3. Difference with a Distinction. An interagency acquisition does not necessarily require interagency (within a government agency) or intra-agency (between government agencies) support, whether through the Economy Act or another authority or most transactions involving revolving fund operations (covered in Chapter 7 of this Deskbook). The key distinction between "support," and "acquisition" is that an interagency acquisition results in an acquisition (either assisted or directed), whereas "support" does not necessarily result in an acquisition. FAR 17.500(c)(1), explicitly notes that Subpart 17.5 "Interagency Acquisitions" does not apply to "[i]nteragency reimbursable work performed by Federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction…." The key point is that interagency assisted acquisitions likely require some sort of support agreement. Fiscal and Contract attorneys must be aware of the distinction because both acquisitions & support require specific authority to ensure compliance with the Purpose statute and prevent the improper augmentation of appropriated funds. I.e., Government agencies cannot mix appropriated funds, whether to buy things (acquisitions) or to give things away (support), without authority.

C. Types of Interagency Acquisitions.

1. Assisted Acquisitions. "…a type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency's behalf, such as awarding and administering a contract, task order, or delivery order." FAR 2.101 A written agreement must be signed by both parties which covers the responsibility for management and administration by establishing the general terms and conditions (GT&C). FAR 17.502-1(a). The GT&C is the first part of a support agreement documented in a FS 7600A.[1]

[1] Note: DFARS 217.701 defines assisted and direct acquisitions as interagency contract actions through a non-DoD agency; however, interagency acquisitions can also occur within the DoD. Practitioners would be apt to note that the definition found in DFARS Subpart 217.7 is under the subpart titled "Interagency Acquisitions: Acquisitions by Nondefense Agencies on Behalf of the Department of Defense." Therefore, the definition is specific to these acquisitions. DFARS Procedures, Guidance, and Information (PGI) 217-502.1(a)(1) specifically requires a written agreement for assisted acquisitions where a contracting activity from one DoD component provides acquisition assistance to deployed units or personnel from another DoD Component.

2. Direct Acquisitions: "…a type of interagency acquisition where a requesting agency places an order **directly** against a servicing agency's indefinite-delivery contract. The servicing agency manages the indefinite-delivery contract but does not participate in the placement or administration of an order." FAR 2.101 (emphasis added).



D. Categories & Formats of Support Agreements covered by DoD 4000.19.

1. Categories

a. Intragovernmental Agreements: Agreements within the Federal Government: (1) intra-agency: an agreement between two or more entities within a single federal agency (e.g., Department of the Navy supports the Department of the Army); and (2) inter-agency agreement: between an Office of the Secretary of Defense or DoD component and one or more non-DoD federal agencies (e.g., Department of Army supported by the Department of State).

b. Intergovernmental Agreements: Agreements between the DoD and a State, local, or tribal government.

c. Governmental to Non-governmental Agreements: Agreements between an OSD or DOD Component and a non-governmental entity specified as a congressionally chartered nonprofit organization pursuant to Title 36, U.S.C. (e.g., The American Red Cross, Boy Scouts of America, girls Scouts of America, and United Service Organizations, Inc., etc.).

2. Formats

a. FS Form 7600A/B & DD Form 448/-2.

(1) FS Form 7600A: The FS Form 7600A must be used to document the General Terms & Conditions for all reimbursable support which requires payment between federal agencies and may be used to document non-reimbursable support.

(2) FS Form 7600B: This is the Fiscal Service order form for intragovernmental buy/sell transactions designed for use with the FS Form 7600. Its use is expected to be mandatory upon the DoD's full incorporation of the Department of Treasury's G-Invoicing system.

(3) DD Form 448/-2: DD Forms 448 and 448-2 are Military Interdepartmental Purchase Request (MIPR) and Acceptance of MIPR respectively. These ordering forms must be continued to be accepted by DoD trading partners during the implementation of the G-Invoicing system and must be placed against an FS Form 7600A.

b. Memorandum of Agreement (MOA) and Memorandum of Understanding (MOU). MOAs are used to document agreements or deliver support without reimbursement, or to supplement a FS Form 7600A where reimbursement is required. MOUs document mutual understanding without an expectation of payment and "where the parties do not rely on each other to execute or deliver on any responsibilities."

E. Interagency Acquisition Contract Vehicle.

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 (MAS) and Federal Supply Schedules (FSS)), government-wide acquisition contracts (GWAC) (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). To establish a 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(b) for additional guidance.

F. Fiscal Policy.

Unless otherwise authorized by Congress, interagency transactions are generally prohibited. *See* 31 U.S.C. § 1532 (generally prohibiting transfers of funds between agencies).[2] Where permitted to be transferred, "appropriated funds are

[2] "Unless otherwise authorized by law, transfers of funds between government agencies and instrumentalities are prohibited." *United States Chem. Safety & Hazard Investigation Bd*., B-331739, Mar. 18, 2021, 2021 U.S. Comp. Gen. LEXIS 80 (citing 31 U.S.C. § 1532).

still required to be used for the purposes originally appropriated, unless otherwise provided."[3]

1. Under 31 U.S.C. § 1301 (the "purpose statute") a federal agency must use its appropriated funds for the purposes for which the appropriations were made. Therefore, unless authorized by Congress, funds appropriated for the needs of one federal agency may not be used to fund goods and services for the use of another federal agency.

    a. From the standpoint of the requesting agency, receiving goods or services funded by another agency's appropriations without reimbursing the servicing agency would constitute an improper augmentation of the requesting agency's funds.

    b. Funds sent by the requesting agency to the servicing agency as reimbursement for goods or services provided could not be retained and spent by the servicing agency, but instead would have to be turned over to the Treasury under 31 U.S.C. § 3302(b) (the Miscellaneous Receipts Statute).

2. Congress has provided several statutory authorities for interagency transactions, 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. § 6307.

    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. An agency must use the more specific "non-Economy Act" authorities instead of the Economy Act if applicable. FAR 17.502-2(b).

G. Practitioner's Note.

1. While the statutory requirements driving interagency transactions are fairly straightforward, this is an area of law that is predominately

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[3] *Matter of: Off. of Mgmt. & Budget1general Servs. Admin.--Reimbursement Requirement for the Tech. Modernization Fund*, B-333396 (July 14, 2022)(citing 31 U.S.C. § 1532 and 31 U.S.C. § 1301(a)).

regulatory driven. Those practicing in this area need to be keenly aware as to whether the governing regulations have been updated.

2. Moreover, the regulatory framework for interagency transactions is incredibly fact specific. Depending on the nature of the transaction, certain regulations may or may not apply.

3. DoD is currently transitioning to the U.S. Department of the Treasury's computer-based government invoicing (G-Invoicing) system to administer all interagency agreements. DoD FMR vol. 11A, ch. 3, para. 030503. However, certain subagencies of the DoD are not able to meet this deadline. For example, DLA states that it is "on track to be fully compliant in **Fiscal Year 2026**." *See* https://www.dla.mil/Finance/G-Invoicing/ (emphasis original).

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:[4]

1. Funds are available;

2. The head of the ordering agency or unit decides the order is in the best interests of the government;

3. The agency or unit filling the order can provide or get by contract the 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.[5]

B. Authorized Uses.

1. The Economy Act applies only in the absence of a more specific acquisition authority. FAR 17.502-2(b).[6]

2. The Economy Act may not be used by an agency to circumvent conditions and limitations imposed on the use of funds, including extending the period of availability of cited funds. The Economy Act may not be used for services which the servicing agency is required by law to provide the requesting agency and for which it receives appropriations. DoD FMR vol. 11A, ch. 3, para. 030303.

C. Determinations and Findings (D&F) Requirements.

(FAR 17.502-2(c); DFARS 217.503; DoD FMR vol. 11A, ch. 3, para. 030501)

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)); DoD FMR, vol. 11A, ch. 3, para. 030301.B

[4] 31 U.S.C. § 1535(a); DoD FMR, vol. 11A, ch. 3, para. 030301; FAR 17.502-2(a).

[5] *See also Dictaphone Corp.*, B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380 (denying protest where protester claimed the Navy lacked a reasonable basis to conclude that a competitor's product could be acquired cheaper).

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

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)); DoD FMR, vol. 11A, ch. 3, para. 030301.D; **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 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).

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). FAR 17.502-2(c)(2). (E.g., Army policy requires that the written D&F for Economy Act orders with non-DoD agencies must be approved at no lower than senior executive service (SES)/flag/general office, and an O6 or GS-15 for orders within the DoD. See, AR 5-9, paragraph 4-8b, 17 April 2018).

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. FAR 17.502-2(c)(2).

c. The requesting agency shall furnish a copy of the D&F to the servicing agency with the order. FAR 17.502-2(c)(3);DFARS 217.503(d).

D. Additional Determinations by DoD Policy.

1. In accordance with the FY 2008 NDAA, Pub. L. 110-181, Section 801, as amended, use of a non-DoD contract to procure goods or services in excess of the simplified acquisition threshold (currently $250,000) only if the head of the nondefense agency conducting the acquisition on DoD's behalf has certified that the agency will comply with applicable defense

procurement requirements for that fiscal year to include applicable DoD financial management regulations and requires determinations in addition to the D&F. FAR 17.703(a); DFARS 217.770.[7]

a. With some slight differences between the military departments, 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.

b. The officials with authority to make these determinations are designated by agency policy.

E. Economy Act Agreements.

1. As part of the U.S. Department of the Treasury's computer-based government invoicing (G-Invoicing) requirement, there are two Fiscal Service Forms (Fiscal Service Forms 7600A &7600B) that are required for interagency between federal entities. DoD FMR, vol. 11A, ch. 18, para. 180402.

2. The 7600A captures the general **agreement** or general terms and conditions between the parties. This form replaces DD Form 1144, Support Agreement.

[7] Non-DoD agency certifications and additional information are available at the Defense Pricing & Contracting (DPC) webpage under "Interagency Acquisition" *available at* https://www.acq.osd.mil/asda/dpc/cp/policy/interagency-acquisition.html.

3. The 7600B captures the **order** and its funding. This form replaces DD Form 448, Military Interdepartmental Purchase Request (MIPR).

4. Practitioner's point. Please note that not all DoD subagencies have completely transitioned to using Treasury's G-Invoicing system. Thus, use of the DD forms may still be required for some interagency acquisitions.

5. For both the agreement and the order, FAR 17.502-1 encourages agencies to review the Office of Federal Procurement Policy's (OFPP) model Interagency Acquisition guidance. *See* FAR 17.502-1.

   a. For the Agreement, OFPP recommends including a **Statement of Authority** and a **Statement of Non-Obligation.**

   b. Sample statement of authority: *The parties enter into this agreement under 31 U.S.C. §1535 (The Economy Act) and certify that all required legal determinations, including best interest of the government, that are necessary to support orders placed under this agreement will be attached to each 7600B (order).*

   c. Sample statement of non-obligation: *This document does not create or constitute an obligation of funds. A fiscal obligation arises when the Requesting Agency demonstrates a bona fide need, provides the necessary requirements and funding information to the Servicing Agency, and both parties execute a funding document using a FS 7600B.*

   d. Form 7600B (the order) must contain:

      (1) A specific, definite, and certain statement of the requirement. Such a statement establishes the bona fide need, enables the recording of the obligation, and specifies exactly what activities are being performed under the designated interagency authority.

      (2) A certification of funds from the requesting agency asserting that the funds cited on the order are proper in terms of purpose, time, and amount.

      (3) Terms and amount of reimbursement. Servicing agencies must be reimbursed for the costs it incurs to prevent a violation of the Purpose Statute or the Rule Against Augmentation. *See* DoD FMR, vol. 11A, ch. 18, para. 180401.

F. 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. 030801.[8]

   a. Actual costs include:

      (1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased; DoD FMR, vol. 11A, ch. 3, para. 030801;[9] **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. 030801.[10]

      (3) DoD activities not funded by working capital funds normally do not charge indirect costs to other DoD activities.[11]

   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); DoD FMR, vol. 11A, ch. 3, para. 030801.

   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

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[8] *See Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network*, B-238024, Jun. 28, 1991, 70 Comp. Gen. 592 (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).

[9] *See Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, Aug. 14, 1978, 57 Comp. Gen. 674; *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).

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

[11] 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.

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.[12]

e. Practitioner's point. There are numerous reimbursement provisions, allowances, and caveats. When used in an interagency agreement, the parties should document therein.

(1) The following non-exhaustive list provides some of the reimbursement provisions:

(a) Advancing Funds (31 U.S.C. §3324; DoD FMR Vol. 4, Ch. 5 (Direct Costs));

(b) Waiving Reimbursement (including direct costs) between DoD Activities (*see* 10 U.S.C. §2571);

(c) Waiving De Minimis Costs (*see* DoDI 4000.19, §3.4(c));

(d) DoD activities not funded by Working Capital Funds normally do not charge indirect costs to other DoD activities (*see* DoD FMR, Vol. 11A, Ch. 3, Para. 030801);

(e) When the contracting activity of one DoD Component provides acquisition support to deployed units or personnel from another DoD Component – Procurement support should be on a nonreimbursable basis, unless the parties mutually agree, in writing, for reimbursable support. (*see* DFARS PGI 217.502-1).

2. Obligation and Deobligation of Funds.

a. Obligation.

(1) Reimbursable Order: the requesting agency obligates funds current when the performing activity accepts the reimbursable order. 31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030604.A.

b. Deobligation.

[12] DoD FMR vol. 11A, ch. 3, para. 030303. *See also,* FAR 17.501(b).

(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. 030604.B.[13]

(2) This deobligation requirement is intended to prevent attempts to use the Economy Act to "park" funds with another agency to extend the life of an appropriation.

[13] *See* GAO Redbook, vol. III, ch. 12 (3d Ed.), pp. 12-43 to 12-50.

III. THE PROJECT ORDER STATUTE (41 U.S.C. § 6307).[14]

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 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. 020205.

   b. A "project order" is a specific, definite, and certain order issued under the Project Order Statute. DoD FMR, vol 11A, ch.2, para 020101 and 020506.

2. Within DoD, regulatory guidance on project orders is found at DoD FMR, vol. 11A, ch. 2.[15]

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. 020201 and 020504.

2. GOGO establishments include:

   a. Equipment overhaul or maintenance shops, manufacturing or processing plants or shops, research and development laboratories, computer software design activities, testing facilities, proving grounds, and engineering and construction activities. DoD FMR, vol. 11A, ch. 2, para. 020201.

   b. GAO decisions have also "found arsenals, factories, and shipyards owned by the military to be GOGOs." *Matter of John J. Kominski*, B-246773, May 5, 1993, 72 Comp. Gen. 172.

[14] 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.

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

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. 020302.1.[16]

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 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.

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

(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. Per DoD FMR, vol. 11A, ch. 2, para. 020303, Treasury has established a standard Interagency Agreement form containing the GT&Cs (FS Form 7600A) and the Order (FS Form 7600B) for federal-wide use in carrying out buy/sell transactions between trading partners.

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. 020510.1.

5. Because project orders are not made under the authority of the Economy Act, there is no requirement for determinations and findings (D&F).[17]

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

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:[18]

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;[19]

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.

a. 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. DoD FMR, vol. 11A, ch. 18, para. 180506.

(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:

(a) Provided the goods or services (or incurred actual expenses in providing the goods or services); or

[18] DoD FMR vol. 11A, ch. 18, para. 180505.

[19] 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.

(b) Entered into a contract with another entity to provide the goods or services before the funds expired, subject to the bona fides need rule.

(2) Non-Severable Services: the contract must be funded entirely with funds available for new obligations at the time the contract was awarded, even though performance may extend across fiscal years. DoD FMR, vol. 11A, ch. 18, para. 180506.[20]

(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. § 3133. DoD FMR, vol. 11A, ch. 18, para. 180506.[21]

(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. 180506.

3. Advance Payment.

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. 030701.

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

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[20] *See* DoD FMR, vol. 11A, ch. 18, para. 180401 (requiring a statement that "I certify that the goods or non-severable services to be acquired under this agreement are necessary expense of the appropriation charged, and represent a bona fide need of the fiscal year in which these funds are obligated.").

[21] *See* DoD FMR, vol. 11A, ch. 18, para. 180401 (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, 2015 U.S. Comp. Gen. LEXIS 4.

and returned to the fund from which originally made. DoD FMR, vol. 11A, ch. 18, para. 030701.

C. DoD Policy for non-DoD orders.

1. If the non-Economy Act order is over the Simplified Acquisition Threshold (SAT), 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:[22]

   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, considering the discounts and fees; and contract administration, to include oversight. DFARS 217.770; DoD FMR, vol. 11A, ch. 18, para. 180403.

   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. Commonly used non-Economy Act transaction authorities.

1. Government Employees Training Act (GETA). (5 U.S.C. § 4104).

[22] DoD FMR, vol. 11A, ch. 18, para. 180302.

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.[23]

b. Federal agencies must provide for training, as far 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.[24]

2. Federal Supply Schedules (FSS). (41 U.S.C. §§ 251-266-- 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

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

[24] *Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses*, B-271894, Jul. 24, 1997, 1997 U.S. Comp. Gen. LEXIS 252; *To the Secretary of Commerce*, B-151540 Jun. 7, 1963, 42 Comp. Gen. 673.

obtaining commercial supplies and services at prices associated with volume buying.

(2) The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards thousands of government-wide ID/IQ contracts for over 11 million commercial items and services.

(3) Agencies place orders or establish blanket purchasing agreements against these Schedule contracts.

b. The procedures of FAR 17.5 do not apply to orders of $600,000 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. (*see also* DFARS 208.404 for requirements for DoD orders against the FSS).

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 Committee,[25] at prices established by the Committee, from AbilityOne nonprofit agencies if they are available within the period required.

[25] 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).

(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. § 3905.[26]

b. Current Requirements:

(1) Under FAR 8.601(e), agencies are encouraged to purchase supplies and services to the maximum extent practicable.

(2) When acquiring an item for which FPI has a significant market share[27] DoD must use competitive procedures or fair opportunity procedures under the FAR to procure the product. DFARS 208.602-70.

(3) If FPI does not have a significant market share, comply with procedures under FAR 8.602.

(a) Before purchasing products from FPI, agencies must conduct market research to determine whether the FPI item is comparable to supplies available from the private sector in terms of price, quality, and time of delivery. This is a unilateral determination of the contracting officer that is not subject to review by FPI. FAR 8.602.

(b) If the FPI item is determined not to be comparable, then agencies should acquire the items using normal contracting (i.e., competitive) procedures, and no waiver from FPI is required.

[26] 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.

[27] 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.

(c) 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. §§ 11101-11704).

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 some current GWACs is available at www.gsa.gov/gwacs; https://nitaac.nih.gov/services/cio-sp3; https://www.contractdirectory.gov/contractdirectory/.

c. Currently, the National Institutes of Health is in the process of evaluating the Chief Information Officers-Solutions and Partners (CIO-SP4) GWAC. https://nitaac.nih.gov/gwacs/cio-sp4. CIO-SP3 is extended through 20 April 2026.

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),[28] run by the Department of the Interior, and FedSource, run by the Department of the Treasury.

b. Operating Details:

(1) Franchise funds are revolving, self-supporting businesslike enterprises that provide a variety of common administrative services, such as payroll processing, information technology support, employee assistance programs, and contracting services.

(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.

[28] A previous DoD-wide prohibition on purchases in excess of $100,000 through GovWorks imposed on June 14, 2007, has since been rescinded. *See* Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, subject: Revision to DoD Prohibition to Order, Purchase, or Otherwise Procure Property or Services through the Acquisition Services directorate of the Department of Interior's National Business Center locations, Herndon, Virginia (formerly known as GovWorks and now known as AQD-Herndon) and Sierra Vista, Arizona (formerly known as Southwest Branch and now known as ACQ-Sierra Vista), dated March 28, 2008, *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.

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.

(3) OMB recently released guidance on the use of these funds with efforts to transform the delivery these types of services into a shared services model.[29] This transformation is ongoing, and as a result, OMB will have the latest guidance on how agencies can best utilize these shared services.

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.[30] Accordingly, the deobligation policies described in section IV.B *supra*, would apply here as well.

7. The International Cooperative Administrative Support Services (ICASS)

a. Purpose: The International Cooperative Administrative Support Services (ICASS) is a system, mandated by law[31] that provides and manages U.S. federal agencies' costs for administrative support at Department of State (DoS) facilities outside the United States.

(1) The Department of State has Title 22 authority to enter into ICASS agreements.[32] Under that authority, DoS can enter

[29] Improving Administrative Functions Through Shared Services, OMB M-16-11 dated May 4, 2016.

[30] *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, Jul. 17, 2007 CPD ¶ 157.

[31] The Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § IV, 110 Stat. 3009, 46 (1997) (Mandated the establishment of a system "that allocates to each department and agency the full cost of its presence outside of the United States").

[32] The State Department Basic Authorities Act of 1956 § 23, 22 U.S.C. § 2695 (2018) (authorizes the Department of State to enter into a support agreement to provide administrative services to a United States federal agency when that agency is conducting a foreign affairs function and it is determined that the consolidation of the administrative services performed in common is more advantageous and economical to both agencies).

into an agreement with other federal agencies for administrative services when those services can "be performed more advantageously and more economically on a consolidated basis."[33] ICASS is the current consolidated service system.[34] It was designed to share costs of operating DoS posts overseas among the various federal agencies permanently present in an Embassy such as Federal Bureau of Investigation (FBI), Defense Intelligence Agency (DIA), and others. Department of State manages those costs and expenses through a working capital fund.[35] The DoS Foreign Affairs Handbook[36] (FAH) implements ICASS.

(2) The Department of Defense Instruction (DODI) 7060.06 provides guidance on using ICASS. The DODI 7060.06 states that the DoD will participate in ICASS "when such participation is determined to be the most economical means of obtaining support and when mission performance necessitates ICASS support."[37] The DODI also the department guidance for managing ICASS.

NOTE: Agreeing to ICASS and then overseeing the implementation of ICASS are both challenging.[38] DOS requires DOD agencies sign a Memorandum of Understanding (MOU). Practitioners should note that certain clauses may violate the most basic DOD fiscal law provisions. The management of ICASS is also challenging. The ICASS guidance[39] requires requesting agencies maintain

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[33] *Id*. at § 2695(a) (2018).

[34] The Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § IV, 110 Stat. 3009, 46 (1997); *See also* Geri Kam, *ICASS: Revolution Underway*, U.S. DEP'T OF STATE ARCHIVE, https://1997-2001.state.gov/publications/statemag/statemag_nov-dec/featxt3.html (last visited Apr. 09, 2024).

[35] The State Department Basic Authorities Act of 1956 § 13, 22 U.S.C. § 2684 (authorizing a working capital fund necessary for providing administrative services to a United States federal agency).

[36] *See* U.S. DEP'T OF STATE, FOREIGN AFFAIRS HANDBOOK 6 FAH-5, Home Page - Foreign Affairs Manual https://fam.state.gov/.

[37] U.S. DEP'T OF DEF., INSTR. 7060.06, INTERNATIONAL COOPERATIVE ADMINISTRATIVE SUPPORT SERVICES (ICASS), 1 (2 Oct. 2020).

[38] Inspector Gen., U.S. DEP'T OF DEF., No. 2016-048, U.S. Army Central Did Not Implement Controls to Effectively Manage the Shared Cost of Administrative Support Functions in Iraq (17 Feb. 2016) (USARCENT did not participate in International Cooperative Administrative Support Service committees, nor did it have an ability to assess its billing accuracies).

[39] U.S. DEP'T OF DEF., INSTR. 7060.06, INTERNATIONAL COOPERATIVE ADMINISTRATIVE SUPPORT SERVICES (ICASS), encl. 2, para. 4 (2 Oct. 2020) (heads of the Department of Defense components will establish and maintain

accountability on the administration of ICASS. When a DOD agency is an occasional user of ICASS, this aspect can present its challenges.

8. Reimbursable Orders for Design and Construction of DoD Facilities (10 U.S.C. § 2818)[40]

   a. Purpose: Permits DoD elements to place reimbursable orders with other DoD elements for the design and construction of DoD facilities, including facility maintenance and repair projects, and unspecified minor military construction projects under 10 U.S.C. § 2805.41

   b. Reimbursable orders placed under this non-Economy act authority are "considered to be an obligation … in the same manner" as a similar order or contract placed with a private entity.[42]

   c. The servicing agency "may include an amount equal to not more than 10 percent of the proposed value of the contract for contingency expenses."[43]

   d. Fund obligations under this authority do not require deobligation like Economy Act orders. However, under the Recording Statute (31 U.S.C. § 1501) an order must describe the design and construction work in specific, definite and certain terms (e.g., similar to what is included in a Statement of Work). These orders must serve the bona fide need that exists in the fiscal year in which the order is executed.

procedures for tracking and paying service charges; attend conferences; and establish a representative for the ICASS Council and budget committee).

[40]Enacted under the National Defense Authorization Act for Fiscal Year 2025 ("FY25 NDAA"), Pub. L. 118-159, Div. B, Title XXVIII, Subtitle C, §2843, 138 Stat. 2263 (2024))

[42] 10 U.S.C. § 2818(b).

[43]10 U.S.C. § 2818(c).

VI. DOD POLICY ON USE OF NON-DOD CONTRACTS.[44]

A. Requirements For Use of Non-DoD Contracts Over the Simplified Acquisition Threshold.

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 the simplified acquisition threshold (currently, $250,000) (under the Economy Act or under any non-Economy Act authority, to include orders against GSA's FSS). *See* DFARS 217.700; DoD FMR, vol. 11A, ch. 18, para. 180303.

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, and requires concurrence by specific contracting activity officials depending on the value of the acquisition.)). *See* AFARS 5117.770.

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:

   a. The order is in the best interest of the Military Department considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;

   b. The supplies or services to be provided are within the scope of the non-DoD contract;

   c. The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and

   d. The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract

[44] Common policy applicable for Economy Act and non-Economy Act transactions.

or order to ensure compliance with applicable statutes, regulations, and directives. DFARS 217.770.

B. Certifications.

Under 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).[45] Certifications from non-DoD agencies indicating that they will comply with defense procurement and financial management regulations are maintained at https://www.acq.osd.mil/asda/dpc/cp/policy/interagency-acquisition.html.

[45] *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).

CHAPTER 7

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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, [hereinafter DoD FMR] vol. 2B, ch. 9; vol. 3, ch. 19; vol. 11B, ch. 1 and ch. 12; 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); *see also Revolving Funds: Key Features*, B-335844, Jan. 17, 2024, *available at* https://www.gao.gov/products/gao-24-107270.

B. Definition.

1. Revolving Fund. "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. 1.7.2.54.

2. Revolving Fund Accounts. "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. 1.3.1.

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" (total investment) of the fund. DoD FMR, vol. 3, ch. 19, para. 180202. This is the sum of all resources used to acquire the items needed to perform the working capital fund's mission.

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. DoD FMR, vol. 3, ch. 19, para. 190204.

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. 1.3.3.

a. The Secretary or Assistant Secretary of the Military Department (or the Director of the Defense Agency) must prepare and sign a charter that details the scope of the potential activity group.

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 four 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.

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. 1.4.

(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 1) the capital assets have a development cost or acquisition cost of not less than $500,000 for procurements by a major range and test facility installation or a science and technology reinvention laboratory; and 2) not less than $250,000 for procurements at all other facilities:

(1) An unspecified minor military construction (UMMC) project under 10 U.S.C. § 2805(c).

(2) Automatic data processing equipment or software.

(3) Any other equipment.

(4) Any other capital improvement.

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)(1).

(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, with respect to the working-capital funds of each Defense Agency, and Secretary of each military department, 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 $2,000,000.

(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. 1.5.

(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. 1.5.6 (e.g., Major Range and Test Facility Activities items, major weapons systems, equipment and minor construction purchased to meet mobilization requirements, etc.). These must be financed by other appropriated funds.

(2) Capital assets include depreciable property, plant, equipment, and software that:

(a) Has a unit cost that is greater than or equal to $350,000 (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. 1.5.16.

(1) Working-capital funds must finance minor construction projects costing more than $2,000,000 through the annual Military Construction Appropriations Act.

(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, para. 1.8.

(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. 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. 1.8.1. This policy protects customers from unforeseen inflationary increases and other cost uncertainties. *See* DoD FMR, vol. 2B, ch. 9, para. 1.8.1 for exceptions to this policy.

k. Revenue Recognition. DoD FMR, vol. 2B, ch. 9, para. 1.8.4.15.

(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. 190205.

(2) The Office of Management and Budget (OMB) apportions appropriations and contract authority to working-capital funds by means of an SF-132. DoD FMR, Vol. 3, Ch. 19, paras. 190205 and 190301.

(3) 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. 2.5.4 (emphasis in original).

(4) A working capital fund may not incur obligations in excess of its apportioned budgetary resources and other financing resources. DoD FMR, Vol. 3, Ch. 19, para. 190206.

(5) 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 additional contract authority is issued by OMB. DoD FMR, Vol. 3, Ch. 19, para. 190205.

(6) Non-supply working-capital funds must maintain a positive budgetary balance. DoD FMR, Vol. 3, Ch. 19, para. 190303.

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.

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. § 11302) 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.

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

e. 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").

f. 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. 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. Full Time Equivalents 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. GAO Redbook, Vol. III, pg. 12-132.

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. GAO Redbook, Vol. III, pg. 12-79. **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. 2.10 (April 2022).

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-308944, 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 revolving 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. § 3070 (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
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. The accomplishment of the most economical and efficient organization and operation of working capital fund activities for the purposes of this subsection shall include actions toward the following:

(1) Undertaking efforts to optimize the rate structure for all requisitioning entities.

