



**THIRTY-SIXTH
FISCAL LAW
COURSE**

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**CONTRACT LAW DIVISION
THE JUDGE ADVOCATE GENERAL'S SCHOOL
UNITED STATES ARMY
CHARLOTTESVILLE, VIRGINIA**

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CONTRIBUTORS

LTC John T. Jones, Jr.
Chief, Contract Law Division

LTC Harry L. Dorsey
Senior Instructor, Contract Law Division

MAJ Michael A. Killham
Instructor, Contract Law Division

MAJ Bobby D. Melvin
Instructor, Contract Law Division

MAJ Michael K. Cameron
Instructor, Contract Law Division

MAJ Anthony M. Helm
Instructor, Contract Law Division

MAJ Steven N. Tomanelli
Instructor, Contract Law Division

Mrs. Mary D. Bell-Bailey
Secretary, Contract Law Division

Mr. Byrd Eastham
Illustrator

SSG Barbara Adanandus
Mrs. R. Chaucile Snyder
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Our predecessors on the Faculty of the Contract Law Division

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36th FISCAL LAW COURSE

DESKBOOK

SUMMARY OF CONTENTS

SUMMARY OF CONTENTS.....	i
BIOGRAPHIES OF INSTRUCTORS.....	iii

<u>CHAPTER</u>	<u>TITLE</u>
1	INTRODUCTION TO FISCAL LAW
2	AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE
3	AVAILABILITY OF APPROPRIATIONS AS TO TIME
4	CONTRACT TYPES
5	OBLIGATING APPROPRIATED FUNDS
6	CONSTRUCTION FUNDING
7	FISCAL CONTROL: GENERAL ACCOUNTING OFFICE PERSPECTIVE
8	USE OF EXPIRED APPROPRIATIONS
9	THE ANTI-DEFICIENCY ACT
10	CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS
11	REPROGRAMMING
12	INTRA-GOVERNMENT TRANSFERS AND REQUIRED SOURCE ACQUISITIONS
13	REVOLVING FUNDS
14	PAYMENT AND COLLECTION
15	NONAPPROPRIATED FUNDS AND CONTINGENCY FUNDS
16	LIABILITY OF ACCOUNTABLE OFFICERS
17	FISCAL CONTROL: DEPUTY COMPTROLLER OF THE ARMY PERSPECTIVE

SUMMARY OF CONTENTS (continued)

APPENDIX

- A SEMINAR: PROFESSIONAL RESPONSIBILITY
- B SEMINAR: OBLIGATION AND ANTI-DEFICIENCY ACT PROBLEMS
- C SEMINAR: SELECTED FISCAL LAW PROBLEMS

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THE JUDGE ADVOCATE GENERAL'S SCHOOL
DEPARTMENT OF THE ARMY

CONTRACT LAW DIVISION

BIOGRAPHIES OF INSTRUCTORS

LIEUTENANT COLONEL JOHN T. JONES, JR., JA, Chief, Contract Law Division. B.E., Magna Cum Laude, Vanderbilt University, 1973; J.D., With High Honors, George Washington University, 1978; LL.M., Government Procurement Law, With Highest Honors, George Washington University, 1986; The Judge Advocate General's School Basic Course, 1978; The Judge Advocate General's School Graduate Course, 1982; Defense Systems Management College Program Managers Course, 1985; U.S. Army Command and General Staff Course, 1989. Career Highlights: Deputy Staff Judge Advocate, U.S. Army Strategic Defense Command, Huntsville, Alabama, 1986-1989; Assistant to the General Counsel, Department of the Army, Washington, D.C., 1986; Trial Attorney, Contract Appeals Division, U.S. Army Legal Services Agency, Falls Church, Virginia, 1982-1986; Chief Trial Counsel, Hanau Legal Center, 3d Armored Division, Hanau, Germany, 1979-1981; Trial Defense Counsel, U.S. Army Berlin, Berlin, Germany, 1978-1979; Platoon Leader, 4th Engineer Battalion, 4th Infantry Division (Mech), Fort Carson, Colorado, 1974-1975. Member of the Bar of Virginia; admitted to practice before the U.S. Claims Court, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court.

LIEUTENANT COLONEL HARRY L. DORSEY, JA, Senior Instructor, Contract Law Division. A.B., Wheeling College, 1973; J.D., Duquesne University, 1977; The Judge Advocate General's School Basic Course, 1978; The Judge Advocate General's School Graduate Course, 1984; Command and General Staff College, 1991. Career Highlights: Branch Chief, Adversary Proceedings Division, U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, 1989-1990; Contract Law Attorney-Advisor, Procurement Law Division, U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey, 1987-1989; Litigation Attorney, General Litigation Branch, Litigation Division, Office of The Judge Advocate General, Washington, D.C., 1984-1987; Contract Law Attorney-Advisor, U.S. Army Contracting Agency, Europe, Frankfurt, Federal Republic of Germany,

1980-1983; Legal Assistance Officer, Contract Law Advisor, 9th Infantry Division, Fort Lewis, Washington, 1978-1980. Member of the Bar of Pennsylvania; admitted to practice before the U.S. Court of Military Appeals, the U.S. Claims Court, and the U.S. Supreme Court.

MAJOR MICHAEL A. KILLHAM, JA, Instructor, Contract Law Division. B.S., United States Military Academy, 1975; J.D., Notre Dame Law School, 1982; The Judge Advocate General's School Basic Course, 1982; LL.M., Military Law, The Judge Advocate General's School, 1988; U.S. Army Command and General Staff College, 1992. Career Highlights: Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1988-1991; Chief, Criminal Law Division and Officer in Charge, Merrill Barracks Branch Office, 1st Armored Division Staff Judge Advocate Office, Ansbach, Germany, 1984-1987; Trial Counsel, 3rd Infantry Division, Wurzburg, Germany, 1983-1984; Chief, Legal Assistance Branch, Office of the Staff Judge Advocate, Fort Devens, Massachusetts, 1982; Platoon Leader, S-3 Air, Company Executive Officer, 1st Battalion, 505th Infantry/3d Brigade, 82nd Airborne Division, Fort Bragg, North Carolina, 1976-1979. Member of the Bars of Indiana and Nebraska; admitted to practice before the Army Court of Military Review, the U.S. Claims Court and the Court of Appeals for the Federal Circuit.

MAJOR BOBBY D. MELVIN, JA, Instructor, Contract Law Division. B.S., United States Military Academy, 1976; J.D., University of Cincinnati College of Law, 1982; The Judge Advocate General's School Basic Course, 1982; LL.M., Military Law, The Judge Advocate General's School, 1987. Career Highlights: Trial Attorney, Contract Appeals Division, U.S. Army Litigation Center, Arlington, Virginia, 1987-1991; Chief, Administrative Law Division, Officer in Charge, Ansbach Branch Office, 1st Armored Division Staff Judge Advocate Office, Ansbach, Federal Republic of Germany, 1982-1986; Platoon Leader, S-3 Air, 1st Battalion, 21st Infantry, 25th Infantry Division, Schofield Barracks, Hawaii, 1977-1979. Member of the Bars of Ohio and Georgia; admitted to practice before the Army Court of Military Review and the U.S. Claims Court.

MAJOR MICHAEL K. CAMERON, JA, Instructor, Contract Law Division. B.A., Washington and Lee University, 1978; J.D., Wake Forest University, 1981; The Judge Advocate General's School Basic Course, 1981; LL.M., Military Law, The Judge Advocate General's School, 1989. Career Highlights: Chief, Nonresident Instruction Division, The Judge Advocate General's School, 1989-1990; Special Assistant U.S. Attorney, U.S. Attorney's Office, Detroit, Michigan, 1987-1988; Administrative Law Attorney, Contract Law Attorney, Senior Counsel Civil Law, XVIII Airborne Corps, Fort Bragg, North Carolina, 1984-1987; Senior Defense Counsel, Taegue, Korea, 1983-1984; Trial Attorney, Fort Dix, New Jersey, 1981-1983. Member of the Bar of North Carolina; admitted to practice before the Army Court of Military Review, the U.S. District Court for the Eastern District of Michigan, and the U.S. Supreme Court.

MAJOR ANTHONY M. HELM, JA, Instructor, Contract Law Division. B.S., California State University, Stanislaus, 1978; J.D., University of Arizona, 1981; The Judge Advocate General's School Basic Course, 1982; LL.M., Military Law, The Judge Advocate General's School, 1990. Career Highlights: Chief, Administrative Law, National Training Center, Fort Irwin, California, 1985-1989; Senior Defense Counsel, Fort Leavenworth, Kansas 1984-1985; Assistant Command Judge Advocate, Trial Defense Counsel, U.S. Disciplinary Barracks, Fort Leavenworth, Kansas, 1982-1984; Mandarin Chinese Language Specialist, USAF Security Service (Okinawa, Thailand), 1970-1974. Member of the Bar of Arizona; admitted to practice before the Army Court of Military Review and the U.S. Supreme Court.

MAJOR STEVEN N. TOMANELLI, USAF/JA, Instructor, Contract Law Division. B.A., Hofstra University, 1979; J.D., Hofstra University, 1982; Air Force Judge Advocate Staff Officer Course, 1983; LL.M., Government Procurement Law, George Washington University, 1992. Career Highlights: Chief of Military Justice/Deputy Staff Judge Advocate, Homestead Air Force Base, Florida, 1988-1991; Area Defense Counsel, Torrejon Air Base, Spain, 1986-1988; Chief of Civil Law, Torrejon Air Base, Spain, 1985-1986; Assistant Staff Judge Advocate/Special Assistant United States Attorney, 1983-1985. Member of the Bars of New York and Florida; admitted to practice before the Air Force Court of Military Review and the Court of Military Appeals.

**THE ADJUNCT FACULTY
INDIVIDUAL MOBILIZATION AUGMENTEES**

MAJOR RICHARD C. BEAN (USAR), Chief, Contract Support Division, Legal Office, Electronic Systems Division, U.S. Air Force Systems Command, Hanscom Air Force Base, Massachusetts. B.A., Holy Cross College, 1975; J.D., New England School of Law, 1978; The Judge Advocate General's School Basic Course, 1979; The Judge Advocate General's School Graduate Course, 1988; Distinguished Graduate, U.S. Army Command General Staff College, 1992. Career Highlights: Attorney-Advisor, Air Force Computer Acquisition Center, Hanscom Air Force Base, Massachusetts, 1983-1989; Attorney-Advisor, Fort Devens, Massachusetts, 1982-1983; Attorney-Advisor, Procurement Law Division, U.S. Army Communications Electronics Command, Fort Monmouth, New Jersey, 1981-82; Assistant Staff Judge Advocate, Fort Monmouth, New Jersey, 1979-1981. Member of the Bars of the State of Massachusetts, United States Supreme Court, United States Claims Court, and the United States District Court for the District of Massachusetts.

CHAPTER 1

INTRODUCTION TO FISCAL LAW

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CHAPTER 1

INTRODUCTION TO FISCAL LAW

I.	INTRODUCTION	1
A.	Course History	1
B.	Course Overview	1
C.	Fiscal Law v. Fiscal Policy	1
II.	CONSTITUTIONAL BASIS FOR FISCAL LAW	2
A.	The Congressional Power of the Purse	2
B.	The President's Powers	3
C.	Implementation of Constitutional Power	3
III.	FEDERAL APPROPRIATIONS	4
A.	What is an Appropriation?	4
B.	President's Budget	5
C.	Enacting Appropriations	5
D.	Presentment to the President	7
IV.	ANALYZING A FISCAL LAW PROBLEM	7
A.	General	7
B.	Identify the Appropriation	8
C.	Availability as to Purpose	10
D.	Availability as to Time	11
E.	Availability as to Amount	11
V.	FISCAL LAW RESEARCH	12
A.	U.S. Constitution	12
B.	Statutes	12
C.	Regulations	12
D.	Decisional Law	13
E.	Treatises	13
VI.	CONCLUSION	13

CHAPTER 1

INTRODUCTION TO FISCAL LAW

I. INTRODUCTION.

- A. Course History. Chairman, Committee on Appropriations, House of Representatives, B-132900, 55 Comp. Gen. 768 (1976).
- B. Course Overview.
- C. Fiscal Law v. Fiscal Policy.
 - 1. The law of federal appropriations, as practiced by federal agencies, has constitutional, statutory, and decisional aspects. These sources of law provide bright line rules which are applied rigidly by the General Accounting Office and other oversight agencies.
 - 2. Additionally, Congress and the Executive Branch have reached informal agreements, not included in statutes, regarding uses of appropriated funds. These agreements lack the force of law, but agency personnel should not deviate from them without the express approval of the head of the agency.
 - 3. Lastly, some fiscal rules reflect accounting practices, which can, and do, change as management changes.
 - 4. Unfortunately, some well-intentioned individuals attempt to use fiscal law as a weapon in policy disputes, or to accomplish management objectives. In so doing, they risk criminalizing actions contrary to the desired policy.

LTC John T. Jones, Jr.
Fiscal Law Course

Chapter 1

II. CONSTITUTIONAL BASIS FOR FISCAL LAW.

A. The Congressional Power of the Purse.

1. Congress has the power to raise revenue and borrow money. U.S. Const., art. I, § 8., cl. 1 - 2.
2. Congress has the power to raise and support armies and a navy. U.S. Const., art. I, § 8, cl. 12 - 13.
3. No money shall be drawn from the Treasury, but in consequence of appropriations made by law. U.S. Const., art. I, § 9, cl. 7. See Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937); Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850).
4. A regular statement and account of all receipts and expenditures of public money shall be published from time to time. U.S. Const., art. I, § 9, cl. 7.
5. No appropriation for the support of armies shall be for longer than 2 years. U.S. Const., art. I, § 8, cl. 12.
6. Congress's power of the purse is extremely broad. Congress may limit a recipient's use of federal appropriations to those purposes it chooses to subsidize. Rust v. Sullivan, ___ U.S. ___, 111 S.Ct. 1759 (1991).
7. Limits on congressional power are set forth in specific constitutional provisions. See United States v. Lovett, 328 U.S. 303 (1946).

B. The President's Powers Are Limited.

1. [The President] shall take care that the laws be faithfully executed. U.S. Const., art. II, § 3.
2. Rescissions.
 - a. Once Congress has passed an appropriation and the President has signed it into law, agencies must obligate and expend that budget authority, unless rescinded. 2 U.S.C. § 683(b).
 - b. Rescissions require separate legislative action.
 - c. The President must notify Congress of proposed rescissions of budget authority. 2 U.S.C. § 684(a).

C. Implementation of Constitutional Power.

1. Congress has implemented its constitutional power of the purse with an extensive statutory control scheme. These laws are primarily found in Title 31, U.S. Code.
2. Congress has authorized agency officials to implement a regulatory system to control obligation and expenditure of appropriations. 31 U.S.C. § 1514(a).
3. Congress has authorized the Comptroller General to issue decisions on the legality of obligation and expenditure of appropriations. 31 U.S.C. § 3529. These decisions are binding. 31 U.S.C. § 3526(b).

Chapter 1

III. FEDERAL APPROPRIATIONS.

A. What is an Appropriation?

1. Agencies require congressional appropriations to defray the costs of operations. An appropriation is a law passed by a majority of members of the House and Senate, and signed by the President.¹ An appropriation provides **BUDGET AUTHORITY** for the stated purpose(s). All other statutes and resolutions passed by Congress, including budget resolutions and authorization acts, do not authorize withdrawal of money from the U.S. Treasury.
2. **BUDGET AUTHORITY** is the authority to incur a legal obligation to pay a sum of money from the U.S. Treasury. 31 U.S.C. § 1511.
3. Occasionally, an appropriations act will provide **CONTRACT AUTHORITY**, the authority to incur legal obligations in advance of appropriations.
4. Budget authority is not money. Only when the agency issues a check withdrawing money from the Treasury and **OUTLAYS** or **EXPENDS** it to pay an obligation previously incurred does the U.S. Treasury actually disburse cash.
5. Appropriations acts are the end result of a long budget process involving many participants from both the executive and legislative branches of government.

¹Alternatively, an appropriation is enacted by a two-thirds majority of both the House and Senate, notwithstanding the President's veto.

B. President's Budget. Title 31, United States Code, Chapter 11.

1. The President must submit a consolidated budget to Congress during the first 15 days of each regular session of Congress. 31 U.S.C. § 1105. The contents of the budget are specified by law.
2. The data contained in the budget is developed by individual agencies. 31 U.S.C. § 1108. In the Department of Defense (DOD), the Programming, Planning, and Budget System (PPBS) regulates the development of the DOD Budget. DOD Dir. 7045.14, The Program, Planning, and Budgeting System (May 22, 1984).

C. Enacting Appropriations.

1. Congress has three separate groups of committees which participate in appropriating funds: budget committees, authorizing committees, and appropriations committees. These committees have competing interests, and the lines of responsibility among the committees shift over time.
2. Budget Committees. The House and Senate Budget Committees are responsible for balancing REVENUES against OUTLAYS. They provide the authorizing and appropriating committees with ceilings on total outlay levels. They also provide revenue raising committees with goals for revenues. They write the annual Budget Resolutions establishing these goals. The Budget Committees' work is an internal congressional process with little executive branch involvement.

Chapter 1

3. Authorization Process.

- a. For many appropriations, Congress has self imposed a requirement that it authorize the purpose of the appropriation. It does so through an authorization act.
- b. Authorizing committees draft the legislation authorizing Congress to appropriate funds for various agencies and programs. For the Department of Defense, the authorizing committees are the House and Senate Armed Services Committees.
- c. After receiving the President's Budget, the authorizing committees hold hearings. Following hearings, they markup draft legislation, which they report to the House or Senate for action. After each house has passed its own version of the authorizing legislation, a conference committee meets to resolve out differences in the two versions of the bill. The conference committee then reports the compromise version of the authorizing legislation to the two houses for final action and transmittal to the President for signature or veto.
- d. DOD may not authorize or expend many of its appropriations unless authorized by law. 10 U.S.C. § 114(a). Authorizing legislation does not allow funds to be withdrawn from the Treasury.
- e. DOD may expend appropriations for purposes outside the scope of 10 U.S.C. § 114(a) without separate authorizing legislation. See Civil Rights Commission, B-246541, 71 Comp. Gen. 378 (1992) (there is no general requirement for an authorization act in the Constitution or in a statute of general applicability).

4. Appropriations Process.

- a. The House and Senate Appropriations Committees draft the legislation that provides the legal basis for withdrawing funds from the Treasury.
- b. The appropriations committees follow the same process as that followed by the authorizing committees regarding hearings, markup, reporting, holding conference committees on the two versions, and reporting the final compromise version for passage by both houses.
- c. The appropriations acts often contain spending provisions that are written in general language, but directed at specific expenditures.

D. Presentment to the President.

Congress must present all authorization and appropriations acts to the President for signature or veto. U.S. Const., art. I, § 7.

IV. ANALYZING A FISCAL LAW PROBLEM.

A. General.

An attorney confronted with a fiscal law issue should analyze the issue using a simple, four-step approach. The approach requires identifying the appropriation proposed for obligation and expenditure, then determining whether the appropriation is available: 1) for the purpose served by the obligation or

Chapter 1

expenditure; 2) at the time of the obligation or expenditure; and 3) in the amount of the obligation or expenditure.

B. Identify the Appropriation.

1. The link between the appropriation and the specific budget authority relied on for a specific obligation or expenditure is the accounting classification code. These codes implement the administrative fund control system and aid in ensuring that funds are used correctly.
2. An accounting classification is commonly referred to as a fund cite. AR 37-100-XX provides a detailed breakdown of Army accounting classifications. The XX, in AR 37-100-XX, stands for the last two digits of the fiscal year, e.g., AR 37-100-93 is the source for accounting classification data for Fiscal Year 1993 for the Department of the Army. AR 37-100-XX is published annually. AFR 172-1, Vol. IV describes Department of the Air Force fund cites.

3. The following is a sample fund cite:

	<u>21</u>	<u>3</u>	<u>2020</u>	<u>67</u>	<u>1234</u>	<u>P720000</u>	<u>2610</u>	<u>S18001</u>
AGENCY	_____	_____	_____	_____	_____	_____	_____	_____
FISCAL YEAR	_____	_____	_____	_____	_____	_____	_____	_____
TYPE OF APPROPRIATION	_____	_____	_____	_____	_____	_____	_____	_____
OPERATING AGENCY CODE	_____	_____	_____	_____	_____	_____	_____	_____
ALLOTMENT NUMBER	_____	_____	_____	_____	_____	_____	_____	_____
PROGRAM ELEMENT	_____	_____	_____	_____	_____	_____	_____	_____
ELEMENT OF EXPENSE	_____	_____	_____	_____	_____	_____	_____	_____
FISCAL STATION NUMBER	_____	_____	_____	_____	_____	_____	_____	_____

4. For the attorney, the first seven fields in the fund cite are the most important part. In the example above, the first seven digits are: 21 3 2020.
 - a. The first two digits represent the military department. The "21" in the example shown is the Department of the Army.
 - b. Other Department codes are:
 - (1) 17 - Navy;
 - (2) 57 - Air Force; and
 - (3) 97 - Department of Defense.
 - c. The third digit shows the Fiscal Year/Availability of the appropriation. The "2" in the example shown represents Fiscal Year (FY) 1992 funds.
 - (1) Most agencies are funded with annual appropriations. Several examples of annual appropriations are:
 - (a) Third digit = 0 = FY 1990 funds;
 - (b) Third Digit = 1 = FY 1991 funds;
 - (c) Third Digit = 2 = FY 1992 funds;
 - (d) Third Digit = 3 = FY 1993 funds; and
 - (e) Third Digit = 4 = FY 1994 funds.
 - (2) Several other fiscal year designators, less frequently encountered in installation contracting, are:
 - (a) Third Digit = X = No Year appropriation, which is available for obligation indefinitely.

Chapter 1

- (b) Third Digit = 9/3 = Multi-Year appropriation, in this example, funds appropriated in Fiscal Year 1989 and available for obligation until Fiscal Year 1993.
- (c) Third Digit = M = Merged or Merged Surplus Account.
- d. A Treasury Department assigned four digit designator indicates the appropriation. Supplement to Vol. 1, Treasury Financial Manual (March 1993).

C. Availability as to Purpose.

1. The second step in the analysis of a fiscal law problem is to determine whether the specific appropriation is available for a specific expenditure. The 4 digit appropriations designator identifies the appropriation in question. An attorney should then research whether the appropriation is available for the proposed expenditure using the tools provided in Chapters 2, 6, and 15 of this deskbook. You may conclude the suggested appropriation is proper, another appropriation is proper, or no available appropriation² is proper. The simplest solution may be to have Congress pass a proper appropriation.
2. Even if the appropriation is legally available for the stated purpose, internal policy, including the rules on Reprogramming in Chapter 11 of this deskbook, may affect the wisdom of a particular expenditure.
3. Furthermore, if your analysis suggests that your agency must use a different appropriation for the

²Excluding contingency funds discussed in Chapter 15.

specific expenditure, that determination may affect your analysis as to time and amount.

D. Availability as to Time.

1. The third step in the analysis of a fiscal law problem is to determine whether the specific appropriation is available at the time the goods or services are needed, the obligation for the goods and services is made or adjusted, and at the time funds are disbursed from the treasury. The tools for this analysis are provided in Chapters 3, 5, 8, and 13 of this deskbook.
2. Correcting an error in the fiscal year of a proper appropriation may affect the availability as to purpose because the language of appropriations acts varies from year to year. Correcting errors in fiscal year may also cause the obligation or expenditure to exceed the amount available.

E. Availability as to Amount.

1. The last step in the analysis of a fiscal law problem is to determine whether sufficient budget authority from the proper fiscal year and appropriation is available at the time of obligation or expenditure to pay the legal liability. You may have a sufficient amount of the wrong appropriation, but not enough of the correct appropriation. The tools you need to perform this analysis are set forth in Chapters 5, 9, and 10 of this deskbook.
2. Analysis of amount comes last because severe criminal and administrative consequences result from exceeding the amount available to support an obligation. Your analysis of the purpose and time

Chapter 1

dimensions of a fiscal law problem may avoid these unpleasant consequences.

V. FISCAL LAW RESEARCH.

A. U.S. Constitution

B. Statutes.

1. Title 31, United States Code.
2. Annual Authorization and Appropriations Acts.
3. Legislative History.

C. Regulations.

1. Department of Defense: Accounting Manual, DOD 7220.9-M; Budget Guidance Manual, DOD 7110-1-M.
2. Army: AR 37-1.
3. Navy: Navy Comptroller Manual.
4. Air Force: AFR 170-6, AFR 170-8, AFR 172-1, and 177-16.

D. Decisional Law.

1. The Comptroller General of the United States settles all claims by and against the government and settles the accounts of the United States. 31 U.S.C §§ 3702 and 3526.
2. The Comptroller General issues opinions concerning the propriety of obligations of appropriated funds. 31 U.S.C. § 3259. Certifying and disbursing officers may request these opinions in advance through Comptroller channels. See also, AR 37-1, para. 20-19.
3. The published decisions of the Comptroller General are published by the Government Printing Office in the Decisions of the Comptroller General of the United States.
4. Computerized legal research services, including FLITE, LEXIS, and WESTLAW, are the most effective tools to research GAO decisions.

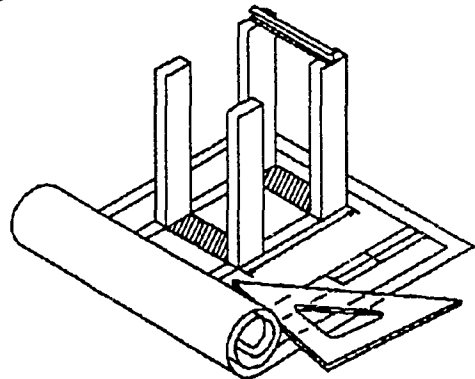
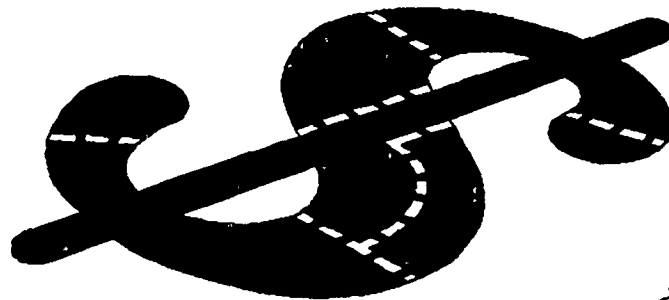
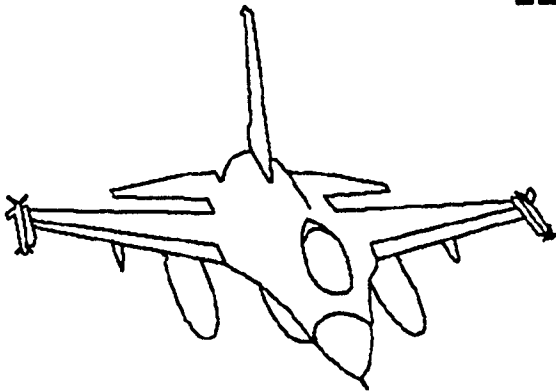
E. Treatises.

1. General Accounting Office, Principles of Federal Appropriations Law, 2d ed., GAO/OGC 91-5 (July 1991)(to be issued in four volumes; Vols. 1 and 2 in print as of 1 May 1993).
2. General Accounting Office, Accounting Guide, GAO/AFMD-PPM-2.1 (September 1990); Policies and Procedures Manual For Guidance of Federal Agencies, Title 7 (February 1990).

VI. CONCLUSION.

CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE



CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I.	INTRODUCTION	1
II.	STATUTORY FRAMEWORK	1
	A. 31 U.S.C. § 1301(a)	1
	B. Defense Appropriations	1
	C. Implementing the Annual Appropriations - Regulatory Guidance	2
III.	DETERMINING THE PROPER PURPOSE OF AN APPROPRIATION .	3
	A. Three Part Test for a Proper Purpose	3
	B. Determining the Purpose of a Specific Appropriation	3
	C. The Necessary Expense Rule	6
	D. Expenditure Is Not Otherwise Prohibited By Law .	11
	E. Expenditure Is Not Otherwise Provided For In a Separate Appropriation	11
IV.	AUGMENTATION OF APPROPRIATIONS	13
	A. General Rule -- Augmentation of Appropriations Is Not Permitted	13
	B. Receipts of Funds Authorized by Statutes	15
	C. Other Authorized Retention of Receipts and Use of Appropriations	15
V.	SPECIAL PROBLEMS	18
	A. Contingency Funds	18
	B. Community Relations and Public Affairs Funds . .	18
	C. Deployments	18
	D. Automatic Data Processing Equipment	19

VI. CONCLUSION	19
Appendix A: Appropriations Available to the Department of Defense	21
Appendix B: Department of the Army Policy Letters dated 25 May 1990 and 13 Dec 1991	30

CHAPTER 2

AVAILABILITY OF APPROPRIATIONS AS TO PURPOSE

I. INTRODUCTION.

II. STATUTORY FRAMEWORK.

A. 31 U.S.C. § 1301(a) provides:

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

The Congress initially enacted this statutory control in the Act of March 3, 1809, 2 Stat. 535. This act, generally referred to as the "Purpose Statute," was passed as part of a reorganization of the War, Navy, and Treasury Departments to limit the discretion of the Executive Branch in spending congressional appropriations.

B. Defense Appropriations. Appendix A.

1. Appropriations are differentiated by service (Army, Navy, etc.) and component (Active, Reserve, etc.), as well as purpose (Procurement, R&D, etc.).

MAJ Bobby D. Melvin
Fiscal Law Course

Chapter 2

2. Appropriations are generally categorized into Operations and Maintenance, Procurement, Research and Development, and Military Construction.

C. Implementing the Annual Appropriations - Regulatory Guidance.

1. Accounting Guidance. The various federal agencies implement appropriations acts in funding guidance provided subordinate activities. AR 37-100-(FY), The Army Management Structure; AFR 172-1, Volume 1 (Vol. 4 - FY 92); and NAV COMPT 7130.25D; assign codes for specific purposes. These codes track the various appropriations provided to the Department of Defense. The regulations also provide guidance regarding what types of expenses should be charged to each appropriation.
2. Programs. The individual agencies' accounting regulations further classify their accounts into programs, budget activities, and program elements for management purposes. Different program elements may or may not represent different appropriations, therefore, charging one program element instead of another may or may not violate the purpose statute. Formally reallocating funds between program elements is known as reprogramming.

III. DETERMINING THE PROPER PURPOSE OF AN APPROPRIATION.

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

1. Expenditure of appropriations must be for a particular purpose;

or:

The expenditure must be necessary and incident to proper execution of the general purpose of the appropriation.

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

B. Determining the Purpose of a Specific Appropriation.

1. Legislation.

- a. Appropriations Act. Examine the language of the appropriations act for the year in question.

- (1) When the language of the statute is clear, there is no need to resort to legislative history to determine congressional intent. United States v. Ron Pair Enters., Inc., 489 U.S. 235

Chapter 2

(1989) ("plain meaning" rule); LTV Aerospace Corp., B-183851, 55 Comp. Gen. 307, 317 (1975), 75-2 CPD ¶ 203.

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

b. Authorization Acts.

- (1) Many annual appropriations are accompanied by an annual authorization act. The authorization act may include language clarifying the intended purposes of a specific appropriation.
- (2) Congress requires that appropriations for certain purposes (aircraft, vessels, missiles, research and development, etc.) receive separate statutory authorization. 10 U.S.C. § 114(a).
- (3) Authorizations are not appropriations. Congress may appropriate funds with limitations that do not appear in the authorization act and that are not authorized. When Congress has appropriated funds without the required authorization, the agency may not obligate or expend the funds. When Congress authorizes and appropriates funds with differing limitations attached, the more restrictive language usually controls the federal agency's obligation and expenditure of the funds.

2. Legislative History.

- a. Legislative history is the record of congressional deliberations which precede the passage of a statute. It is not legislation. Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).
- b. Generally, the pertinent legislative history will consist of:
 - (1) Text of the bill;
 - (2) Reports of the House Armed Services Committee, the Senate Armed Services Committee, the House Appropriations Committee, and the Senate Appropriations Committee;
 - (3) Conference reports;
 - (4) Floor debates reported in the Congressional Record; and
 - (5) Hearings.
- c. The reports include nonbinding P-1 and R-1 documents which may shed light on lawful uses of appropriations. ANGUS Chemical Co., B-227033; B-227034, August 4, 1987, 87-2 CPD ¶ 127.
- d. The legislative history is not necessarily binding upon the Executive Branch. Where Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions. SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30; LTV Aerospace Corp., B-183851, 55 Comp. Gen. 307 (1975), 75-2 CPD ¶ 203.

Chapter 2

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

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

C. The Necessary Expense Rule.

- 1. 31 U.S.C. § 1301(a) does not require Congress to specify every item of expenditure in an appropriation act. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. U.S. Dep't. of Labor - Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Affairs, B-245541, May 21, 1992, 71 Comp. Gen 402 (1992); Defense Nuclear Agency -- Strategy of Career Transition Course, B-226380, 68 Comp. Gen. 127 (1988); Dep't of the Army -- Purchase of Commercial Calendars, B-211477, 62 Comp. Gen. 566 (1984).
- 2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. MG Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927); Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962).