(2) Encouraging a working capital fund activity to perform reimbursable work for other entities to sustain the efficient use of the workforce.

(3) Determining the appropriate leadership level for approving work from outside entities to maximize efficiency.

(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 7543 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 $500,000 for procurements by a major range and test facility installation or a science and technology reinvention laboratory and not less than $250,000 for procurements at all other facilities:

(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) This subsection shall not apply to advance billing for background investigation and related services performed by the Defense Counterintelligence and Security Agency.

(5) 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.

(s) Limitation on Cessation or Suspension of Distribution of Funds for Certain Workload.-(1) Except as provided in paragraph (2), the Secretary of Defense or the Secretary of a military department is not authorized-

(A) to suspend the employment of indirectly funded Government employees of the Department of Defense who are paid for out of working-capital funds by ceasing or suspending the distribution of such funds; or

(B) to cease or suspend the distribution of funds from a working-capital fund for a current project undertaken to carry out the functions or activities of the Department.

(2) Paragraph (1) shall not apply with respect to a working-capital fund if-

(A) the working-capital fund is insolvent; or

(B) there are insufficient funds in the working-capital fund to pay labor costs for the current project concerned.

(3) The Secretary of Defense or the Secretary of a military department may waive the limitation in paragraph (1) if such Secretary determines that the waiver is in the national security interests of the United States.

(4) This subsection shall not be construed to provide for the exclusion of any particular category of employees of the Department of Defense from furlough due to absence of or inadequate funding.

(t) Market Fluctuation Account.-(1) From amounts available for Working Capital Fund, Defense, the Secretary shall reserve up to $1,000,000,000, to remain available without fiscal year limitation, for petroleum market price fluctuations. Such amounts may only be disbursed if the

Secretary determines such a disbursement is necessary to absorb volatile market changes in fuel prices without affecting the standard price charged for fuel.

(2) A budget request for the anticipated costs of fuel may not take into account the availability of funds reserved under paragraph (1).

(u) Use for Unspecified Minor Military Construction Projects to Revitalize and Recapitalize Defense Industrial Base Facilities.-(1) The Secretary of a military department may use a working capital fund of the department under this section to fund an unspecified minor military construction project under section 2805 of this title for the revitalization and recapitalization of a defense industrial base facility owned by the United States and under the jurisdiction of the Secretary.

(2)(A) Except as provided in subparagraph (B), section 2805 of this title shall apply with respect to a project funded using a working capital fund under the authority of this subsection in the same manner as such section applies to any unspecified minor military construction project under section 2805 of this title.

(B) For purposes of applying subparagraph (A), the dollar limitation specified in subsection (a)(2) of section 2805 of this title, subject to adjustment as provided in subsection (f) of such section, shall apply rather than the dollar limitation specified in subsection (c) of such section.

(3) In this subsection, the term "defense industrial base facility" means any Department of Defense depot, arsenal, shipyard, or plant located within the United States.

(4) The authority to use a working capital fund to fund a project under the authority of this subsection expires on September 30, 2023.

(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 ; Pub. L. 114–92, div. A, title XIV, §§1421, 1422, Nov. 25, 2015, 129 Stat. 1083 , 1084; Pub. L. 115–91, div. A, title II, §212, Dec. 12, 2017, 131 Stat. 1324 ; Pub. L. 115–232, div. A, title III, §321, title VIII, §809(a), title XIV, §1422, Aug. 13, 2018, 132 Stat. 1718 , 1840, 2093; Pub. L. 116–92, div. A, title III, §352, title XVII, §1731(a)(29), Dec. 20, 2019, 133 Stat. 1320 , 1813.)

Historical and Revision Notes
1956 Act

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*

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

Revised section	*Source (U.S. Code)*	*Source (Statutes at Large)*
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

2021- The 2021 amendment by P.L. 116-283 added (l)(4); and redesignated former (l)(4) as (l)(5).

2019-Subsec. (u). Pub. L. 116–92, §1731(a)(29), inserted "of this title" after "2805" wherever appearing.

Subsec. (u)(1). Pub. L. 116–92, §352(1), substituted "to fund" for "to carry out".

Subsec. (u)(2). Pub. L. 116–92, §352(2), designated existing provisions as subpar. (A), substituted "Except as provided in subparagraph (B), section 2805" for "Section 2805" and "carried out with" for "funded using", and added subpar. (B).

Subsec. (u)(4). Pub. L. 116–92, §352(3), substituted "to fund" for "to carry out".

2018-Subsec. (e). Pub. L. 115–232, §1422, inserted at end "The accomplishment of the most economical and efficient organization and operation of working capital fund activities for the purposes of this subsection shall include actions toward the following:

"(1) Undertaking efforts to optimize the rate structure for all requisitioning entities.

"(2) Encouraging a working capital fund activity to perform reimbursable work for other entities to sustain the efficient use of the workforce.

"(3) Determining the appropriate leadership level for approving work from outside entities to maximize efficiency."

Subsec. (i). Pub. L. 115–232, §809(a), substituted "section 7543" for "section 4543".

Subsec. (u). Pub. L. 115–232, §321, added subsec. (u).

2017-Subsec. (k)(2). Pub. L. 115–91 substituted "$500,000 for procurements by a major range and test facility installation or a science and technology reinvention laboratory and not less than $250,000 for procurements at all other facilities" for "$250,000" in introductory provisions.

2015-Subsec. (s). Pub. L. 114–92, §1421, added subsec. (s).

Subsec. (t). Pub. L. 114–92, §1422, added subsec. (t).

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 THE 2018 AMENDMENT

Amendment by section 809(a) of Pub. L. 115–232 effective Feb. 1, 2019, with provision for the coordination of amendments and special rule for certain redesignations, see section 800 of Pub. L. 115–232, set out as a note preceding section 3001 of this title.

XII. 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."

XIII. 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."

XIV. ADVANCE BILLING FOR FISCAL YEAR 2020

Pub. L. 116–136, div. B, title III, §13003, Mar. 27, 2020, 134 Stat. 522 , provided that:

"(a) Notwithstanding section 2208(l)(3) of title 10, United States Code, during fiscal year 2020, the total amount of the advance billings rendered or imposed for all working-capital funds of the Department of Defense may exceed the amount otherwise specified in such section.

"(b) In this section, the term 'advance billing' has the meaning given that term in section 2208(l)(4) of title 10, United States Code."

XV. PILOT PROGRAM FOR AQUISITON OF COMMERCIAL SATELLITE COMMUNICATION SERVICES

Pub. L. 113–291, div. A, title XVI, §1605, Dec. 19, 2014, 128 Stat. 3623 , as amended by Pub. L. 114–92, div. A, title XVI, §1612, Nov. 25, 2015, 129 Stat. 1103 ; Pub. L. 114–328, div. A, title XVI, §1606(a), Dec. 23, 2016, 130 Stat. 2586 , provided that:

"(a) Pilot Program.-

"(1) In general.-The Secretary of Defense shall develop and carry out a pilot program to effectively and efficiently acquire commercial satellite communications services to meet the requirements of the military departments, Defense Agencies, and combatant commanders.

"(2) Funding.-Of the funds authorized to be appropriated for any of fiscal years 2015 through 2020 for the Department of Defense for the acquisition of satellite communications,

not more than $50,000,000 may be obligated or expended for such pilot program during such a fiscal year.

"(3) Certain authorities.-In carrying out the pilot program under paragraph (1), the Secretary may not use the authorities provided in sections 2208(k) and 2210(b) of title 10, United States Code.

"(4) Methods.-In carrying out the pilot program under paragraph (1), the Secretary may use a variety of methods authorized by law to effectively and efficiently acquire commercial satellite communications services, including by carrying out multiple pathfinder activities under the pilot program.

"(b) Goals.-In developing and carrying out the pilot program under subsection (a)(1), the Secretary shall ensure that the pilot program-

"(1) provides a cost-effective and strategic method to acquire commercial satellite communications services;

"(2) incentivizes private-sector participation and investment in technologies to meet future requirements of the Department of Defense with respect to commercial satellite communications services;

"(3) takes into account the potential for a surge or other change in the demand of the Department for commercial satellite communications services in response to global or regional events;

"(4) ensures the ability of the Secretary to control and account for the cost of programs and work performed under the pilot program; and

"(5) demonstrates the potential to achieve order-of-magnitude improvements in satellite communications capability.

"(c) Duration.-The pilot program under subsection (a)(1) shall terminate on October 1, 2020.

"(d) Reports and Briefings.-

"(1) Initial report.-Not later than 270 days after the date of the enactment of this Act [Dec. 19, 2014], the Secretary shall submit to the congressional defense committees [Committees on Armed Services and Appropriations of the Senate and the House of Representatives] a report that includes-

"(A) a plan and schedule to carry out the pilot program under subsection (a)(1); and

"(B) a description of the appropriate metrics established by the Secretary to meet the goals of the pilot program.

"(2) Briefing.-At the same time as the President submits to Congress the budget pursuant to section 1105 of title 31, for each of fiscal years 2017 through 2020, the Secretary shall provide to the congressional defense committees briefing on the pilot program.

"(3) Final report.-Not later than December 1, 2020, the Secretary shall submit to the congressional defense committees a report on the pilot program under subsection (a)(1). The report shall include-

"(A) an assessment of the pilot program and whether the pilot program effectively and efficiently acquires commercial satellite communications services to meet the requirements of the military departments, Defense Agencies, and combatant commanders; and

"(B) a description of-

"(i) any contract entered into under the pilot program, the funding used under such contract, and the efficiencies realized under such contract;

"(ii) the advantages and challenges of using the pilot program;

"(iii) any additional authorities the Secretary determines necessary to acquire commercial satellite communications services as described in subsection (a)(1); and

"(iv) any recommendations of the Secretary with respect to improving or extending the pilot program.

"(e) Implementation of Goals.-In developing and carrying out the pilot program under subsection (a)(1), by not later than September 30, 2017, the Secretary shall take actions to begin the implementation of each goal specified in subsection (b)."

XVI. 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".

XVII. 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".

XVIII. 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.

XIX. 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.

XX. 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.

XXI. 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.

XXII. 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.

XXIII. 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

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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. Because of this, it is important to confirm the applicable statutory thresholds, as well as approval levels set by policy.

II. REFERENCES

1. Military Construction Codification Act, Pub. L. No. 97-214, 96 Stat. 153 (1982) (codified as amended at 10 U.S.C. §§ 2801-2885).

2. 41 U.S.C. § 6303. Certain Contracts Limited to Appropriated Amounts.

3. Annual Military Construction Authorization and Appropriation Acts and their accompanying Conference Reports.

4. DOD Directive 4270.05, Military Construction (31 August 2018) [hereinafter DOD Dir. 4270.05].

5. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 6, Military Construction/Family Housing Appropriations (February 2025) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 6].

6. DOD Instruction 4165.56, Relocatable Buildings (23 June 2022) [hereinafter DODI 4165.56].

7. DOD Regulation 7000.14-R, DOD Financial Management Regulation, vol. 2B, Budget Formulation and Presentation, ch. 8, Facilities Sustainment and Restoration/Modernization (December 2016) [hereinafter DOD Reg. 7000.14-R, vol. 2B, ch. 8].

8. 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 (July 2021) [hereinafter DOD Reg. 7000.14-R, vol. 3, ch. 17].

9. Army Regulation 415-32, Engineer Troop Unit Construction in Connection with Training Activities (18 June 2018) [hereinafter AR 415-32].

10. Army Regulation 420-1, Army Facilities Management (RAR 28 August 2012) [hereinafter AR 420-1].

11. DA Pamphlet 420-1-2, Army Military Construction and Non-Appropriated Funded Construction Program Development and Execution (2 April 2009) [hereinafter DA Pam 420-1-2].

12. DA Pamphlet 420-11, Project Definition and Work Classification (3 October 2023) [hereinafter DA Pam 420-11].

13. AFI 32-1023, Designing and Constructing Military Construction Projects (22 December 2020) [hereinafter AFI 32-1023].

14. DAFI 32-1020, Planning and Programming Built Infrastructure Projects (18 December 2019, incorporating Change 1, 19 January 2022) [hereinafter DAFI 32-1020].

15. DAFMAN 65-605, vol. 1 / DAFI 65-601, vol. 1, Budget Guidance and Procedures, ch. 10, Military Construction Appropriations (31 March 2021) [hereinafter DAFMAN 65-605, vol. 1, ch. 10].

16. DAFI 65-601, vol. 1, Budget Guidance and Procedures, ch 21, Military Family Housing (MFH) Appropriations (22 June 2022) [hereinafter DAFI 65-601, vol. 1, ch. 21].

17. OPNAVINST 11010.20J, Navy Facilities Projects (27 December 2022) [hereinafter OPNAVINST 11010.20J].

18. 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* 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, that is, a complete and usable facility, a comparison of interdependence as opposed to facility interrelationship should be made.. AR 415-32, Section II, Terms; DA PAM 420-11, Glossary of Terms (*See* OPNAVINST 11010.20J, para. 2.3.b (defined as Incrimination); DAFI 32-1020, 1.3.3, 2.4.6 (defined as Project Splitting))

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. (*See* DAF 32-1020 Attachment 1, Terms (defined as Phases and Concurrent Project); OPNAVINST 11010.20J, para. 2.2(3)(a)).

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. (*See* DAFI 32-1020, Attachment 1, Terms (defined as Companion Project, OPNAVINST 11010.20J, para. 2.2.3(b))

F. Military Construction.

1. Statutory Definition. 10 U.S.C. § 2801(a). The term "military construction" includes "any construction, development, conversion,[1] or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements…."

a. Service Regulation Definitions. See, e.g., AR 420-1, para. 4-17; DAFI 32-1020, para. 1.3.1, 5.1 and Attachment 4; OPNAVINST 11010.20J, para. 4.3.a(1). 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.

[1] Some conversions of real property may properly be classified as "repairs" when there is a "conversion of a real property facility, system, or component to a new functional purpose without increasing its external dimensions." 10 U.S.C. § 2811.

1. Absent specific statutory authorization to the contrary, military construction may only be conducted on a military installation, regardless of the type or amount of funds used. 10 U.S.C. § 2801. 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[2] of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control."[3]

2. Operational control needed for the U.S. to undergo military construction does not affect a host nation's sovereignty over its own territory, but it must extend beyond a host nation granting restricted right of access or use by the U.S.[4]

a. For military construction outside of the U.S., Implementing Agreements are commonly used to document existing grants of operational control from host nations.

I. Project Splitting.

Programming a MILCON project in separate increments solely to reduce the project's 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 O&M 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. *See* DAFI 32-1020, 1.3.3, 2.4.6; OPNAVINST 11010.20J, para. 2.2.3(b) and (c)

J. Relocatable Facilities/Buildings.

1. Department of Defense Policy.

a. DoDI 4165.56, Relocatable Buildings (22 June 2022) no longer contains a definition for the term "relocatable building" even though that term does appear in the DoDI. However, the DoDI now defines "relocatable facility" as "A facility that is specially designed and constructed to be readily erected, disassembled, transported, stored, and re-used. Examples of relocatable facilities include, but are not limited to, trailers, CONEX boxes, sheds on skids, tension fabric

[2] *See also* 23 U.S.C. § 23 for a description of operational control for defense access road projects.
[3] Although "operational control" is not per se defined, 10 U.S.C. § 2801, and 2802 provide its legal basis.
[4] See Office of General Counsel White Paper, 25 February 2014.

structures, and air supported domes. A relocatable facility is not constructed as a part of any other military vehicle, DoD tactical equipment (vehicle mounted or wheeled and towable) or equipment which is already accounted for in a designated accountable property system of record (APSR)."

b. RLFs are personal property. Relocatable facilities must be acquired as personal property. DoDI 4165.56, para 3.1.c. When properly classified as personal property, the relocatable facility is purchased as an equipment item with funds available for O&M, RDT&E, or Procurement Funds, as appropriate, and in accordance with the applicable thresholds.

c. Acquisition of buildings that do not qualify as relocatable buildings must be acquired as military construction. DoD FMR, Vol 3, Ch. 17, paras. 3.7.3, 3.7.4. Thus, O&M funding can be used unless the threshold for Unspecified Minor Military Construction is met. Note that the DoD FMR still primarily uses the term "relocatable buildings."

d. Practitioners should pay close attention to potential project splitting when calculating the cost of a relocatable facility since RLFs joined together can make project analysis tricky. Per para 3.2.a. of DoDI 4165.56, "For the purpose of determining the appropriate funding source, cost threshold, and approval level, multiple relocatable or modular units intended to be joined will be considered a single relocatable facility."

2. AR 420-1 Definition of "relocatable building". Despite the DoDI update in June of 2022, AR 420-1 still defines "relocatable building" as: "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 that use real property utilities will be considered relocatable." AR 420-1, Glossary (24 August 2012). *See* OPNAVINST 11010.33C, para. 4.f; DAFI 32-1020, Chap 8; DAFMAN 65-605 vol 1, 10.16.

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. *See* OPNAVINST 11010.33C, para. 4.e.

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. 2.1; AR 415-32, Glossary, sec. II; AR 420-1, para. 2-12d and 4-17; DAFI 32-1020, paras. 1.3.1 and 1.3.3., and Chap. 5; OPNAVINST 11010.20J, para. 4.3.a(1), para. 7, 1.

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; DAFI 32-1020, para 1.3.3, 2.4.6; OPNAVINST 11010.20J, para. 2.3.b.

a. An agency may not treat "clearly interrelated"[5] construction activities as separate projects. The Hon. Michael B. Donley, B-234326, 1991

[5] 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.*

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); 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 Military Construction Codification Act (MCCA) specifically prohibited:

(1) Splitting a project into increments to avoid:

(a) An approval threshold; or

(b) The Unspecified Minor Military Construction (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.[6]

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

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).

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

(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, para. 3.2.

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

b. Each UMMC project must result in a complete and usable facility.

c. Each UMMC project must, to the maximum extent possible, be consistent with the appropriate installation master plan.

d. Prior to establishing a UMMC project, DOD Components must identify the required end result of a minor construction project and its correlation with the installation master plan; and comply with the intent of 10 U.S.C. § 2805 (UMC).

e. Multi-Use Facilities. DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 2.7.

(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. 1-7.

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 authority to begin or complete a "specified" military construction project.

4. Air Force Guidance and Restrictions.

a. DAFI 32-1020, para. 2.7.3.2, states, a UMMC project shall not be accomplished concurrently with a MILCON project in the same facility. A UMMC project may precede a known MILCON project for a new mission requirement when the UMMC provides a complete and usable facility to meet a specific need. A UMMC project may follow a complete MILCON project when necessary, per the guidance [in Chapter 2 of the DAFI].

b. 12-month rule. DAFI 32-1020, para. 2.7.2. specifically prohibits work to modify a newly constructed facility, funded by any source, within 12 months after the placed in service date.

c. Additionally, paragraph 2.7.3.1 requires the Air Force to include all known UMMC work required for a facility within the next 12 months, for accomplishment as a single construction project. Exceptions to this rule may be made when:

(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 11010.20J, para. 2.2.a(1), For Minor Construction Projects funded with O&M three principle considerations when determining and approving the scope:

(1) Prohibition against incrementing or fragmenting the full scope for purposes of circumventing approval authority limitations

(2) Each project must result in the facility being able to perform its designated functional purpose (complete and usable);

(3) Project scope is consistent with the planning action.

b. OPNAVINST 11010.20J, para. 2.2b, When there is one existing Real Property Facility:

(1) All construction proposed for a real property facility in which the same functional purpose or related functional purposes are involved will be treated as one project;

(2) All concurrent construction proposed for contiguous areas of a multi-use facility must be treated as a single project even though the construction pertains to unrelated functional purposes:

(a) Contiguous means “in actual contact” or “touching”

(b) this is not applicable to repairs in spaces physically separated by walls, ceilings, or floors;

(3) All construction proposed for a multi-use facility that is common to the facility as a whole or common to areas in which the same or related functional purposes are performed, will be treated as a single project.

(4) Construction proposed for a multi-use facility may be divided into separate projects if each project can be clearly defined and the result is a complete and usable facility.

c. However, OPNAVINST 11010.20J, para. 2.2d, A complete and usable facility may require extensions, modifications or improvements to other supporting facilities such as exterior electrical, water, sewage distribution systems, parking and roads, fencing and other infrastructure improvements. Extensions, modifications or improvements to supporting facilities must be included in the project scope, to include central utility systems, if deemed necessary to provide a complete and usable facility.

d. OPNAVINST 11010.20J, para. 2.2c, For projects supporting a mission change or new mission requirement (such as MDAP), multiple facilities must be incorporated into a single project, unless it can be demonstrated that each facility meets:

(1) They satisfy unrelated/dissimilar purposes;

(2) They are not dependent on each other;

(3) 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 420-1, 2-5 (b) (6). This person sometimes holds the title of facilities engineer and

resides in the Directorate of Public Works (DPW). *See* OPNAVINST 11010.20J, para. 4.d; DAFI 32-1020, para. 1.2.4.

B. Construction? Repair? Maintenance?

1. Determine whether the work is defined as construction, repair, maintenance, or something else (like RLF/RLB's when they are classified as personal property).

2. Construction

a. Statutory Definition. 10 U.S.C. § 2801(a). Military construction includes any construction, development, conversion[7], 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. 1-7c; DAFI 32-1020, para. 1.3.1, 5.1 and Attachment 4; OPNAVINST 11010.20J, para. 4.3.a(1), para. 7, 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.

[7] Some conversions of real property may properly be classified as "repairs" when there is a "conversion of a real property facility, system, or component to a new functional purpose without increasing its external dimensions." 10 U.S.C. § 2811.

(c) A conversion is a change to the interior or exterior arrangements of a facility that permits its use for a new purpose.[8]

(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.[9]

(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. DA PAM 420-11, 3-1(a). See DAFI 32-1020, Attachment 1, Terms; OPNAVINST 11010.20J, para. 1.2.c(20)

(5) Related site preparation, excavation, filling, landscaping, or other land improvements.[10]

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[8] Some conversions of real property may properly be classified as "repairs" when there is a "conversion of a real property facility, system, or component to a new functional purpose without increasing its external dimensions." 10 U.S.C. § 2811.

[9] 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).

[10] This includes the foundation, site work, and utility work associated with the setup of a relocatable building. AR 420-1.

(6) MILCON projects sometimes include relocatable buildings (RLBs). See, DODI 4165.56, AR 420-1, para. 6-17; DAFI 32-1020 Ch. 8; and OPNAVINST 11010.33C, Appendix D (RLF/RLB Funding Flowchart). However, practitioners must first determine whether the structure is truly a RLF/RLB (personal property), or a real property facility.

(7) Relocatable Facility – DODI 4165.56 Definition. A facility that is specially designed and constructed to be readily erected, disassembled, transported, stored, and re-used. Examples of relocatable facilities include, but are not limited to, trailers, CONEX boxes, sheds on skids, tension fabric structures, and air supported domes. A relocatable facility is not constructed as a part of any other military vehicle, DoD tactical equipment (vehicle mounted or wheeled and towable) or equipment which is already accounted for in a designated APSR.

(8) Relocatable Building - Army Definition.

(a) An RLB is 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 RLBs. AR 420-1 Glossary.

(b) 20% Rule – The total cost 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. AR 420-1 Glossary.

(i) 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.

(ii) Standard time of use for a relocatable facility will not exceed 7 years.[11]

(c) If the costs do not exceed 20%, account for the buildings as personal property (use either O&M or Procurement funds, as appropriate).

(d) When properly classified as a personal property (unfunded construction costs, see section VII below), 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 does not include furnishings or other attachments." ASA(I&E) RLB memo, (13 May 2009).

(e) A legal review is required prior to the approval of relocatable building purchase or lease. AR 420-1, para. 6-14l(2).

(f) Disposition: Relocatable buildings accounted for as equipment, upon becoming excess to DoD Component requirements, must be redistributed or, if determined to be excess or unserviceable, disposed of in accordance with personal property procedures pursuant to DoDI 5000.64 and Volume 1 of DoD Manual 4160.21. The APO must be fully

[11] DOD 4165.56 para. 4.1. Standard time of use for a relocatable facility will not exceed 7 years. Maximum time of use for a relocatable facility with an extension will not exceed 14 years. For leased relocatable facilities, the time of use is limited by Chapter 26 of Volume 4 of DoD 7000.14R. The approving authority must be the same as identified in Paragraph 3.1.a. (general officer/flag officer or senior executive service equivalent located at a centralized headquarters organization).

integrated in the final disposition process. DoDI 4165.56 para. 5.2.

3. Maintenance and Repair.

a. Maintenance and repair projects are not construction for fiscal funding purposes. AR 420-1, Terms, sec. II; DAFI 32-1020, para. 1.3.1.2.2; OPNAVINST 11010.20J, para. 4.2.a. Therefore, maintenance and repair projects are not subject to the $4 million O&M limitation on construction.[12] 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").

a. Maintenance.

(1) AR 420-1, Terms, 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 functional purpose." It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See DA Pam 420-11, para. 1-7h.

(2) DAFI 32-1020, para. 3.2, defines maintenance as "the recurring, day-to-day, periodic, or scheduled work required to preserve real property facilities, systems, or components and prevent premature failure or deterioration, so they may be effectively used for their designated purposes. Maintenance does not change the function of a facility nor does it result in a capital improvement."

(3) OPNAVINST 11010.20J, para. 4.2.a(2), defines maintenance as "the day-to-day, periodic, or scheduled work required to sustain faciality to such a condition that it may be used for its designated purpose." The term

[12] See FY24 NDAA Sec. 2802 permanently increasing the threshold under which O&M funds may be used for unspecified minor military construction projects from $2 million to $4 million. 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).

"maintenance" includes work undertaken to prevent damage to a facility that would be more costly to repair (e.g., waterproofing and painting interior and exterior walls; seal-coating asphalt pavement; resealing joints in runway concrete pavement; dredging to previously established depths; and cleaning storage tanks).

b. Repair.

(1) Statutory Definition. 10 U.S.C. § 2811(e). A "repair project" is defined as a project

(a) to restore a real property facility, system, or component to such a condition that it may effectively be used for its designated functional purpose; or

(b) to convert a real property facility, system, or component to a new functional purpose without increasing its external dimensions.

(2) 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).

c. Army Definition. AR 420-1, Glossary, sec. II; DA Pam 420-11, para. 1-7b. Repair is:

(1) Restoration of a real property facility (RPF) to such condition that it may be used effectively for its designated functional purpose.[13]

(2) 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.

(a) The requirement for a component to first be in a "failed or failing" condition does not extend to projects qualifying as a repair under 10 U.S.C. § 2811(e)(2)(conversion without increasing external dimensions).

(3) A utility system or component may be considered "failing" if it is energy inefficient or technologically obsolete. See DA Pam 420-11, para. 1-7b(5) and para. 1-8p(3).

(4) 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, i.e., in a failed or failing condition;

(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.

d. Air Force Definition. DAFI 32-1020, para. 1.3.1.2.2, and Chap. 3. This DAFI uses the 10 U.S.C. § 2811 definition of "repair project."

[13] If a facility cannot be used for its designated functional purpose, it is likely in a "failed or failing" condition.

See DAFI 32-1020, Attachment 4, para. A4.2. for a non-exhaustive list of examples of "repair" work. However, "Repair does not normally increase the volume or footprint of a facility, although repair may result in greater usable floor space due to reconfiguration of the interior of a building. For example, work to increase the gross square footage of a building by adding floors to interior space within the existing building envelope may be classified as repair. Space allowances and optimization need to be primary considerations in reconfiguration work or work to increase interior square footage." *Id*. at para. 3.3.

e. Navy Definition. OPNAVINST 11010.20J, para. 4.2.a(1). The OPNAVINST uses the 10 U.S.C. § 2811 definition of "repair project."

(1) The term "repair" includes:

(a) adding, altering or replacing any systems or components within the external dimensions of an existing facility to meet applicable standards, codes and functional requirements;

(b) increasing the gross square footage of a building by adding floors to interior space within the existing building envelope where overhead clearance allows it. A project may also add exterior appurtenances (such as fire escapes, elevators and handicap ramps) where such work is required to meet applicable building codes and standards;

(c) increasing the durability and load bearing capacity of an existing facility used to support vehicular or aircraft traffic (such as road, runway, taxiway, aircraft parking apron or vehicle parking area) to include improving its wearing surface, but may not expand the wearing surface unless the additional surface is required only to meet applicable safety codes or standards;;

(d) Utility systems are often treated as one real property asset composed of many components; each component of the utility system or network, including a linear structure, is potentially eligible for repair by replacement, especially when required to make conversion of a space complete and usable

(i) A repair project may replace an existing linear structure (i.e., measured in lineal feet) such as an electrical or water distribution line, but may not increase its carrying capacity unless:

(a) The linear structure serves only as a service (branch) line between the distribution line and an existing building

(b) The linear structure is in an unserviceable or failing condition.

(e) Demolition of a facility or a portion of a facility because the extent of deterioration is such that it can no longer be economically maintained, or because the facility is a hazard to the health and safety of personnel is classified as repair. Demolition of an excess facility is always classified as repair. (When demolition is done to clear the footprint for a new facility, the demolition should be included as part of the scope of the construction project and paid for from the same fund source as the construction project fund source.) OPNAVINST 11010.20J, para. 4.2.b(3).

4. Concurrent Work. AR 420-1, para. 3-54g(2); DAFI 32-1020, para. 2.7.6., Attachment 1, Terms OPNAVINST 11010.20J, para. 2.2.b(4)

a. A military department or agency can normally do construction, maintenance, and repair projects simultaneously if 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.