3. In some instances, Congress has specifically authorized expenditures as "necessary expenses" of an existing appropriation. See Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, April 10, 1992, 71 Comp. Gen. 346 (1992) (10 U.S.C. §1125 authorizes Secretary of Defense to purchase and award medals, trophies, etc. to members of armed forces for excellence in activities relating to the armed forces); 5 U.S.C. §§ 4501-4507 (Government Employees Incentive Awards Act).
4. Necessary Expense defined.
 - a. ".... an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function" Internal Revenue Service Federal Credit Union -- Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987).
 - b. A necessary expense does not have to be the only way or even the best way to accomplish the object of an appropriation. Secretary of the Interior, B-123514, 34 Comp. Gen. 599 (1955). However, a necessary expense must be more than merely desirable. Utility Costs under Work-at-Home Programs, B-225159, 68 Comp. Gen. 505 (1989).
5. Determinations are fact/agency/purpose specific. Use of Appropriated Funds for an Employee Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).

Chapter 2

6. Typical questionable expenses.

- a. Clothing. Clothing is generally a personal expense. 5 U.S.C. § 7903 (special clothing, for government benefit, and protects against hazards); White House Communications Agency -- Purchase or Rental of Formal Wear, B-247683, July 6, 1992, 71 Comp. Gen. 447 (1992) (tuxedo rental or purchase for employees authorized); IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period was not authorized); Internal Revenue Service -- Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (safety shoes authorized).

b. Entertainment.

(1) Appropriated funds are not generally available to pay for entertainment. HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989); Department of The Army -- Claim of the Hyatt Regency Hotel, B-230382, December 22, 1989 (unpub.) (coffee and donuts unauthorized entertainment expense); Provision of Meals on Government Aircraft, B-218672, 65 Comp. Gen. 16 (1985) (in-flight meals may be provided to government employees in travel status); Coast Guard--Meals at Training Conference, B-244473, Jan. 13, 1992 (unpub.); Navy Fireworks Display, B-202518, Jan. 8, 1982, 82-2 CPD ¶ 1 (fireworks unauthorized entertainment); Internal Revenue Service -- Live Entertainment and Lunch Expense of National Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (live musical performance generally entertainment, exception for agency EEO cultural and ethnic programs).

(2) Unless authorized by statute. Golden Spike Nat'l Historic Site, 68 Comp. Gen. 544 (1989) (Statutory authority to conduct "interpretive demonstrations" includes autho-

city to pay for musical entertainment at the 1988 Annual Golden Spike Railroader's Festival); Claim of Karl Pusch, B-182357, Dec. 9, 1975 (unpub.) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club - twice); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (refreshments incident to employee awards ceremonies may be paid from general appropriations); 10 U.S.C. §1124 - allows military awards program).

- c. Decorations. Department of State & General Services Administration -- Seasonal Decorations, B-226011, B-226900, 67 Comp. Gen. 37 (1987) (purchase of decorations proper); The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (personal Christmas cards not proper expenditure); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee).
- d. Business Cards. Forest Service -- Purchase of Information Cards, B-231830, 68 Comp. Gen. 467 (1989) (personal expense and may not buy absent specific statutory authority); Promotional and Business Expenditures in the Sale of Commemorative Coins, B-206273.2, 68 Comp. Gen. 583 (1989) (use of funds to buy business cards for government sales representatives prohibited, other forms of "advertising" permissible); United States Trade Representative -- Use of Reception and Representation Funds, B-223678, June 5, 1989 (unpub.) (authorized representational expense for the U.S. Trade Representative).
- e. Telephones. 31 U.S.C. § 1348; Use of Appropriated Funds to Pay Long Distance Telephone Charges Incurred by a Computer

Chapter 2

Hacker, B-240276, 70 Comp. Gen. 643 (1991)(may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate); Timothy R. Manns -- Installation of Telephone Equipment in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters allowed.)

- f. Miscellaneous Personal Expenses. Smithsonian Institution Use of Appropriated Funds for Legal Representation of Officers and Employees, B-241970.2, 70 Comp. Gen. 647 (1991) (payment of attorney fees improper); Defense Mapping Agency -- Use of Imprest Funds for a Dremel Shoe Polisher, 1991 U.S. Comp. Gen. LEXIS 976, July 30, 1991 (unpub.)(shoe polisher not authorized); Department of the Navy -- Purchase of Employee Identification Tags, B-237236, Dec. 11, 1989, 69 Comp. Gen. 82 (1989) (name tags an authorized purchase); Office of Personnel Management -- Purchase of Air Purifiers, B-215108, July 23, 1984, 84-2 CPD ¶ 194 (purchase of air purifiers for common areas allowed).

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

- a. May current appropriations be charged?
- b. Test: Do the new duties have a sufficient relationship to purpose of previously enacted appropriation? Director, National Science Foundation, B-158371, 46 Comp. Gen. 604 (1967); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

D. Expenditure is not Otherwise Prohibited by Law.

1. Constitutional Prohibitions.
2. Permanent Legislation Prohibitions.
3. Annual Appropriation Act Prohibitions (provisos and riders).

E. Expenditure is not Otherwise Provided for in a Separate Appropriation.

1. Where there is another, more specific, appropriation available, it must be used in preference to the more general appropriation. 1 Comp. Dec. 126 (1894) (purchase of books); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) (foreign assistance funds available).
 - a. That a specific appropriation is exhausted is immaterial. Secretary of Commerce, B-129401, 36 Comp. Gen. 386 (1956).
 - b. General appropriations may not be used as a back-up for a more specific appropriation. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940).

Chapter 2

- c. Limitation applies even if specific appropriation is included in the more general appropriation. Secretary of the Interior, B-14967, 20 Comp. Gen. 739 (1941).
2. Two appropriations reasonably equally available for expenditures not specifically mentioned in either appropriation.
- a. The agency may choose either appropriation. Payment of SES Performance Awards of the Railroad Retirement Board's Office of Inspector General, B-231445, 68 Comp. Gen. 337 (1989). Agency discretion is generally not questioned. Secretary of Agriculture, A-96689, 18 Comp. Gen. 285, 292 (1938).
 - b. Once the election is made, however, the agency is required to continue to use the selected appropriation to the exclusion of any other, absent changes in the appropriations act. Recording Obligations under EPA Cost-Plus-Fixed-Fee Contract, B-195732, 59 Comp. Gen. 518 (1980), rev'd other grounds, 61 Comp. Gen. 609 (1980). The election is binding even after the chosen appropriation is exhausted. Honorable Clarence Cannon, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted, Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

IV. AUGMENTATION OF APPROPRIATIONS.

A. General Rule -- Augmentation of Appropriations is not Permitted.

1. What is augmentation of an appropriation?

Augmentation is action by an agency which increases the amount of funds in an agency's appropriation. This generally 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 of the following provisions.

a. The United States Constitution, Article I, Section 9, Clause 7, provides that:

No money shall be drawn from the treasury except in consequence of appropriations made by law.

b. 31 U.S.C. § 1301(a) provides that:

Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.

Chapter 2

c. 31 U.S.C. § 3302(b) provides that:

Except as . . . [otherwise provided] . . . an official or agent of the government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim. (Miscellaneous Receipts Statute).

3. 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). Reimbursement of Registration Fees for Federal Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Administrative Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and Human Services -- Detail of Office of Community Services Employees, B-211373, 64 Comp. Gen. 370 (1984).
4. Augmenting an appropriation by retaining government funds received from another source. This violates the Miscellaneous Receipts Statute. Interest Earned on Unauthorized Loans of Federal Grant Funds, B-246502, May 11, 1992, 71 Comp. Gen. 387 (1992). When the retained funds are expended, this generally violates the constitutional requirement for an appropriation. 31 U.S.C. § 3302(b); Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988); Bureau of Alcohol, Tobacco, and Firearms -- Augmentation of Appropriations -- Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (31 U.S.C. § 3302 only applies to monies received, not other property or services).

B. Receipts of Funds Authorized by Statutes.

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 ordering agency with the goods or services. See 41 U.S.C. § 12 (project orders).
2. Revolving Funds. Revolving funds are management tools which provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Adm'r, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).
3. Proceeds received from bond forfeitures, but only to the extent necessary to cover costs of the United States. 16 U.S.C. § 579c; USDA Forest Service -- Authority to Reimburse General Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Service -- Disposition of Performance Bond Forfeited to Government by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).
4. Defense Gifts. 10 U.S.C. §§ 2608. The Secretary of the Defense may accept monetary gifts and intangible personal property for defense purposes. However, these Defense gifts may not be expended until appropriated by Congress.

Chapter 2

C. Other Authorized Retention of Receipts and Use of Appropriations.

1. Replacement Contracts. An agency may retain recovered excess reprocurement costs to fund replacement contracts. Bureau of Prisons -- Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, B-210160, Sept. 28, 1983, 84-1 CPD ¶ 91; see also Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988); Patterson, Funding of Replacement Contracts, The Army Lawyer, Jun. 1989, at 56; Funding of Replacement Contracts Following Termination, The Nash & Cibinic Report, vol. 3, no. 4, ¶ 33 (April 1989). Any excess over the actual costs of the replacement contract must be deposited as a miscellaneous receipt.
2. When the receipt is a refund for an erroneous payment. Defense Logistics Agency -- Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (contractual recovery must be deposited as miscellaneous receipts); International Natural Rubber Organization -- Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1983); Department of Justice -- Deposit of Amounts Received From Third Parties, B-205508, 61 Comp. Gen. 537 (1982).
3. Receipt of property other than cash. When the government receives a replacement for property damaged by a third party in lieu of cash, the agency may retain the property. Bureau of Alcohol, Tobacco, and Firearms -- Augmentation of Appropriations -- Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (replacement by repair of damaged vehicles).

4. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments which it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by DOE for oil company overcharges to their customers may be held in trust for specific victims).
5. Nonreimbursable details. The Comptroller General held nonreimbursable agency details of personnel to other agencies generally unallowable in 1985. Department of Health and Human Services -- Detail of Office of Community Services Employees, B-211373, 64 Comp. Gen. 370 (1985). Certain details, however, are still permitted:
 - a. Details to congressional committees. National Housing Administration, B-25199, 21 Comp. Gen. 954 (1942);
 - b. Details between executive branch agencies where similar matters are ordinarily involved. Department of Health and Human Services -- Detail of Office of Community Services Employees, B-211373, 64 Comp. Gen. 370 (1985);
 - c. Details for brief periods when necessary services cannot be obtained by other means, and the persons and costs are minimal. Department of Health and Human Services -- Detail of Office of Community Services Employees, B-211373, 64 Comp. Gen. 370 (1985).

Chapter 2

V. SPECIAL PROBLEMS.

A. Contingency Funds.

Contingency funds are appropriations made available to the executive branch which may be expended without the normal controls. Congress has provided contingency funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438. Contingency funds are regulated closely because of their limited availability and potential for abuse. See Chapter 15, Course Deskbook.

B. Community Relations and Public Affairs Funds. AR 360-61, Community Relations (15 Jan. 1987).

C. Deployments.

HONDURAS: The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

1. Construction.
2. Foreign Humanitarian Assistance.
3. Foreign Military Assistance.
4. U.S. Military Training.

D. Automatic Data Processing Equipment.

1. Expense/Investment Threshold. End items costing less than \$15,000 are generally purchased using operating funds. End items costing more than \$15,000 are generally purchased using the appropriate procurement appropriation. Applying this deceptively simple rule to computers and software has caused problems because equipment and software, costing less than \$15,000 standing alone, may be combined into large systems costing well over \$15,000. Auditors have frequently challenged expenditures as violations of the Purpose statute.
2. The Army has published guidance to assist activities in determining the proper appropriation to charge for computer equipment. Appendix B.

VI. CONCLUSION.

Chapter 2

APPENDIX A
APPROPRIATIONS AVAILABLE
TO
THE DEPARTMENT OF DEFENSE

Chapter 2

DEPARTMENT OF DEFENSE
OFFICE OF THE SECRETARY OF DEFENSE

General Funds

97 0030	Retired Pay, Defense (fiscal year)
97 0040	Payments to Military Retirement Fund, Defense (fiscal year)
97 0100	Operation and Maintenance, Defense Agencies (fiscal year)
97 0101	Contingencies, Defense (fiscal year)
97 0102	Claims, Defense (fiscal year)
97 0103	Base Realignment and Closure Account, Part I, Defense (fiscal year)
97 0104	Court of Military Appeals, Defense (fiscal year)
97 0105	Drug Interdiction and Counter-Drug Activities, Defense (fiscal year)
97 0106	Goodwill Games, Defense (fiscal year)
97 0107	Office of the Inspector General, Defense (fiscal year)
97 0108	Emergency Expenses, Defense (fiscal year)
97 0115	Corporate Information Management Initiative Transfer Account, Defense (fiscal year)
97 0116	Summer Olympics, Defense (fiscal year)
97 0130	Defense Health Program, Defense (fiscal year)
97 0131	Real Property Maintenance, Defense (fiscal year)
97X0132	Claims, Mount Pinatubo, Defense
97 0132	Claims, Mount Pinatubo, Defense (fiscal year)
97 0133	Payment to Coast Guard, Defense (fiscal year)
97 0300	Procurement, Defense Agencies (fiscal year)
97 0301	Special Operations Forces Fund, Defense (fiscal year)
97 0350	National Guard and Reserve Equipment, Defense (fiscal year)
97X0360	Defense Production Act Purchases, Defense
97 0360	Defense Production Act Purchases, Defense (fiscal year)
97 0370	NATO Cooperative Defense Programs, Defense (fiscal year)
97X0390	Chemical Agents and Munitions Destruction, Defense
97 0390	Chemical Agents and Munitions Destruction, Defense (fiscal year)
97 0400	Research, Development, Test, and Evaluation, Defense Agencies (fiscal year)
97 0450	Developmental Test and Evaluation, Defense (fiscal year)
97 0460	Operational Test and Evaluation, Defense (fiscal year)
97 0500	Military Construction, Defense Agencies (fiscal year)
97X0510	Department of Defense Base Closure Account 1990
97 0706	Family Housing, Defense Agencies (fiscal year)
97 0800	Special Foreign Currency Program, Defense (fiscal year)
97X0801	Foreign Currency Fluctuations, Defense
97X0803	Foreign Currency Fluctuation, Construction, Defense
97X0804	North Atlantic Treaty Organization Infrastructure, Defense
97 0805	Military Construction, Reserve Components Generally, Defense (fiscal year)
97 0806	Special Pay for Aviation Officers, Defense (fiscal year)
97 0809	Acquisition, Construction, and Improvements, Coast Guard, Defense (fiscal year)
97X0810	Environmental Restoration, Defense
97 0810	Environmental Restoration, Defense (fiscal year)
97 0812	Tenth International Pan American Games, Defense (fiscal year)
97 0819	Humanitarian Assistance, Defense (fiscal year)
97 0823	Military and Civilian Pay Raises, Defense (fiscal year)
97 0826	The Mildred and Claude Pepper Foundation (fiscal year)
97 0827	World University Games, Defense (fiscal year)
97 0828	Defense Reinvestment for Economic Growth, Defense (fiscal year)
97 0829	World Cup USA, Defense (fiscal year)
97X1997	Unapplied Appropriation Financed Material Charges, Defense Agencies

**SUPPLEMENT TO VOL 1
TREASURY FINANCIAL MANUAL**

97X1998 Unapplied Stock Fund Charges, Defense Agencies
97X3910 ADP Equipment Management Fund, Defense

Revolving Funds

97X4090	Homeowners Assistance Fund, Defense	42 USC 3374(d)
97 4090	Homeowners Assistance Fund, Defense (fiscal year)	10 USC 2687 nt
97X4093	William Langer Jewel Bearing Plant Revolving Fund, Defense	5 USC 5724 nt
97X4555	National Defense Stockpile Transaction Fund, Defense	101 Stat. 1246
97X4930	Defense Business Operations Fund, Defense	10 USC 2208
97X4950	Pentagon Reservation Maintenance Revolving Fund	10 USC 2674(e)
97X4965	Emergency Response Fund, Defense	103 Stat. 1126; 1127

Special Fund

97X5187	Defense Cooperation Account, Defense	104 Stat. 873
97X5188	Disposal of Department of Defense Real Property	104 Stat. 1786; 1787
97X5189	Lease of Department of Defense Real Property	104 Stat. 1786; 1787
97X5193	Department of Defense Overseas Military Facility Investment Recovery Account	10 USC 2391 nt

Deposit Funds

97X6001	Proceeds of Sales of Lost, Abandoned, or Unclaimed Personal Property, Office of Secretary of Defense (T)	10 USC 2575
97X6130	Employee and Employer Contributions, Foreign Government Social Security and Related Programs, Office of Secretary of Defense	22 USC 889
97X6131	Employee and Employer Contributions, Private Insurance Plans, Office of Secretary of Defense	22 USC 889
97X6147	NATO Airborne Early Warning Program, Office of Secretary of Defense	31 USC 3513

Trust Funds

97X8096	Department of Defense Dependents' Education Gift Fund	10 USC 2605
97X8097	Department of Defense Military Retirement Fund	10 USC 1331
97X8098	Department of Defense, Education Benefits Fund	10 USC 2006
97X8164	Surcharge Collections, Sales of Commissary Stores, Defense Commissary Agency	90 Stat. 1293
97X8165	Foreign National Employees Separation Pay Account, Defense	105 Stat. 1456
97X8168	National Security Education Trust Fund	105 Stat. 1274
97X8311	Uniformed Services University of the Health Sciences Gift Fund	97 Stat. 200
97X8335	Voluntary Separation Incentive Fund, Defense	105 STAT. 1397

DEPARTMENT OF THE ARMY

General Funds

21 0702	Family Housing, Army (fiscal year)
21 1705	National Board for the Promotion of Rifle Practice, Army (fiscal year)
21X1805	Salaries and Expenses, Cemeterial Expenses, Army
21X1997	Unapplied Appropriation Financed Material Charges, Army
21X1998	Unapplied Stock Fund Charges, Army
21 2010	Military Personnel, Army (fiscal year)
21X2020	Operation and Maintenance, Army
21 2020	Operation and Maintenance, Army (fiscal year)

21 2030	Procurement of Equipment and Missiles, Army (fiscal year)
21 2031	Aircraft Procurement, Army (fiscal year)
21 2032	Missile Procurement, Army (fiscal year)
21 2033	Procurement of Weapons and Tracked Combat Vehicles, Army (fiscal year)
21 2034	Procurement of Ammunition, Army (fiscal year)
21 2035	Other Procurement, Army (fiscal year)
21 2036	Army National Guard Equipment (fiscal year)
21 2040	Research, Development, Test, and Evaluation, Army (fiscal year)
21 2050	Military Construction, Army (fiscal year)
21 2060	National Guard Personnel, Army (fiscal year)
21 2065	Operation and Maintenance, Army National Guard (fiscal year)
21 2070	Reserve Personnel, Army (fiscal year)
21 2080	Operation and Maintenance, Army Reserve (fiscal year)
21 2085	Military Construction, Army National Guard (fiscal year)
21 2086	Military Construction, Army Reserve (fiscal year)
21 2087	Summer Olympics, Army, (fiscal year)

Revolving Funds

21X4528	Working Capital Fund, Army Conventional Ammunition	10 USC 2208(a)
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Special Funds

21X5095	Wildlife Conservation, etc., Military Reservations, Army	16 USC 670b
21X5096	Army Reserve Training Center, Army	89 Stat. 568
21X5098	Restoration, Rocky Mountain Arsenal, Army	100 Stat. 4003
21X5285	Department of Defense, Forest Products Program, Army	10 USC 2665
21X5286	National Science Center, Army	99 Stat. 763, 764

Deposit Funds

21X6001	Proceeds of Sales of Lost, Abandoned, or Unclaimed Personal Property, Army (T)	10 USC 2575
21X6002	Personal Funds of Deceased, Mentally Incompetent or Missing Personnel, Army (T)	31 USC 3513
21X6010	Pay of the Army, Deposit Fund (T)	10 USC 1035
21X6015	Funds of Civilian Internees and Prisoners of War, Army (T)	31 USC 3513
21X6031	Effects of Mentally Incompetent Soldiers, United States Army (T)	31 USC 3513
21 6060	Estates of Deceased Soldiers, Regular Army (T) (fiscal year)	24 USC 44
21X6069	Advances, Federal Republic of Germany (T)	10 USC 2211
21X6075	Withheld Allotment of Compensation for Payment of Employee Organization Dues, Army	31 USC 3513
21X6083	Withheld Allotment of Compensation for Charitable Contributions, Army	31 USC 3513
21X6105	Withheld Employee Contributions, State or Territorial Retirement, Army	5 USC 518
21X6108	Employer Contributions, State or Territorial Retirement Army	5 USC 518
21X6112	Withheld Employee Contributions, State or Territorial Disability Benefits, Army	5 USC 518
21X6113	Withheld Employee Contributions, State or Territorial Death Benefits, Army	5 USC 518
21X6129	Foreign Taxes Withheld, Army	31 USC 3513
21X6131	Employee and Employer Contributions, Private Insurance Plans, Army	22 USC 889a,b
21X6134	Amounts Withheld for Civilian Pay Allotments, Army	31 USC 3513
21X6208	Amounts Withheld for Group Life Insurance, National Guard Members, Army	37 USC 707
21X6325	Coupons, Petroleum, Oil and Lubricants, Army	31 USC 3513

**SUPPLEMENT TO VOL 1
TREASURY FINANCIAL MANUAL**

21X6434	Servicemen's Group Life Insurance Fund, Suspense, Army	38 USC 769
21 6763	Gains and Deficiencies on Exchange Transactions, Army (fiscal year)	31 USC 3342
21X6999	Accounts Payable, Check Issue Underdrafts, Army	31 USC 3513

Trust Funds

21X8063	Bequest of Major General Fred C. Ainsworth, Library, Walter Reed General Hospital	49 Stat. 287
21X8064	Fisher House Trust Fund, Army	105 STAT. 1175
21X8174	National Science Center's Gift Fund, Army	99 Stat. 763, 764
21X8420	Surcharge Collections, Sales of Commissary Stores, Army	65 Stat. 449
21X8927	Department of the Army General Gift Fund	10 USC 2601

DEPARTMENT OF THE NAVY

General Funds

17X0380	Coastal Defense Augmentation, Navy
17 0703	Family Housing, Navy and Marine Corps (fiscal year)
17 1105	Military Personnel, Marine Corps (fiscal year)
17 1106	Operation and Maintenance, Marine Corps (fiscal year)
17 1107	Operation and Maintenance, Marine Corps Reserve (fiscal year)
17 1108	Reserve Personnel, Marine Corps (fiscal year)
17 1109	Procurement, Marine Corps (fiscal year)
17 1205	Military Construction, Navy (fiscal year)
17 1235	Military Construction, Naval Reserve (fiscal year)
17X1319	Research, Development, Test and Evaluation, Navy
17 1319	Research, Development, Test, and Evaluation, Navy (fiscal year)
17 1405	Reserve Personnel, Navy (fiscal year)
17 1453	Military Personnel, Navy (fiscal year)
17 1505	Procurement of Aircraft and Missiles, Navy (fiscal year)
17 1506	Aircraft Procurement, Navy (fiscal year)
17 1507	Weapons Procurement, Navy (fiscal year)
17X1611	Shipbuilding and Conversion, Navy
17 1611	Shipbuilding and Conversion, Navy (fiscal year)
17 1804	Operation and Maintenance, Navy (fiscal year)
17 1806	Operation and Maintenance, Navy Reserve (fiscal year)
17 1810	Other Procurement, Navy (fiscal year)
17X1997	Unapplied Appropriation Financed Material Charges, Navy
17X1998	Unapplied Stock Fund Charges, Navy
17X3980	Navy Management Fund

Revolving Funds

17X4557	National Defense Sealift Fund, Navy	P.L. 102-396
17 4557	National Defense Sealift Fund, Navy (fiscal year)	106 stat. 1896, 2488

Special Fund

17X5095	Wildlife Conservation, etc., Military Reservations, Navy	16 USC 670b
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Deposit Funds

17X6001	Proceeds of Sales of Lost, Abandoned, or Unclaimed Personal Property, Navy (T)	10 USC 2575
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17X6002	Personal Funds of Deceased, Mentally Incompetent or Missing Personnel, Navy (T)	31 USC 3513
17X6025	Pay of the Navy, Deposit Fund (T)	10 USC 1035
17X6026	Pay of the Marine Corps, Deposit Fund (T)	10 USC 1035
17X6075	Withheld Allotment of Compensation for Payment of Employee Organization Dues, Navy	31 USC 3513
17X6083	Withheld Allotment of Compensation for Charitable Contributions, Navy	31 USC 3513
17X6134	Amounts Withheld for Civilian Pay Allotments, Navy	31 USC 3513
17X6434	Servicemen's Group Life Insurance Fund, Suspense, Navy	31 USC 3513
17X6705	Civilian Employees Allotment Account, Navy	5 USC 5525
17X6706	Commercial Communication Service, Navy	47 USC 327
17 6763	Gains and Deficiencies on Exchange Transactions, Navy (fiscal year)	31 USC 492b
17X6850	Housing Rentals, Navy	42 USC 1543
17X6999	Accounts Payable, Check Issue Underdrafts, Navy	31 USC 3513

Trust Funds

17X8008	Office of Naval Records and History Fund	10 USC 7222
17X8331	U.S. Naval Home Capital Program	104 Stat. 1723
17X8332	U.S. Naval Home Operation and Maintenance	104 Stat. 1723
17X8334	U.S. Naval Home Trust Fund	104 Stat. 1723
17X8421	Surcharge Collections, Sales of Commissary Stores, Marine Corps	90 Stat. 1293
17X8423	Midshipmen's Store, United States Naval Academy	10 USC 6971(a)
17X8716	Department of the Navy General Gift Fund	10 USC 2601
17X8723	Ships' Stores Profits, Navy	10 USC 7220, 7604
17X8730	United States Naval Academy Museum Fund	10 USC 6974
17X8733	United States Naval Academy General Gift Fund	10 USC 6973

DEPARTMENT OF THE AIR FORCE

General Funds

57 0704	Family Housing, Air Force (fiscal year)
57X1997	Unapplied Appropriation Financed Material Charges, Air Force
57X1998	Unapplied Stock Fund Charges, Air Force
57X1999	Unclassified Receipts and Expenditures, Air Force
57 3010	Aircraft Procurement, Air Force (fiscal year)
57 3020	Missile Procurement, Air Force (fiscal year)
57 3080	Other Procurement, Air Force (fiscal year)
57X3300	Military Construction, Air Force
57 3300	Military Construction, Air Force (fiscal year)
57 3400	Operation and Maintenance, Air Force (fiscal year)
57 3500	Military Personnel, Air Force (fiscal year)
57 3600	Research, Development, Test, and Evaluation, Air Force (fiscal year)
57 3700	Reserve Personnel, Air Force (fiscal year)
57 3730	Military Construction, Air Force Reserve (fiscal year)
57 3740	Operation and Maintenance, Air Force Reserve (fiscal year)
57 3830	Military Construction, Air National Guard (fiscal year)
57 3840	Operation and Maintenance, Air National Guard (fiscal year)
57 3850	National Guard Personnel, Air Force (fiscal year)

**SUPPLEMENT TO VOL 1
TREASURY FINANCIAL MANUAL**

Revolving Funds

Special Fund

57X5095	Wildlife Conservation, etc., Military Reservations, Air Force	16 USC 670b
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Deposit Funds

57X6001	Proceeds of Sales of Lost, Abandoned, or Unclaimed Personal Property, Air Force (T)	10 USC 2575
57X6002	Personal Funds of Deceased, Mentally Incompetent or Missing Personnel, Air Force (T)	31 USC 3513
57X6010	Pay of the Air Force, Deposit Fund (T)	10 USC 1035
57X6031	Effects of Mentally Incompetent Soldiers, United States Air Force	31 USC 3513
57 6060	Estates of Deceased Airmen, Regular Air Force (T) (fiscal year)	24 USC 44
57X6075	Withheld Allotment of Compensation for Payment of Employee Organization Dues, Air Force	31 USC 3513
57X6083	Withheld Allotment of Compensation for Charitable Contributions, Air Force	31 USC 3513
57X6090	Unclaimed Moneys Due Creditors of Contractors with the United States under Cost-Plus-A-Fixed-Fee Contracts, Department of the Air Force (T)	31 USC 3513
57X6105	Withheld Employee Contributions, State or Territorial Retirement, Air Force	5 USC 518
57X6108	Employer Contributions, State or Territorial Retirement, Air Force	5 USC 518
57X6112	Withheld Employee Contributions, State or Territorial Disability Benefits, Air Force	5 USC 518
57X6113	Withheld Employee Contributions, State or Territorial Death Benefits, Air Force	5 USC 518
57X6129	Foreign Taxes Withheld, Air Force	31 USC 3513
57X6130	Employee and Employer Contributions, Foreign Government Social Security and Related Programs, Air Force	22 USC 889
57X6131	Employee and Employer Contributions, Private Insurance Plans, Air Force	22 USC 889
7X6134	Amounts Withheld for Civilian Pay Allotments, Air Force	31 USC 3513
57X6136	Amounts Withheld for Group Life Insurance, National Guard Members, Air Force	37 USC 701
57X6434	Servicemen's Group Life Insurance Fund, Suspense, Air Force	38 USC 769
57 6763	Gains and Deficiencies on Exchange Transactions, Air Force (fiscal year)	31 USC 3342
57X6922	Air Transportation, Military Air Transport Service, Department of the Air Force (T)	10 USC 2632
57X6999	Accounts Payable, Checks Issue Underdrafts, Air Force	31 USC 3513

Trust Funds

57X8418	Air Force Cadet Fund	68 Stat. 47; 37 USC 725s
57X8420	Surcharge Collections, Sales of Commissary Stores, Air Force	65 Stat. 449
57X8928	Department of the Air Force General Gift Fund	10 USC 260i

CORPS OF ENGINEERS, CIVIL

General Funds

96X3112	Flood Control, Mississippi River and Tributaries, Corps of Engineers, Civil
96X3121	General Investigations, Corps of Engineers, Civil

96 3122	Construction, General, Corps of Engineers, Civil (fiscal year)
96X3123	Operation and Maintenance, General, Corps of Engineers, Civil
96X3124	General Expenses, Corps of Engineers, Civil
96X3125	Flood Control and Coastal Emergencies, Corps of Engineers, Civil
96X3126	Regulatory Program, Corps of Engineers, Civil
96X3930	Consolidated Working Fund, Army, Engineers, Civil

Revolving Funds

96X4902	Revolving Fund, Corps of Engineers, Civil	33 USC 76
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Special Funds

96X5007	Special Recreation Use Fees, Corps of Engineers, Civil	16 USC 4061-6a nt
96X5066	Hydraulic Mining in California, Debris	33 USC 683
96X5090	Payments to States, Flood Control Act of 1954	33 USC 701c-3
96X5125	Maintenance and Operation of Dams and Other Improvements of Navigable Waters	16 USC 803(f), 810

Deposit Funds

96X6075	Withheld Allotment of Compensation for Payment of Employee Organization Dues, Corps of Engineers, Civil	31 USC 3513
96X6094	Advances from the District of Columbia, Corps of Engineers, Civil	31 USC 3513
96X6134	Amounts Withheld for Civilian Pay Allotments, Corps of Engineers	31 USC 3513
96X6145	Technical Assistance, United States Dollars Advanced from Foreign Government, Corps of Engineers, Civil	22 USC 2357a
96X6302	Moneys Withheld from Contractors, Corps of Engineers, Civil	31 USC 3513

Trust Funds

96X8333	Coastal Wetlands Restoration Trust Fund	104 Stat. 4778; 4788
96X8862	Rivers and Harbors Contributed and Advance Funds, Corps of Engineers, Civil	33 USC 60, 701h, 702f, 703

UNITED STATES SOLDIERS' AND AIRMEN'S HOME

Deposit Funds

84X6083	Withheld Allotment of Compensation for Charitable Contributions, United States Soldiers' and Airmen's Home	31 USC 3513
84X6103	Estate and Pension Funds, United States Soldiers' and Airmen's Home (T)	24 USC 2

Trust Funds

84X8331	U.S. Naval Home Capital Program	104 Stat. 1723
84 8332	U.S. Naval Home Operation and Maintenance, (fiscal year)	P.L. 102-394 (10/6/92)
84X8334	U.S. Naval Home Trust Fund	104 Stat. 1723
84X8463	Soldiers' and Airmen's Home Revolving Fund	24 USC 44, 45, 46
84X8929	U.S. Soldiers' and Airmen's Trust Fund	104 Stat. 1723
84X8930	Payment of Claims, United States Soldiers' and Airmen's Home	24 USC 44, 45, 46
84 8931	Operation and Maintenance, United States Soldiers' and Airmen's Home (fiscal year)	96 Stat. 848
84X8932	Capital Outlay, United States Soldiers' and Airmen's Home	96 Stat. 848

Chapter 2

APPENDIX B

Department of the Army Policy Letters
dated 25 May 1990 and 13 Dec 1991.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0109
13 December 1991



MEMORANDUM FOR DISTRIBUTION

SUBJECT: Policy for Application of the Expense/Investment
Criteria for the Purchase/Modification of Information
Mission Area (IMA) Software and Hardware

Reference ASA(FM) memorandum of May 25, 1990, subject as
above.