To determine the appropriate funding source and approval authority for MILCON projects, practitioners must first determine which costs in a project will apply toward given funding and approval thresholds. To do this, all costs going toward a MILCON project are divided into "funded" and "unfunded" categories. Only "funded" project costs are used to determine the "project cost" for purposes such as approval authority (including any requirements to notify the appropriate congressional committees) and appropriate source of funds.

AR 420-1, Terms, sec. II; DAFI 32-1020, para. 2.10, Att. 5, para. A5.1; OPNAVINST 11010.20J, para. 1.2.c(7) & (12).

B. Funded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 1.1; DA PAM 420-11, para. 1-5b; AR 420-1, para. 2-17c; DAFI 32-1020, Att. 5; OPNAVINST 11010.20J, para. 1.2.c(7)[14].

1. "Funded costs" are "costs to be charged to appropriations available for military construction" (chargeable to the appropriation designated to pay for the project.)

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

   a. All materials, supplies, and services applicable to the project;[15]

   b. Installed capital equipment and installed building equipment;

   c. Transportation costs for materials, supplies, and unit equipment;[16]

[14] OPNAVINST refers to funded costs as "Direct Project Costs"

[15] AR 420-1, para. 2-17c, specifically includes government-owned materials, supplies, and services as funded costs. See AR 415-32, para. 2-5a(1) (including materials, supplies, and services furnished on a non-reimbursable basis by other military departments and defense agencies).

[16] 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

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;[17]

h. Operation and maintenance costs for government-owned equipment (e.g., fuel and repair parts); and

i. Demolition and site preparation costs.

j. Installing equipment in place in new facilities

C. Unfunded Costs.

DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 5.1; AR 420-1, 2-17f; DAFI 32-1020, Att, 5; OPNAVINST 11010.20J, para. 1.2.c(12).[18]

1. "Unfunded costs" are those costs that, although financed by appropriations or funds other than those available for a specific MILCON project, are to be capitalized as part of the real property investment.

2. Unfunded costs are costs that:

a. Contribute to the military construction project;

project is part of a larger activity, such as an annual training exercise). AR 415-32, para. 2-5a(9) and b(1).

[17] 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).

[18] OPNAVINST refers to unfunded costs at "Indirect Project Cost"

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.

3. Unfunded costs include, but are not necessarily limited to:[19]

a. Costs financed from military personnel (MILPER) appropriations,

b. Civilian prisoner labor;

c. Costs applicable to the depreciation of government-owned equipment used to build the project;[20]

d. Materials, supplies, and equipment obtained for the project on a non-reimbursable basis as excess distributions from another military department or federal agency.[21]

e. Licenses, permits, and other fees chargeable under:

(1) A State or local statute; or

(2) A status of forces agreement (SOFA);

f. Unfunded civilian fringe benefits;

[19] See also DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 5.1.

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

[21] Generally, DOD Reg 7000.14-R, Vol. 3, ch. 17, para. 3.2.5.2. 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 AR 420-1, para. 2-17 and Glossary.

g. Contract or in-house planning and design costs;[22]

h. Gifts from private parties;[23] and

i. Donated labor and material.[24]

4. 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. Normally, annual congressional acts provide appropriated funds (MILCON) for DOD's specified and unspecified military construction (UMC) programs.

2. Congress may enact measures that provide military construction funding outside the routine appropriations process.[25]

3. MILCON appropriations are generally available for a period of 5 years.

4. See, e.g., Consolidated Appropriations Act, 2024, Pub. L. No. 118-42, Division A, Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2024.

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[22] See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 3.2.5.1. (stating that planning and design costs are excluded from the cost determination for purposes of determining compliance with 10 U.S.C. § 2805). See OPNAVINST 11010.20J, para. 1.2.c(12) for planning and design costs.

[23] 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/.

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

[25] See e.g., Division B of H.R. 1370 (P.L. 115-96), the "Department of defense Missile Defeat and Defense Enhancements Appropriations Act, 2018" (known as the missile amendment, provided $200 million in military construction funds to carry out construction of a missile field in Alaska in response to provocative action by North Korea.

B. Department of Defense Appropriations Act.

See, e.g., Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, Division A, Department of Defense Appropriations Act, 2024.

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.

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 (see Military Construction Authorizations Act, 2024, Pub. L. No. 118-31, Division B). 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 the unspecified minor military construction (UMMC) threshold.[26]

(2) A military department may not carry out a military construction project expected to exceed the UMMC threshold 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

[26] Note though that congress does specify some projects under the threshold (formerly $6,000,000 and now permanently increased to $9,000,000 under the FY24 NDAA).

the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.[27]

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

2. Unspecified Minor Military Construction (UMMC) Projects.

a. Scope of Authorization. 10 U.S.C. § 2805(a). See AR 420-1, Appendix D; DAFI 32-1020, ch. 4; AFI 32-1023, para. 4.5; OPNAVINST 11010.20J, para. 2.4a, para. 4.3b(1). 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 $9 million or less.[28]

c. Proper Appropriation. Congress usually provides funding for UMMC projects in the Military Construction Appropriations Act or other Consolidated legislation.[29]

d. 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 projects.

e. The Army refers to its "unspecified" military construction appropriations as "Unspecified Minor Military Construction, Army" (UMMCA). AR 420-1, Appendix D.[30]

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[27] The statutory provisions governing military family housing are at 10 U.S.C. §§ 2821-2837.

[28] 10 U.S.C. § 2805.

[29] See, e.g. Consolidated Appropriations Act, 2024, Division A – Military Construction, Veterans Affairs, and Related Agency Appropriations Act, 2024.

[30] 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

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

(1) Before beginning a UMMC project with an approved cost greater than $750,000, the Secretary concerned (or delegated official) must approve the project.

(2) In addition, when the project costs more than $4,000,000, the Secretary concerned must:

(a) Notify the appropriate committees of Congress;[31] and

(b) Wait 14 days.

(3) UMMC funds are typically available for five (5) years. DOD Reg. 7000.14-R. Vol. 3, ch. 17, 170204.

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

a. Statutory Exception for UMMC Projects. 10 U.S.C. § 2805(c). The Secretary of a military department or his designee may use O&M funds to execute UMMC projects not otherwise authorized by law and costing not more than $4 million.[32]

a. Most installations use O&M funds to finance routine operations; however, 41 U.S.C. § 6303 prohibits a federal agency from entering 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.

b. Within the Army, approval authority for O&M-funded minor military construction projects under $4,000,000 has been delegated to

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with either UMMC or O&M funds. OPNAVISNT refers to UMC as MILCON funded UMC or Unspecified Minor MILCON.

[31] 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 also DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 2.4 (detailing the requirements for reprogramming requests).

[32] The 2024 National Defense Authorization Act permanently raised the threshold to use O&M funding for unspecified minor construction to $4 million in funded costs.

Commander, IMCOM, who may re-delegate this authority.[33] See Section IX – Identifying the Proper Approval Authority below for further discussion on the current delegations of authority. Also see Appendix C – Real Property Project Approval Authorities Chart.[34]

c. Special Requirements for Exercise-Related UMMC Projects. AR 415-32, para. 3-10. For procedural guidance for executing ERC, see Joint Chiefs of Staff, INSTR. 4600.02C, Exercise-Related Construction Program Management (4 October 2022).

4. Combat and Contingency Related O&M Funded Construction.

a. O&M funded contingency construction started with section 2808 of the FY 2004 NDAA and has been extended and modified by each NDAA since 2004 (see e.g. Sec. 2802, 2806, and 2809 of prior NDAAs). In the 2023 NDAA, Section 2809 made this authority permanent in 10 U.S.C. 2804

b. Other Contingency Construction Authority.

(1) 10 U.S.C. § 2804 (Contingency Construction). See DOD Dir. 4270.05 (Military Construction); AR 420-1, para. 4-9; DAFI 32-1020, para. 7.1; OPNAVINST 11010.20J, para. 4.3b(4); see also DOD Reg. 7000.14-R, vol. 3, ch(s). 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 contingency construction projects not otherwise authorized by law.[35]

[33] See AR 420-1, para. 2-14a.

[34] OPNAVINST 11010.20J, Appendix B for Authority Levels ad Funding Appropriations

[35] 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. 4270.05, para. 5.3.

(b) Proper Appropriation. Funds are specifically appropriated for contingency construction authorized under 10 U.S.C. § 2804.[36]

(c) Requirements for Use.

(i) Before using 10 U.S.C § 2804, 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;[37] and

(ii) Wait 21 days.[38]

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[36] 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 of 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).

[37] 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. 3.3.1.3. (detailing the requirements for reprogramming requests). But see DOD Dir. 4270.05, para. 4.2 (stating that reprogramming is not necessary for these projects).

[38] DOD Reg. 7000.14-R, para. 170102.F.1, indicates that the Secretary concerned may not obligate any funds for the project until the end of the 21-day waiting period.

(e) Limitations.

(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. 4270.05, 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.

(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 (Emergency Construction).

5. INDO-PACIFIC Posture UMMC Projects.

   a. FY 2025 NDAA Section 2807 modifies Sec. 2810 of the FY2024 NDAA providing special authority for the INDOPACOM Commander to carry out unspecified minor military construction projects. This includes construction, renovation, repair, and even land acquisition. For these projects, the Commander legally acts as the "Secretary concerned."

   b. Projects must serve one of three purposes: supporting rotational deployments, enhancing installation resilience, or prepositioning equipment and supplies.

   c. Only at designated military installations within the INDOPACOM area of responsibility.

   d. Financials:

      (1) Project Cost Cap: Each project must be less than $30,000,000, increased from $15,000 in FY24 NDAA.

      (2) Funding Sources: May be funded by a specific INDOPACOM MILCON fund or from Operation and Maintenance (O&M) appropriations within certain limits.

   e. Congressional Notice: Written notification to Congress is required for any project exceeding $2,000,000.

   f. Waiting Period: A 14-day hold is required after congressional notification before the project can begin.

   g. Expiration Date: This entire authority terminates on March 31, 2029.

   h. Significant expansion in FY25 NDAA. Beyond the $30,000 cost cap, other significant modifications were made:

      (1) Expanded Land Acquisition Authority: The rules for acquiring land have been broadened in two key ways:

         (a) Land acquisition can now be a "stand-alone" action and is not required to be part of a minor construction project. This authority can be used to acquire interests in land to establish a defense site

where the Secretary of Defense or a military department will have operational control, regardless of how long that control lasts

(b) A new authorized purpose has been added: projects can now be undertaken specifically to acquire land or operational control over an area needed to support other projects under this authority or to support future military construction projects.

(2) Broader Project Location: Projects are no longer limited to existing military installations. They can now be carried out at a military installation or a "planned military installation".

(3) Flexible O&M Funding Limit: When using Operation and Maintenance (O&M) funds, the funding limit can now be adjusted upward to reflect a local construction cost index, if one is available for the project's location. However, this adjusted amount cannot exceed the new overall project limit of $30,000,000.

6. Emergency Construction Projects. 10 U.S.C. § 2803. See DOD Dir. 4270.05; AR 420-1, para. 4-55; DAFI 32-1020, para. 1.3.1.2.3; OPNAVINST 11010.20J, para. 7.3c; see also DOD Reg. 7000.14-R, vol. 3, ch(s). 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.[39]

(1) Congress must normally approve a reprogramming request for the project.[40]

[39] 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. 3.3.2.2. (detailing the requirements for reprogramming requests).

[40] The Secretary concerned must submit a reprogramming request to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.05, para. 3.2. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 3.3.2.2. (detailing the requirements for reprogramming requests); see also DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 3.3.2.4. (requiring prior congressional notification and approval for

(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 (10 U.S.C. § 2803(c)(1)).

c. Requirements for Use.

(4) Before using this authority, the Secretary concerned must determine that:

(a) The project is vital to:

(i) National security; or

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

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

(i) National security; or

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

(5) In addition, the Secretary concerned must:

(a) Notify the appropriate committees of Congress;[41] and

(b) Wait 21 days.

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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).

[41] The Secretary concerned must notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; (2) the justification for carrying out the project under this section; and (3) the source of funds for the project. 10 U.S.C. § 2803(b).

d. Limitations.

(6) 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.[42]

(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 also AR 420-1, para. 4-55c.

(7) Army Limitations. The Army should execute emergency construction projects under its UMMC program, if possible. AR 420-1, para. 4-55e.

7. Reserve Component Construction Authorities.

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

(1) Includes authority to acquire, lease, or transfer, and construct, expand, rehabilitate, or convert and equip such facilities as necessary to meet the missions of the reserve components.

(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

[42] 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).

create a state enclave within a federal installation. 10 U.S.C. § 18233(b).

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

8. Projects Resulting from a Declaration of War or National Emergency. 10 U.S.C. § 2808. See DOD Dir. 4270.05; AR 420-1, para. 4-57; DAFI 32-1020, para. 1.3.1.2.5; OPNAVINST 11010.20J, para. 7.3e; see also DOD Reg. 7000.14-R, vol. 3, ch(s). 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.[43]

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;[44] 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).[45]

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[43] 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. 4270.05, para. 5.3. See DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 3.3.1.3.

[44] 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).

[45] 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

e. In February 2019, President Donald Trump also used this authority to divert unobligated MILCON funds toward the construction of a border wall along the U.S.-Mexican border. See Proclamation 9844 of February 15, 2019 (declaring a National Emergency Concerning the Southern Border of the United States), and continued on February 13, 2020 (85 Fed. Reg. 8715). President Joe Biden terminated those emergency authorities, and paused work on the border wall on 20 January 2021. On January 20, 2025, President Trump once again declared a "National Emergency at the Southern Border of the United States," invoking 10 U.S.C. § 2808 to reallocate MILCON funds not yet obligated.

9. Environmental Response Actions. 10 U.S.C. § 2707. See DOD Reg. 7000.14-R, vol. 3, ch(s). 7 and 17.

a. Scope of Authority. The SECDEF may use this authority—or permit the Secretary of a military department to use this authority—to carry out military construction projects for environmental response actions.

b. Proper Appropriation. The SECDEF must use funds specifically appropriated for environmental restoration to finance these projects.[46]

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:

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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."

[46] 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. 4270.05, para. 4.2 (stating that reprogramming is not necessary for these projects). But see DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 3.5.3. (detailing the requirements for reprogramming requests).

(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;[47] and

(b) Wait 21 days.[48]

10. The Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854. See DOD Dir. 4270.05; AR 420-1, para. 4-56; DAFI 32-1020, para. 1.3.1.2.6, and 7.2; OPNAVINST 11010.20J, para. 7.3b; see also DOD Reg. 7000.14-R, vol. 3, ch(s). 7 and 17.

a. Scope of Authority. The Secretary of a military department may use this authority to repair, restore, or replace a facility that has been damaged or destroyed.[49]

b. Proper Appropriation.

(1) O&M Funds. See H.R. Rep. No. 97-612 (1982); see also AR 420-1, para. 4-56c; DAFI 32-1020, para. 7.2.2.

(a) The Secretary concerned may use O&M funds under 10 U.S.C. § 2805(c) if the cost of the project is $4 million or less.

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[47] 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).

[48] DOD Reg. 7000.14-R, vol. 3., ch. 17, para. 3.5.5., indicates that Secretary concerned may not obligate any funds for the project until the end of the7-day waiting period.

[49] 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.

(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.[50] 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.[51]

(i) Congress must normally approve a reprogramming request for the project.[52]

(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.

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

[51] 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).

[52] The Secretary concerned must submit reprogramming requests to the Under Secretary of Defense (Comptroller). DOD Dir. 4270.05, para. 3.2; AR 420-1, para. 4-56d. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 3.2.2.5. (requiring prior congressional notification and approval for reprogramming action).

(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;[53] and

(ii) Wait 14 days.

(d) Limitations.

(i) Army Limitations. AR 420-1, para. 4-56c(2) restricts the use of this authority for family housing projects.

(ii) Air Force Limitations. DAFI 32-1020, para. 7.2.3. provides additional criteria for repairing damaged Air Force facilities.

(iii) Navy Limitations. SECNAV may repair, restore, or replace facilities that have been damaged or destroyed, not by neglect. However, any replacement facility would use current design and material criteria and may be increased in size to meet current mission and functional requirements. OPNAVINST 11010.20J, para. 7.3b.

D. Statutory Thresholds.

1. If the approved cost of the project is $4 Million or less, use O&M funds. 10 U.S.C. § 2805(c) & AR 420-1 para. 4-9 b.(9)(c) 1.[54]

[53] 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. 3.5.3. (detailing the requirements for reprogramming requests).

[54] Section 2802 of the FY24 NDAA permanently increased the threshold to $4,000,000 under which O&M may be used for military construction projects.

2. If the approved cost of the project is between $4 Million and $9 Million, 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)(2)[55]

3. If the approved cost of the project is greater than $9 million, use "specified" MILCON funds unless you have authority to use operation and maintenance funds pursuant to statutory authority listed above.[56]

E. Exceeding a Statutory Threshold.

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.[57]

3. If the project still exceeds the statutory threshold, the department or agency must correct the Purpose violation by deobligating the improper funds and obligating the proper funds.

4. The department or agency should consider Anti-deficiency Act (ADA) reporting requirements as well as avoid potential ADA violations by obtaining proper funds.[58] Reporting potential ADA violation may be required.

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[55] Section 2802 of FY24 NDAA permanently increased this range to between $4,000,000 and $9,000,000. UMMC funds are authorized in the NDAA as "unspecified military construction" but are funded from one of various MILCON appropriations.

[56] Section 2802 of FY24 NDAA permanently increased this limit to $9,000,000.

[57] 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).

[58] Obtaining the proper funds (i.e., funds that meet the 3-part test) does not obviate the commander's obligation to investigate and report the alleged Antideficiency Act violation. See 31 U.S.C. §§ 1351, 1517; OMB Cir. A-34, para. 32.1, DOD Reg. 7000.14-R, vol. 14, ch(s). 4-7; Memorandum, Principal Deputy Assistant Secretary of the Army (Financial Management and

F. Authorized Variations.[59] 10 U.S.C. § 2853; AR 420-1, paras. 4-50 and 4-51; DAFI 32-1020, para. 3.5.4; OPNAVINST 11010.20J, para. 7.6b(2).

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 $4 million cap is absolute.[60]

c. For MILCON funded projects, The Secretary of a military department may increase or decrease the cost of a "specified" military construction project by the lesser of:

(1) 25% from the amount specified for that project, construction, improvement, or acquisition in the justification data provided to Congress as part of the request for authorization of the project, construction, improvement, or acquisition.

(2) 200% of the UMMC ceiling.

(3) Note that certain costs, such as contractor claims and certain environmental remediation costs, do not count. (10 U.S.C. § 2853(c))

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

Comptroller), subject: Supplemental Guidance to AR 37-1 for Reporting and Processing Reports of Potential Violations of Antideficiency Act Violations [sic] (Aug. 17, 1995).

[59] These authorized variations apply only to "specified" military construction projects. 10 U.S.C. § 2853. They do not generally apply to UMMC projects. However, 10 U.S.C. § 2805(a)(1) permits the Secretaries of the military departments to carry out UMMC projects "within an amount equal to 125 percent of the amount authorized by law for such purpose." In addition, 10 U.S.C. § 2863 permits the SECDEF and the Secretaries of the military departments to use unobligated funds appropriated to the department and available for military construction or family housing construction to pay meritorious contractor claims arising under military construction contracts or family housing contracts "[n]otwithstanding any other provision of law." 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.

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

(5) 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 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 U.S.C. § 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 U.S.C. § 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 U.S.C. § 2853(c)).

IX. IDENTIFYING THE PROPER APPROVAL AUTHORITY.

A. Approval of Construction Projects.

1. Army. 2018 NDAA; AR 420-1, app. D.

a. Commander, IMCOM may approve a minor construction projects using Operations and Maintenance funds with total funded costs of $4 million or less. As of July 2022, much of this authority has been delegated to IMCOM Garrison Commanders and Garrison Managers

and their respective Directors of Public Works.[61] It is important to understand the various approval thresholds based on the particular installation. See Appendix C – Real Property Project Approval Thresholds, for a depiction of the 15 July 2022 approval threshold levels for Construction, Maintenance, and Repair projects.

b. The Deputy Assistant Secretary of the Army for Installation and Housing (DASA (IH&P)) approves UMMC projects costing between $4 million and $9 million.[62] AR 420-1, app. D.

2. Air Force. DAFI 32-1020.[63]

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).[64]

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

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[61] On 4 April 2018, pursuant to the FY18 NDAA, the Secretary of the Army was the approval authority for all minor construction projects that exceed $750,000. However, these approval authorities have been delegated further. The US. Army Materiel Command (AMC) re-delegated to the Commander, IMCOM, the authority which the Deputy Assistant Secretary of the Army for Installations, Housing and Partnerships (DASA IHP) delegated to the Land Holding Commands to approve and re-delegate in writing, using funds available for O&M within their respective Commander's subordinate installations. *See* 16 FEB 2021 AMC Memorandum for Commander IMCOM, SUBJECT: No. 2020-28 Delegation of Authority for Use of Funds Available for Operation and Maintenance on Real Property, Maintenance, Repair, and Minor Construction Projects. Then, on 15 July 2022, the Commander, IMCOM, re-delegated this authority to IMCOM Garrison Commanders and Garrison Managers with encouragement to re-delegate some or all of these authorities to their Director of Public Works. *See* 15 JUL 22 IMCOM Memorandum for IMCOM Directorates, et. al., SUBJECT: Delegation of Authority for Maintenance, Repair, and Minor Construction Projects Using Funds Available for Operations and Maintenance. On 19 March 2024, Commander, IMCOM executed another delegation memo revising the previous delegation memo pursuant to the FY24 NDAA increasing to delegation to IMCOM Garrison Commanders and Garrison Managers of available O&M appropriations up to $4 million. *See* 19 MAR 24 IMCOM Memorandum for IMCOM Directorates, et. al., SUBJECT: Update to the Delegation of Authority for the Use of Available Operations Maintenance (O&M) Funds for Unspecified Minor Construction (UMC) Projects.

[62] There is a discrepancy between the increased UMMC amount of $9 million in effect after the 2024 NDAA, and the amount that is authorized by AR 420-1.

[63] This regulation predates the legislation that increased the statutory threshold for O&M projects to $2 million and now legislation that increased the threshold to $4 million.

[64] The AF/ILE may further delegate this authority. AFI 32-1032.

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. Much of this authority has been delegated to the Commander, IMCOM and re-delegated to Garrison Commanders and Garrison Managers. It is important to understand the various approval thresholds based on the particular installation.

2. Air Force. DAFI 32-1020.

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 11010.20J, app. B.

a. The C.O. approves construction or repair utilizing O&M up to $1.5 million.

b. Commander, Naval Installations Command, approval is required for all minor construction projects and combination projects over $1.5 million.

c. For construction projects $2 million to $6 million funded by O&M or UMC must be submitted via Commander, Naval Installations Command, Director, Installations for Assistant Secretary of the Navy

(Energy, Installations, & Environment) approval and notice to Congress.

d. Commander, Naval Installations Command, approval is required for all repair projects over $1.5 million.

e. The DASN (I&F) approves general repair projects costing $7.5 million or more.

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.

1. It is important to take a systematic approach in reviewing a construction funding issue. The framework for such a review is located at Appendix A herein. This checklist does not address every issue but identifies the major steps in the process for construction funding fiscal review.

2. With regard to construction-related legal opinions, 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.

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. Down scoping is permissible, provided it results in a complete and usable facility.
    d. Consider whether the facilities are 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: Restoration of a "failed or failing" facility to its designated purpose. Conversion can be repair if the footprint is not extended. "Failed or failing" is not required for a conversion.

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).

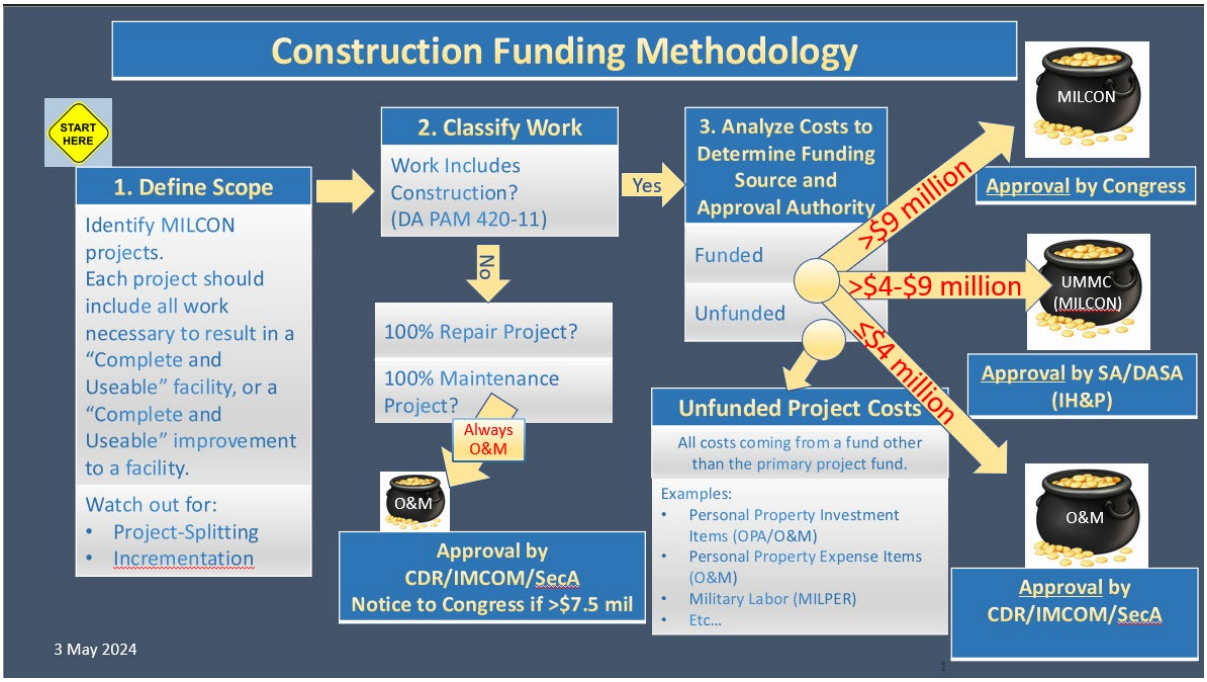
4. Select the Proper Appropriation (Construction Projects)

    a. Less than $4 Million, O&M Funds
    b. $4 Million - $9 Million UMMC Funds
    c. Over $9 Million, Specified MILCON Funds (Congress).

5. Identify the Proper Approval Authority (Construction Projects)

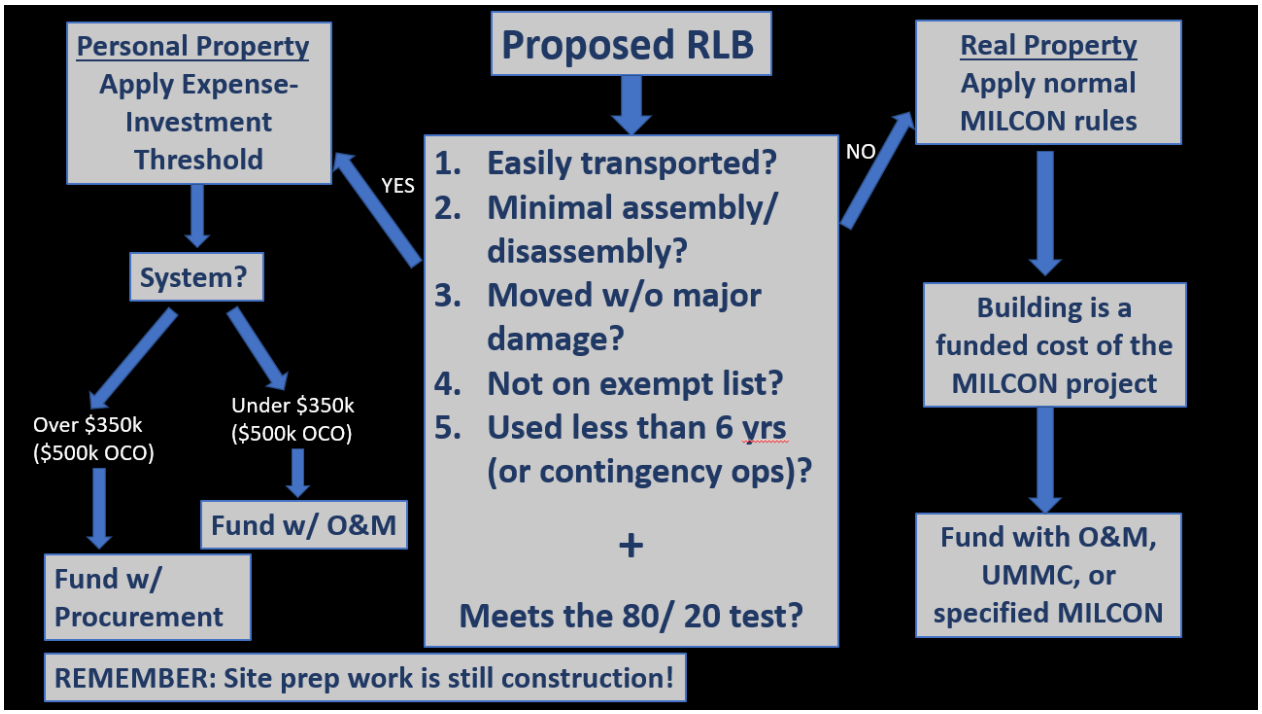
    a. Less than $4 Million, ARMY Garrison Commander (if delegated)/IMCOM.
    b. $4 Million - $9 Million, DASA (IHP).
    c. Over $9 Million, Congress.

APPENDIX B – CONSTRUCTION FUNDING FLOW CHART



APPENDIX C – RELOCATABLE FACILITY/BUILDING FLOW CHART

*See supra Section III. J.



CHAPTER 9

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CHAPTER 9

CONTINUING RESOLUTION AUTHORITY (CRA) & FUNDING GAPS

I. REFERENCES

A. Office of Management and Budget Circular A-11, Preparation, submission, and Execution of the Budget, Section 123, Apportionments Under Continuing Resolutions, and Section 124, Agency Operations in the Absence of Appropriations (2023) [OMB Cir. A-11] (*available at* https://www.whitehouse.gov/omb/information-for-agencies/circulars/).

B. Office of Management and Budget, Agency Contingency Plans (includes a frequently asked questions info sheet), *available at* https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/.

C. Department of Defense Guidance for Continuation of Operations During a Lapse in Appropriations (Sept. 2023), *available at* (https://media.defense.gov/2023/Sep/29/2003311351/-1/-1/0/DEPUTY-SECRETARY-OF-DEFENSE-MEMO-POTENTIAL-FOR-LAPSE-IN-FUNDING.PDF).

D. 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/appropriations-law-decisions/red-book).

E. DOD 7000.14-R, Department of Defense Financial Management Regulation (FMR) (*available at* http://comptroller.defense.gov/fmr.aspx).

F. Appropriations Status Table (Regular Appropriations, Continuing Resolutions, Supplemental Appropriations, and Budget Resolutions), *available at* https://crsreports.congress.gov/AppropriationsStatusTable.

G. Congressional Research Service (CRS) reports and primers, *available at* https://crsreports.congress.gov/.

II. DEFINITIONS

A. Continuing Resolution ("CR," may also be referred to as a *continuing appropriation resolution* or *continuing appropriation act*, once passed).

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, (page 12 of Section 20).

2. A 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. Each CR will have its own unique fixed term. A CR can be enacted with a period of availability extending for a full fiscal year, only up to a specified date, or until regular appropriations are enacted. GAO, A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Washington DC, September 2005) 35-36.

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.k.a., "lapse in appropriations"). A funding gap refers to a period of time between the expiration or exhaustion of an appropriation and the enactment of a new one, i.e., a period when no appropriations act or continuing resolution exists. GAO Redbook, ch. 6, page 6-146.

C. Joint Resolution. A joint resolution, with the exception of proposed amendments to the Constitution, becomes 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.

1. "A legislative measure frequently employed for such matters as constitutional amendments, continuing appropriations, establishing

permanent joint committees, and corrections of errors in existing law, and the vehicle most often used for congressional approval and disapproval, though it can be used for any legislative matter. Becomes law when approved by both Chambers and signed by the president, except for a proposed constitutional amendment, which requires a two-thirds affirmative vote in each Chamber and ratification by three-quarters of the states." *See* https://www.senate.gov/about/glossary.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). If the appropriation did not allow the agency to perform the activity in the previous year, doing so in the current fiscal year is a new start. For an example of "new start" restrictions under a CR, see, e.g., section 102 of the Continuing Appropriations Act, 2024 (division C, P.L. 118-15).

III. 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 1 October, 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 1 October. *See* Congressional Research Service, Continuing Resolutions: Overview of Components and Practices, R46595 (November 5, 2020).

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. Congressional Research Service, The Executive Budget Process: An Overview, R42633 (July 27, 2012). 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 below[1]:

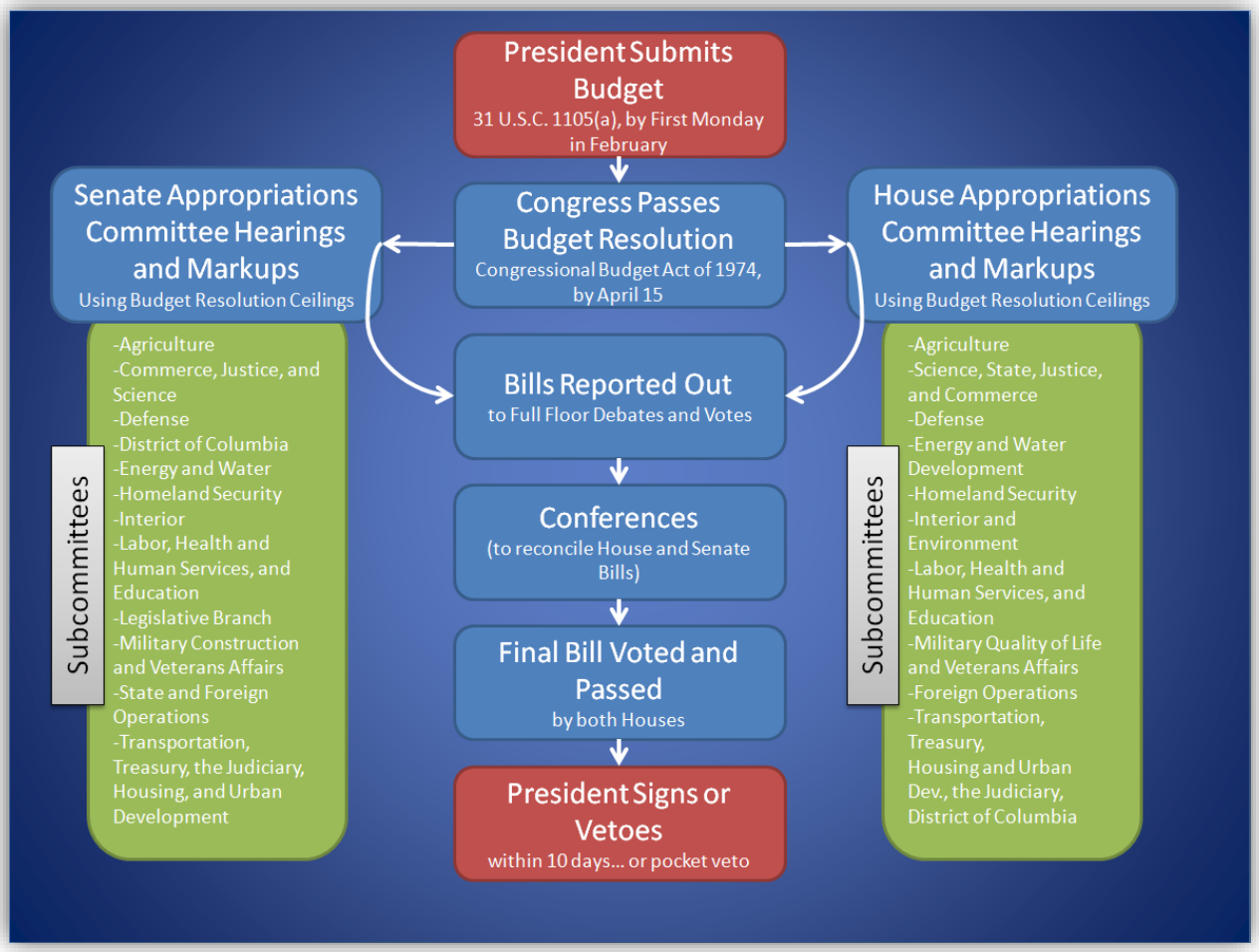
[1] Congressional Research Service, Introduction to the Federal Budget Process, R46240 (January 10, 2023), Table 1 at p. 13.

Table 1. Congressional Budget Process Timetable

On or before:	Action to be Completed
First Monday in February	President submits his budget.
February 15	Congressional Budget Office submits report [on the economic and budget outlook] to Budget Committees.
Not later than 6 weeks after President submits budget	Committees submit views and estimates to Budget Committees.
April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriations bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriations bills.
October 1	Fiscal year begins.

Source: Section 300, Congressional Budget Act, 2 U.S.C. §631.

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. 93-344) (2 U.S.C. §§ 601 - 688) requires Congress to adopt a Budget Resolution setting spending limits for each appropriations sub-committee. 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 12 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. In some years, these and other agencies' appropriations are passed in a single bill titled as the Consolidated 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.

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 budgetary authority attached to it. It only provides authority to spend funds. It essentially gives us additional purposes for which we can spend money, as well as limitations on how or why we can spend appropriated funds. *See* Congressional Research Service, The Congressional Appropriations Process: An Introduction, R42388 (November 30, 2016); Congressional Research Service, Authorizations and the Appropriations Process, R46497 (August 27, 2020).

IV. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS

A. Continued Operations – History of 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 Circular A-11, Sec. 124.1. This 1995 memo is often referred to as the "Dellinger Memo" (*see* discussion below).

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 Civiletti Memo. 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). (Appendix A).

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 under specific statutory authority. *See, e.g.*, 41 U.S.C. § 6301 (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 winding down 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. In September 2023, anticipating an impending funding gap, the 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).

a. Activities that can 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) Negotiation, preparation, execution, and administration of new/existing contracts for permissible activities/functions;

(7) Litigation activities associated with imminent legal action, only so long as courts and administrative boards remain in session;

[2] Excepted activities 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 excepted functions (i.e., food supply and service inspections).

(8) Legal support for any permitted activities;

(9) MWR activities to the extent operated by NAF personnel; and

(10) Some childcare activities, including Department of Defense Dependents Schools.

b. Activities required to be suspended during the funding gap:

(1) Military Personnel Selection Boards and Administrative Boards;

(2) Routine medical procedures (including vaccinations) in DOD medical facilities for non-active duty personnel, and;

(3) PCS moves and TDY travel for active duty, reserve, and civilian personnel unless engaged in an excepted activity using current FY funding.

V. 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 (CR). 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 appropriate budget authority at 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 usually 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) 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.

(2) For example, the Continuing Appropriations Act, 2021 (the first of five) provided:[3]

"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 2021, and for other purposes, namely:

SEC. 101. (a) Such amounts as may be necessary, at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2020 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 2020, and for which appropriations, funds, or other authority were made available in the following appropriations Acts: . . ."

c. In January of FY2021, the Department of Defense received a full appropriation and was no longer subject to a Continuing Resolution or a funding gap. *See* Public Law 116-260. Not long before that, in FY2018, much of the Executive Branch endured the longest funding gap in U.S. history (34 days).

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."[4]

[3] Pub. L. 116-159, 134 Stat. 712 (Oct. 1, 2020) provided continuing appropriations through December 11, 2020. There were a total of five CRs in December 2020. This examples and those that follow cite to specific text from the CR in FY 2021. The provisions cited in Section V from this particular CR are reflective of what the enacted CR text from those sections looks like in previous and subsequent CRs. In other words, much of the baseline language in the CRs changes little from year to year.

[4] *Id*.

2. New Starts. Unless stated expressly, 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 common legal 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 Continuing Appropriations Act, 2021 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 2020 or prior years; (2) the increase in production rates above those sustained with fiscal year 2020 funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization . . . for which appropriations, funds, or other authority were not available during fiscal year 2020."[5]

   b. Under the definition in the Continuing Appropriations Act, 2021, 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.

      (1) Said another way, if the agency *could have* done it under the last full appropriation (regardless of whether they were actually doing it or not), the agency can do it during the CR.

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

[5] *Id*.

(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. Note: The construction thresholds discussed in Chapter 8 still apply.

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 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." Continuing Appropriations Act, 2021.

C. Availability of Appropriations as to Time under a Continuing Resolution.

1. Generally, a continuing resolution provides budget authority:

a. Until a fixed cut-off date specified in the continuing resolution;

b. Until an annual appropriations act is signed into law; or

c. Until another continuing resolution is signed into law.

2. The Continuing Appropriations Act, 2021 provided:

"SEC. 106. Unless otherwise provided for in this Act or in the applicable appropriations Act for fiscal year 2021, 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 2021 without any provision for such project or activity; or

(3) December 11, 2020."

3. In applying the Bone Fide Needs (BFN) rule during a CR, keep in mind that each CR has its own period of availability. However, see B-336934 where GAO indicated the bona fide need of a CRs' appropriation lasts the duration of the Fiscal Year and not just the CR.

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 Continuing Appropriations Act, 2021 provided funding "at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2020." Pub. L. 116-159 (2020).

   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. Although a CR's "total rate" generally equals the entire amount appropriated in the prior regular appropriation, the OMB is still required to apportion the funds appropriated by Continuing Resolutions. 31 U.S.C. § 1512.

      (1) OMB provides apportionment guidance in the form of a Bulletin. For FY24 OMB Bulletin 23-02 (Sept. 30, 2023)

gave agencies specific guidance for implementation of the 2024 continuing resolutions.6

(2) Some funds are apportioned automatically. OMB specified for the 2024 continuing resolutions amounts would be automatically apportioned by multiplying the annualized amount provided by the continuing resolution by the percentage of the year (pro-rata) covered by the CR. .

(a) 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.

(b) 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. Pattern of Obligations. The general purpose of a CR is to maintain the *status quo* in government funding and operations. *See, e.g.,* B-324481, Mar. 21, 2013. Agencies have some discretion in determining their pattern of obligations under a CR, but "where an agency usually obligates funds uniformly over the entire year, it is limited to that pattern under the [CR], unless it presents convincing reasons why its pattern must be changed in the current fiscal year." *See* B-255529, Jan. 10, 1994; B-152554, Feb. 17, 1972. In evaluating a pattern of obligations under a CR, the GAO looks to the agency's normal practice. *See, e.g.,* B-255529, Jan.

6 See, Bulletin 23-03 at: https://www.whitehouse.gov/wp-content/uploads/2023/09/FY-2024-OMB-CR-Bulletin-23-02.pdf.

10, 1994 (evaluating whether an early obligation of funds deviated from the "normal pattern of obligations"). *See also* B-331094, Sept. 5, 2019 (where the U.S.D.A. accelerated its payment of monthly SNAP benefits in anticipation of a funding gap, thereby unlawfully altering its pattern of obligations).

4. 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. Statutory Rate Reductions. 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*." FY1996 Continuing Resolution, H.J. Res. 108-4 (emphasis added).

For Fiscal Year 2018, Section 101(b). "The rate of operations provided by subsection (a) is hereby reduced by 0.6791 percent."

c. Reductions to Amount Appropriated. During the life of the 2014 Continuing Resolution, the rate for operations was calculated to

[7] GAO Redbook, Vol. II, ch. 8, Continuing Resolutions at p. 8-16 (2006).

[8] *See e.g.*, Continuing Appropriations Act, 2023, Pub. L. 117-180 (Sept. 30, 2022).

reflect reductions to the FY2013 appropriations made by the Presidential Sequester and the Consolidated and Further Continuing Appropriations. *See* FY2014 Continuing Resolution, Pub. L. 113-46.

E. Relationship of a Continuing Resolution to Other Legislation.

1. A continuing resolution appropriates funds that are "not otherwise appropriated." 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).

VI. 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 supporting an excepted activity 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 OMB, DOD, and 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 of employee of the United States to:

> involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.[9] On it's face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.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

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[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).

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

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[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, э 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).

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.

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[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).

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.

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.

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

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

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 *1981Opinion* 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."

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.[5] This section does not by itself authorize paying employees in emergency situations, but it does authorize entering into obligations to pay for such labor.

The central interpretive task under 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.[6] 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.

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, *see1993 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 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 the near at hand and demanding of immediate response.

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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.

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 *1981Opinion* 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 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").

CHAPTER 10

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CHAPTER 10

OPERATIONAL FUNDING

I. INTRODUCTION AND ANALYTICAL FRAMEWORK

A. Key Terms

1. The Office of the Chairman of the Joint Chiefs of Staff, *DoD Dictionary of Military and Associated Terms* (April 2024), defines the following:

a. Operation: A sequence of tactical actions with a common purpose or unifying theme (see Joint Publication (JP) 1); a military action or the carrying out of a military mission (*see* JP 3-0).

b. Task: A clearly defined action or activity specifically assigned to an individual or organization, or derived during mission analysis, that must be accomplished (*see* JP 1).

c. Mission: The essential task or tasks, together with the purpose, that clearly indicates the action to be taken and the reason for the action (*see* JP 3-0).

d. Foreign Assistance: Support for foreign nations that can be provided through development assistance, humanitarian assistance, and security assistance (*see* JP 3-0).

e. Security Assistance: A group of programs authorized by federal statutes by which the United States provides defense articles, military training, and other defense-related services by grant, lease, loan, credit, or cash sales in furtherance of national policies and objectives, and those that are funded and authorized through the Department of State to be administered by Department of Defense/Defense Security Cooperation Agency, which are considered part of security cooperation. (*see* JP 3-20)

f. Security Cooperation: Department of Defense interactions with foreign security establishments to build relationships that promote specific United States security interests, develop allied and partner military and security capabilities for self-defense and multinational operations, and provide

United States forces with peacetime and contingency access to allies and partners (*see* JP 3-20).[1]

g. Security Force Assistance: The Department of Defense activities that support the development of the capability and capacity of foreign security forces and their supporting institutions. (*see* JP 3-20)

2. Joint Publication 3-0, *Joint Campaigns and Operations* (18 June 2022), identifies the continuum of military campaign operations activities to include, but not be limited to, large-scale combat operations, limited contingency operations, countering violent extremist organizations, space operations, cyberspace operations, operations in information environment, security cooperation, foreign humanitarian assistance, freedom of navigation, and defense support of civil authorities (*see* JP 3-0, Figure I-1).

3. The DoD Dictionary of Military and Associated Terms defines "combined," as in combined operations, as between two or more forces or agencies of two or more allies.

B. Operational Funding Equation

In order for the DoD to fund any operation, mission, or task, i.e., operational activities, a command must have (1) mission authority, (2) funding authority, and (3) proper funds.

****

Mission Authority + Funding Authority + Proper Funds

= Executable Mission

****

C. Mission Authority (also known as Operational Authority)

The Unified Command Plan and 10 U.S.C. § 164 require a chain of approval that synchronizes the armed forces toward specific priorities in the interest of national security.[2] The practical aspect is that the services (e.g., the Army) cannot

[1] *See also* 10 U.S.C. § 301(7).

[2] *See generally* ANDREW FEICKERT, CONG. RESEARCH SERV., R42077, THE UNIFIED COMMAND PLAN AND COMBATANT COMMANDS: BACKGROUND AND ISSUES FOR CONGRESS (2013). The authority of a combatant commander (CCDR) includes giving authoritative direction to subordinate commands, prescribing the chain of command, organizing commands and forces, employing forces within that command to carry out missions.

generate their own operational missions.[3] Rather, the services must receive mission authority from the appropriate command level.

1. Definition.

a. Neither mission authority nor operational authority is defined in doctrine or regulation. Although mission authority and operational authority may be used interchangeably, the rest of this chapter refers to mission authority.

b. The practical definition of mission authority may be asserted as the directive or right—provided through a combatant commander—to execute a particular task.

2. Mission Authority vs. Command Authority

a. Mission authority runs through a unified or specified combatant commander possessing command authority.[4] Although mission authority and command authority are similar in function and effect, they are distinct.

b. Command authority is the statutory authority which permits organizing and employing forces to accomplish *assigned* missions. A commander may have command authority to operationally control their forces but command authority, in and of itself, does not provide mission authority to carry out a specific mission.

3. Flow of Mission Authority

Only the President and the Secretary of Defense (SECDEF) may initiate and convey original mission authority.[5]

a. The President's Commander-in-Chief Powers. Under the U.S. Constitution, the President has the power to conduct foreign affairs, to

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Goldwater-Nichols Dep't of Def. Reorganization Act of 1986, 99 P.L. 433, 100 Stat. 992 (1986), codified at 10 U.S.C. § 164(c).

[3] *See, e.g.,* 10 U.S.C. § 7013 (providing the Secretary of the Army with authorities only necessary to carry out the affairs of the Army, including organizing, training, and equipping). The President or the Secretary of Defense (SECDEF) direct military operations through the combatant commanders (CCDRs), not the service secretaries or chiefs. JP 1, at III-4, para. 3.c.

[4] 10 U.S.C. § 162(b).

[5] JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT PLANNING, p. II-14, para. 13.d.(1) (1 December 2020) ("Execution begins when the President or SECDEF authorizes the initiation of a military operation or other activity.").

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 SECDEF derives authority to convey original mission authority from 10 U.S.C. § 113 and has authority, direction, and control over the Department of Defense (DoD).

c. The Chairman, Joint Chiefs of Staff issues the execute orders (EXORDs), or other authorizing directives, at the direction of the President or SECDEF to initiate or conduct the military operations.

d. The Combatant Commanders (CCDRs) exercise non-transferable combatant command (CCMD) authority established by 10 U.S.C. § 164. This authority is exercised only by unified or specified CCDRs unless otherwise directed by the President or SECDEF.[6]

4. Identifying Mission Authority / Analyzing Military Orders. Mission authority may be derived from the following non-exhaustive list:

a. Commander's Intent

b. Specified Tasks

c. Implied Tasks

d. Concept of Operations (CONOPS)

e. Verbal Orders

D. Framework for Identifying and Analyzing Funding Authorities: Who Benefits?

1. Most fiscal issues concerning the funding of "operations" will follow the traditional Purpose-Time-Amount analysis. Operational Funding is an in-

[6] 10 U.S.C. § 164(c).

depth analysis of the "purpose" prong with special emphasis on contingency operations and funding foreign governments and militaries, foreign civilians, and other entities not ordinarily eligible for funding from the DoD-wide or military departments' Operation and Maintenance (O&M) funds.

2. Judge Advocates may find the chart located at Appendix A to be helpful when analyzing recommended projects and missions for their commanders in an operational environment. ***While this chart is intended to provide general assistance to the practitioner as a quick reference guide, it is not comprehensive or all-inclusive of every possible funding authority, and is not a substitute for careful research based on the unique facts and use case for each situation***.

II. THE LEGISLATIVE FRAMEWORK FOR 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 (e.g., Purpose, Time, Amount; *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).[7]

   a. The expenditure must "bear[] a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission";

[7] *See Religious Seasonal Decorations in Federal Government Buildings*, 45 Op. O.L.C. ___ (Jan. 15, 2021); *Indemnification of Treasury Department Officers and Employees*, 15 Op. O.L.C. 57, 60 (1991).

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

c. The expenditure must not fall specifically within the scope of some other category of appropriations (i.e., be otherwise provided for). 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 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 authorizations for the funds that are appropriated in the yearly DoD Appropriations Act (DoDAA).

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.

C. "Permanent" vs. "Temporary" Authorizations

1. Permanent appropriations and authorizations are incorporated into U.S. statutory code (e.g., Title 10 for DoD authorities and Title 22 for Department of State (DoS) 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.

III. DEPARTMENT OF DEFENSE AUTHORIZATIONS AND APPROPRIATIONS

A. The Military's Role in Funding/Executing Foreign Assistance[8]

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.[9]

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.

3. DoD may conduct foreign assistance under the following two exceptions: (1) Interoperability, Safety, Familiarization and (2) express statutory authority—either permanent or temporary—from Congress for the DoD to conduct the assistance.

   a. Interoperability, Safety, Familiarization (ISF): activities with foreign forces for the primary purpose of promoting interoperability, safety, and/or familiarization with U.S. military forces in advance of an operation or exercise; U.S. military forces receive the primary benefit of ISF activities. This concept was formerly referred to as "little t training."

[8] The DoD Dictionary of Military and Associated Terms (February 2023) defines foreign assistance as "[s]upport for foreign nations that can be provided through development assistance, humanitarian assistance, and security assistance."

[9] 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); *see also* Exec. Order No. 12163, 44 Fed. Reg. 56673 (1979) (delegating the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to the Department of State).

(1) ISF activities fall within the ambit of Traditional Commander Activities (TCA's) of combatant commanders.[10]

(2) Practitioners must differentiate ISF from other forms of training that would be considered "Security Assistance" or training, as provided in 10 U.S.C. § 301(9).[11] Security Assistance Training, as discussed in the Honorable Bill Alexander Opinion of 1984[12] 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. [13]

(3) 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.

(4) Examples:

(a) Interoperability, Safety, Familiarization: Three hours of safety training for an 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.

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[10] *See* 10 U.S.C. § 164.

[11] 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).

[12] *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 military exercises with Honduras.

[13] N.B. The HBA opinion refers to "security assistance" throughout. DoD may also be able to conduct such activities properly authorized under "security cooperation." *See* 10 U.S.C. § 301.

(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 paratroopers. Training expenses will have to be funded using DoS security assistance appropriations, unless DoD has express congressional authority to conduct this training.

b. Express Statutory Authority. 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) security cooperation, including building partner capacity; (2) other specific authorities to conduct counterinsurgency, counterterrorism, and overseas contingency operations; (3) DoD aid and assistance to foreign civilians (i.e., humanitarian assistance); and (4) disposal of property. Within these categories, practitioners will find both permanent and temporary authorities to fund foreign assistance operations. JAs should be engaged early in the operational planning process to identify how to properly fund these various mission types.

C. General-Purpose Authorities and Funds

1. Emergency & Extraordinary Expenses ("Triple E") Authority: 10 U.S.C. § 127.

a. Purpose: "for any emergency or extraordinary expense which cannot be anticipated or classified."

b. Time/Amount: This is an authority only; not a source of funds. Typically, Congress appropriates this authority as a "not to

exceed" amount within both service-specific and Defense-wide O&M appropriations.[14]

c. Approval Authority: Secretary of Defense, Secretaries of the military departments, and Inspector General. Authority may be delegated (and re-delegated).

d. 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.

e. Practitioner Notes:

(1) Common Use: for official representation purposes pursuant to DoDI 7250.13 and AR 37-47. O&M funds are made available under the EEE authority which is allocated for official courtesies and other representation and are often referred to as Official Representation Funds (ORF). ORF is not its own appropriation, but rather O&M funds spent under EEE authority according to the policies laid out in the applicable regulations.

(2) EEE authority is also allocated for certain "confidential military purposes" typically for certain intelligence support. Generally, aside from ORF, this authority is used as a last resort for funding a unique emerging requirement for which the Department does not otherwise have authority.

(3) General principles of use:

[14] *See e.g.*, the Further Consolidated Appropriations Act, 2024 , Title II, under the heading "Operation and Maintenance, Army" ("For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law, $58,604,854,000: Provided, That not to exceed $12,478,000 may be used for emergencies and extraordinary expenses, to be expended upon the approval or authority of the Secretary of the Army . . .") (emphasis added); *see also* Further Consolidated Appropriations Act, 2024 , Title II, under the heading "Operation and Maintenance, Defense-Wide (. . . "*Provided further*, That not to exceed $36,000,000 may be used for emergencies and extraordinary expenses, to be expended upon the approval or authority of the Secretary of Defense. . .").

(a) Must be used for official DoD purposes;

(b) May not be used to overcome an express statutory prohibition contained in an appropriations act on the use of funds appropriated in that act; and

(c) Should not be used if other authority and funds are available to carry out the activity or make the payment.

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 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/Amount: 1 year O&M, Defense-wide funds; as authorized by Congress ($2.981 million in FY 2024).[15]

c. 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.

d. Approval Authority: Initiatives nominated by Combatant Commanders with final approval authority of CJCS.[16]

e. Practitioner Notes:

(1) Funding: Funds are controlled by CJCS, and projects are competitively selected from among the CCMDs.

(2) Common Use: Unforeseen or emergent contingency operation requirements.

D. Security Cooperation/Building Partner Capacity

Within this functional category, there are three general subgroups of authorities. The first group authorizes spending DoD appropriations for combined exercises

[15] *See* Further Consolidated Appropriations Act, 2024, 2024 , Title II, under the heading "Operation and Maintenance, Defense-Wide" (". . . Provided, That not more than $2.981,000 may be used for the Combantant Commander Initaitive Fund authorized under section 166a of title 10, United States Code.") Historically, the CCIF "not to exceed" amount was much higher (e.g., $50M cap in FY 2011). However, the FY24 amount mirrors the FY23 amount.

[16] Chairman, Joint Chiefs of Staff Instruction (CJCSI) 7401.01F, Combatant Commander Initiative Fund (30 November 2012).

and training, the second authorizes logistical support to foreign forces, and the third authorizes activities to build the capacity of foreign security 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: Authority for Combined Exercises and Training

a. Exchange of Defense Personnel Between the United States and Friendly Foreign Countries: 10 U.S.C. § 311[17]

(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.

[17] Section 311 consolidated authorities preoviusly provided under Section 1082 of the NDAA for Fiscal Year 1997 (P.L. 104-201) and Section 1207 of the NDAA for Fiscal Year 2010 (P.L. 111-84).

(3) Approval Authority: Under Secretary of Defense (Policy) (USD(P))[18]

(a) Secritary of State (SECSTATE) concurrence is required for exchange agreements with a non-defense security ministry of a foreign government or an international or regional security organization.

b. Payment of Personnel Expenses Necessary for Theater Security Cooperation: 10 U.S.C. §312.[19]

(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. SECDEF 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 SECSTATE).

(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

[18] The Deputy Secretary of Defense delegated authority to USD(P) via memorandum titled "Delegation of Authority and Assignment of Responsibility Related to Security Cooperation," dated February 3, 2017.

[19] Section 1243 of the NDAA for FY 2017 (P.L. 114-328), 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 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).

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 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.[20] 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;[21]

(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.

[20] 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, the Chief of Space Operations, or the head of a Defense Agency. *See* 10 U.S.C. § 312.

[21] 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.

(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.

(i) SECDEF 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) Only for Developing Countries.[22] May be used only for the payment of expenses of, and special compensation for, personnel from developing countries, except that 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

[22] Section 1241(n) of the NDAA for FY 2017 (P.L. 114-328), directed the SECDEF to prescribe a definition of "developing country" for purposes of Chapter 16. The USD(P)U, via memorandum titled "Definition of 'Developing Country' for Security Cooperation Programs," May 15, 2017, subsequently defined "developing country" to mean all low and middle income countries based on gross national income per capita as published annually in the World Bank list of economies.