This memorandum serves two purposes: to implement a
change in the policy for funding for ADPE purchases at RDTE
installations; and to provide clarifying definitions of several
of the terms used in the referenced memorandum.

Existing Army policy states that ADPE required for base
operations (indirect costs) to support multiple projects of
users are funded in accordance with the expense/investment
criteria; that is, OMA or RDTE funds are to be used if the cost
is under \$15,000, and OPA is to be used if \$15,000 or higher.
However, recent decisions authorize the use of RDTE funds for
the acquisition of all ADPE equipment at RDTE-funded
facilities. These decisions bring Army into full
synchronization with DoD policy; therefore, the Army policy is
hereby amended to allow the use of RDTE funds for the purchase
of ADPE equipment at RDTE-funded facilities, regardless of cost.

The referenced memorandum provided broad policy guidance
on how to apply the expense/investment criteria against IMA
acquisitions. The memorandum was intentionally written to be
non-specific, because it is a statement of policy and guidance.

However, publication of the guidance has raised numerous
questions from the field concerning the definitions and
concepts which were addressed in the memorandum. The attached
definitions are intended to be used in conjunction with the
guidance issued in May 1990, and should answer many of the
questions which arise when applying expense/investment criteria.

As stated before, there is no flexibility in interpretation
of the rules on expense/investment funding. The policy guidance
is the Army's implementation of Congressional direction and OSD
guidance. For this reason, waivers to the policy may not be
granted. Lack of the proper funding is not a factor in
applying the expense/investment criteria to a given situation.

The intent of the policy guidance issued in May 1990, and of the clarifying information contained herein, is that resource managers at the local level be provided with the guidance necessary for them to make a reasoned judgment as to the proper type of funding to be used for IMA hardware and software requirements. The responsibility for this decision rests with the resource manager who certifies the funds, with the assistance of the local information manager and legal counsel. The local resource manager has the best knowledge of the facts pertaining to his/her specific situation, and is in the best position to make this determination. If questions or disagreements on the application of the expense/investment criteria arise which cannot be answered using the guidance already provided, they should be submitted through the normal chain of command (to headquarters or higher headquarters, and ultimately to the MACOM level) for resolution. Questions which cannot be resolved at the MACOM level may be forwarded to HQDA by the MACOM.



Douglas A. Brook
Assistant Secretary of the Army
(Financial Management)

Attachment

Assumptions/guidance parameters:

- A "system" includes any combination of components which work together to perform a function or satisfy an approved requirement. Systems may be components of or work in conjunction with other systems. The determining factors include primary usage and the necessity for the interaction.

(Using this definition, if I buy computers primarily for standalone wordprocessing, but hookup them up to a LANS for communications purposes, to access PROFS, and other e-mail systems, I can consider each computer a standalone system; and the LANS a separate system. Part of the LANS system, however, would be those parts in the standalone computers needed to communicate with the LANS--for example, modems, communications software, communications cards, etc. Thus, in this example it is possible to have a multitude of standalone computer systems, and one separate overall LANS system to which the standalones are hooked for communications purposes. A follow-on however of the above, is that if I start to operate and use the computers in a networked system for wordprocessing and my work is primarily done on the LANS, then the standalone systems evaporate, and we have one system, a LANS.)

- A "centrally managed system" is managed in a central supply system or is managed on a service-wide basis (i.e., it is a system in which the manager has the authority for management and procurement of software/equipment.) The characteristics of a centrally managed system include such functions as requirements determination, distribution management, procurement direction, configuration control and disposal direction. Centrally procured systems are not necessarily centrally managed.

Problems:

1) If the system will be managed only from HQ, FORSCOM for FORSCOM installations, and the manager would perform all the central management functions (whatever those are), do we have a centrally managed system?

The answer would be NO. The system is not managed in a central supply system or on a service-wide basis. Depending on the ADPE configuration, the acquisition could nevertheless be an acquisition of a single "system."

2) Does "central management" require life cycle management, to include configuration control after fielding? If so, then systems which are only centrally controlled through fielding (i.e., centrally purchased and configuration controlled through fielding but not thereafter) might not be "centrally managed" systems.

Example, TAPA Commander designates an individual to be a program or project manager to field hardware and software to all Army battalions, to run the Army's training system. (We want to standardize reports, planning and costing of exercises.) The

project manager is told that all battalions will be fielded a set hardware and software system-with configuration control up to the time of fielding. (The software will be developed.) Thereafter, only the software will continue to be configuration controlled. ADPE may be disposed and modified and used for any other purpose desired by each battalion commander.

Query: Is this/should this be a centrally managed system?

No. The system is not configuration and disposal controlled after fielding.

OR Yes. Because software configuration control exists after fielding.

OR Yes. We don't care whether configuration and disposal is controlled after fielding. The system was centrally managed through the fielding cycle. That is enough. (Query: Is our guidance clear on this point? By saying central management includes requirements determination and many other steps to include configuration control and disposal direction, we appear to suggest that a centrally managed system must have all these characteristics to be centrally managed? If not, we need to modify the definition and clarify what we mean.)

Follow-on issue: Assume the hardware is intended to operate in a standalone mode. Is the software centrally managed, as it is centrally developed, fielded and changes are controlled by the project manager? (This may be a non-issue, however, as the software and its changes are developed--thus all OMA funded. Conceptually, however, can we ever say software by itself is centrally managed?)

Following follow-on issue: Does it matter that the manager has no money for the purchase--but is directing all battalions to go out and acquire specific make and model hardware and to use the developed software--and the manager permits no deviations from the hardware specifications and configuration. Is this a centrally managed system? Does it make a difference if the manager only directs the acquisition of IBM-compatible equipment and leaves discretion to the battalions of what make and model to purchase?

Last question: Do we even have a system? If the battalions are linked together, clearly it is one system. However, if they are not linked, but reports are prepared and transferred by a disk to brigade HQs, do we have a single system or not?

3) Hardware and software were originally purchased for standalone purposes. Dollars for the purchases came from the installations in some cases, and in other instances from a DA proponent. The hardware is now linked by a LANS. Software, however, is now centrally developed and runs on the LANS. No office can change its basic software--it is now configuration controlled. Similarly, the ADPE purchased with the DA proponent's \$s cannot be disposed of without approval of the DA proponent.

Office X comes in and wants to upgrade its LANS and its standalone computers (say for example, replace keyboards and boards in the back to upgrade the machines from 286 to 386 chips).

Query (1) Is this really a centrally managed system? or is only the software centrally managed?

Query (2) Is each office a separate system now (because while they do standalone wordprocessing, they are now all linked to a LANS, do wordprocessing substantially in the LANS configuration; their wordprocessing package and software is furnished by the DA proponent; and software configuration is centrally controlled)?

Does it matter whether the purchase is with local dollars or dollars furnished by the DOD proponent?

4) ADPE was originally acquired -- to standardize civilian personnel offices and reports throughout the Army. Installations have been directed to purchase new high speed printers to operate with the previously purchased hardware. The printers will print info which is incoming and be used in the various civilian personnel offices. Ten installations purchases are consolidated. Each printer will cost \$5,000.

- Is this a centrally managed system? If DA has directed the purchase, configuration and controls configuration and directs the type of printers to be purchased--the answer appears to be yes.

- If not centrally managed, can we consider the printers as add-ons to each installation's CPO "system," and thus use OMA for the purchase?

5) Are all MAISARC reviewed ADPE acquisitions centrally managed acquisitions? If so, why? Do all MAISARC managed systems give the managers authority to control the configuration and disposal of systems after they are fielded? or is the salient characteristic that all MAISARC systems are managed in the central supply system?

EXPENSE-INVESTMENT DEFINITIONS

REQUIREMENT: This is the basic determining factor for all expense-investment criteria decisions. A requirement consists of the set of capabilities which are necessary to perform the mission. This set of capabilities directs the decision as to what is or is not part of a system, or what is an independent upgrade. The requirement is documented in an information management plan and an approved requirements statement. Neither the capability nor the requirement will be fragmented to circumvent application of the expense/investment criteria.

SYSTEM: DoD 7110-1-M defines a system as follows: "The combination of a number of components that are functioning within the context of a whole to satisfy a documented requirement." For the purposes of this policy memorandum, there are two considerations for the definition of a system. The first consists of an automation capability which is centrally managed and must be considered by a Major Automated Information Systems Review Committee (MAISRC). The second is generic and could be any combination of components/items which work together to perform a function or to satisfy an approved requirement as defined above. Systems may be components of or work in conjunction with other systems. The determining factors are the primacy of usage and the necessity for this interaction.

LOCAL AREA NETWORK (LAN): The hardware and software required to interconnect and transfer data between linked systems. It may or may not consist of those linked systems. Whether a component is part of a LAN depends on how the components are operating (as standalone or interconnected). Primacy of purpose and usage is the factor which determines whether the component is part of the LAN.

WIDE AREA NETWORK (WAN) and METROPOLITAN AREA NETWORK (MAN):
Expanded LANs (higher levels).

CENTRALLY MANAGED SYSTEM: A system which is managed in the central supply system, or DoD-wide/Service-wide acquisition and control system, in which the manager has the authority for management and procurement of software/equipment. This includes such functions as requirements determination, distribution management, procurement direction, configuration control and disposal direction. It should be noted that just because a system is centrally contracted, it is not necessarily centrally managed.



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103



May 25, 1990

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Policy for Application of the Expense/Investment
Criteria for the Purchase/Modification of Information
Mission Area (IMA) Software and Hardware.

References:

- a. AR 25-1, "Army Information Resources Management Program".
- b. DoD 7110-1M, "Budget Guidance Manual" (under revision).

This policy is applicable to all Army components purchasing and/or modifying Information Mission Area hardware and software for systems governed by AR 25-1, "Army Information Resources Management Program" including the Army Model Improvement Program.

Expense/Investment Threshold (FY 1990+). In the absence of an Authorization Act, Section 303 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 returned the expense/investment threshold to \$5,000 during the period of Continuing Resolution Authority October 1 through November 29, 1989. Section 303 was repealed by the National Defense Authorization Act for Fiscal Year 1990 effective November 29, 1989 returning the expense/investment threshold to \$15,000 for the remainder of FY 1990. The \$15,000 threshold will remain in effect until changed through the budget process or by legislation.

Criteria for Determining Expense and Investment Costs (See matrix at enclosure). The "system" concept must be considered in evaluating the procurement of an end item. 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 a approved Army requirement. Fragmented or piecemeal acquisition of the documented requirement will not be used as a basis to circumvent the "system" concept.

Acquisition of a system/end item (not designated for centralized item management/asset control or a centrally managed system) shall be applied on the basis of the unit/end item cost of a complete system rather than on the component parts of the system. The total system cost (including all component parts) assumes the identity of a single end item and the total dollar cost for the end item (total system) is applied against the dollar threshold for determination of the appropriate color of money. The following is a summary of related costs:

- Installation. Normal installation costs will be included as part of the total system cost.

- Training. Training will normally be funded separately with Operation and Maintenance funds (e.g., Operation and Maintenance, Army, Operation and Maintenance, Army National Guard and Operation and Maintenance, Army Reserve) or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation) and not included within the cost of the total system. However, when the cost of training is included as part of the original contract and is inseparable (not separately priced) it then becomes part of the total system cost and is funded with the same color of money as the system.

- Maintenance. Annual fees for maintenance will normally be funded separately with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation) and not included within the cost of the total system. However, when the cost of maintenance/warranty service is inseparable (not separately priced) it then becomes part of the total system cost and is funded with the same color of money as the system.

- Real property preparation. The costs associated with preparation of real property to support installation of movable equipment, such as installation of false floors or platforms or prefabricated clean rooms, will be considered an integral part of the system and funded accordingly. If the modifications include structural changes, they will be funded as construction.

a. Communications/ADPE Procurement:

1. New Equipment/System Procurement. The aggregate cost of an end item/system procured to address a valid requirement (including peripherals, installation and system unique software) will be used to determine whether it should be treated as an expense or investment cost. Determination of what comprises an end item/system will be based on the primary function of the hardware and software to be acquired as stated in the approved requirements document.

For example, the appropriate color of money for the purchase of 5 standalone computers is determined by deciding whether the primary function of the computers is to operate as independent workstations (i.e., five systems) or as a part of a larger system. If the computers are designed to primarily operate independently, they should be considered as separate end items and applied against the expense/investment criteria individually. If they function as a component of a larger system (i.e., interconnected and primarily designed to operate

as one), then they should be considered a system and the total cost applied against the expense/investment criteria.

2. Additional or Replacement Equipment/System Procurement. When requirements necessitate adding/replacing or modifying equipment/software which is a component of, or supports the functioning of an existing system, only the additional equipment/software procurement costs (including installation) will be used to determine whether the purchase is an expense or an investment.

b. Communications/ADP Software Acquisition.

1. Off-the-Shelf Software.

(a) Acquisition of a standard off-the-shelf software where no modification is required will be subject to the expense/investment criteria as follows:

(1) When the purchase is part of an initial hardware/software acquisition. The cost of the off-the-shelf software will be included as part of the total system cost and determination of the appropriate dollar threshold will be based on application of the total system cost against the dollar threshold.

(2) When the purchase is adding to or upgrading an existing system. The total cost of the add-on/upgrade will be applied against the dollar threshold.

(b) Acquisition of off-the-shelf software where modification is required will be funded as follows:

(1) Acquisition of the off-the-shelf software will be funded as in paragraph (a) above.

(2) Modification of the off-the-shelf software is not considered to be a part of the total system cost, is not subject to the dollar threshold and will be financed with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

(c) Development of application software is not considered to be a part of the total system cost, is not subject to the dollar threshold and will be financed with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

3. Modification of existing software. The modification (e.g., enhancement, conversion, etc.) of an existing software end item is not considered to be a part of the

total system costs, is not subject to the dollar thresholds and will be financed with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

Example 1. The Army enters into a contractual arrangement to purchase 5 off-the-shelf software packages to upgrade an existing system at a cost of \$10,000 each. The software packages will require modification at a total cost of \$18,000. The total cost of the 5 software packages (\$50,000) would be applied against the dollar threshold and financed with procurement funds. The modification effort (\$18,000) would be financed with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

Rationale

The 5 off-the-shelf software packages constitute an upgrade to an existing system. The rule (paragraph b.1.(a).(2).) provides, "When the purchase is adding to or upgrading an existing system. The total cost of the add-on/upgrade will be applied against the dollar threshold." The modification effort is financed in accordance with paragraph b.1.(b).(2). using Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

Example 2. The Army enters into a contractual arrangement to purchase 5 off-the-shelf application software packages to upgrade 5 standalone PCs at a cost of \$10,000 each. The software packages will require modification at a total cost of \$18,000. The 5 software packages would be applied individually against the dollar threshold and financed with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation). The modification effort (\$18,000) would also be financed with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

Rationale

The cost of each off-the-shelf application software package (\$10,000) is applied individually against the dollar threshold because they are being purchased to upgrade 5 individual systems/end item (i.e., 5 standalone PCs). The rule (paragraph b.1.(a).(2).) which provides, "When the purchase is adding to or upgrading an existing system. The total cost of the add-on/upgrade will be applied against the dollar threshold.", would be applied under this scenario against each of the 5 systems individually. Therefore, the total cost to upgrade each system is \$10,000 which is below the current threshold and the

use of Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation) would be appropriate. The modification effort is financed in accordance with paragraph b.1.(b).(2). using Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

Example 3. The Army enters into a contractual arrangement with a contractor to develop an application software for \$25,000. The developmental effort is not subject to the dollar threshold and will be financed with Operations and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation).

Rationale

In this case, the Army is contracting to develop an application software package. Determination of the appropriate color of money will be in accordance with paragraph b.1.(c). which states, "Development of application software is not considered to be a part of the total system cost, is not subject to the dollar threshold and will be financed with Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation)." Therefore, the use of Operation and Maintenance or Research, Development, Test and Evaluation, Army funds (if a RDTE funded installation) would be appropriate.

4. "Off-the-Shelf" Software Licensing.

(a) When the purchase of an "off-the-shelf" software package includes a one-time up-front payment for the use of the software over the life of the system, the color of money will be determined by applying the rules in paragraph b.1. above.

(b) When the purchase of an "off-the-shelf" software package includes an annual licensing fee the following will apply:

(1) The appropriate color of money for acquisition of the software package will be determined by applying the rules in paragraph 1 above.

(2) The annual licensing fees are not subject to the expense/investment dollar threshold and will be financed by the Operation and Maintenance or Research, Development, Test and Evaluation, Army appropriation.