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.

(5) Approval Authority: Assistant Secretary of Defense for Strategy, Plans, and Capabilities ASD(SPC); Commanders of Combatant Commands; Director, Defense Security Cooperation Agency (DSCA); or Director, POW/MIA Accounting Agency (where SECSTATE concurrence is required, it must be obtained by DSCA or the ASD(SPC)).

(6) Practitioner's Notes: The Services fund section 312 activities from their O&M appropriations.

(a) 10 U.S.C. § 312 does not permit the payment of U.S. personnel expenses for theater security cooperation. For U.S. personnel expenses, legal advisors should review the activity and identify the proper funding authority and source of funds most appropriate for the activity.

(b) U.S. personnel expenses may be funded by O&M appropriations. For example, if the activity is a military-to-military activity (M2M) (e.g., subject matter expert exchange, key leader engagement, traveling contact team) legal advisors should consider Traditional Combatant Commander Activities (TCA) funding.

(c) TCA funding is for U.S. personnel during CCMD-directed military-to-military activities (M2Ms), under the authority of 10 U.S.C. § 164. M2Ms consist of interactions between U.S. and foreign forces for security cooperation or other specific CCMD objectives. TCA funding cannot be used for training foreign militaries. TCA funding fulfills the long-standing requirement for CCMDs to *interact* with foreign militaries in order to promote regional security and other national security goals.

(d) When reviewing an M2M, legal advisors should be cautious to ensure the activity does not rise to the level of

training. Legal advisors should focus on the content of the activity to determine whether it meets the intent of TCA and ultimately the Necessary Expense Doctrine.

c. Training with Friendly Foreign Countries: Payment of Training and Exercise Expenses: 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. Limit the payment of incremental expenses to friendly foreign countries only to developing countries, except in the case of exceptional circumstances as specified in the regulations.

(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) Time/Amount: Funded from O&M Service-wide funds.

(3) 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.[23]

(4) Training and Exercise Approval Authority: SECDEF, delegated to Assistant Secretary of Defense (Strategy, Plans, and Capabilities).[24]

(5) Payment Authority: Secretary of a military department or the commander of a combatant command.

(6) Practitioner's Notes:

(a) Section 321 authority was created pursuant to Section 1244, NDAA for FY 2017 (P.L. 114-328), which consolidated 10 U.S.C. § 2010 (Developing Countries Combined Exercise Program (DCCEP)) and Section 1203, of the NDAA for FY 2014 (P.L. 113-66), which authorized training of "General Purpose Forces of the United States" with military and other security forces of friendly countries.

(b) Limited to paying incremental expenses for "developing countries."[25]

(c) In addition to the limitations on incremental expenses, Congress also requires quarterly notice of the schedule of planned training engagements for the next calendar quarter.

d. Special Operations Forces: Training with Friendly Foreign Forces (commonly referred to as Joint Combined Exchange Training (JCET)) – 10 U.S.C. § 322

(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).

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[23] 10 U.S.C. § 321 does not mandate vetting in accordance with 10 U.S.C. § 362 – Prohibition on the use of Funds for assistance to units of foreign security forces that have committed a gross violation of human rights, commonly referred to as "Leahy Vetting."

[24] Memorandum for Assistant Secretary of Defense for Strategy, Plans, and Capabilities, Delegation of Authority for 10 U.S.C. 321 (Oct. 25, 2017).

[25] *See supra* note 22.

(2) Time/Amount: 1 year, Defense-wide, O&M funds (maganged by USSOCOM).

(3) Practitioner's Notes: Where available, the SOCOM Commander or commander of any other specified or 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.

e. Regional Centers for Security Studies (RSC): 10 U.S.C. § 342(f)(3)(A)[26]

(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 SECDEF determines that attendance of such personnel without reimbursement is in U.S. national security interests.

[26] 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).

(a) SECDEF may, with the concurrence of SECSTATE, waive costs of personnel of nongovernmental and international organizations who participate in RSC activities if SECDEF 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).

f. Training for Eastern European National Security Forces in the Course of Multilateral Exercises: § 1251, NDAA for FY2016, as amended

(1) Purpose: Provide training and pay other countries' incremental expenses for multilateral exercises in which the U.S. is a participant and that does any of the following: (A) increase interoperability in U.S.-led or NATO-led coalition efforts; (B) increase the capacity of foreign military forces to respond to external threats; (C) increase the capacity of foreign military forces to respond to hybrid warfare; or (D) increase the capacity of foreign military forces to respond to calls for collective action within NATO.

(2) Time/Amount: Per section 1249 of the NDAA for FY2024, this authority expires on December 31, 2026. Up to $28 million per year may be spent on incremental expenses. Funded from O&M (Army) and O&M (Defense-Wide).

(3) Approval Authority: Commander, U.S. European Command, delegated to Director, Exercises and Assessments (ECJ7), USEUCOM via memorandum dated 1 July 2022.

(4) Limitations: The training must be conducted with U.S. forces and the national military forces of non-NATO countries that are signatories to the Partnership for Peace Framework Documents; countries that joined NATO after January 1, 1999; or The Republic of Kosovo.[27]

2. Subgroup Two: Providing Logistical Support to Foreign Forces

a. Acquisition & Cross-Servicing Agreements (ACSA): 10 U.S.C. §§ 2341–2350 (DoDD 2010.9 and CJCSI 2120.01).[28]

(1) Purpose: Bilateral agreements for the reimbursable mutual exchange of logistic support, supplies, and services (LSSS), excluding Significant Military Equipment (SME).[29] The ACSA authority is an acquisition tool only. 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.[30]

[27] *See* Section 1249 of the NDAA for Fiscal Year 2024 (P.L. 118-31).

[28] *See* DoD Directive 2010.09, Acquisition and Cross-Servicing Agreements (April 28, 2003) (C2, August 31, 2018); *see also* Chairman of the Joint Chiefs of Staff Instruction 2120.01D, Acquisition and Cross-Servicing Agreements (21 May 2015) (implementing the DODD).

[29] *See* 10 U.S.C. § 2350(1) (defining "logistic support, supplies, and services" to mean "food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Such term includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act."

[30] Eligible countries and organizations include (a) NATO countries; (b) NATO subsidiaries; (c) UN or any other regional international organization; and (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).

(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) Basic fiscal rules apply. 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 one of three methods and within the following time periods:[31]

(i) Payment-in-Kind (PIK): Reimbursement due date must not more than 30 days from the date of the invoice.[32]

(a) Defined: The receiving defense department reimburses the providing defense department the full value of the LSSS in currency.

(b) Example: DoD provides $10,000 in tents to a foreign defense department and receives $10,000 in currency.

(ii) Replacement-in-Kind (RIK): Reimbursement must occur within 1 year of initial order date of delivery.[33]

(a) Defined: the receiving defense department reimburses the providing

[31] 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.

[32] DoD FMR, Volume 11A, Chapter 8, para. 2.1.1.

[33] *Id.* at para. 2.1.2.

defense department by providing the same type of LSSS.

(b) Example: DoD provides tents to a foreign defense department and receives the exact same type of tents.

(iii) Equal Value Exchange (EVE): Reimbursement must occur within 1 year of initial order date of delivery.[34]

(a) Defined: the receiving defense department reimburses the providing defense department by providing LSSS with the same value as the LSSS initially provided.

(b) Example: DoD provides $10,000 in tents and is reimbursed by the foreign defense department with $10,000 of fuel.

(3) Amount: During any fiscal year, DoD is limited to the following amounts in obligations and reimbursable (applies to PIK transactions only, not exchange transactions):[35]

(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.

[34] *Id.*

[35] 10 U.S.C. § 2347.

(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 under chapter VI or VII of the U.N. Charter) 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.[36]

(b) Transaction Approval Authority: Personnel are designated specifically based on knowledge and experience to carry out transactions.

(5) Practitioner's Notes:

(a) ACSA orders may not be used to facilitate the transfer of LSSS to a country that has not signed an ACSA agreement.[37]

(b) ACSAs may not be used to procure goods or services that are reasonably available from U.S. commercial sources.[38]

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[36] DoDD 2010.09, 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. Note: as of February 1, 2018, pursuant to section 901 of the NDAA for FY 2018, the USD(AT&L) split and the Under Secretary for Acquisition and Sustainment is the successor for purposes of ACSA implementation.

[37] 10 U.S.C. § 2342(d). An up-to-date list of ACSAs and Implementing Arrangements can be found at https://intellipedia.intelink.gov/wiki/ACSA_Country_Documents.

[38] 10 U.S.C. § 2342(c).

(c) Size and scope of support under the 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.

(d) Common Use: Providing food, transportation, and lodging.

b. ACSA-Lend Authority: Section 1207, NDAA for Fiscal Year 2015, as amended.

(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 (e.g., 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 currently set to expire on December 31, 2029.[39]

(3) Approval Authority:

(a) SECDEF designates CCDRs as approval authorities.[40]

(b) Requires SECSTATE Concurrence.[41]

[39] *See* Section 1207 of the NDAA for Fiscal Year 2024 (P.L. 118-31).

[40] *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).

[41] *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).

(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. Support for the Conduct of Operations: 10 U.S.C. § 331[42]

(1) Purpose: Authorizes SECDEF to provide support to friendly foreign countries in connection with the conduct of designated operations. Support that can be authorized includes:

(a) Provision of LSSS[43] 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

[42] This authority was formerly located at 10 U.S.C. §127d. Sec. 1245, NDAA for FY 2017 redesignated and amended §127d as 10 U.S.C. §331.

[43] 10 U.S.C. §331(h) ("In [§331] the term [LSSS] has the meaning given that term" in 10 U.S.C. §2350(1)).

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 construction[44] 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.

(2) Time: Services fund 331 support from their O&M appropriations.

[44] Within Chapter 16, Title 10 U.S.C. the term "small-scale construction" is defined as construction at a cost not to exceed $1,500,000 for any project. 10 U.S.C. §301(8).

(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. Section 1205 of the NDAA for FY 2023 (P.L. 117-263) increased this cap to $950 million for fiscal years 2023 and 2024 **only**.

(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: Under Secretary of Defense (Policy) (USD(P)).

(a) Requires SECSTATE concurrence.

(5) Practitioner Notes: NOT for joint training exercises — **may only be used for operations**.

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. Support to the Office of Security Cooperation in Iraq (OSCI): Section 1215 of the NDAA for Fiscal Year 2012, as amended.[45]

[45] Note that this authority is amended almost every year in the current year's NDAA. This section is current through the NDAA for FY 2024, sec. 1265 (P.L. 118-31), .

(1) Purpose: SECDEF may, with SECSTATE concurrence, support U.S. Government security cooperation activities in Iraq by providing funds for the operations and activities of OSCI.

(2) Types of support may include life support and transportation and personal security.

(3) Time/Amount: FY24 Air Force O&M[46] may not exceed $18,000,000. Furthermore, not more than $10,000,000 may be obligated or expended until SECDEF provides information in accordance with section 1215(h).

(4) As of the enactment of the NDAA for FY 2020, section 1215 no longer includes authority to engage in construction or renovation activities.

f. Coalition Support Fund (CSF): Section 1233 of the NDAA for FY 2008, as amended:[47] Reimbursement of Certain Coalition Nations for Support Provided to United States 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: Authority extended to 31 December 2024.

[46] Subsection (d) requires that funding is derived from amounts available for that fiscal year for operation and maintenance for the Air Force.

[47] Note this authority has been amended numerous times. This section is current through the NDAA for FY 2024 (P.L. 118-31), .

(3) Amount: Not to exceed $15,000,000 of reimbursements for the period from October 1, 2023 through December 31, 2024.

(4) Approval Authority: Under Secretary of Defense (Comptroller) (USD(C)) 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.

3. Subgroup Three: Authority to Build Capacity – 10 U.S.C § 333

(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) Air domain awareness operations;

(h) Operations or activities that contribute to an existing international coalition operation that is determined by the Secretary to be in the national security interest of the United States;

(i) Cyberspace security and defensive cyberspace operations.

(2) Types of Support Authorized: may include the provision and sustainment of defense articles, training, defense services, supplies (including consumables), and small-scale construction.[48]

(3) Required Elements: Programs must include elements that promote both (a) and (b):

(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;

(i) In order to meet this requirement, the SECDEF shall certify, prior to the initiation of the program, that the DoD or the DoS is already undertaking, or will undertake as part of the security sector assistance provided to the foreign country concerned, training that includes a comprehensive curriculum on the law of armed conflict, human rights and fundamental freedoms, and the rule of law, and that enhances the capacity to exercise responsible civilian control of the military, as applicable, to such national security forces.

(b) Institutional Capacity Building.

[48] *See* Section 1203 of FY24 NDAA (P.L. 118-31), increasing the limit of small-scale construction from $1,500,000 to $2,000,000.

(i) To meet this requirement, SECDEF must certify, prior to the initiation of the program, that the DoD or another department or agency is already undertaking, or will undertake as part of the security sector assistance provided to the foreign country concerned, a program of institutional capacity building with appropriate institutions of such foreign country to enhance the capacity of such foreign country to organize, administer, employ, manage, maintain, sustain, or oversee the national security forces of such foreign country.

(4) Time: Appropriated as 2-year O&M, Defense-wide funds for the Defense Security Cooperation Agency (commonly referred to as the "International Security Cooperation Programs" account).[49]

(5) Approval Authority: USD(P) 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

[49] *See* Section 8109 of the Further Consolidated Appropriations Act, 2024, providing $1,406,346,000 avaliable until September 30, 2025..

fiscal year and end not later than the end of the second fiscal year thereafter.

(d) Section 1201 of the FY19 NDAA added the following requirement:

(i) In developing and planning a program to build the capacity of the national security forces of a foreign country, SECDEF and SECSTATE should jointly consider political, social, economic, diplomatic, and historical factors, if any, of the foreign country that may impact the effectiveness of the program.

E. Conducting Counterinsurgency, Counterterrorism, & Overseas Contingency Operations (OCO)

The nature of operations must adapt to specific environments, and commanders often request additional or special authorities to fill any capability gaps. Many current operating environments require counterinsurgency, counterterrorism, or country- or theater-specific authorities that Congress has provided to DoD upon request. These authorities, which are generally temporary, can and do change over time, as operating environments and needs 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: Beginning in FY 2022, the Office of Management and Budget directed that "Overseas Contingency Operations" is eliminated as a category of funding. All military operations are funded with the base appropriation (O&M, MILCON, Procurement, etc.).

2. 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 section 1042 of the FY16 NDAA.

c. Amount: An individual award cannot exceed $5 million.

d. Approval Authority: By statute, SECDEF is the primary approval authority (SECSTATE concurrence required over $2,000,000). Also by statute, SECDEF may delegate this authority as follows:

(1) To the Deputy, SECDEF or an USD 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 USD 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.

3. Authority to Provide Assistance to Counter the Islamic State of Iraq and Syria (Counter-ISIS): Section 1236 of the NDAA for FY 2015, as amended.

a. Purpose: to provide assistance, including training, equipment, logistics support, supplies, and services, stipends, facility and infrastructure repair and renovation, small-scale construction of temporary facilities necessary to meet urgent operational or force

protection requirements with a cost less than $6,000,000,[50] 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.[51]

(1) The U.S. may accept equipment procured using funds provided under this heading, or under the heading "Iraq Train and Equip Fund" (ITEF) in prior Acts, that was transferred to security forces, irregular forces, or groups participating or preparing to participate in activities counter to ISIS and returned by such forces or groups to the U.S., and such equipment may be treated as stocks of the DoD upon written notification to the congressional defense committees.

b. Time/Amount:

(1) Funding is available in the amount of $241,950,000 from Counter-ISIS Train and Equip Fund (CTEF), with a two-year period of availability.[52]

(2) Assistance under this authority extends through 31 December 2024.

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) The CTEF appropriation, in addition to the authorizations provided for its use in Iraq and Syria (para. 6 below) is also

[50] As amended by sec 1263 of the FY24 NDAA (P.L. 118-31). This amount was previously $4,000,000.

[51] Note that the appropriations language differs in the activities that may be funded and that the Departemnt generally implements the stricter of the two which, historically, has been the appropriations language.

[52] The total CTEF appropriation for FY 2024 was $397,950,000, the Department budgets for, and Congress appropriates funds for, individual Iraq and Syria lines.

available in countries that have a security mission to counter-ISIS.[53] These countries include:

(a) Egypt

(b) Jordan

(c) Lebanon

(d) Turkey

(e) Tunisia

(2) Provision of assistance in Iraq 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.

(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.

(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.

(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.

[53] Note that the DoD does not budget for support to these countries and any proposed use of CTEF funding for such countries should be vetted with Under Secretary of Defense (Comptroller)/Program and Budget.

(6) Does not apply to assistance provided directly to "covered groups" in accordance with the authority granted by section 1223 of the FY16 NDAA.

(i) Covered groups: Kurdish Peshmerga and Sunni tribal security forces, or other local security forces, with a national security mission.

e. Practitioner Notes:

(1) New as of the NDAA for FY 2022, section 1236(o) is an authority to waive the dollar amount limitation in section (a) (currently $6 million, as amended by sec 1263 of the FY24 NDAA). The President delegated this authority to SecDef by memorandum dated June 3, 2022.

(2) This authorization requires vetting in addition to Leahy vetting in accordance with 10 U.S.C. § 362 :

(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.

4. Syria Train and Equip: Section 1209 of the NDAA for FY 2015, as amended (Authority to Provide Assistance to the Vetted Syrian Opposition).

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: Funding in the amount of $160,000,000 is available from the Counter-ISIS Train and Equip Fund (CTEF) with a two-year period of availability.[54]

c. Time: This authority expires on 31 December 2024.

[54] *See* note 39 above.

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) Construction and repair projects carried out under this section may not exceed, in any fiscal year, $6,000,000 per project; or $20,000,000 in the aggregate.

(3) 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.

(4) Not an authorization for the introduction of U.S. Armed Forces into hostilities or into situations wherein hostilities are clearly indicated by the circumstances.

(5) None of the funds may be used for the procurement or transfer of man portable air defense systems.

f. Practitioner Notes:

(1) New as of the NDAA for FY 2022, section 1209(l)(3) is an authority to waive the dollar amount limitation in section (a) (currently $6 million).[55] The President delegated this authority to SecDef my memorandum dated June 3, 2022.

[55] *See* sec 1263 of the FY24 NDAA (P.L. 118-31).

(2) 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.

5. Support of Special Operations for irregular warfare: 10 U.S.C. §127d[56]

a. Purpose: To provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing and authorized irregular warfare operations by U.S. Special Operations Forces (SOF) combating terrorism.

b. Time: DoD operation and maintenance funds (generally, from 1-year O&M, Defense-wide funds allocated to USSOCOM).

c. Amount: up to $20,000,000 annually.

d. Approval Authority: SECDEF (may not be delegated), with the relevant Chief of Mission concurrence.

(1) 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 $500,000 or an amount equal to 10% of such funding level (whichever is less).

(2) This section does not provide the authority to conduct covert action.[57]

[56] This authority was initially what is now the authority enumerated under 10 U.S.C. § 331.
[57] As defined by Section 503(e) of the National Security Act of 1947, 50 U.S.C. § 3093(e)).

(3) For the purposes of this authority, "irregular warfare" is defined as activities not involving armed conflict that support predetermined U.S. policy and military objectives conducted by, with, and through regular forces, irregular forces, groups, and individuals.[58]

6. Support of Special Operations to Combat Terrorism: 10 U.S.C. §127e[59]

a. 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.

b. Time: DoD operation and maintenance funds (generally, from 1-year O&M, Defense-wide funds allocated to USSOCOM).

c. Amount: up to $100,000,000 annually.

d. Approval Authority: SECDEF (may not be delegated).

(1) 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.

(2) 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.

7. Expenditure of funds for clandestine activities that support operational preparation of the environment and non-conventional assisted recovery capabilites: 10 U.S.C. § 127f

a. Purpose: The Secretary of Defense may expend up to $15,000,000 in any fiscal year for operational prepareation of the environment (OPE)[60]

[58] 10 U.S.C. § 127d(k)).

[59] This authority was initially 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 and codified the former authority at 10 U.S.C. §127e. Prior to this amendment, the annual amount appropriated was approximately $85,000,000.

[60] Defined as "the conduct of activities in likely or potential operational areas to set conditions for mission execution. 10 U.S.C. § 127f(j).

for operations of a confidential nature or to establish, develop, and maintain non-conventional assisted recovery capabilities to facilitate the recovery of U.S. military and civilian personnel, or other individiuals, who become isolated or separated.

b. Time/Amount: up to $40,000,000 per FY; from O&M, Defense-wide funds.

c. Approval Authority: SECDEF; this may not be delegated with respect to any expenditure in excess of $250,000.

(1) This section does not provide the authority to engage in intelligence, counterintelligence, or intelligence-related activities.[61]

Funding used to establish, develop, and maintain non-conventional assisted recovery capabilities require concurrence from the relevant Chief of Mission before obligation and expenditure.

8. Expenditure of funds for Department of Defense Intelligence and Counterintelligence Activities: section 1057 of the NDAA for FY 2020.

a. Purpose: amounts made available for the Military Intelligence Program (MIP) for any of fiscal years 2020 through 2025 for intelligence and counterintelligence activities for any purpose the Secretary determines to be proper with regard to intelligence and counterintelligence objects of a confidential, extraordinary, or emergency nature. Such a determination is final and conclusive upon the accounting officers of the United States.

b. Time/Amount: limited to 5 percent of the MIP for any fiscal year.

c. Approval Authority: SECDEF; this may not be delegated with respect to any expenditure in excess of $100,000.

9. Ukraine Security Assistance Initiative: Section 1250, NDAA for FY2016, as amended

a. Purpose: Authorizes SECDEF, in coordination with the SECSTATE, to provide security assistance and intelligence support, including training, equipment, and logistics support, supplies, and services, to military and other security forces of Ukraine. The section lists 16 specific capability-

[61] As defined by Section 3 of the National Security Act of 1947, 50 U.S.C. § 3003).

increasing activities that can be supported by this authority, including lethal assistance, cyber and electronic warfare capabilities, and training. [62]

b. Time/Amount: $300,000,000 in O&M, Defense-wide, is available for FY24 and $300,000,000 in O&M, Defense-wide, is available for FY25. This authority is currently set to terminate on December 31, 2026, per section 1241 of the NDAA for FY2024 (P.L. 118-31).

F. DoD Aid and Assistance to Foreign Civilians[63]

1. Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA): 10 U.S.C. §§ 401[64], 402, 404, 407, 2557, 2561.[65]

a. Purpose: The OHDACA appropriation "funds DoD humanitarian assistance (HA) activities that build the capacity of a partner nation (PN) government to provide essential humanitarian service[66]s to the civilian population and supports PN efforts to reduce the risk of, prepare for, and respond to humanitarian disasters thereby reducing reliance on international disaster relief assistance. When authorized, OHDACA funds are used to conduct Foreign Disaster Relief (FDR)."

Time/Amount: Generally 2 year funds. The 2021 DoDAA provided $147,50,000 to finance the humanitarian assistance and mine action programs as well as the foreign disaster relief initiative until September 30, 2022. The 2022 DoDAA provides 160,051,000 until September 30, 2023.

2. Individual Statutory Authorizations:

[62] Originally, there were 9 specific capability-increasing activities, which has increased to 16 through subsequent NDAA amendments to § 1250. *See* § 1250(b)(1-9) of FY16 NDAA.

[63] *See* The Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq. (general authority for humanitarian assistance for civilian populations)

[64] While the appropriation authorizes the use of OHDACA to fund 10 U.S.C. § 401 Humanitarian and Civic Assistance (HCA) activities, by policy, HCA activities are funded with O&M.

[65] 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. A digital version of the SAMM can be found at the following address: https://samm.dsca.mil/listing/esamm.

[66] *See* https://samm.dsca.mil/chapter/chapter-12#C12.1.

a. Humanitarian and Civic Assistance (HCA): 10 U.S.C. § 401[67]

(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 CCMD'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:[68]

(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;

(ii) Construction of rudimentary surface transportation systems;

(iii) Well drilling and construction of basic sanitation facilities;

[67] *See* DoDI 2205.02, Humanitarian and Civic Assistance Activities, CH 1., 22 May 2017 (establishing DoD policy and assigning responsibility for conducting HCA activities).

[68] *See id.* (providing examples of authorized HCA projects).

(iv) Rudimentary construction and repair of public facilities.[69]

(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)).[70]

(b) 2022 DoDAA § 8011: O&M funds may be expended on § 401 projects.

[69] 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."

[70] *See* DEF. SEC. COOPERATION AGENCY, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL sec. C12.1 (22 May 22).

(i) These funds may be obligated for HCA costs and for costs "incidental to authorized operations and pursuant to authority granted in section 401 . . . ."[71]

(3) Approval Authority:

(a) Assistant Secretary of Defense for Special Operations/Low Intensity Conflict (ASD(SO/LIC)), approves HCA projects that exceed $15,000. 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. 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.

(4) Command Approved HCA examples:

(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.

[71] 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."

(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 asphalting 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. Transportation of Humanitarian Relief Supplies to Foreign Countries (Denton Program): 10 U.S.C. § 402

(1) Purpose: transport to any country, without charge,[72] supplies furnished by NGO's for humanitarian assistance on a space-available basis.

(2) Practitioner's Notes:

(a) Before transporting supplies, the Secretary of Defense must determine:

(i) The transport of the supplies is consistent with U.S. foreign policy;

[72] 10 U.S.C. § 402(d)(2) authorizes the Secretary of Defense to require reimbursement for incurred transportation costs.

(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) NGO's must coordinate through USAID for approval to utilize Denton Program. DSCA and USAID coordinate with NGO's through the joint OHASIS portal.[73]

(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. Foreign Disaster Assistance: 10 U.S.C. § 404

(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.[74]

(2) Approval Authority: The President has delegated authority to SECDEF who must have SECSTATE's concurrence.[75]

[73] *See* https://hatransportation.ohasis.org/account/login.

[74] 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.

[75] 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.

(3) Practitioner's Notes:

(a) Within 48 hours of commencing relief activities, the President 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. Humanitarian Demining Assistance and Stockpiled Conventional Munitions Assistance: 10 U.S.C. § 407[76]

(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 $15,000,000 may be spent for equipment, services, and supplies for humanitarian demining activities per year.

(3) Approval Authority: Service Department Secretary with specific Secretary of State approval.

(4) Practitioner's Notes:

(a) No duplication of other services provided.

(b) Expenses covered include: travel, transportation, and subsistence expenses of DoD personnel; equipment, supplies, and services acquired for the activities.

(c) This authority was part of section 401 until section 407 was created (and section 401 amended) in the 2007 NDAA. Some implementing guidance, including the SAMM, still refer to demining as part of 401, but as of 17 Oct 2006, demining activities

[76] Section 1092 of the 2012 NDAA expanded the scope of 10 USC § 407 to also include "stockpiled conventional munitions assistance."

are authorized by section 407 instead of section 401.

e. Excess Non-Lethal Supplies: 10 U.S.C. § 2557

(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.[77]

(2) Practitioner's Notes:

(a) DoD transfers the property to the appropriate Department Secretary concerned who then has the responsibility to distribute the property. **NOTE: There are several ways to transfer property to DoS (see Property Disposal section of this outline).**

(b) Property must primarily benefit the intended recipient country civilians or Veterans. For foreign assistance, this may be used in conjunction with §2561 Humanitarian Assistance funds to get materials to location.

(c) Nonlethal Excess Supplies = property, other than real property, that is excess under DoD regulations and is not a weapon, ammunition, or other

[77] 2011 NDAA § 1074 expanded this authority to include domestic emergencies.

equipment/material designed to inflict serious bodily harm or death.

f. Humanitarian Assistance (HA): 10 U.S.C. § 2561

(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 contractors 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.

IV. PROPERTY DISPOSAL

A. Overview of DoD Property Disposal

1. Statutory authority is required for any transfer or sale of government owned or purchased property, particularly if transferred to a foreign military, government, or population. Although the overarching principles of the Federal Property and Administrative Services Act apply to both real and personal property, this outline will focus on personal property disposition.

2. An understanding of the statutorily mandated processes for the disposition of excess personal property is necessary to properly evaluate the authority for a proposed disposition. Generally speaking, the mandated processes involve reutilization, transfer, donation, and sale (R/T/D/S), and if none of these are possible, abandonment/destruction (A/D) through "donation" or disposal contracts. The order in which these processes are executed and the priority assigned to potential requisitioners or transferees is also mandated. Thus, reutilization screening within the DoD must occur before the property can be considered for transfer, donation, or sale. Similarly, transfer to federal civilian agencies must be ruled out before property can be offered for sale. No property can be put on a disposal contract unless it is not eligible for a "higher priority" process, or the opportunities for such transfers have been exhausted, and the property is not wanted by a qualified[78] 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:

[78] 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.

a. To give the Administrator, GSA the responsibility for management of U.S. Government owned property, to include procurement, storage, use, and disposition.[79]

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)[80] 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 U.S.C. §701).

d. Relevant Statutory and Regulatory Definitions:[81]

(1) Surplus property: excess property that is no longer required to meet the needs or responsibilities of *any* federal agency.

(2) Excess property: 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, 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.

[79] The Secretary of Defense may exempt itself for national security purposes (see § 501).

[80] 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.

[81] 40 U.S.C. § 102.

(3) Disposal: the reutilization, transfer, donation, sale, abandonment, or destruction of excess and surplus federal government property.