(c) Annual fees. Annual fees for the use of the license itself with additional annual fees for maintenance or

modifications provided by the vendor would be financed within the O&M or RDT&E appropriations.

c. Local Area Network (LAN) and Wide Area Network (WAN). Local Area Networks and Wide Area Networks are considered to be systems. As such, the total cost of all component parts must be applied against the dollar threshold to determine the appropriate color of money when the LAN or WAN is purchased as an add-on or upgrade to an existing system. If the WAN or LAN is part of the initial hardware/software acquisition, the cost will be included as part of the total system cost.

d. Centrally managed systems. Acquisitions for any system which is centrally managed is considered an investment regardless of the amount. Systems managed by an Army-Acquisition-Executive-chartered Program Executive Officer or Program Manager are considered centrally managed systems.

e. Turnkey Acquisition. Acquisitions wherein a single or prime contractor provides a complete system to include hardware, software, installation, etc. may be entirely financed with procurement funds. A turnkey system is typically large and at the point of contracting the appropriate color of money cannot be readily determined due to the nature of the system. Therefore, it is appropriate to budget and execute the entire acquisition within the procurement appropriations.

Military Interdepartmental Purchase Requests (MIPR) and Reimbursable Orders (RO). Using a MIPR or RO to acquire IMA hardware and/or software from another Army activity or Federal agency is proper and legal, provided the appropriate color of money is cited. Neither the MIPR nor the RO can be used to circumvent the expense/investment criteria or to change the color of money. It is illegal for one activity to MIPR Operation and Maintenance funds to another Federal Agency to purchase IMA equipment and software which should be financed with procurement funds.

Questions may be directed to Mr. Bruce Smith, SARD-RR, Commercial 694-5706 or Autovon 224-5706 for Procurement appropriations and Ms. Angela Desenze, SAFM-BUO-A, Commercial 697-2762 or Autovon 227-2762 for Operation and Maintenance appropriations.



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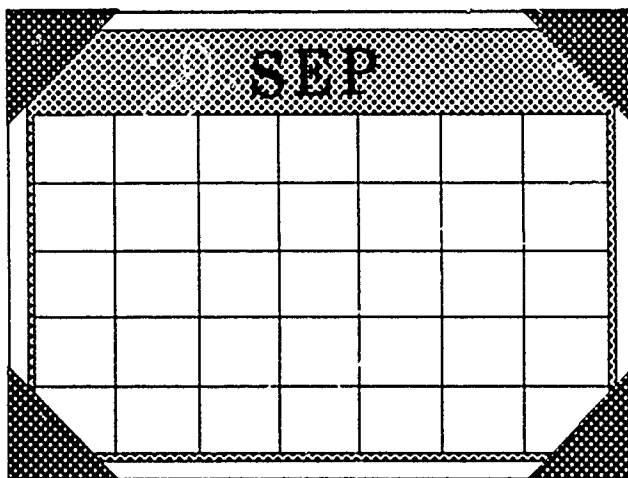
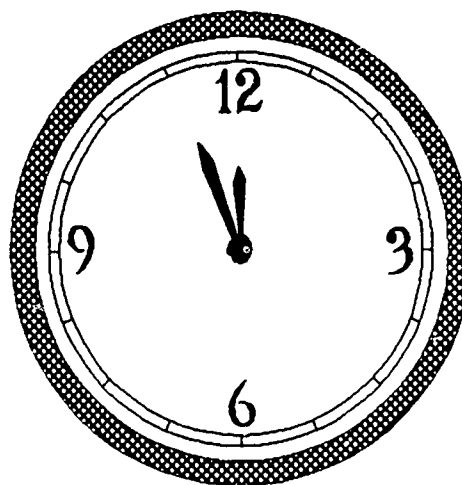
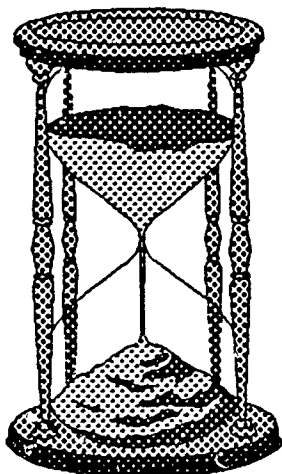
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Deputy ASA for Army Budget

Enclosure

CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO TIME



CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO TIME

I.	INTRODUCTION	1
II.	LIMITATIONS BASED UPON THE TYPE OF APPROPRIATION .	1
	A. General	1
	B. Period of Availability for Various Appropriations	2
	C. Types of DOD Appropriations Described by Period of Availability	3
III.	FUNDING REPLACEMENT CONTRACTS	5
	A. General	5
	B. Protests to the General Accounting Office . .	5
	C. Terminations for Default	6
	D. Terminations for Convenience of the Government	6
IV.	LIMITATIONS BASED UPON THE <u>BONA FIDE</u> NEED RULE . .	8
	A. Statutory Basis	8
	B. General	8
	C. Practical Considerations	9
	D. <u>Bona Fide</u> Need Rule Applied to Supply Contracts	10
	E. <u>Bona Fide</u> Need Rule Applied to Service Contracts	12
	F. <u>Bona Fide</u> Need Rule Applied to Training Contracts	13
	G. <u>Bona Fide</u> Need Rule Applied to Maintenance and Repair Contracts	13
V.	MULTIPLE YEAR FUNDS AND MULTIPLE YEAR CONTRACTS . .	16
	A. References	16
	B. General	16
	C. Statutory Presumption - Annual Appropriation .	17

D.	Administrative Controls: Program Objectives .	17
E.	Full Funding Policy	18
F.	Incremental Funding Policy	20
VI.	USE OF EXPIRED APPROPRIATIONS	22
A.	References	22
B.	General Principles	22
VII.	CONTRACT FORMATION AND TIME LIMITATIONS	23
A.	References	23
B.	Options	23
C.	Requirements or Indefinite Quantity Contracts	24
D.	Contracts on the Fiscal Year Cycle	25
VIII.	CONCLUSION	25
A.	Basic Rules Relating to Time	25
B.	<u>Bona Fide</u> Need Rule	25
C.	Multiple Year Funds	26

CHAPTER 3

AVAILABILITY OF APPROPRIATIONS AS TO TIME

I. INTRODUCTION.

II. LIMITATIONS BASED UPON THE TYPE OF APPROPRIATION.

A. General.

1. The Time Rule: An appropriation is available for obligation for a definite period of time. It must be obligated during this period of availability, or the authority to obligate expires. 31 U.S.C. § 1552; AR 37-1, para. 9-5b(1)(b).
2. Funds may not be obligated prior to signature of the Appropriation Act and receipt of the funds from the Office of Management and Budget through higher headquarters. 31 U.S.C. § 1341(a)(1)(B); AR 37-1, para. 9-5i. Avoid situations that require "coercive deficiency" appropriations. See Project Stormfury - Australia - Indemnification of Damages, B-198206, 59 Comp. Gen. 369 (1980).
3. Generally, the time limitations apply to obligating the funds, not disbursing them. See Secretary of Commerce, 37 Comp. Gen. 861, 863 (1958).
4. Absent express statutory authority in the appropriations act itself, funds may not be obligated after the expiration of their period of availability. National Endowment for the Arts -- Time Availability for Appropriations, B-244241, October 24, 1991, 71 Comp. Gen. 39; 31 U.S.C. § 1502.

LTC Harry L. Dorsey
Fiscal Law Course

Chapter 3

B. Period of Availability for Various Appropriations.

1. Funds are presumed to be available for obligation only during the fiscal year in which they are appropriated. 31 U.S.C. § 1301; AFR 170-8, para. 7.

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 provided herein. See e.g. Pub. L. 101-511, § 8004, 104 Stat. 1874 (1990); AR 37-1, para. 9-5b(1)(b).

3. The appropriation act language controls other general statutory provisions. National Endowment for the Arts -- Time Availability for Appropriations, B-244241, October 24, 1991, 71 Comp. Gen. 39 (general statutory language making appropriations available until expended is subordinate to appropriation act language stating that funds are available until a date certain).
4. Multiple year appropriations expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. Title 7, Fiscal Guidance, Chapter 2, para. 2.1.C.1.b., GAO's Policy and Procedures Manual for Guidance of Federal Agencies (Feb. 12, 1990); Section 21.1, Office of Management and Budget Circular A-34, Instructions on Budget Execution (August 1985).

C. Types of DOD Appropriations Described by Period of Availability.

1. The major annual appropriations are:
 - a. Operation & Maintenance (O&M).
 - b. Personnel
2. The major multiple-year appropriations usually provided to the Department of Defense include:
 - a. Research, Development, Test, and Evaluation (RDT&E) Appropriations - 2 years.
 - b. Procurement Appropriations - 3 years.
 - c. Shipbuilding and Conversion, Navy - 5 years, except that certain obligations may be incurred for longer periods.
 - d. Military Construction Appropriations - 5 years.
 - e. Chemical Agents and Munitions Destruction, Defense - various periods.
 - f. Multi-Year - Varies up to five years depending on the program. The Defense Department receives a variety of special purpose appropriations, some of which are available for more than one year. For example:
 - (1) O&M, Humanitarian Assistance - 2 years
 - (2) O&M, Goodwill Games - 2 years.

Chapter 3

- g. The language typically used by the Congress is ".... to remain available for obligation until September 30, XXXX." See Defense Technical Information Center -- Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989).
 - (1) The bona fide need rule, 31 U.S.C. § 1502(a), applies to annual as well as multiple year appropriations. Defense Technical Information Center -- Availability of Two Year Appropriations, B-232024, 68 Comp. Gen. 170 (1989); Chairman, Committee on Appropriations, House of Representatives, B-132900, 55 Comp. Gen. 768 (1976).
 - (2) A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. AFR 170-8, para. 8. Therefore, the FY 1990 RDT&E, Army Appropriation, which was available for obligation until September 30, 1991, may be obligated for the needs of FY 1990 and FY 1991. It is not available for the needs of FY 1992, or any subsequent. AR 37-1, para. 9-5c(2).
 - (3) Administrative controls, including regulations, may impose independent restrictions on the use of multi-year funds. See e.g., DOD Dir. 7200.4, Full Funding of DOD Procurement Programs; AR 70-6; AFR 170-8, para. 8.
3. Stock and Industrial Funds - Indefinite (No Year).
- a. Ordering activities must comply with the bona fide need rule and cite current available funds for orders issued to stock and industrial funds. AR 37-1, para. 12-5a.

- b. The stock and industrial funds may award contracts using no-year funds.
- c. Orders will not be issued to obtain "technical obligation" of funds. AR 37-1, para. 12-5k(2).

III. FUNDING REPLACEMENT CONTRACTS.

A. General.

- 1. There are three important exceptions to the general prohibition on obligating funds after the period of availability.
- 2. These exceptions are the result of a long line of Comptroller General decisions, dating back to 1922. Secretary of War, 2 Comp. Gen. 130 (1922).

B. Protests to the General Accounting Office.

- 1. "[F]unds available to an agency for obligation for a contract at the time a protest is filed in connection with . . . award of such a contract shall remain available for obligation for 90 working days after the date on which the final ruling is made on the protest." This authority is limited to protests filed at the GAO or in a court. 31 U.S.C. § 1558.
- 2. This statutory provision is implemented by FAR 33.102(b). 55 Fed. Reg. 55,782 (1990), (Federal Acquisition Circular 90-3), and AR 37-1, para. 9-5i.

Chapter 3

C. Terminations for Default.

1. Terminations for Default: If a contract or order is terminated for default, and a bona fide need still exists for the supplies or services, the original funds remain available for obligation for a reprocurement, even if they otherwise would have expired. The agency must award the reprocurement contract without undue delay; it must be for substantially the same item or service; and, the reprocurement contract must be awarded to different contractor. AR 37-1, para. 9-5g; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976); AR 37-1, Table 9-9; AFR 170-8, para. 9; See also Funding of Replacement Contracts, B-198074, 60 Comp. Gen. 591 (1981).
2. If additional funds are required for the replacement contract, and the funds have otherwise expired, the original years' funds may be used to fund the additional cost. Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976); See also Funding of Replacement Contracts, B-198074, 60 Comp. Gen. 591, 594 (1981). This position is based upon an extension of the bona fide need analysis used by the Comptroller General in the Lawrence W. Rosine Co. decision.

D. Terminations for Convenience of the Government.

1. General rule: a termination for the convenience of the government extinguishes the obligation of undisbursed, prior year funds remaining on the contract. These funds are not available to fund a replacement contract in a subsequent year. AR 37-1, para. 9-5h; AR 37-1, Table 9-9; AFR 170-8, para. 9c.

2. Exception to the rule: this rule was modified by the Comptroller General in Funding of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988). Funds originally obligated in one fiscal year, for a contract that is later terminated for convenience in response to a court order or to a determination by the General Accounting Office or other competent authority that the award was improper, may be used to award the replacement contract in the subsequent fiscal year. AR 37-1, para. 9-5h; AR 37-1, Table 9-9; AFR 170-8, para. 9.
3. This authority was expanded in 1991 to include terminations for convenience resulting from a contracting officer's determination that the award was clearly erroneous. Navy, Replacement Contract, B-238548, February 5, 1991, 70 Comp. Gen. 230, 91-1 CPD ¶ 117; AR 37-1, para. 9-5h.
4. If the original award is improper and the contract is terminated for convenience, either by the contracting officer or by judicial order, the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:
 - a. The original award was made in good faith;
 - b. The agency has a continuing bona fide need for the goods or services involved;
 - c. The replacement contract is of the same size and scope as the original contract;
 - d. The replacement contract is executed without undue delay after the original contract is terminated for convenience;

Chapter 3

- e. If the termination for convenience is based upon the contracting officer's determination that the original award was improper, the contracting officer executes a written determination stating the factual and legal basis for the conclusion that the award was improper; and
- f. The replacement contract is awarded to a different contractor. AR 37-1, para. 9-5h; AR 37-1, Table 9-9; AFR 170-8, para. 9.

IV. LIMITATIONS BASED UPON THE BONA FIDE NEED RULE.

A. Statutory Basis.

"The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability, or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law." 31 U.S.C. § 1502(a).

B. General.

1. Agencies may obligate appropriated funds only for properly incurred expenses of the period of availability of the appropriation. See Magnavox - Use of Contract Underrun Funds, B-207453, September 16, 1983, 83-2 CPD ¶ 401; To the Secretary of the Army. 33 Comp. Gen. 57 (1953); AR 37-1, para. 9-5c(2); AFR 170-8, para. 4c.

2. The bona fide need rule applies only to appropriations with fixed periods of availability for obligation.

C. Practical Considerations.

1. The term "bona fide need" has meaning only in the context of a fiscal law analysis. A bona fide need analysis is separate and distinct from an analysis of contract specifications and whether they are a legitimate expression of the government's minimum needs.
2. A bona fide need inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government.
3. The government must have a good faith intent that the contractor start work promptly and perform in accordance with the contract terms. AR 37-1, para. 9-5c(3).
4. The needs of the government and the nature of a product or service determine when a bona fide need arises.
5. Determining the bona fide need for an acquisition requires the application of judgment.
6. Each bona fide need determination is fact-specific. AFR 170-8, para. 4c.

Chapter 3

7. Bona fide need is determined at the time of a obligation of the appropriated funds.

D. Bona Fide Need Rule Applied to Supply Contracts.

1. Generally, bona fide need is determined by the date the government actually requires the supplies being acquired, i.e., when the government actually will be able to use the items.
2. Accordingly, funds are obligated for the fiscal year in which the supplies will be used.
Chairman, United States Atomic Energy Commission, 37 Comp. Gen. 155 (1957); Betty F. Leatherman, Department of Commerce, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Administration, 44 Comp. Gen. 399 (1965).
3. Supply needs of a future fiscal year are the bona fide need of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are: the lead-time exception and the stock level exception. AR 37-1, para. 9-5c(2).
4. Lead-time exception to the bona fide need rule requires the consideration of the normal production lead-time in determining the bona fide need for an acquisition. AR 37-1, para. 9-5c(2); AFR 170-8, para. 4c(1).
 - a. For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation of Fiscal Year 1992 funds is appropriate for a delivery on or before 15 November 1992. (Remember 1 October 1992 is the beginning of Fiscal Year 1993.) This is a bona fide need of Fiscal Year 1992. If delivery after 15 November 1992 is permitted by the government, there is no bona fide need

for the item in Fiscal Year 1992, because the necessary lead time prior to delivery permits the item to be ordered and delivered in FY 1993.

- b. If the government establishes a delivery date for an item that is both beyond the normal lead time and in the next fiscal year, funds for the next fiscal year must be used. In the example above, if delivery is permitted after 15 November 1992, Fiscal Year 1993 funds must be used.
5. Stock level exception to the bona fide need rule. Agencies may purchase sufficient supplies necessary to maintain adequate and normal stock levels. This is sometimes referred to as the stock-level exception to the bona fide need rule. AR 37-1, para. 9-5c(2); AFR 170-8, para. 4c(1).
- a. For example, a contract to maintain the normal, authorized stock levels of repair parts may be awarded in August 1992, and requiring delivery in September 1992, using FY 1992 funds, even if it is known that the repair parts will not be used until early October 1992.
 - b. Current year funds may be used to replace stock consumed in the current fiscal year, even though the replacement stock may not be used until the following fiscal year.
 - c. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

Chapter 3

E. Bona Fide Need Rule Applied to Service Contracts.

1. General rule: Services are the bona fide need of the fiscal year in which performed. AR 37-1, Table 9-2; AFR 170-8, para. 4c(2); Theodor Arndt GmbH & Co., January 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, 65 Comp. Gen. 154 (1985). Thus, service contracts generally cannot cross fiscal years and agencies must fund service contracts with dollars available for obligation on the date the services are performed.
2. Nonseverable services exception: If the services produce a single or unified outcome, product, or report, the services may be regarded as being nonseverable. If so, the entire effort may be funded with dollars available for obligation at the time the contract is executed, and the contract performance may cross fiscal years. AR 37-1, Table 9-2; AFR 170-8, para. 4c(2); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, February 25, 1991, 70 Comp. Gen. 296; Acumenics Research and Technology, Inc. - Contract Extension, B-224702, August 5, 1987, 87-2 CPD ¶ 128; Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, 65 Comp. Gen. 741 (1986).
3. Statutory exceptions: 10 U.S.C. § 2410a provides that contracts for a period not to exceed 12 months may be awarded and completely funded at any time during the fiscal year for the following purposes:
 - a. Maintenance of tools and facilities;
 - b. Lease of real or personal property, including the maintenance of the property, when contracted for as part of the lease agreement;

- c. Depot maintenance; and
 - d. Operation and maintenance of equipment.
 - e. The provisions of 10 U.S.C. § 2410a apply only to the Department of Defense. Cf. AR 37-1, para. 9-5c(2)(a)-(c); AR 37-1, Table 9-2; AFR 170-8, para. 7g.
4. DFARS 237.106 contains a list of services that are appropriate for cross-year funding using the authority of 10 U.S.C. § 2410a.

F. Bona Fide Need Rule Applied to Training Contracts.

- Training courses that begin on or about the first of October may be paid for with the prior year's appropriation if the scheduling of the course is beyond the control of the agency and the time between award of the contract and performance is not excessive. Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course, B-238940, February 25, 1991, 70 Comp. Gen. 296; AR 37-1, Table 9-1 (training must begin within 90 days of start of new FY; be available from only one source; be offered only one time per year, by an institution requiring a noncancellable deposit before the end of the prior FY); AFR 170-8, para. 7e(5).

G. Bona Fide Need Rule Applied to Maintenance and Repair Contracts.

- 1. Current funds may be obligated for one-time maintenance and repair contracts awarded near the end of the fiscal year, even if performance may not begin until the next fiscal year. AR 37-1, Table 9-2, n. 5 (performance must begin NLT 1

Chapter 3

January of the following fiscal year); AFR 170-8, para. 7c (normally performance must commence within 60 days, but never later than 1 January of the following fiscal year).

2. This authority is limited to the following situations:
 - a. The requirement must represent a bona fide need of the current fiscal year; and
 - b. The contract must contain a specific provision requiring that the work must actually start on or before January 1 of the following calendar year, except in contracts with a foreign government or contracts entered into pursuant to a binding international agreement.
3. Commencement of work is evidenced by:
 - a. Physical on-site evidence based upon a visual inspection; or
 - b. Documentary evidence of costs incurred or materials ordered.
4. Normal weather conditions must be considered when planning for outdoor construction or renovation projects. A project that cannot reasonably be expected to commence before the onset of winter weather is not the bona fide need of the prior Fiscal Year. Cf. AR 37-1, para. 9-5c(3). For example, a contract for paving 18 kilometers of roads in Fairbanks, Alaska, probably should not be awarded on 30 September 1992 and funded with Fiscal Year 1992 dollars unless the government intends to demand immediate performance of the work.

5. If mission requirements make it impossible to allow the commencement of the work until 15 December, the requirement is not the bona fide need of the prior fiscal year.
6. Factors within the government's control are most important in determining bona fide need. Cf. Theodor Arndt GmbH & Co., B-237180, January 17, 1990, 90-1 CPD ¶ 54 (agency decision to wait until Fiscal Year 1990 to award a service contract, with performance commencing on 15 October 1989, is correct where services are not needed until that date). In analyzing the bona fide need for a given item, the following factors are appropriate for consideration:
 - a. The required delivery date in the contract;
 - b. The normal rate of consumption;
 - c. The date when the government is making facilities, sites, or tools available; and
 - d. The degree of actual control the government has over the date that work may be commenced. For example, if a barracks will not be available for renovation until 27 December 1992 because a Brigade is deploying on the 20th of December and cannot be disrupted between 1 October and 20 December, and if the normal lead-time for starting a renovation project of this type is 15 days, the renovation is a bona fide need of Fiscal Year 1993 because the contract could be awarded in FY 1993 and performance could commence by the time that the brigade vacated the building. Accordingly, use of Fiscal Year 1992 funds under these facts violates the bona fide need rule.

Chapter 3

7. These principles apply to Job Order contracts entered into under the authority of AFARS 17.9000. AR 37-1, Table 9-2, fn. 6.
8. The exceptions to the bona fide need rule relating to acquisitions to maintain stock levels and lead time for special goods also apply. This statutory rule is limited by administrative policies.

V. MULTIPLE YEAR FUNDS AND MULTIPLE YEAR CONTRACTS.

A. References.

1. See Hill, The Dollars and "Sense" of Government Contract Funding (American Bar Association, Public Contract Law Section Monograph, 1988), Chapter 2.
2. DoD Dir. 7200.4, Full Funding of DoD Procurement Programs.
3. AR 70-6.
4. AFR 172-1, Vol 1.

B. General.

1. Make a clear distinction between fiscal law and contract law regarding multiple year appropriations. Proper analysis requires consideration of fiscal law issues independent of the contractual form.
2. The law governing multi-year contracting and contracts containing options is beyond the scope of this course and will not be considered.

C. Statutory Presumption - Annual Appropriation.

1. 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 provided herein. See e.g. Pub. L. 102-484, § 9003, 106 Stat. 2481 (1992).

2. The appropriation act language controls other general statutory provisions. National Endowment for the Arts -- Time Availability for Appropriations, B-244241, October 24, 1991, 71 Comp. Gen. 39 (general statutory language making appropriations available until expended is subordinate to appropriation act language stating that funds are available until a date certain).
3. Multiple year appropriations expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. Title 7, Fiscal Guidance, Chapter 2, Paragraph 2.1.C.1.b., GAO's Policy and Procedures Manual for Guidance of Federal Agencies (Feb. 12, 1990); Section 21.1, Office of Management and Budget Circular A-34, Instructions on Budget Execution (August 1985).

D. Administrative Controls: Program Objectives.

1. Procurement appropriations: Program managers using procurement appropriations want to have all the necessary funding in hand before they obligate funds on a procurement contract. Having all of the funds helps to ensure stable production runs and lower costs. This policy is referred to as "Full Funding." DOD Dir. 7200.4, Full Funding of

Chapter 3

DOD Procurement Program, (6 September 1983); AR 37-42; AFR 172-1, Vol 1, ch. 8.

2. RDT&E appropriation: Program managers using RDT&E may prefer to dribble out funding among various programs, giving more to those programs showing progress and withholding from other programs.
3. The managers of procurement appropriations and RDT&E appropriations have diametrically opposing outlooks on funding programs within their purview. These philosophies result in two different funding policies.

E. Full Funding Policy.

1. DOD Directive 7200.4, Full Funding of DOD Procurement Programs (6 Sept. 1983), describes the full funding policy as follows:

At the time of contract award, funds are available to cover the total estimated cost to deliver the contract quantity of complete, militarily usable items. If a future-year appropriation is required for delivery of the end items, the contract is not fully funded. See AFR 172-1, vol. 1, ch. 8.

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

3. Full Funding and Contract Terms.

- a. Full funding is primarily a budgeting concept. An agency may only initiate an acquisition for a procurement item only if the funds for the total estimated cost of the contract quantity are available for obligation.
- b. The acquisition, however, need not be for the total quantity, nor for usable end items DOD Dir. 7200.4, Para. E.6., Full Funding of DOD Procurement Programs (6 Sept. 1983). Thus, for example, the annual procurement quantity may be divided among several contracts. Similarly, several contracts may be awarded with the product of some contracts, not militarily usable end items, provided to other contractors as government furnished equipment for incorporation into the end item. Only if a future-year appropriation is required for delivery of usable end items, is the program not fully funded.

4. Efficiency dictates two general exceptions to full funding policy. DOD Dir. 7200.4, Full Funding of DOD Procurement Programs (Sept. 6, 1983).

- a. Advance procurement for long lead-time items allows acquisition of components, material, parts, and effort in an earlier fiscal year than that in which the related end item will be acquired.
- b. To be eligible for advanced procurement, long-lead time items must have a significantly longer lead-time than other items. The cost of the advanced procurement items must be relatively small when compared to the remaining costs of the end item. An annual budget request must include at least

Chapter 3

the estimated termination liability for long lead-time item procurements. The advanced procurement is for one fiscal year's program increment.

- c. Advance economic order quantity (EOQ) procurement for multi-year procurement allows the agency to acquire components, materials, and parts for up to five fiscal year's program increment to obtain the economic advantage of multi-year procurements. The advance procurement may obligate the termination costs, or the entire cost, if cheaper. EOQ costs may also be included in an unfunded cancellation clause.
- d. The DOD full funding policy is not statutory. Violations of the full funding policy do not violate the Antideficiency Act. Newport News Shipbuilding and Drydock Co., B-184830, 55 Comp. Gen. 812, 822 (1976); 76-1 CPD ¶ 136 (option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).

F. Incremental Funding Policy.

- 1. The Research, Development, Test and Evaluation Program is executed by incremental funding contracts and other obligations. AR 70-6, para. 2-2; AFR 170-8, para. 8.
- 2. The incremental funding policy budgets an amount for each fiscal year sufficient to cover the obligations expected during that fiscal year. Each contract awarded limits the government's obligation to the costs estimated to be incurred during the fiscal year. Funds for succeeding years are obligated during later years. The incremental funding policy is intended to maintain very close control over R&D programs by limiting their funding.

3. Contract Provisions.

- a. An incrementally funded cost reimbursement contract contains FAR 52.232-22, Limitation of Funds. This provision limits the government's obligation to pay for performance under the contract to the funds allotted to the contract. The contract also typically contains a schedule for providing funding. Typically, the contractor promises to manage its costs, to perform the contract until the next increment is provided.
 - b. Incrementally funded fixed-price contracts contain a similar clause, Limitation of Government's Obligation, pursuant to a FAR class deviation. See DA MSG, SARD-KP, 032015Z Jul 90, SUBJ: Approved Deviation.
 - c. Funds are allotted to the contract by an administrative modification identifying the funds.
 - d. To prevent funding gaps associated with late appropriations, the contracting officer may use current funds to fund contract performance for 90 days into the next fiscal year. AR 70-6, para. 2-2b.(4).
4. Incremental funding transforms 2 year RDT&E appropriations into 1 year funds. Legally, however, RDT&E appropriations may be obligated 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).

Chapter 3

VI. USE OF EXPIRED APPROPRIATIONS.

A. References.

1. 31 U.S.C. §§ 1551-1557.
2. 31 U.S.C. § 1301.
3. 10 U.S.C. § 2782.
4. AR 37-1, paras. 9-5q and 9-5r.
5. AFR 177-16, Interim Message Change 92-1, dated 28 February 1992.

B. General Principles.

1. Fixed appropriations are cancelled after five years and retain fiscal permanent identifiers. A "fixed appropriation" is defined as an appropriation available for obligation for a definite period of time. The term encompasses annual appropriations and multiple year appropriations.
2. Fixed appropriations have auditable identification of fiscal year and type of funds.
3. Some adjustments are possible after the end of the period of availability, but before the closing of the account. AR 37-1, paras. 9-5q and 9-5r; AFR 177-16, Interim Message Change 92-1, dated 28 February 1992.
4. The use of expired appropriations is covered in detail in Chapter 8 of this Deskbook.

VII. CONTRACT FORMATION AND TIME LIMITATIONS.

A. References.

1. FAR Subpart 17.2.
2. FAR Subpart 32.7.
3. FAR Subpart 37.1

B. Options.

1. Contracts with options are one means of ensuring continuity of a contractual relationship for services from fiscal year to fiscal year. The contract continues to exist, but performance must be subject to the availability of funds. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327; Contel Page Services, 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 option must be previously synopsisized in the Commerce Business Daily, priced, and evaluated at the time of contract award. FAR 17.207(f). If the option was not evaluated or is unpriced, the government must justify the exercise the option IAW FAR Part 6 (the contracting activity must obtain approval for an other than full and open competition, i.e., obtain and approved justification and approval under FAR Part 6).
 - b. Exercise of the option cannot be automatic.
 - c. There must be a determination that the option is the most advantageous means of filling a requirement.

Chapter 3

- d. Funds must be available.
- e. Contracts must contain a Subject to Availability of Funds clause, FAR 32.703-2. Cf. Blackhawk Heating, Inc. v. United States, 622 F.2d 539 (Ct. Cl. 1980).
- f. Obligate funds for each option period after funds become available. After the option is exercised, the government may fund the option period incrementally, i.e., during CRA periods, funding may be provided for the period of the CRA. United Food Services Inc., ASBCA No. 43711, 93-1 BCA ¶ 25,462 (if the original contract contains the Availability of Funds clause, and the option is properly exercised, funding is a separate matter and funding the option period in multiple increments does not void the option).
- g. Obligations must be consistent with all normal limitations on the obligation of appropriated funds, e.g., bona fide need rule, period of availability, type of funds.

C. Requirements or Indefinite Quantity Contracts.

- 1. Requirements contracts and indefinite quantity contracts also allow the contractual relationship to cross fiscal years. FAR 37.106.
- 2. Use of a "subject to availability of funds" clause is mandatory. FAR 32.705-1.
- 3. Obligate funds for each delivery order using funds available for obligation at the time the order is issued.

D. Contracts on the Fiscal Year Cycle.

1. Contracts may be awarded with terms running concurrently with the fiscal year, i.e., contract period is 1 October to 30 September.
2. This technique places a large burden on contracting offices and invites fiscal problems when appropriations acts are delayed and CRA periods or funding gaps occur.
3. Within DOD, consider using the authority of 10 U.S.C. § 2410a to award contracts that cross fiscal years. See DFARS 237.106.

VIII. CONCLUSION.

A. Basic Rules Relating to Time.

1. You may not obligate funds before they are authorized and appropriated.
2. You may not incur new obligations after the period of availability ends.
3. Appropriations are presumed to be one year funds, unless expressly stated otherwise.
4. The various types of appropriations have different periods of availability.