(4) Foreign Excess Property: excess property that is not located in the States of the United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the Virgin Islands.[82] 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 Government records.[83]

[82] *Id*.
[83] *Id.*

(9) Usable Sales: sales of federal government property to the general public (usually via auctions) for full use in the manner originally intended.

(10) Scrap Sales: sales of federal government property to the general public (usually via auctions) for use of the components.

(11) Abandoned: federal government property without any private or public value.[84]

(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.[85]

[84] 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.

[85] DoDM 4160.21, Vol. 2, Enclosure 4.

b. Property is requisitioned on an "as is/where is" basis.[86]

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. [87]

(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

[86] *See* DRMS-I 4160.14.

[87] Other special programs include Computers for Schools (Dep. Of Ed.), and Equipment for Law Enforcement (FBI, ICE, DHS).

components, agencies, and approved governments and organizations.

(5) Priority 4 – Sales: window of time where property not requisitioned during priority 1-3 periods may be now sold to the general public via "usable sales" or "scrap sales." Property with military capabilities must be demilitarized to be eligible for sale. If unable to demilitarize, the property must be destroyed.

(6) Abandonment or Destruction: property not requisitioned during priorities 1-4 may now be abandoned or destroyed. Abandonment includes the "donation in lieu of abandonment" process for property utilizing the Economy formula which essentially provides that property may be given away when efforts at sale have failed or the cost of its care and handling incident to sale would exceed any estimated proceeds. This is a "cost avoidance" principle. However, ordinary limitations on transfer apply precluding release of such items as defense articles or hazardous waste to the public.

C. Foreign Excess Personal Property (FEPP): 40 U.S.C. § 701(b)(2)(B)

1. Purpose: an overview of requirements and transfer authority.

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." [88]

b. This law has received recent attention and application, as the U.S. completed retrograde operations in Afghanistan. Practitioners of fiscal law are often asked about "retrograde" operations, a term that loosely encompasses the process of transferring equipment.[89]

[88] DoDM 4160.21, Vol. 2, Enclosure 4 provides DoD guidance on FEPP disposal.

[89] 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.

c. The statutory and regulatory guidance applies to FEPP regardless of whether it is generated in the "installation" (i.e., bases under arrangements with foreign states) or "operational" setting (i.e., contingency operations).

(1) The processes are the same as for excess property generated stateside. That is, "reutilization, transfer, donation, sale, abandonment/destruction" unless screening waivers apply. These processes apply as policy guidance set forth in Agency regulation, rather than statutory mandate.

(2) There is greater ability to vary screening and reutilization processes in the operational setting in order to meet operational needs or due to resource limitations. In 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.[90] 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

[90] *See* DoDM 4160.21, Vol. 2, Enclosure 4.

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."[91]

(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. Approval Authority Levels for individual property transfer amount is tiered by rank and designated in delegation memorandum.

3. Practitioner Notes:

a. "FEPP is a distinct category of property not to be confused with "excess and surplus."[92] 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

[91] F.M. 3.0 defines "retrograde" as a defense task involving "movement away from the enemy. This includes delays, withdrawals, and retirements." Many operators and fiscal attorneys use this term incorrectly when referring to the property disposition process. Instead of effecting a disposal, retrograde involves the management of property that will be retained somewhere by a component of the DoD.

[92] DoDM 4160.21, Vol. 2, Enclosure 4, para. 1.b.

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. 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.

V. DEPARTMENT OF STATE AUTHORIZATIONS AND APPROPRIATIONS (TITLE 22)

A. Introduction

1. General Rule: The Department of State (DoS) has the primary responsibility to establish policy and conduct Foreign Assistance on behalf of the USG– even during U.S. Military Operations.[93] The legal authority for the DoS to conduct Foreign Assistance is found in the Foreign Assistance Act of 1961, 22 U.S.C. §2151.[94]

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)[95] 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.[96]

   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.[97]

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[93] *See* HBA, *supra* note 11.

[94] 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.

[95] *See* Pub. L. No. 105-118, Foreign Operations, Export Financing, and Related Programs Appropriations Act, section 570, "Limitation on Assistance to Security Forces."

[96] The DoS Leahy Law is permanently codified under section 620M of the Foreign Assistance Act of 1961, 22 U.S.C. § 2387d.

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 identified five broad strategic goals to shape and sustain a peaceful, prosperous, just, and decmocratic world: (1) Renew U.S. leadership and mobilize coalitions to address the global challenges that have the greatest impact on Americans' security and well-being; (2) Promote global prosperity and shape an international environment in which the United States can thrive; (3) Strengthen democratic institutions, uphold universal values, and promote human dignity; (4) Revitalize the diplomatic and development workforce and institutions; (5) Serve U.S. Citizens around the world and facilitate secure international travel.

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). [98]

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.

[97] 10 U.S.C. § 362(c).

[98] 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.

c. DoD:

(1) Defense Security Cooperation Agency (DSCA): DoD organization charged with implementing multiple DoS funded and controlled security assistance programs involving transfer of defense articles[99] and services.[100]

(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).[101]

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)[102] and The Arms Export Control Act of 1976 (AECA).[103] Congress frequently amends these Acts

[99] *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.*

[100] 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.]").

[101] 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/.

[102] 22 U.S.C. § 2151 et seq.

[103] 22 U.S.C. § 2751 et seq.

in the annual DoS and DoD appropriation acts. Judge Advocates may find it beneficial to consider these programs in two general subcategories: reimbursable and U.S.-financed.

1. Reimbursable Security Assistance

a. Foreign Military Sales (FMS): 22 U.S.C. § 2761 (AECA §§ 21-27).

(1) Purpose: Contracts or agreements between an authorized foreign purchaser and the U.S. for the sale of DoD defense articles, services, and training from existing stocks or new procurements for the purpose of internal security, legitimate self-defense, participation in regional/collective arrangements consistent with the UN charter, or to enable foreign military contribution to public works and civic action programs.

(2) Time/Amount: FMS is a "Revolving Fund," with the intent of being self-funded. As such, no annual appropriation is required.

(a) DoS is authorized to charge an administrative fee to the foreign purchasing nation for each "case" (sale) to reimburse the U.S. for administrative costs.

(b) This fee allows DoS to generate the funds necessary to reimburse the appropriate DoD account via an Economy Act transaction, or other reimbursement authority in another statute.

(c) Unless an exception applies under the statute, payment must be made in advance of delivery of the defense article/service and must be made in U.S. dollars.

(3) Approval Authority:

(a) Countries or international organizations are only eligible for FMS transactions if the President makes a determination of their eligibility.[104] DoS then

[104] SAMM, Table C4.T2 contains a list of current eligibility status for Countries and International Organizations.

determines whether an FMS case is approved. Current eligibility criteria:

(i) Furnishing of defense articles / services must strengthen U.S. security and promote world peace.

(ii) No re-transfers without Presidential consent.

(iii) No use of articles / services for purposes other than for which furnished, unless consent of the President has first been obtained.

(iv) Recipient must maintain security of such article.

(b) The FMS program, like many of the DoS Security Assistance programs, is operated by DoD on behalf of DoS via DSCA.[105]

(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 (ITAR). [106]

(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

[105] Practitioners can find additional information on this implementation in the SAMM, *supra* note 96.

[106] 22 CFR part 120-130.

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 (DDTC) before the contractor may provide the products to the foreign nation.[107]

(b) Some Significant Military Equipment (SME) must be purchased through FMS.

[107] *See* ITAR, 22 CFR 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.[108] Loaned funds must be repaid over a period not to exceed 12 years unless otherwise approved by Congress.

Amount: FY 2024 Further Consolidated Appropriations Act appropriated $6,133,397,000[109] (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 FMF is only approved on a limited case-by-case basis.[110]

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

[108] 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.

[109][109] *See* FY 2024 Further Consolidated Appropriations Act. *See also* FY 2024 Supplemental Appropriations Act (Pub. L. No. 118-50) for additional amounts appropriated for FMF.

[110] *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)[111]

(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.[112]

(c) Limitations: requires the Presidential determination (PD) and prior congressional notification (CN).[113]

(2) Nonemergency Drawdown Authority - 22 U.S.C. § 2318(a)(2).[114]

(a) Purpose: for international narcotics control, disaster relief, antiterrorism assistance, nonproliferation assistance, and migration and refugee assistance.

[111] Foreign Assistance Act (FAA) § 506(a)(1). Emergency Drawdown Authority under 22 U.S.C. § 2318(a)(2) also referred to as Presidential Drawdown Authority has been used most recently to address the situation in Ukraine. See Office of the Under Secretary of Defense (Comptroller)/CFO at https://comptroller.defense.gov/Budget-Execution/pda_announcements. Pracitioners will find additional guidance on Emergency Drawndown Authority in Defense Security Cooperation Agency's Electronic Security Assistance Management Manual (eSAMM), Chapter 11 and the DoD FMR, Vol. 15, Chapter 7.

[112] This statutory cap has been incrementally increased through supplemental appropriations. *See, e.g.*, FY 24 Supplemental Appropriations Act (Pub. L. No. 118-50), Division A, Title III, section 302: "During fiscal year 2024, section 506(a)(1) of the Foreign Assistance Act of 1961 (22 U.S.C. 2318(a)(1)) shall be applied by substituting '$7,800,000,000' for '$100,000,000.'"

[113] See Delegations of Authority under Section 506(a)(1) for assistance to Ukraine from the President to the Secretary of State by searching "506(a)(1)" at the Federal Register website.

[114] Foreign Assistance Act § 506(a)(2). Pracitioners will find additional guidance on Emergency Drawndown Authority in Defense Security Cooperation Agency's Electronic Security Assistance Management Manual (eSAMM), Chapter 11 and the DoD FMR, Vol. 15, Chapter 7.

(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.

(c) Limitations: Drawdowns supporting counternarcotics and refugee or migration assistance require PD 15-day prior CN.[115]

(3) Peacekeeping Operations Drawdown Authority - 22 U.S.C. § 2348a(c)(2).[116]

(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

[115] *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).

[116] FAA § 552(c)(2).

education and training for Iraqi democratic opposition organizations.

(ii) Time/Amount: may not exceed $97 million.[117]

(iii) Limitations: requires 15 day prior CN.

(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.[118] 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.[119]

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.

[117] 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.

[118] This authority is carried out under section 506 (22 USC §2318(a)(1)) of the Foreign Assistance Act.

[119] For example, Congress also provided $165M reimbursement for the AFSA Drawdown. *See* Sec. 1307 of the FY03 Emergency Wartime Supplemental Appropriation.

(a) Prior to sale, the value of the item may be depreciated.

(b) EDA may be purchased by foreign nations, or they may be purchased by foreign nations with funds loaned or granted by the United States under the DoS FMF program. While both sales and grants are authorized, sales are rarely conducted under this authority – grants are the primary type of transfer.

(c) DoD procurement funds may not be expended in connection with the transfer.

(3) Limitations:

(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).[120] 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.

[120] SAMM, paragraph C11.3.1

(d) DSCA-executed program on behalf of DoS.

d. Complex Crises Fund (CCF) –FY 2024 Further Consolidated Appropriations Act. [121]

(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: $55,000,000

(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 personnel[122] 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.

[121] DoS Executive Budget Summary, Function 150 & Other International Programs, available at http://www.state.gov/documents/organization/135888.pdf.

[122] 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.

(2) Time/Amount: FY 2024 Further Consolidated Appropriations Act appropriates $119,152,000 available until September 30, 2025.

(a) Up to $3,000,000 may remain available until expended to increase the participation of women in programs and activities under this objective.

(b) Up to $50,000 may be available for entertainment expenses.

(c) 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.[123]

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 2024 Further Consolidated Appropriations Act appropriated $410,458,000, of which $291,425,000 may remain available until September 30, 2025.

(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.

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

[123] 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/.

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). Judge Advocates are often key participants in the Rule of Law mission while deployed and should be familiar with the interagency aspect of funding such missions.

1. Economic Support Fund (ESF): 22 USC § 2346.

a. Purpose: to advance U.S. interests by helping countries meet short and long-term political, economic, and security needs. In other words, the primary function is to build the governance capacity of a foreign country.[124]

b. Time: generally 2 year period of availability.

c. Amount: FY24 Further Consolidated Appropriations Act: $3,890,400,000

d. Limitations:

(1) Under §2346(e), these funds may NOT be used for military or paramilitary purposes.

(2) These funds are sometimes earmarked for certain countries within the appropriations act.

(3) Funds should also be used to the maximum extent practicable to emphasize participation of women.

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.

[124] USAID is the Agency primarily responsible for expenditure of these 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.).

VI. DOMESTIC OPERATIONS.

A. Overview. In domestic operations, DoD generally provides military assistance to requesting local and state governments on a reimbursable basis. 42 U.S.C. § 5147.4. However, Congress expressly appropriates funds to DoD for some support.[125] DoD may also transfer part of its O&M funding to "no-year" accounts. Once transferred, the funds become available for the same purpose and the for the same time period as the appropriation to which such funds are transferred.[126] Basic fiscal law controls of purpose, time, and amount apply in domestic support operations.

B. National Guard Civil Support.

1. National Guard Civil Support means "[s]upport provided by the National Guard while in a State Active Duty [SAD] status or Title 32 status to civil authorities for domestic emergencies, designated law enforcement, and other activities."[127] When National Guard members are serving in a Title 32 capacity, they are reporting to their state's chain of command but are federally funded. The most common example of serving in a Title 32 status is when performing required weekend training or annual training. When National Guard members are serving in a SAD status, they are funded by the state *(e.g.*, state responses to floods or wildfires).

2. The Secretary of Defense has the sole authority to authorize DoD funding of the National Guard for DoD operations or missions. The authority is exercised upon concurrence of affected states.[128] If authorized by the Secreatary of Defense to perform federally-funded domestic operations, National Guard members support DoD missions pursuant to 32 U.S.C § 502(f). Accordingly, the National Guard members performing such operations are paid out of the Army National Guard and Air National Guard personnel accounts. If this type of Title 32 duty is pursuant to a

[125] For example, Congress has appropriated funds to DoD for counterdrug support. CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3710.01B, DOD COUNTERDRUG SUPPORT (26 Jan. 2007) [hereinafter CJCSI 3710.01B].
[126] *See e.g.*, Disaster Relief Fund: Fiscal Year 2021 Funding Requirements, Federal Emergency Management Agency, February 10, 2020, https://www.fema.gov/sites/default/files/documents/fema_disaster-relief-fund-report_2021.pdf.
[127] CHIEF, NAT'L GUARD BUREAU, INST. 3000.04, NATIONAL GUARD BUREAU DOMESTIC OPERATIONS GL-2 (24 Jan. 2018).
[128] DoDI 3025.22, The Use of the National Guard for Defense Support of Civil Authorities, 15 May 2017.

mission assignment from the Federal Emergency Management Agency (FEMA), FEMA may reimburse those military personnel accounts under the Stafford Act (42 U.S.C. § 5121, *et seq.*). In this scenario, the Secretary of Defense determines that the National Guard is the appropriate sourcing solution for a FEMA mission assignment and authorizes the use of National Guard personnel to perform the mission in a Title 32 status.

3. During a SAD mission, the State's Adjutant General (i.e., the Commander of that state National Guard) has the authority to use federal equipment for state emergency response as determination by the Governor. The National Guard Bureau's United States Property and Fiscal Officers (USPFOs) provide oversight for federal funds and federal equipment in possession of state National Guard units. USPFOs are responsible for tracking federal equipment for reimbursement purposes. Following a SAD mission, the USPFO presents a bill to the state for reimbursement.

C. Defense Support of Civil Authorities.

1. Defense Support of Civil Authorities means "[s]upport provided by U.S. Federal military forces, DoD civilians, DoD contract personnel, DoD Component assets, and National Guard forces (when the Secretary of Defense, in coordination with the Governors of the affected states, elects and requests to use those forces in title 32, U.S.C., status) in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events."[129] The National Guard may perform Defense Support of Civil Authorities missions when supporting missions assigned to DoD by FEMA (see above). When performing such missions, the National Guard personnel are in a Title 32 status.[130]

2. The Posse Comitatus Act (18 U.S.C. § 1385) provides limitations on the types of support that the Federal military may provide to civilian law enforcement.[131] The Posse Comitatus Act does not prohibit all military involvement with civilian authorities. 10 U.S.C. §§ 271-275 includes exceptions to the general limitation. DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies, contains several enclosures discussing areas of permissible DoD activity, including: Participation in Law Enforcement (Enclosure 3), Support of Civil Disturbance Operations (Enclosure 4), Domestic Explosive Ordnance Disposal Support for Law Enforcement (Enclosure 5), Domestic Terrorism Incident Support (Enclosure 6), Use of Information Collected During Military Operations

[129] DoD Directive 3025.18, Defense Support of Civil Authorities, 19 March 2018.
[130] DoDI 3025.22 *supra*.
[131] The Posse Comitatus Act only applies to the National Guard when National Guard members are in a Title 10 status.

(Enclosure 7), and the Use of DoD Equipment and Facilities (Enclosure 8).

D. Disaster and Emergence Response. 42 U.S.C. §§ 5121, *et seq*. (Stafford Act) and DoDD 3025.18.

1. DoD may be involved in a disaster relief response when:

a. The President declares a major disaster. 42 U.S.C. § 5170.

b. The President declares an emergency. 42 U.S.C. § 51791.

c. The President decides to rely on DoD assets to preserve life and property during an emergency. 42 U.S.C. § 5170b(c).

d. The President sends in DoD assets where an emergency occurs in an area "for which the primary responsibility for response rests with the United States because the emergency involves a subject area for which, under the Constitution or laws of the United States, the United States exercises exclusive or preeminent responsibility and authority." 42 U.S.C. § 5191b.

2. The Department of Homeland Security (DHS), through FEMA, directs and coordinates the Federal response on behalf of the President. DHS has prepared the National Response Framework (NRF), which defines fifteen Emergency Support Functions (ESFs) for which certain Federal agencies have either a primary or supporting role. DoD is a supporting agency for all ESFs. FEMA appoints a Federal Coordinating Officer (FCO), typically the senior FEMA official at the site. If DoD is involved, a Defense Coordinating Officer (DCO) is assigned to the FCO.

a. DoD is reimbursed by FEMA for the incremental costs of providing support pursuant to the DCO's tasking in response to the FEMA mission assignment. Incremental expenses are those expenses incurred by the agency providing the military assistance that, but for the request, would not otherwise have been incurred. The DoD Financial Management Regulation (FMR) 7000.14-R, vol. 11A, ch. 19, para. 8.2, lists the following as eligible for reimbursement:

(1) Overtime, travel, and per diem of permanent Federal agency personnel;

(2) Wages, travel, and per diem of temporary Federal agency personnel assigned solely for the performance of services directed in the major disaster or emergency area;

(3) Travel and per diem of Federal military personnel assigned solely for the performance of services directed in the major disaster or emergency area;

(4) Cost of work, services, and materials procured under contract for the purposes of providing directed assistance;

(5) Cost of materials, equipment, and supplies (including transportation, repair, and maintenance) from regular stocks used in providing directed assistance;

(6) All costs incurred that are paid from trust, revolving, or other funds, and whose reimbursement is required by law; and

(7) Other costs presented by an agency with written justification or mutually agreed upon in writing.

E. Immediate Response Authority.

1. In response to a civilian request for assistance, Federal military commanders and Heads of DoD Components have Immediate Response Authority (IRA) to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions when time does not permit approval from higher headquarters. DoDD 3025.18, para 4.i.

2. Support under IRA should be provided on a cost-reimbursable basis. But assistance should not be delayed or denied because the requester is unable to commit to reimbursement.

3. IRA support may be provided on a non-reimbursable basis if authorized by law and approved by the appropriate DoD official.[132] If states have funding available to reimburse DoD, funding must be sent to the Treasury. DoDD 3025.18, para. 4.d. DoD military personnel must comply with the

[132] *See* DoDD 3025.18, *supra*, para. 4.d ("All requests for support shall be written, and shall include a commitment to reimburse the Department of Defense in accordance with… The Stafford Act… The Economy Act [31 U.S.C. § 1535], or other authorities. Unless approval authority is otherwise delegated by the Secretary of Defense, all requests shall be submitted to the office of the Executive Secretary of the Department of Defense.").

Miscellaneous Receipts Statute, which requires that amounts received for the Government be deposited in the Treasury. 31 U.S.C. § 3302(b).

F. Support to Civilian Law Enforcement.

1. The maintenance of law and order is primarily vested in local officials. Involvement of DoD personnel is only appropriate in extraordinary circumstances. For example, the Insurrection Act permits the President to use the Federal Armed Forces domestically under certain circumstances. 10 U.S.C. §§ 251-55. DoD functions in a supporting role and not as replacement of civilian authorities. Once the President directs DoD support to local officials, DoD may use O&M funding to cover the cost if support.

2. When DoD military personnel provides indirect assistance, such assistance does not violate the Posse Comitatus Act even when DoD military personnel performs enforcement-type activities. Under 10 U.S.C. § 274(a), the Secretary of Defense may make DoD personnel available for the maintenance of equipment provided, to include equipment provided pursuant to 10 U.S.C. § 272. Under 10 U.S.C. § 274(b)(1), the Secretary may also, upon a request from the head of a Federal law enforcement agency, make DoD personnel available to operate equipment with respect to criminal violations of the Controlled Substances Act, the Immigration and Naturalization Act, the Tariff Act of 1930, the Maritime Drug Law Enforcement Act, and any law, foreign or domestic, prohibiting terrorist activities; a foreign or domestic counter-terrorism operation; or a rendition of a suspected terrorist from a foreign country to the United States to stand trial. Under 10 U.S.C. § 274(b)(2), DoD personnel made available to a civilian law enforcement agency may operate equipment for a variety of purposes.

3. Economy Act. Pursuant to 10 U.S.C. § 277, the support provided between Federal agencies under these authorities is reimbursable under the Economy Act, unless the support is provided in the normal course of training or operations, or the support results in a substantially equivalent training value.

4. The Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b), requires that funds received by an agency must be deposited in the Treasury, without any deduction for any charges or claims, unless there is a positive legal authority, like the Economy Act, that allows an agency to retain the money. The Economy Act does not apply to the National Guard in the performance of SAD missions. Further, the reimbursement provision in 10 U.S.C. § 277 provides no mechanism for reimbursement except for support between Federal agencies, even though the language in 10 U.S.C.

§ 272 *et seq*. authorizes support to local civilian law enforcement agencies. If commanders loan equipment to local civilian law enforcement agencies, any reimbursement obtained would go to the U.S. Treasury as a miscellaneous receipt.

5. Excess Property. 10 U.S.C. § 2576 authorizes the surplus sale of military equipment to state and local law enforcement and firefighting agencies. 10 U.S.C. § 2576(a) authorizes the surplus sale of military equipment to Federal and state agencies suitable for carrying out law enforcement, firefighting, homeland security, and emergency management services. The state or local agency must initiate a request for the equipment. 10 U.S.C. § 2576a and § 2576b provide additional mechanisms for the transfer of excess property (without sale) to law enforcement and firefighting agencies.

6. Training. Subject to approval limitations in DoDI 3025.21, DoD components may provide expert advice to local law enforcement officials in accordance with 10 U.S.C. § 373.60. Direct assistance by DoD personnel in activities that are fundamentally civilian law enforcement operations is not permitted unless specifically authorized by DoDI 3025.21.

7. Counterdrug Support.

   a. Congress annually appropriates funds to DoD for counterdrug operations. Types of counterdrug support to local enforcement agencies include:

      (1) Maintenance and repair of loaned defense equipment to preserve the potential future utility or to upgrade to ensure compatibility of that equipment (10 U.S.C. § 284(b)(1) & (2))

      (2) Transportation support (10 U.S.C. § 284(b)(3));

      (3) Establish and/or operate bases or training facilities (includes minor military construction projects) (10 U.S.C. § 284(b)(4));

      (4) Counterdrug-related training of law enforcement personnel (10 U.S.C. § 284(b)(5));

      (5) Detect, monitor, and communicate the movement of air and sea traffic within 25 miles of and outside United States borders (10 U.S.C. § 284(b)(6)(A));

(6) Engineering support (roads, fences, and lights) to block drug smuggling at U.S. borders (10 U.S.C. § 284(b)(7));

(7) Establish command, control, communications, and computer networks (10 U.S.C. § 284(b)(8));

(8) Linguist and intelligence analysis services (10 U.S.C. § 284(b)(9)); and

(9) Aerial and ground reconnaissance support (10 U.S.C. § 284(b)(10)).

b. Authority to approve counterdrug operational support to law enforcement agencies has been delegated by the Secretary of Defense, through the Chairman of the Joint Chiefs of Staff, to the Commanders of the Unified Combatant Commands. CJCS Instruction 3710.01B.

c. DoD serves as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. DoD's detection and monitoring mission, however, is carried out in support of the counter-drug activities of Federal, state, local, and foreign law enforcement agencies. 10 U.S.C. § 124a. DoD detection and monitoring does not extend to missions covering land transi *(i.e.*, the Mexican border).

G. Explosive Ordnance Disposal. Civilian authorities have the primary responsibility for explosive ordnance disposal operations outside of DoD installations. DoD assistance may be provided to local authorities upon request when the DoD component concerned determines that such assistance is required or desirable in the interest of public safecty. Each service is repsonsbile for all self-caused explosive ordance contaminatin on its own installations. AR 75-14.

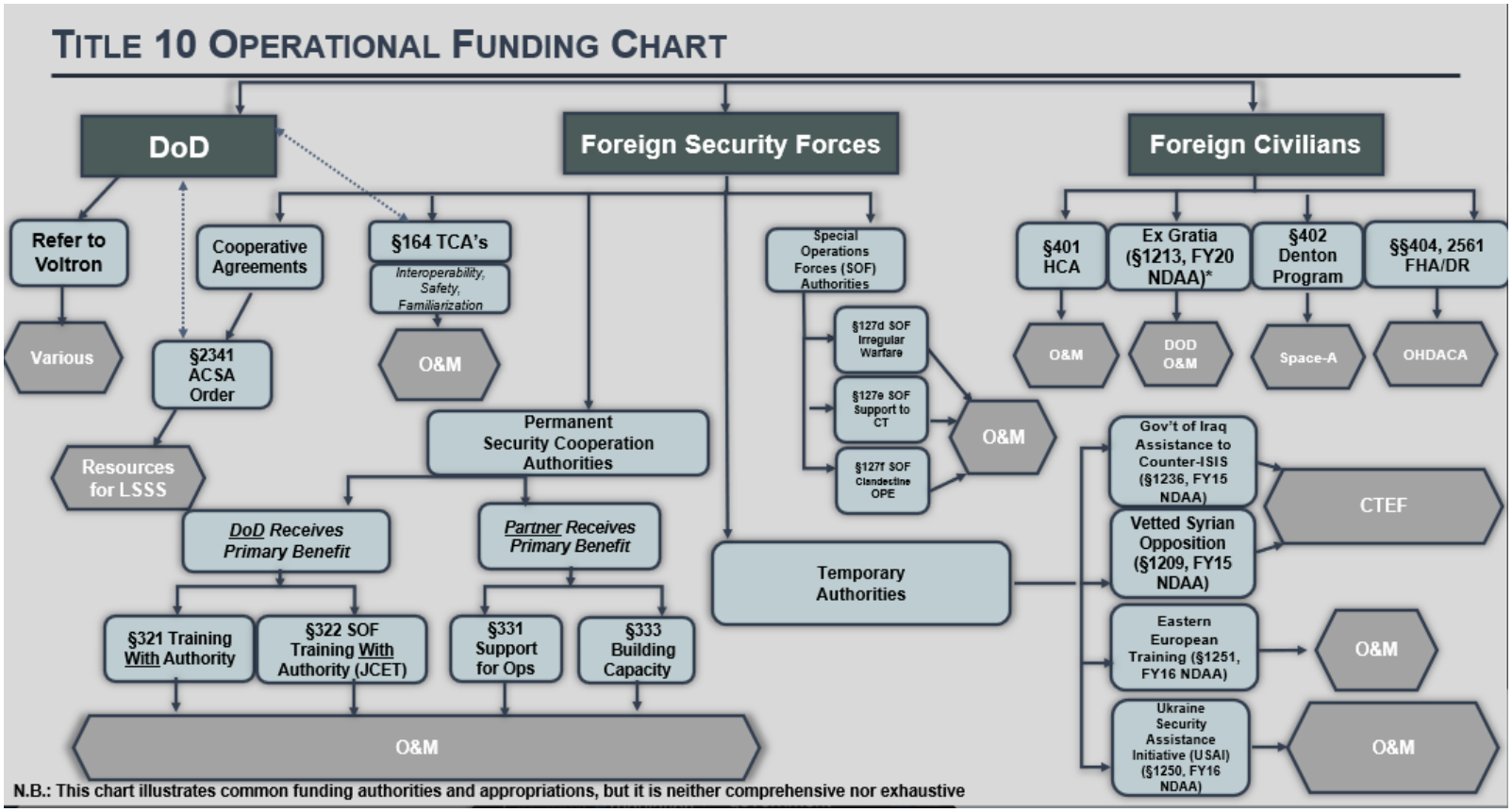
H. Military Working Dogs. Military working dogs include patrol dogs, and patrol dogs with specialized training in either contraband detection or explosive detection. Upon request from a Federal agency or local civilian authority at any level, the installataion commander concerned determines that assistance is required in the interest of public safety and meets the requirements of DoDD 3025.18. AR 190-12. *See also* DoDD 5200.31E, DoD Military Working Dog (MWD) Program, 21 September 2020.

VII. CONCLUSION.

The Department of State, not the Defense Department, is primarily responsible for foreign assistance. The Department of Defense conducts foreign assistance under specific, limited

statutory authorities. These authorities allow for security cooperation, security assistance (under the direction of the Department of State), humanitarian assistance, and property disposal to foreign entities, but all of these are only pursuant to specific authorities with prescribed limitations and requirements. In domestic operations, DoD provides military assistance to requesting local and state governments on a reimbursable basis unless Congress has expressly appropriated funds for such assistance to DoD.

APPENDIX A: TITLE 10 OPERATIONAL FUNDING CHART



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. 31 C.F.R. § 256 (providing rules for obtaining payments from the Judgement Fund).

D. Treasury Financial Manual (TFM) 6-3100, vol. I, Certifying Payments and Recording Corresponding Intragovernmental Receivables in the Federal Government's Judgment Fund [hereinafter TFM 6-3100]. Available at https://tfm.fiscal.treasury.gov/v1/p6/c310.html.

E. General Accounting Office, *Principles of Fed. Appropriations Law*, vol. III, ch. 14, GAO-08-978SP (3d ed. 2008); General Accounting Office, *Principles of Fed. Appropriations Law*, vol. III, ch. 14, GAO-15-303SP (Annual Update of 3d ed. 2015) [hereinafter GAO Red Book].

F. DoD Regulation 7000.14-R, *Financial Management Regulation*, vols. 3 & 10 [hereinafter DoD FMR]. Available at https://comptroller.defense.gov/FMR/fmrvolumes.aspx.

G. Army Federal Acquisition Regulation Supplement, pt. 5133.212-98 [hereinafter AFARS].

H. Air Force Manual 65-605, vol. I, Budget Guidance and Technical Procedures (31 March 2021) [hereinafter AFMAN 65-605].

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 or tribunal 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*, 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 a board of contact appeals.

F. Unexpired Appropriation (Unexpired Account). An appropriation account available for obligation during the current fiscal year (current funds). *See* DoD FMR, Glossary; AFMAN 65-605, para. 7.2.4.

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; AFMAN 65-605, para. 7.2.2.

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; AFMAN 65-605, para. 7.2.3.

III. OBLIGATION OF FUNDS FOLLOWING AGENCY-LEVEL SETTLEMENT OF A CONTRACT CLAIM.

Generally, agencies should obligate funds using the same obligation rules that are used for normal contract changes. *See also supra* Chapter 5, *Obligating Appropriated Funds.*

A. If the settlement relates to an **in-scope contract change** (the "relation-back theory"), then settlement should be funded from the appropriation cited on the original contract. *See* DoD FMR, vol. 3, ch. 8, para. 3.6; AFMAN 65-605, para. 7.3.2.2; *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); *National Endowment of the Arts-Dept. of Justice Appropriations Availability-Payment of Settlement*, B-255772, 1995 U.S. Comp. Gen. LEXIS 544, 1995 WL 500331 (1995) (stating "Contractual liability is established at the time the government enters into the contract. Any expense within the scope of that contract is payable from appropriations available at the time of contracting, even if the payment is not made until a subsequent fiscal year").

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. 3.6 and para. 4.2.2; AFMAN 65-605, para. 7.3.2.2; *see also* DoD FMR, vol. 3, ch. 10, para. 3.4.3. *But see, National Science Foundation—Potential Antideficiency Act Violation by the National Science Board Office*, B-317413, 2009 U.S. Comp. Gen. LEXIS 81 (2009) (the agency's settlement of a request for equitable adjustment, resulting from an unauthorized contract modification in a prior fiscal year, created a new obligation that must be funded with available appropriations from the current fiscal year funds).

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. 3, ch. 8, para. 4.2.2 and vol. 10, ch. 12, para. 2.9.2; AFARS 5133.212.98(c)(2)(iii) (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 or the agency must obtain a special supplemental appropriation from Congress. *See* 31 U.S.C. § 1553; AFARS 5133.212.98(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**, the agency should fund it from "the appropriation available and charged for the change in scope." DoD FMR, vol. 3, ch. 8, para. 3.6.5.

IV. OBLIGATION OF FUNDS FOLLOWING A JUDGMENT OR AWARD REGARDING A CONTRACT.

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)(1).

B. If insufficient current funds are available, the Judgment Fund must be used to pay the judgment/award. *See* AFARS 5133.212.98(d)(2). The Contract Disputes Act (CDA) 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. 4.2.2; AFMAN 65-605, para. 7.3.1.1.3.1.

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. C1. 22, 36 (1879) (holding that the Appropriations Clause does not prohibit the incurrence of legal liabilities through issuance of a judgment, but likewise does not authorize the withdrawal of money to satisfy that judgment).

B. Judgments can be satisfied through one of the following methods:

1. A specific appropriation covering a specific judgment;

2. A general appropriation covering multiple or a class of judgments; or

3. An authorization from Congress to use existing appropriations.

C. 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); *see also GAO Red Book*, vol. III, ch. 14, 14-31.

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); *see also* 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, 1980 WL 16589 (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 (*e.g.*, 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, 1980 WL 17186 (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. § l304(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. Judgments against the United States by the Court of Federal Claims, and monetary awards to a contractor from the Armed Services Board of Contract Appeals (ASBCA) are authorized to be paid and charged in accordance with the procedures applicable under the Judgment Fund statute. *See* DoD FMR, vol. 10, ch. 12, para. 2.10.3 (120210).

2. The agency must reimburse the Judgment Fund for any payment made by the agency using the Judgment Fund. *See* 41 U.S.C. § 7108(c); DoD FMR, vol. 10, ch. 12, para. 2.10.3 (120210).

B. **Consent Judgments.** The Judgment Fund is generally not available to pay agency settlements (*e.g*., settlements between the contracting officer and the contractor), to include settlements resulting from alternative dispute resolution before a Board of Contract Appeals. *See, e.g., Rules of the ASBCA*, Addendum II, Alternative Methods of Dispute Resolution; *Triad Microsystem, Inc.*, ASBCA No. 48763, 2000-1 BCA ¶ 30,876. One way to work around this restriction is for the agency and the contractor to stipulate or consent to an entry of award by the Board of Contract Appeals based upon the terms of the settlement. *See* DoD FMR, vol. 10, ch. 12, para. 2.9.2 (120209); AFARS 5133.212.98 (c)(2); *Rules of the ASBCA*, Rule 12, Decisions. *See, e.g., Casson Constr. Co*., GSBCA No. 7276, 84-1 BCA ¶ 17,010. Pursuant to the AFARS, the contracting officer must notify and receive the approval of the Army Assistant Secretary (Financial, Management and Comptroller) (ASA(FM&C)) before entering into a consent decree when insufficient current fiscal year funding exists to reimburse the Judgement Fund. AFARS 5133.212.98 (c)(2)(iii).

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."). *See also* AFARS 5133.212-98(a)(1).

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. 2.10.3 (120210). In 2002, Congress enacted the Notification and Federal Employee Antidiscrimination and Retaliation (No FEAR) Act of 2002 (5 U.S.C. § 2301). This Act also 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. 4.3.

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. First, the affected DoD Components must determine what appropriation(s) originally funded the portion of the contract that led to the claim and subsequent judgment. Second, the agency must reimburse the Judgment Fund with funds available for the same purpose that were current at the time of the judgment provided by 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. *See* DoD FMR, vol. 3, ch. 8, para. 4.2.2 (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 Department of the Treasury's Bureau of the Fiscal Service (Fiscal Service).

   a. For payments arising out of the CDA, according to the TFM, the Fiscal Service will send a reimbursement notice to the responsible agency 30 business days from the date of the payment from the judgment fund. TFM 6-3100, § 3140. Upon receipt of the notice, the agency has 45 business days to repay the Judgement or make contact with the Fiscal Service to arrange the reimbursement. TFM 6-3100, § 3140.10. For these same payments, the DoD FMR establishes a shorter timeline. It describes the notice as occurring 15 business days after payment and requires reimbursement within 30 business days from the receipt of the notice. DoD FMR, vol. 3, ch. 4, para. 4.2.3.

b. For payments arising out of the No Fear Act, according to the TFM, the Fiscal Service will send a reimbursement notice to the responsible agency 15 business days from the date of the payment from the judgment fund. TFM 6-3100, § 3140. Upon receipt of the notice, the agency has 45 business days to repay the Judgement or make contact with the Fiscal Service to arrange the reimbursement. TFM 6-3100, § 3140.20. With regard to No Fear Act repayments, the DoD FMR's requirements are the same. *See* DoD FMR, vol. 3, ch. 4, paras. 4.3.1 & 4.3.2.

c. Despite the reimbursement requirements, agencies have historically had a far from perfect repayment record. *See* GAO, *The Judgment Fund: Status of Reimbursements Required by the No Fear Act and Contract Disputes Act*, GAO-08-295R (Washington, D.C.: Feb. 26, 2008). As a result, the Financial Service identifies agency quarterly balances publicly[1] and provides a robust Judgment Fund Payment search tool on its webpage.[2] Further, the Fiscal Service regulations make it clear that it will identify agency CDA repayment noncompliance in reports to Congress. TFM 6-3100, § 3140.10. For No Fear Act repayment non-compliance, the Fiscal Service will identify the offending agencies in its required annual non-compliance report. TFM 6-3100, § 3140.20.

5. For reimbursements greater than $1 million, DoD agencies must first obtain approval from their respective comptrollers. *See* DoD FMR, vol. 3, ch. 4, para. 4.2.7. For the Army, that individual is the ASA(FM&C). AFARS 5133.212-98. Further, AFARS 5133.212-98(a)(1) provides that "Only authorized officials of a federal agency may request for payment from the Judgment Fund." The authorized official for Army is the ASA(FM&C). *Id.* However, for a request at or below $1M, the ASA(FM&C) delegated approval authority to the Deputy Assistant Secretary of the Army (Financial Operations) (DASA(FO)). *See* AFARS Appendix GG; *See also* Memorandum from ASA(FM&C) to DASA(FO), subject: Delegation of Authority – Access to the Judgment Fund for Cases at or below $1M (14 Apr. 2020).

[1] *See, e.g.,* https://treasurydirect.gov/government/treasury-managed-accounts/contract-disputes/
[2] https://fiscalcrm.my.site.com/jfpaymentsearch/s/

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 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 October 29, 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. Practically speaking, practitioners should not be seeing defective claims made from prior to October 29, 1992 anymore. 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. EAJA permits courts and agencies to award fees and other expenses to certain prevailing parties against the United States in connection with civil cases and administrative proceedings in certain circumstances. *See* 5 U.S.C. § 504; 28 U.S.C. § 2412(d). Under EAJA, the United States may be assessed these fees and expenses, including attorney fees and expert witness fees, if the Government's position was not "substantially justified." *Freedom, N.Y., Inc. v. United States*, 49 Fed. Cl. 713, 717 (2001) (*citing Helfer v. West*, 174 F.3d 1332, 1336 (Fed. Cir. 1999)).

2. The Judgment Fund may not be used to pay fees and expenses unless those costs are enumerated within the cost statute, 28 U.S.C. § 1920, or are set forth in a substantive statute specifically governing payment of the judgment or award. *See* 31 C.F.R. § 256.34.

3. Fees and other expenses awarded under EAJA are not payable from the Judgment Fund. Instead, an agency must pay these costs from operating funds available to the agency at the time of the award. *See*; 5 U.S.C. § 504(d); 28 U.S.C. § 2412(d)(4); *National Endowment of the Arts-Dept. of Justice Appropriations Availability-Payment of Settlement*, B-255772, 1995 U.S. Comp. Gen. LEXIS 544 (1995); *see also* DoD FMR, vol. 10, ch. 12, para. 2.10.4 (120210).

4. While the Judgment Fund cannot be used for fees and other expenses awarded under EAJA, as noted above, it 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.

VIII. CERTIFICATION.

A. **Requirement for Certification**. As discussed above, in order to qualify for payment an award, judgment, or settlement must be: 1) Final; 2) Require payment of a specific sum of money; 3) Satisfy one of the authorities specified in 10 U.S.C. § 1304(a)(3); and 4) Not legally payable from another source of funds. 31 C.F.R. § 256.1. 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); 31 C.F.R. § 256.1; TFM 6-3100, § 3125.

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. *See* TFM 6-3100, § 3125.

C. **Mechanics of the Certification Process.** 31 C.F.R. § 256.

1. For court judgments and settlements of litigation, the Department of Justice must normally submit the request for payment from the Judgment Fund. 31 C.F.R. § 256.1(a). However, agencies that have independent litigating authority may submit a request for payment themselves if the Department of Justice is not responsible for the case. *Id.* For administrative awards, the program agency that is authorized to approve the award (or settle the claim) must submit the request for payment. 31 C.F.R. § 256.1(b); *see also* TFM 6-3100, § 3130.10.

2. Pursuant to the TFM, the responsible or the submitting agency must submit Judgment Fund payment requests using the Judgment Fund Internet Claims System (JFICS). TFM 6-3100, § 3130.10.

IX. FUNDS RECEIVED FROM THE CONTRACTOR THROUGH A JUDGMENT, AWARD, OR SETTLEMENT.

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). However, several exceptions exist, to include exceptions affecting replacement contracts, refunds, and False Claims Act recoveries. *See supra* Chapter 2, *Availability of Appropriations as to Purpose*, Section IX (Augmentation of Appropriations & Miscellaneous Receipts); *see also* 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.

X. CONCLUSION.

CHAPTER 12

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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 (May 2025), 6 (Sep. 2015), and 7 (Apr. 2021) [hereinafter DOD FMR] available at: http://comptroller.defense.gov/FMR.aspx

D. Air Force Manual 65-601, Volume 1, ch. 3, Budget Guidance and Technical Procedures (31 March 2021) available at: https://static.e-publishing.af.mil/production/1/saf_fm/publication/dafman65-605v1/dafman65-605v1.pdf

E. Department of Navy, NAVSO P-1000, Financial Management Policy Manual, Volume 2, ch. 2, paragraph 020207 (July 2020) available at: https://www.secnav.navy.mil/fmc/Documents/CurrentFMPM.pdf

F. 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

G. Office of Management and Budget, Circular No. A-11, Preparation, Submission, and Execution of the Budget (July 2024) available at https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf

H. Congressional Research Service (CRS) Report R47600, Transfer and Reprogramming of Appropriations: An Overview, (June 2023), available at https://crsreports.congress.gov/product/pdf/R/R47600

I. CRS Report R46421, DOD Transfer and Reprogramming Authorities: Background, Status, and Issues for Congress, (June 2020), available at https://crsreports.congress.gov/product/pdf/R/R46421

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. 1.7.2.51. When an agency reprograms funds, it is moving funds *within* an appropriation, for example, 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. The reprogramming of funds is *generally permitted* unless it is restricted by statute.

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. 1.7.2.58. (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. 2.2.2 and 4.3; OMB Circular No. A-11, Sec. 20.4(j) (Page 22 of Section 20). Transfers are *generally prohibited* unless an agency has specific statutory authorization to do so.

IV. TRANSFERS DISTINGUISHED FROM REPROGRAMMING

A. Transfers. GAO, Principles of Fed. Appropriations Law, Chapter 2, p. 2-38 – 2-43.

1. Transfers shift money between different appropriations.

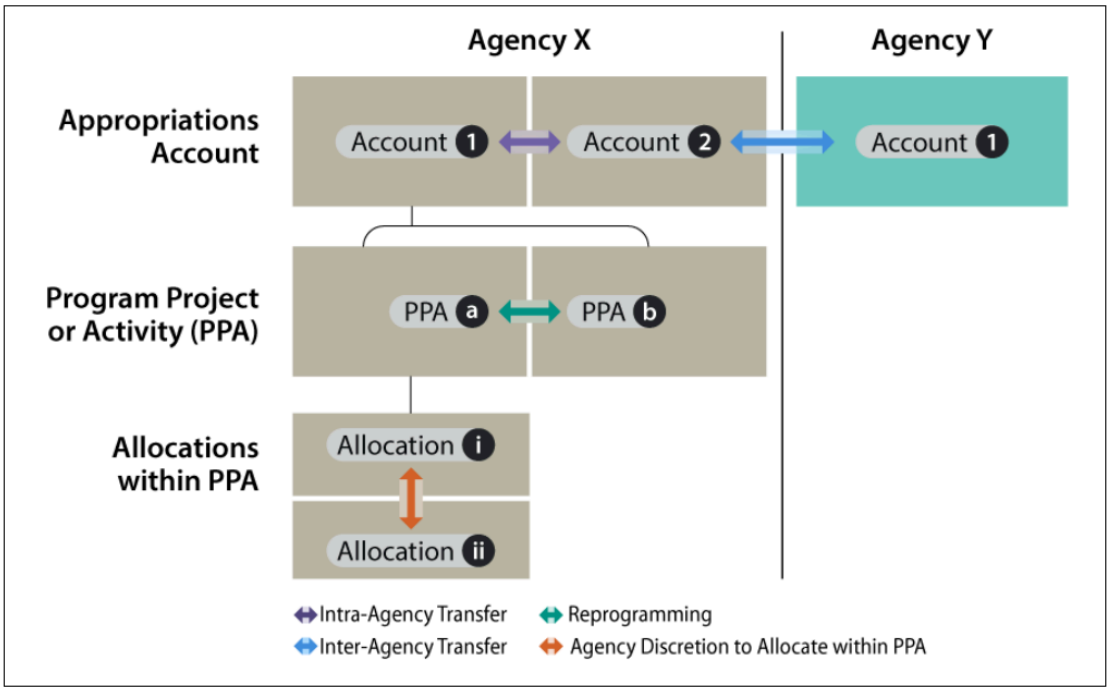
2. There are generally three types of transfers:

   a. Transfers between accounts within the same agency, e.g., Army Operation and Maintenance, Army (OMA) account to Army Military Personnel, Army (MPA) account. See *purple arrow* on Figure I;

   b. Transfers between agencies, e.g., Department of Defense to Department of State. See *blue arrow* on Figure I; 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 (Dec. 23, 1997). An earmark, is in essence, treated like a separate appropriation account. See The Honorable Peter Hoekstra, B-279886, 1998 WL 229292 (Comp. Gen. Apr. 28, 1998)

Figure 1. Example of Transfers, Reprogramming, and Other Forms of Budgetary Discretion Within and Among Agencies



Transfers and Reprogramming Visualized (source CRS Report R47600)

3. Transfers require statutory authority. 31 U.S.C. § 1532; The Honorable Peter Hoekstra, B-279886, 1998 WL 229292 (Comp. Gen. Apr. 28, 1998).

a. 31 U.S.C. § 1532 prohibits transfers without statutory authority. This statute provides in part:

> 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]

[1] GAO decisions interpreting 31 U.S.C. § 1532 consistently conclude 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, Chapter 2, p. 2-42 to 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.

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.

(a) Typically, Congress provides general transfer authority to DOD in its annual appropriations acts, normally in recurring Section 8005. See, e.g., 2024 Further Consolidated Appropriations Act, Division A, 2024 Department of Defense Appropriations Act, Title VIII § 8005. [hereinafter FY 24 Consolidated Appropriations Act]. Often, corresponding transfer authority is found in authorization acts as well, normally in recurring Section 1001.

(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. 2.2.2 (Feb. 2015); FY 24 Consolidated Appropriations Act, § 8005.

(2) Specific Transfer Authority. Congress can authorize or direct the movement of funds to support specific programs. See, e.g., FY 24 Consolidated Appropriations Act, Title VI, Other Department of Defense Programs, Defense Drug Interdiction and Counter-Drug Activities, Defense. This provision allows the transfer of funds to other appropriations to carry out counter-drug activities.[2]

[2] See also Department of Defense—Availability of Appropriations for Border Fence Construction, B-330862, September 5, 2019. GAO provides a detailed analysis of this transfer authority as it relates to the construction of border fencing.

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. The account adjustment statute, 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, B-238024, 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).[3]

[3] For example, section 8005 of the FY 24 Consolidated Appropriations Act permits DOD to transfer up to $6 billion from DOD's working capital funds to any DOD appropriation (except the military construction appropriation) "for military functions," subject to several conditions, including Congressional notification.

(b) Transfers from the Operation and Maintenance Appropriation, Army. 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.[4]

(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.[5]

(b) 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 Mentor Protégé Program.[6]

4. Generally, proposals to exercise transfer authority must be submitted by DoD Components formally to the DOD Comptroller for processing. DOD FMR, vol. 3, ch. 3, para. 4.0 (Actions Related to Exercise of Transfer Authority).

[4] For example, section 8064 of the FY 24 Consolidated Appropriations Act permits the Secretary of Defense to transfer from the Army's operation and maintenance appropriation to any other federal appropriation for "acquisition of real property, construction, personal services, and operations."

[5] Section 8054 of the FY 24 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.

[6] Section 8015 of the FY 24 Consolidated Appropriations Act authorizes the transfer of funds appropriated for the Mentor Protégé Program to any other DOD appropriation for the specific purpose of implementing "the Mentor-Protégé Program developmental assistance agreement" pursuant to 10 U.S.C. § 4902. The purpose of this program is to assist 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, Chapter 2, p. 2-43.

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, 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. GAO, Principles of Fed. Appropriations Law, Chapter 2, pp. 2-44 to 45;[8] Dep't of Def.--Amount Limitations on the Lift & Sustain Program, B-332393, 2021 WL 1814918 (May 5, 2021).

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 24 Consolidated Appropriations Act, § 8005.

[8] Since the 2009 NDAA, Congress has added or incorporated funding tables into the authorization act specifying amounts authorized for projects, programs, and activities. See e.g., NDAA 2009, P.L. 110-417, § 1005 (2008) (the first joint explanatory statement). Each year since that time, the NDAA has included funding tables, usually at Division D. See also, FY 24 Consolidated Appropriations Act, § 8006 (incorporating funding tables located at https://www.armed-services.senate.gov/imo/media/doc/fy24_ndaa_funding_tables.pdf by reference).

[9] GAO, Principles of Fed. Appropriations Law, Chapter 2, p. 2-45.

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 24 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. **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. 4.7 (Sept. 2015).

V. REPROGRAMMING TYPES

A. Reprogramming Actions Requiring Prior Approval of Congressional Committees

Committees. DOD FMR vol. 3, ch. 6, para. 4.1 (Sept. 2015). See also Conference Report accompanying annual DOD appropriations acts.

1. If a DOD Component 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 (See generally, CRS Report R46421, page 12, and DOD FMR, vol. 3, ch. 6, para. 4.1):

   a. Any reprogramming that involves an item designated as a Congressional special interest item;

b. Any increase in the procurement quantity of a major end item, such as an individual aircraft, missile, naval vessel, tracked combat vehicle, and other weapon or torpedo and related support equipment;

c. Any reprogramming action that involves the application of funds which exceed thresholds agreed upon by the congressional committees and DOD:

(1) Military Personnel: cumulative increases in a budget activity[10] 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.

[11] See e.g. Explanatory Statement for the FY 24 Further Consolidated Appropriations Act, Div. A, Defense Appropriations Act, which directs the Secretary of Defense to continue to follow the reprogramming guidance in the 2009 DOD Appropriations Act which lists 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; *see also* DOD FMR vol. 3, ch. 6, para. 4.1.4.2.

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. 4.1.5;

e. Termination of programs that result in the elimination of certain procurement programs and subprograms and RDT&E elements, projects, and subprojects. DOD FMR, vol. 3, ch. 6, para. 4.1.6; and

f. Most fund shifting/movements that make use of general transfer authority.[13] But see DOD FMR, vol. 3, ch. 6, for exceptions.

B. "Internal" Reprogramming. DOD FMR, vol. 3, ch. 6, para. 4.2 (Internal Reprograming Actions) (Sept. 2015).

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. 4.3 (Sept 2015). Internal reprogramming actions do not change the congressional intent behind the original appropriation—and thus do not require new congressional approval. CRS Report R46421, June 2020, page 14.

[12] See e.g., FY 24 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.** The DOD Comptroller sometimes uses the term *reprogramming action* to categorize transactions that transfer or reprogram funds. See, e.g., https://comptroller.defense.gov/Budget-Execution/ReprogrammingFY2023/

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 for the same purposes originally contemplated when submitted to Congress.

   b. Transfer Appropriations.[14] Designated "Transfer accounts" or "Transfer Appropriations" 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: Environmental Restoration, Army; Environmental Restoration, Navy; Environmental Restoration, Air Force; Environmental Restoration, Defense-Wide; Environmental Restoration, Formerly Used Defense Sites, Drug Interdiction and Counter-Drug Activities, Defense; Overseas Contingency Operations Transfer Fund; Foreign Currency Fluctuations, Defense; and Foreign Currency Fluctuations, Construction, Defense.

   c. Procurement Quantities. Approval to increase quantities of major end items where Congress has specified that approval is not required.

3. Technically, funding changes within program elements are not regarded as "reprogramming." The Honorable Roy Dyson, House of Representatives, B-220113, 65 Comp. Gen. 360 (1986).

4. Internal reprogrammings are not subject to dollar thresholds.

5. Internal reprogrammings do not require prior congressional approval or notification. Such actions are audit-trail type actions processed within DOD Secretary of Defense, Comptroller.

[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. 4.2.2.

C. Below Threshold Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 8.0 (Below-Threshold Reprogramming Actions)(Sept. 2015).

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. Below-threshold reprogramming are considered minor actions, below threshold reprogrammings are approved by the military services and defense agencies, and are reported in aggregate on a quarterly or annual basis, depending on the appropriation title.

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. 8.1 (Sept. 2015). 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 availability.

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 submission of its quarterly DD 1416, Report of Programs.

D. Letter Notifications. DOD FMR, vol. 3, ch. 6, para. 4.3 (Letter Notifications to Congress). See also 1416 Quarterly Reports (available at https://comptroller.defense.gov/Budget-Execution/1416QrtlyRptsfy2023/).

1. Letter notifications are used to process transfers specifically authorized in legislation, including transfers between agencies. For example, DOD regularly transfers funding from the Defense Health Program, Operation and Maintenance appropriation account to the Department of Veterans Affairs for the DOD-VA Medical Facility Demonstration Fund. 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. DOD FMR, vol. 3, ch. 6, para. 4.3.6.

E. Intelligence Related Reprogrammings. DOD FMR, vol. 3, ch. 6, para. 6.0.

1. Generally, the same rules apply to reprogramming intelligence resources as provided for other reprogramming actions under DOD FMR, vol. 3, ch. 6, para. 6.1 (Intelligence Reprograming Guidance).

2. Some special rules do apply:

a. Actions reprogramming DOD appropriations that impact the National Foreign Intelligence Program are subject to additional guidelines.

b. As authorized by 50 U.S.C. §3024(d), The Office of the Director of National Intelligence issues specific guidance on processing certain intelligence reprogramming actions and on below-threshold determinations. The statute also requires the Secretary of Defense to consult with the Director of National Intelligence before transferring or reprogramming funds made available under the Military Intelligence Program.

VI. MILITARY CONSTRUCTION REPROGRAMMING.

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 (April 2021).

1. Proposed military construction reprogramming actions 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; 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 (DOD FMR, vol. 3, ch. 7, para. 3.2 (partial list below, but see FN 15):

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).

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 unspecified minor military construction (UMMC).

d. To increase the amount appropriated for architectural and engineering services and construction design.

e. For any family housing project relocation project to be accomplished by 10 U.S.C. § 2827.

2. *Notice* to Congress is Required[15] Prior to Reprogramming (partial list):

a. 10 U.S.C. § 2803. Provides permanent authority to obligate and reprogram up to $50 million annually for emergency construction if a project is:

(1) Not otherwise authorized by law;

(2) Vital to national security or to the protection of health, safety, or the quality of the environment; and

(3) So urgent that waiting until the next budget submission would be inconsistent with national security, or the protection of health, safety or environmental quality.[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 ($9 million in accordance with Sec. 2802 of the FY24 NDAA, modifying 10 U.S.C. § 2805), the Secretary concerned must notify the appropriate committees of Congress.[17]

[15] DOD FMR, vol 3, ch. 7, para. 3.2.2. 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.

[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 5-day waiting period beginning on the date that the notification is received by the congressional committees.

[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 14-day waiting period beginning on the date that the notification is received by the congressional committees.

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 is not required:

(1) When a DOD Component takes action to reprogram funds between or among family housing operations and maintenance account, provided cumulative reprogramming actions do not exceed 10 percent of the reprogramming base of the increased account;

(2) For any project being completed with expired funds for valid upward adjustments of pre-existing commitments.

D. Restrictions on Reprogrammings. DOD FMR, vol. 3, ch. 7, para. 3.3.

1. DOD will not submit a request for MILCON 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, Chapter 2, p. 2-46.

VII. CONCLUSION

A. Note the differences between reprogramming and transferring funds.

B. There are special rules involved in reprogramming for military construction purposes.

C. Nearly all reprograming actions require involvement of the DoD Comptroller, except for some limited below-threshold reprogrammings that occur at the DoD Component level.

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 (February, 2025).

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 (January 23, 2023).

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 5, 2024.

K. AR 215-1, Morale, Welfare and Recreation Programs and Nonappropriated Fund Instrumentalities, September 24, 2010.

L. AR 215-4, Nonappropriated Fund Contracting, June 25, 2021.

M. AR 215-7, Civilian Nonappropriated Funds and Morale, Welfare and Recreation Activities, August 30, 2019.

N. AR 215-8 / Air Force Instruction (AFI) 34-211(I), Army and Air Force Exchange Service Operations, July 14, 2023.

O. AFI 34 -101, Air Force Morale, Welfare, and Recreation (MWR) Programs and Use Eligibility, March 7, 2022.

P. Air Force Manual (AFMAN) 34-201, Use of Nonappropriated Funds, September 27, 2018.

Q. AFMAN 64-302, Nonappropriated Fund (NAF) Contracting Procedures, September 26, 2019.

R. AFI 65-106, Appropriated Fund Support of MWR and Nonappropriated Fund Instrumentalities, January 15, 2019.

S. Secretary of the Navy Instruction (SECNAVINST) 1700.12B, Operation of Morale, Welfare and Recreation Activities, March 26, 2021.

T. SECNAVINST 5401.2A, Establishment, Management, and Control of NAFIs and Financial Management of Supporting Resources, January 21, 2004.

U. Commander, Navy Installations Command Instruction (CNICINST) 1710.3, Operation of Morale, Welfare, and Recreation Programs, 14 Jun 2013.

V. Marine Corps Order (MCO) P1700.27B W Change 1, Marine Corps Community Services 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. 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. 0106; 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 ensure uniformity in the establishment, management, allocation and control of resource support. DODI 1015.15, para. 6.1.1.1. These program groups include: (1) Military MWR programs; (2) Armed Service Exchange programs; (3) Civilian MWR programs; (4) Lodging Program Supplemental Mission Funds; (5) Supplemental Mission Funds; and (6) 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.

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. 1-9.

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. 1-9.

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 Installation Management Command (IMCOM) 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. AFMAN 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 cohesion. The funds should not be used solely for parties and picnics. 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, but must be done during meal periods at the work site. CNICINST 1710.3, para 205.

IV. MANAGEMENT OF MWR PROGRAMS.

A. Army. AR 215-1, Chapter 1-9: "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 Deputy Chief of Staff (DCS), G-9 manage the Army-wide MWR program as specified in AR 215-1[1].

3. The DCS G-9[2] develops the overall guidance, standards, and procedures to implement specifically approved MWR programs. Additionally, DCS G-9 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, 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:

[1] MWR functions were managed by the IMCOM Commander and the Assistant Chief of Staff for Installation Management (ACSIM) until October 2, 2019, when SECARMY approved Army General Order 2019-23 redesignating ACSIM to DCS G-9. *See* Army General Order 2019-23.

[2] This and other MWR functions in the Army were formerly performed by the Army Family Morale, Welfare and Recreation Command (FMWRC). FMWRC was deactivated in 2011. However, not all Army Regulations have been updated to account for this change and some may still reference FMWRC. *See e.g.* AR 215-1.

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 level forum 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. NAF 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.[3] AR 215-1, Glossary.

[3] Non-governing councils may also include military retirees and family members.

b. Councils are required for separate garrison NAFIs and garrison MWR operating entities. AR 215-1, para. 3-18.

B. Air Force. AFMAN 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 Services Council and Air Force Audit Committee provide recommendations to the CSAF on broad issues affecting policy, management, and oversight of NAFs, NAFIs, and MWR programs.

2. Directorate of Services, HQ, U.S. Air Force:

a. Administers the AF Central Fund NAFI and establishes any new Central NAFIs, as required; and

b. Approves the establishment and dissolution of all AF NAFIs with the exception of base isolated unit funds, AF Fisher House Fund and AF Civilian Welfare Fund Boards.

3. Commander, Air Force Services Activity:

a. Oversees all AF NAFIS worldwide, except those governed by their respective boards;

b. Executes the Commanders Nonappropriated Fund Sustainment Program; and

c. Ensures all NAFIs in the AF protect assets as required by AFI 31-101 and 34-202;

4. Installation Commander (wing commander or equivalent):

a. Requests approval to establish base-level NAFIs from the Air Force Services Activity;

b. Appoints a custodian for each NAFI and appoints a NAF council; and

c. Ensures NAF expenditures do not exceed available funds and is ultimately responsible for the solvency of the installation NAFIs.

5. 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 MWR program is managed by the Commander, Navy Installations Command (CNIC). Within CNIC HQ, Fleet and Family Readiness (N9) establishes MWR policies and administers the Navy MWR program.

2. Chaired by the Vice Chief of Naval Operations, a MWR/Navy Exchange (NEX) Board of Directors (BOD) makes major policy and business decisions for both programs.

3. The Navy MWR NAF activities are regionalized and managed by Regional Commanders and Installation Commanding Officers through their Region/Installation MWR Program Managers.

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 Marine Corps Community Services (MCSS) is comprised of exchange activities, MWR programs, and family service activities. It includes activities that are fully funded by appropriated funds as well as NAF funded activities.

V. CASH MANAGEMENT, BUDGETING, SOURCES OF NAFI REVENUE, AND RESOURCE MANAGEMENT.

A. NAFI Cash Management. AR 215-1, para. 16-5.

1. All Army NAFIs (includes supplemental mission NAFIs) and garrison MWR operating entities are required to generate sufficient cash when coupled with existing funds, to permit the NAFI/entity to fund all of its own requirements, both operating and capital, with the exception of NAF major construction funded by the Army MWR Fund (AMWRF). Long-term requirements must be fully covered by adequate cash flow.

VI. \Y6T7HIJNM,

1. 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 (*i.e.*, 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 Directorate. Annual budgets must comply with specific instructions and procedures issued annually by IMCOM. 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 Directorates will review and approve installation and community budgets and forward consolidated budgets to IMCOM. 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 directorate single MWR fund. NAFs generated by each garrison level MWR program are pooled into the IMCOM directorate 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 IMCOM 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 directorate contribution to a NAF construction project will be withdrawn from the garrison entity or IMCOM directorate 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 directorate 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 <u>other than those recognized as MWR programs</u>.

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

VII. FUNDING SUPPORT OF MWR PROGRAMS.

A. Program Groups. 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 programs.

2. Program Group II—Armed Services Exchange Programs.

3. Program Group III—Civilian MWR programs. DODI 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. AFI 65-106, Chapter 2 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. The degree to which APF support is authorized 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. Programs in this category have virtually no capacity for generation of NAF revenues.

(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 (16 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 but provide recreational activities that contribute to building a sense of community and enjoyment. They 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 16 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.

VIII. 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. 5-13, 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 an MWR program and its operations, to cover capital requirements and overhead expenses, and to satisfy budget requirements for support of other MWR programs dependent upon it. 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 an equitable basis to achieve a balanced, adequate MWR program. CNICINST 1710.3, para. 216.

1. The emphasis should be placed on MWR programs that benefit the greatest number of eligible patrons.

2. MWR NAF funds are authorized only for those purposes related to the official MWR program.

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 AFMAN 34-201, para. 4.2 (listing prohibited expenditures for Air Force NAFs); CNICINST 1710.3, para. 219 (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. 5-14b; AFMAN 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. 5-14*b*(1));

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. 5-14*b*(2)); and

c. When the DOD MWR Utilization, Support and Accountability (USA) policy applies.

4. Support private organizations. AR 215-1, para. 5-14c; AFMAN 34-201, para. 4.2.13.

5. Contract with Government personnel, military or civilian, except as authorized in AR 215-4. (Para. 1-23 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 (at the squadron level or above) on a "modest" basis, as established by MAJCOM commanders. AFMAN 34-201, para. 12.4.7.

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; AFMAN 34-201, para. 4.2.18.

D. In the Air Force, NAFs may NOT be used for the following activities (see AFMAN 34-201 for other restrictions):

1. Supporting programs or personnel attending functional or professional courses. AFMAN 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. AFMAN 34-201, para. 4.2.3.

3. Loans to individuals, AFMAN 34-201, para. 4.2.7.

4. Purchasing land, AFMAN 34-201, para.4.2.21.

5. Buying portraits of senior Air Force leaders, AFMAN 34-201, para.4.2.22.

E. In the Navy, NAFs may not be used for the following activities (see CNICINST 1710.3 para. 219 for other restrictions):

1. Command receptions or for expenses of similar functions incident to the official activation, deactivation or realignment of a command, ;

2. For support of aero or sky diving clubs;

3. To subsidize recycling programs;

4. For support of religious programs;

5. For recognition awards, incentive awards, rating badges, wing insignias, and similar items not related to MWR program (except for unit funds); and

6. For support of activities, and programs unrelated to MWR purposes ("welcome aboard" gifts, and retirement/farewell gifts).

IX. FUNDING PROGRAMS FOR CONSTRUCTION.

A. APF support for construction of MWR facilities is generally determined by the category of the MWR activity.

B. Construction to support MWR programs are funded either from APF or NAF construction programs as specified in AR 215-1, Appendix E. Requirements associated with category A programs will be funded from APF construction programs; generally, those for category B and C programs will be funded from NAF construction programs unless other specified in AR 215-1, Appendix E. AR 215-1, para. 15-4*b*.

C. For a discussion of the NAF construction program and APF v. NAF funding, see AR 215-1, Chapter 15, Section II (Construction Planning).

X. 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, September 20, 2024, Chapter II, para. 3b(10) (discussing planning and execution of MWR in a contingency setting).

2. In-theater MWR support for contingency operations be funded with appropriated funds. AR 215-1, para. 9-6b. Impact to garrison MWR operations caused by contingency operations (such as expansion of programs due to backfill of Reserve units) will be mission funded with APFs to the fullest extent authorized.

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.[4]

2. This constitutes augmentation of appropriations and violates the Antideficiency Act (ADA).

3. Use of APF employees to perform NAF functions beyond those which are authorized violates the Purpose Statute and the ADA.

4. Use of NAF employees to execute an APF mission may be accomplished through the execution of a MOA in which the APF activity reimburses the NAF activity for all costs associated with the employment of the NAF employee to include salary and any other benefits.

[4] Note that this does not include acquisitions accomplished through UFM or MWR USA. Congress statutorily authorized both of these funding mechanisms.

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, tables 1 and 2. Programs are established primarily for military personnel, but 28 categories of authorized patrons are listed in Table 7-1 of AR 215-1, Chapter 7. 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. IMCOM is the sole Army agency authorized to award MWR PPV contracts. See DODI 1015.13; AR 215-1, para. 15-12.

2. In order to meet MWR requirements, installations may identify activities that are unavailable through normal funding sources and that may be met by the private sector. IMCOM 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. 2; 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. 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).

CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

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CHAPTER 14

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES.

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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), *available at* https://www.gao.gov/assets/gao-06-382sp.pdf.

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.).

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 2, Section 3.0. Examples of "accountable officials" include: Disbursing Officials (DO); Deputy DOs, Subordinate Disbursing Agents, 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," such as improper certification 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. Within DOD, certain individuals comprise another 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 Definitions.

1. Certifying Officer. A certifying officer is a government officer or employee whose job is or includes certifying vouchers for payment. A certifying officer differs from other accountable officers in that the certifying officer does not have physical custody of government funds. Rather, accountability is statutorily prescribed because of the nature of the certifying function. Certifying Officer liability is established by 31 U.S.C. § 3528. Certifying officers are responsible for the legality of proposed payments and are liable for the amount of illegal or improper payments resulting from their certifications. GAO Redbook, Third Edition, Vol. II, 9-13.

   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, Vol. 5, Chapter 5, para. 1.1.2. DOD Certifying Officers must be appointed in writing on a DD Form 577. DOD FMR, Vol. 5, Definitions.

   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. 3.4.

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. The term is essentially self-defining." GAO Redbook, Third Edition, 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.

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, Definitions. A "Deputy DO" (DDO) may be appointed to act in the name of the DO. All DO and DDO appointees a must be U. S. citizens. See generally 31 U.S.C. § 3321; DOD FMR, Vol. 5, Ch. 2, para. 4.1.

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 DOs and DDOs, disbursing agents cannot sign U.S. Treasury checks. DOD FMR, Vol. 5, Ch. 2, para. 7.2.1.

c. Cashier. An officer, enlisted member, or civilian employee, appointed by the DO, 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. 7.3; 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). For Restrictions, see DOD FMR, Vol. 5, Ch. 2, para. 7.3.4 .

d. Paying Agents. Paying agents are appointed only when adequate payment, currency conversion, or check cashing services cannot otherwise be provided. DOD FMR, Vol. 5, Ch. 2, para. 7.4.1. Paying agents cannot act as purchasing officers or certifying officers. DOD FMR, Vol. 5, Ch.2, para. 7.4.2.

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. 7.5.1.

f. Change Fund Custodians. A change fund custodian receives a change fund from the parent disbursing office, safeguards it, is pecuniarily liable for any loss, and uses it to make change for sales transactions. The sales activity commander (e.g., commissary, hospital) establishes the position. DOD FMR, Vol. 5, Ch. 2, para. 7.6.1.

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. 7.7.Imprest Funds are generally not authorized for DOD activities, but there are exceptions for contingency and classified operations. DOD FMR, Vol. 5, Ch. 2, para. 9.1. In most cases, the government purchase card is the vehicle used to make micro-purchases. FAR 13.301.

3. Departmental Accountable Officials (DAO). A DAO is a formally appointed individual who provides certifying officers information, data, or services that the certifying officers rely upon directly in certifying vouchers for payment. 10 U.S.C. § 2773a (Departmental Accountable Officials); DOD FMR, Vol. 5, Ch. 1, para. 3.3.3.1. 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 before certification;

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, approved travel claim);

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) Not a legal obligation of the fund or appropriation cited; 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. 3.4.2.

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 residing with agency program officials.").

h. Successive Certification. If more than one certifying officer is involved in a given payment, the officer who certified the original payment is still responsible for the correctness of the voucher. Subsequent certifying officers are responsible for additional related vouchers or for changes to the original voucher that they have certified. DOD FMR, Vol. 5, Ch. 5, para. 5.4.

i. The certifying officer may rely on data received from reliable automated systems that have been certified as compliant with the Federal Financial Management Improvement Act (FFMIA) (see Volume 1, Chapter 3), 31 U.S.C. § 3512; DOD FMR, Vol. 5, Ch. 5, para. 3.4.2.1.

2. Liability attaches when an official makes an erroneous payment based on an improperly certified voucher. "A certifying officer's legal liability is strict and arises automatically at the time of an illegal or improper payment." Transp. Sec. Admin. Proposed Time & Attendance Sys., B-291001, 2002 U.S. Comp. Gen. LEXIS 275 (Dec. 23, 2002); Responsibilities and Liabs. of Certifying Officers, B-184145, 55 Comp. Gen. 297 (Sept. 30, 1975).

B. Disbursing Officers.

1. Disbursing officers are:

a. Responsible for examining vouchers as necessary to ensure that they are in the proper form, duly certified and approved, and computed correctly on the basis of the facts certified.

b. Responsible for disbursing funds only upon, and in strict accordance with, duly certified vouchers. 31 U.S.C. § 3325; DOD FMR, Vol. 5, Ch. 2.

2. Disbursing Officers are pecuniarily liable for payments made that are not in accordance with certified vouchers, and for errors in their accounts. DOs who make payments in accordance with certifications of properly appointed certifying officers may be relieved of their liability. DOD FMR, Vol. 5, Ch. 5, para 7.1.1; 31 U.S.C. § 3325.

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 may be either individual or 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. 7.1.3.

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.

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. 3.3.3.3.1 for considerations on where to appoint foreign local nationals in overseas areas as certifying officers and DAOs.

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. 5, sec. 3.0.

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 para. 5 below) are strictly liable for losses or erroneous payments of public funds. A series of 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. 7.1.

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'ls Abroad, B-305919, 2006 U.S. Comp. Gen. LEXIS 56 (Mar. 27, 2006); DoD FMR, Vol. 5, Ch. 5, para. 7.1.3.

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. 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. 1.3.1.

a. 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.

b. DoD FMR, Vol. 5, Ch. 12, Table 12-1, 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.

c. 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. 3.1.

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

b. The obligation was in good faith, no law specifically prohibited the payment, and the government received some benefit. 31 U.S.C. § 3528(b)(1)(B); Envtl. Prot. Agency, B-262110, 97-1 CPD ¶ 131 (Mar. 19, 1997) (certifying officials not required to second-guess discretionary decisions of senior agency officials); Ms. Trudy Huskamp Peterson, B-257893, 1995 U.S. Comp. Gen. LEXIS 337 (June 1, 1995).

2. The Comptroller General will deny relief if the head of the agency did not attempt diligently to collect an erroneous payment under procedures prescribed by the Comptroller General. 31 U.S.C. § 3528(b)(2).

D. Relief of Non-DOD Disbursing Officers for Illegal, Improper, or Incorrect Payments.

1. The Comptroller General may, on his own initiative, or on the written recommendation of the head of an agency, relieve a disbursing official responsible for a deficiency in an account because of an illegal, improper, or incorrect payment when the Comptroller General decides that the payment was not made as a result of bad faith or lack of reasonable care by the official. 31 U.S.C. § 3527(c).

2. The Comptroller General may deny relief if the head of the agency did not pursue collection action diligently under procedures prescribed by the Comptroller General. 31 U.S.C. § 3527(c).

E. Relief of Other Non-DOD Accountable Officers.

1. Applicability. The Comptroller General may relieve an accountable official or an agent from liability for the physical loss or deficiency of public money, vouchers, checks, securities, or records when:

a. The agency head finds that:

(1) The officer or agent was carrying out official duties when the loss or deficiency occurred or the loss or deficiency occurred because of an act or failure to act by a subordinate of the officer or agent; *and*

(2) The loss or deficiency was not the result of fault or negligence of the officer or agent. 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). The $3,000 limitation applies to "single incidents or the total of similar incidents which occur about the same time and involve the same accountable officer." 7 GAO-PPM § 8.9.C. Thus, two losses arising from the same theft, one under the limit and one over, should be combined for purposes of relief. B-189795, Sept. 23, 1977.

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. 2.2.1, defines "erroneous" payments, as those which include:

a. Any payment that should not have been made or that was made which results in 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. 1.1 ("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, para. 1.1. Currently, that authority has been re-delegated to the Director, Strategy, Policy and Requirements (DFAS-ZP). *Id*.

5. The standard for relief of an erroneous payment, for certifying officers under 31 U.S.C. § 3528 (and also DOD FMR, Vol. 5, Ch. 6, para. 6.4.2):

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. 6.4.1 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 need not take any action for erroneous payments that are properly certified. DoD FMR, Vol. 5, Ch. 6, para. 5.1.2.2.1.

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, or the loss or deficiency occurred because of an act by a subordinate of the official;

   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(a)(1).

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, it follows that a lack of negligence, at a minimum, will result in relief of liability.

3. Further, the presumption of negligence does not apply to DAOs. See DoD FMR, Vol. 5, Ch. 5, para. 7.1.3.

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 within sixty (60) days 5 U.S.C. § 5512(b). By doing this, the individual can get the 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. Historically, private and collective relief legislation 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 for the erroneous payment "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. 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. The statute of limitations begins to run when the voucher and supporting documentation for the improper payment was substantially complete. "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) (Certifying officer was not liable for improper payment because the three-year statute of limitations in 31 U.S.C. § 3526(c) expired).

3. If the loss is due to 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). 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. However, if a a relevant law or regulation exists and an accountable officer fails to follow it, and a loss of funds or an improper payment is caused thereby, such failure to follow the regulations shall be considered negligent and relief from accountability will be denied.

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 burden is on the accountable officer seeking relief to present evidence that he or she exercised the requisite degree of care. It is not enough to rely on the absence of implicating evidence. An administrative determination that there is no evidence of fault or negligence will not adequately rebut the presumption of negligence. The accountable officer must come forward with affirmative evidence that he exercised the requisite degree of care. Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Melvin L. Hines, B-243685, 1991 U.S. Comp. Gen. LEXIS 985 (July 1, 1991); Mr. Frank D. Derville, B-241478, 1991 U.S. Comp. Gen. LEXIS 1488 (Apr. 5, 1991); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (Feb. 28, 1969).

3. 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, Third Edition, Vol. II, Ch. 9, para. C.3.d, pp. 9-51 through 9-54.

2. If negligence occurred and it was the proximate cause of the loss or deficiency, the Comptroller General may <u>not</u> grant relief from liability. 31 U.S.C. § 3527(a). *See* GAO Redbook, Third Edition, Vol. II, Ch. 9, para. C.3.d, pp. 9-51 through 9-54.

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 safe opened upon being dropped, and the burglars too the money and fled; thus, the cashier's failure to the lock the safe, while negligent, was not the proximate cause of the loss.

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% of the individual's disposable pay, absent written consent of the individual); 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.

CHAPTER 15

FISCAL LAW RESEARCH

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CHAPTER 15

FISCAL LAW RESEARCH

I. LEGISLATION & STATUTES.

A. Appropriation Acts.

1. On an annual basis, Congress 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 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 2024, Congress has combined some or all of the appropriations into consolidated appropriations acts. *See, e.g.*, Consolidated Appropriations Act, 2024, Pub. L. No. 118-42.

4. Congress occasionally funds some agencies 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 LEXIS™- and Westlaw ™ -based research, one can use the Library of Congress' website, Congress.gov to conduct research on legislation enacted since 1973. For instance, the 2024 NDAA, Pub. L. No. 118-31, can be found on Congress.gov (listed as H.R.2670 – National Defense Authorization Act for Fiscal Year 2024) and shows you the legislation's significant legislative history. The Pentagon Digital Library, available at http://www.whs.mil/library/, also contains a list of and links to Department of Defense (DoD) appropriation and authorization acts. Select "intranet" and on the next page, on the left, you will see the Key Information Guides, which includes DoD Authorizations/Appropriation Laws.

B. Organic Legislation. Organic legislation 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).

1. In December 2019, the President signed the 2020 National Defense Authorization Act. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92. This act created the Space Force within the Air Force as the sixth armed service. Section 960 of the Act authorized the obligation of FY 2020 funds appropriated to the Air Force to be used for the establishment of the Space Force.

C. Authorization Act. An authorization act is substantive legislation, passed annually by Congress, that authorizes the appropriation of funds for programs and activities. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FED. BUDGET PROCESS 17, GAO-05-734SP (Sept. 2005).

1. 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 "[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 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. 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, however, may choose to place limits in the authorization act on the amount of appropriations it may subsequently provide.

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 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 DoD Financial Management Regulation (FMR) 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:

      Matter of Prohibition on Use of Appropriated Funds for Defense Golf Courses, B-277905, Mar. 17, 1998, 98-1 CPD ¶ 135.

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. However, some terms in the glossary do not match term usage in other documents. For example, usage of the terms "allocation" and "allotment" in the DoD FMR's 2019 guidance on Anti-Deficiency Act violations (*see* DoD 7000.14-R, Vol. 14, ch. 3) differs from the definition provided in the glossary.

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 (December 2020), *available at* https://www.whitehouse.gov/wp-content/uploads/2018/06/a11.pdf.

B. Within DoD, Volumes 2A and 2B of the 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 (Jan. 2011), 2B (Nov. 2017), *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/Budget-Materials/.

4. The Air Force's budget materials can be found at: https://www.saffm.hq.af.mil/FM-Resources/Budget/.

5. The Navy's budget materials can be found at: https://www.secnav.navy.mil/fmc/fmb/Pages/Fiscal-Year-2022.aspx.

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/department-reports/.

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. 25-38, ARMY PRINTING AND DISTRIBUTION PROGRAM para. 3-6 (14 July 2021); U.S. DEP'T OF THE AIR FORCE, MANUAL 65-605, VOL. 1, BUDGET GUIDANCE AND TECHNICAL PROCEDURES para. 5.36 (Mar. 31, 2021); Department of the Navy (Financial Management and Comptroller) Financial Management Policy Manual, Volume 02 Budget, 020303, B.14 (July 2020).

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: https://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: https://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: https://www.secnav.navy.mil/doni/secnav.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: https://www.jcs.mil/Doctrine/.

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. Those without a CAC can access some of the JAGCENT publications at https://tjaglcs.army.mil/publications.

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 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 DoD. 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-Guidance/DFAS-IN-Manual-37-100/FY-2020. (CAC required.)

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: https://www.secnav.navy.mil/fmc/Pages/default.aspx.

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
A	
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.edu/
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	https://www.adr.af.mil/
Air Force Audit Agency	http://www.afaa.af.mil/
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 Home Page	http://www.af.mil/
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	https://www.army.mil/aaa
Army Corps of Engineers Home Page	http://www.usace.army.mil/

Army Corps of Engineers Office of the Chief Counsel	https://www.usace.army.mil/About/Offices-and-Units/Chief-Counsel-Office/
Army Financial Management & Comptroller	http://www.asafm.army.mil/
Army General Counsel	https://ogc.altess.army.mil/
Army General Counsel Ethics & Fiscal	https://ogc.altess.army.mil/Practice_Groups/Ethics_Fiscal.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

B

Bid Protest, GAO Material	http://gao.gov/legal/bids/bidprotest.html
Budget of the United States	https://www.whitehouse.gov/omb/budget

C

CASCOM Home Page	http://www.cascom.army.mil/index.htm
CECOM	https://cecom.army.mil/
Center for Law and Military Operations (CLAMO)	https://www.jagcnet.army.mil/CLAMO
Central Contractor Registration (CCR)	https://www.sam.gov/SAM/
Civilian Board of Contract Appeals	https://cbca.gov/
Coast Guard Home Page	https://www.uscg.mil
Code of Federal Regulations	http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR
Commission on Wartime Contracting	http://www.wartimecontracting.gov/
Comptroller General Appropriations Law Decisions	http://www.gao.gov/legal/appropriations-law-decisions/search
Comptroller General Bid Protest Decisions	http://gao.gov/legal/bids/bidprotest.html
Comptroller General Legal Products	http://gao.gov/legal/
Congressional Documents	https://www.congress.gov/
Congressional Record	https://www.govinfo.gov/app/collection/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)	www.law.cornell.edu
Court of Appeals for the Federal Circuit)	http://www.cafc.uscourts.gov/
Court of Federal Claims	https://www.uscfc.uscourts.gov/

D

Defense Contract Audit Agency (DCAA)	https://www.dcaa.mil/

Defense Acquisition Regulations Directorate (the DAR Council)	https://www.acq.osd.mil/dpap/dars/index.html
Defense Acquisition University (DAU)	https://www.dau.edu/
Defense Comptroller	http://comptroller.defense.gov/
Defense Contract Management Agency (DCMA)	http://www.dcma.mil/
Defense Finance and Accounting Service (DFAS)	http://www.dfas.mil/
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 Technical Information Center	http://www.dtic.mil
Department of Energy Acquisition Guide	http://energy.gov/management/downloads/acquisition-guide-0
Department of the Interior Acquisition Regulation	http://www.doi.gov/pam/programs/acquisition/pamareg.cfm
Department of Justice	http://www.usdoj.gov
Department of Navy Issuances (DONI)	https://www.secnav.navy.mil/doni/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/

E

Executive Orders	https://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders

F

Federal Acquisition Institute (FAI)	http://www.fai.gov/
Federal Acquisition Regulation (FAR)	https://www.acquisition.gov/far/
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	https://www.federalregister.gov/
Financial Management Regulation (DoD)	http://comptroller.defense.gov/FMR/fmrvolumes.aspx
FindLaw	http://www.findlaw.com

Fiscal Budget Process Glossary	http://www.gao.gov/products/GAO-05-734SP

G

Government Accountability Office (GAO) Appropriations Law Decisions	https://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 (Now USA Learning)	https://usalearning.gov/
Government Printing Office (GPO)	http://www.gpo.gov
GSA Advantage	http://www.gsaadvantage.gov

J

JAGCNET (Army JAG Corps Homepage)	https://www.jagcnet.army.mil/
JAGCNET (The JAG Legal Center & School (TJAGLCS) homepage)	https://tjaglcs.army.mil/
Joint Electronic Library (Joint Publications)	https://www.jcs.mil/Doctrine/

L

Library of Congress	http://www.loc.gov/index.html

M

Marine Corps Home Page	http://www.usmc.mil
MWR Home Page (Army)	https://www.armymwr.com/

N

National Aeronautics and Space Administration (NASA) Procurement	https://www.hq.nasa.gov/office/procurement/
National Industries for the Blind	https://www.nib.org/
National Industries for the Severely Handicapped (NISH)National Industries for the Blind	http://www.sourceamerica.org/
Navy Financial Management and Comptroller	https://www.secnav.navy.mil/fmc/Pages/default.aspx
Navy General Counsel	http://www.ogc.navy.mil/
Navy Home Page	http://www.navy.mil
Navy Forms Online	https://www.public.navy.mil/bupers-npc/career/reservepersonnelmgmt/Pages/Forms.aspx
Department of Navy Issuances (DONI)	https://www.secnav.navy.mil/doni/default.aspx
North American Industry Classification System	http://www.census.gov/eos/www/naics/;

O

Occupational Safety & Health Administration	https://www.osha.gov/pls/imis/sicsearch.html
Office of Federal Procurement Policy (OFPP) Guides	https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#_Office_of_Federal
Office of Government Ethics (OGE)	http://www.oge.gov/
OGE Ethics Advisory Opinions	https://www.oge.gov/web/oge.nsf/OGE+Advisories/
Office of Management and Budget (OMB)	https://www.whitehouse.gov/omb/

P

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/
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

R

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

S

Service Contract Act Directory of Occupations	https://www.dol.gov/whd/regs/compliance/wage/SCADirV5/SCADirectVers5.pdf
Small Business Administration (SBA)	http://www.sba.gov/
Small Business Administration (SBA) Federal Contracting Home Page	https://www.sba.gov/federal-contracting
Small Business Innovative Research (SBIR) & Small Business Technology Transfer (STTR)	https://www.sbir.gov/
Special Inspector General for Afghanistan Reconstruction	https://www.sigar.mil/
System for Award Management	https://sam.gov/content/home

T

TJAGLCS Publications	https://tjaglcs.army.mil/publications

U

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/
U.S. Court of Appeals for the Federal Circuit (CAFC)	http://www.cafc.uscourts.gov/
U.S. Court of Federal Claims	http://www.uscfc.uscourts.gov/

W

Where in Federal Contracting?	http://www.wifcon.com/