B. Bona Fide Need Rule.

1. Funds may be obligated only for the bona fide need of the period of availability of the appropriation.

Chapter 3

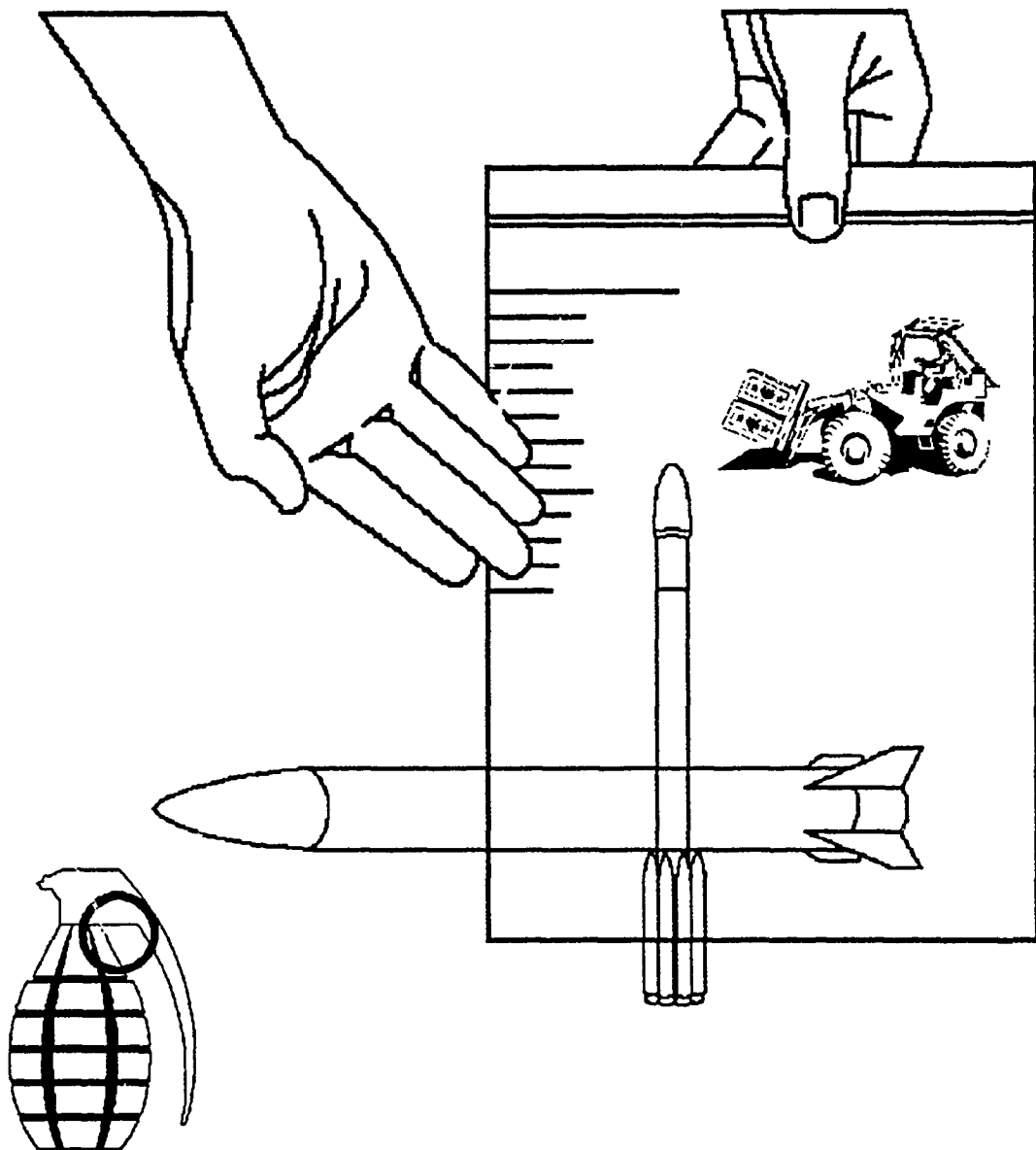
2. "Supply" exceptions to the bona fide need rule, lead time and stock level, authorize obligation during the period of availability and delivery of the supplies in a subsequent fiscal year.
3. Severable services are the bona fide need of the current fiscal year. Contracts for nonseverable services may obligate current funds for performance to be completed in a subsequent fiscal year.

C. Multiple Year Funds.

1. Appropriations are presumed to be annual. Multiple year appropriations are specifically identified as such in appropriations acts.
2. The bona fide need rule applies to multiple year appropriations.
3. Administrative regulations may impose strict controls on the use of multiple year appropriations in the "out years." These restrictions may be more stringent than those imposed by statute.

CHAPTER 4

CONTRACT TYPES



CHAPTER 4

CONTRACT TYPES

I.	INTRODUCTION.	1
II.	CONTRACT TYPES - CATEGORIZED BY PRICE	1
	A. Fixed-Price Contracts	1
	B. Cost Reimbursement Contracts	5
	C. Level of Effort Contracts	12
III.	CONTRACT TYPES - CATEGORIZED BY QUANTITY OR TIME OF DELIVERY	13
	A. Variable Quantity Contracts	13
	B. Definite Quantity; Indefinite Delivery	15
	C. Basic Agreements	15
IV.	LETTER CONTRACTS	16
	A. Defined	16
	B. Approval for Use	16
	C. Definitization	16
V.	OPTIONS	17
	A. Defined	17
	B. Unpriced Options	17
	C. Total Contract Period	17
VI.	CONCLUSION	18

CHAPTER 4

CONTRACT TYPES

I. INTRODUCTION.

II. CONTRACT TYPES - CATEGORIZED BY PRICE.

A. Fixed-Price Contracts. FAR Subpart 16.2.

The contractor promises to perform at a fixed-price, and bears the cost risk (the responsibility for increased costs of performance). ITT Arctic Servs., Inc. v. United States, 207 Ct. Cl. 743 (1975); Chevron U.S.A., Inc., ASBCA No. 32323, 90-1 BCA ¶ 22,602 (the risk of increased performance costs in a fixed-price contract is on the contractor absent a clause stating otherwise); DK's Precision Machining & Mfg., ASBCA No. 39616, 90-2 BCA ¶ 22,830.

1. Firm Fixed-Price contract (FFP).
FAR 16.202.

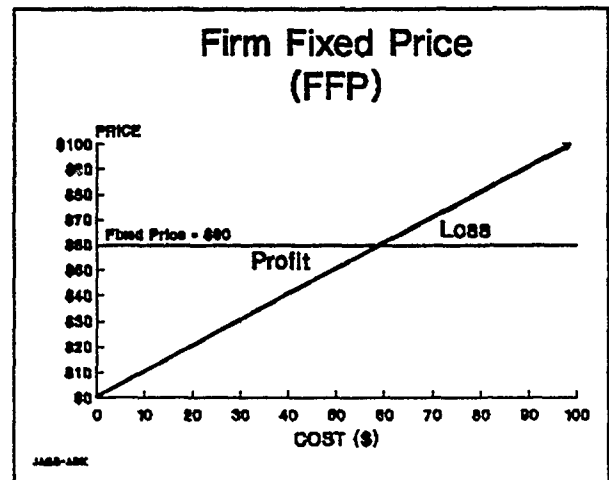


Figure 1

- a. Used when fair and reasonable price can be established at outset, the specifications are reasonably definite or describe a commercial

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Fiscal Law Course

Chapter 4

item, and adequate competition is expected.
Delco Elecs. Corp., B-244559, October 29, 1991,
91-2 CPD ¶ 391 (selection of type committed to
agency discretion and selection of FFP not
unreasonable).

- b. Statute, regulation, and policy limit the use of FFP contracts for research and development. Pub. L. 101-511, § 8038, 104 Stat. 1882 (1990); DFARS 235.006. For older fixed-price development contracts, agencies may not restructure those contracts without prior approval from DOD.
2. Fixed-price contract with economic price adjustment (FP w/EPA). FAR 16.203. The EPA clause, FAR 52.216-2, allows contractors to exclude certain contingencies in their bids, such as material and wage price fluctuations. The parties may adjust the contract price later if the contingencies occur.

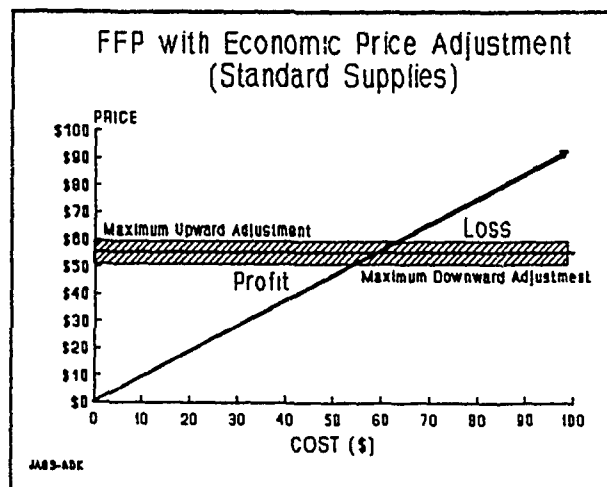


Figure 2

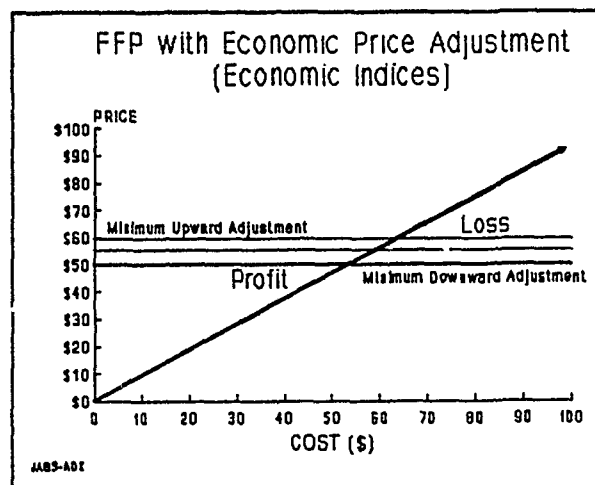


Figure 3

a. Methods of adjustment. FAR 16.203-1.

- (1) Established prices.
- (2) Actual costs.
- (3) Indices.
- (4) The DFARS proscribes the use of moving base periods. Craft Mach. Works, Inc., ASBCA No. 35167, 90-3 BCA ¶ 23,095 (moving base periods would not protect contractor from price fluctuations following award).
- (5) Two ceilings are authorized. Commercial Energies, Inc., B-243616, August 15, 1991, 91-2 CPD ¶ 152 (agency could use two ceiling in FFP w/EPA because the ceilings protected the government against two problems).

Chapter 4

3. Fixed-price redeterminable (FPR). FAR 16.205 and 16.206.
 - a. Prospective. Price is fixed for initial quantities, but the government adjusts it periodically for future quantities based upon the contractor's cost experience. This type of contract is useful for initial production contracts.
 - b. Retroactive. Price for work already performed is also subject to redetermination based upon the contractor's actual cost experience. This type is useful on small R&D contracts and other contracts where unresolved disagreements over cost accounting issues may affect price significantly.
4. Fixed-Price Incentive contract (FPI). FAR 16.403, AFFARS 16.403.

The contractor must complete a defined amount of work for a fixed-price. The government and the contractor share underruns. The contractor bears all costs above the fixed-price.

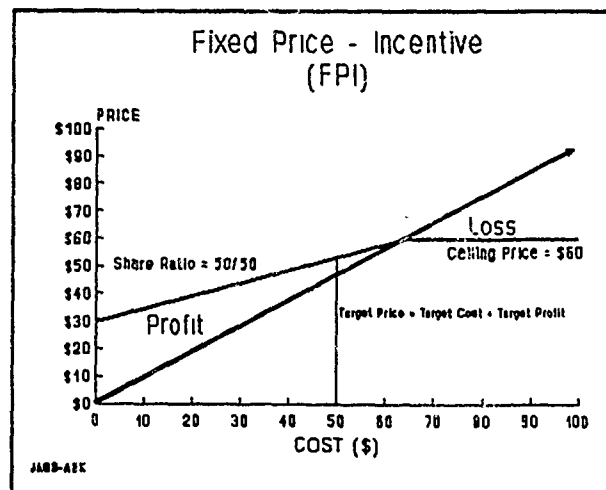


Figure 4

B. Cost Reimbursement Contracts. FAR Subpart 16.3.

The contractor promises to use its "best efforts" to perform the contract within its cost estimate, but the government bears most or all of the cost risk (the responsibility for increased costs of performance).

1. Generally, the government pays the contractor's incurred costs, plus a fee (often erroneously called profit), as prescribed in the contract. Costs must be reasonable, allocable, properly accounted for, and not specifically disallowed.
2. Limitations on cost type contracts. FAR 16.301-3.
 - a. Determination and Finding (D&F) by contracting officer that a cost type contract is most advantageous to the government, either because it is likely to be less costly than any other kind, or because it is impractical to obtain the required goods or services without using this type.
 - b. Contractor must have an adequate cost accounting system. See CrystaComm, Inc., ASBCA No. 37177, 90-2 BCA ¶ 22,692 (contractor failed to establish required cost accounting system).
 - c. The government must be able to exercise adequate surveillance to ensure reasonable efficiency.
 - d. The government imposes cost ceilings through the Limitation of Cost clause, FAR 52.232-20, or the Limitation of Funds clause, FAR 52.232-22.

Chapter 4

- (1) The contractor must notify the contracting officer in advance of potential cost overruns.
- (2) FAR 32.706 provides that a contracting officer, upon receipt of notice, must do one of the following:
 - (a) Fund continued performance.
 - (b) Terminate the contract for convenience.
 - (c) Inform the contractor that the government will allot no additional funds to the contract, direct it to submit a proposal for fee adjustment, and inform it that it may request termination for convenience.
 - (d) Inform the contractor that the government is seeking additional funds, that continued performance is at its own risk, and that it may request a termination for convenience of the government.
- (3) The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. Hughes Aircraft Corp., ASBCA No.24601, 83-2 BCA ¶ 16,396; QAO Corp., DOT CAB No. 1280, 83-1 BCA ¶ 16,379; RMI, Inc. v. United States, 800 F.2d 246, 5 FPD ¶ 87 (Fed. Cir. 1986).

(4) Exceptions to this rule include:

- (a) The overrun was not foreseeable.
General Elec. Co. v. United States,
194 Ct. Cl. 678, 440 F.2d 420 (1971).
- (b) Estoppel. American Elec. Labs., Inc. v. United States, 774 F.2d 1110 (Fed. Cir. 1985) (successfully asserted); Southwest Marine of San Francisco, Inc., ASBCA No. 33404, 89-1 BCA ¶ 21,425 (1988) (unsuccessfully asserted).
- e. Limitation on maximum fee. 10 U.S.C. § 2306(d); 41 U.S.C. § 254(b); FAR 15.903(d).
 - (1) Fee limitations are based on the estimated cost at the time of award, not on the actual costs incurred.
 - (2) For research and development contracts, the maximum fee is a specific amount no greater than 15% of estimated costs at the time of award.
 - (3) For other than R&D contracts, the maximum fee is a specific amount no greater than 10% of estimated costs at the time of award.
 - (4) These limitations are statutory for cost-plus-fixed-fee contracts and regulatory for other cost type contracts.

Chapter 4

- (5) In architect-engineer (A-E) contracts, the contract price (cost plus fee) for the A-E services may not exceed 6% of the estimated project cost.

3. Cost-Plus-Fixed-Fee (CPFF) contract. FAR 16.306.

- a. The contract identifies the work the contractor must perform. The contract price is the contractor's incurred costs, plus a fixed fee which is negotiated and set prior to award.

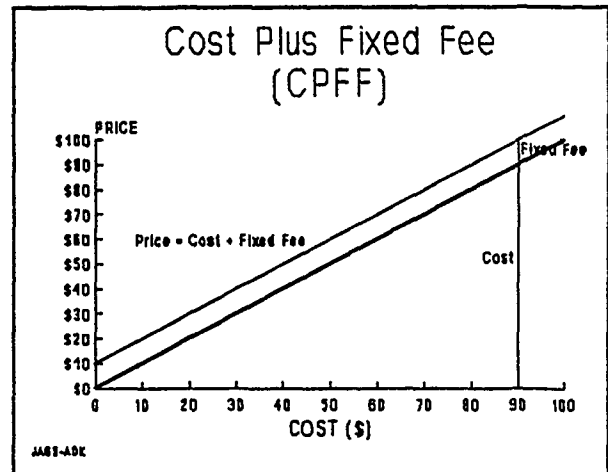


Figure 5

- b. The fixed fee may be a loss. See Lockheed-Georgia Co., Div. of Lockheed Corp., ASBCA No. 27660, 90-3 BCA ¶ 22,957 (cost plus \$200 million fixed loss on initial C-5A production contract).

4. Cost-Plus-Incentive-Fee contract (CPIF). FAR 16.304, FAR 16.404-1.

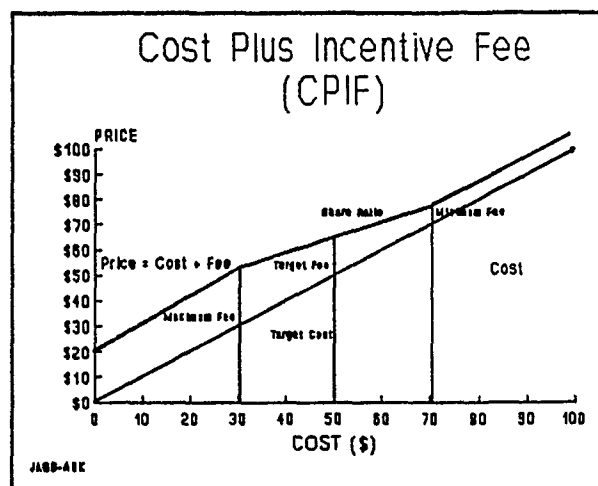


Figure 6

- a. The government transfers some of the cost risk to the contractor by requiring it to share in overruns and underruns through changes in its target fee.
 - b. In any incentive contract, the government must provide a cost incentive. FAR 16.402-1(a).
 - c. The government may combine non-cost incentives with cost incentives.
5. Cost-Plus-Award-Fee (CPAF) contract. FAR 16.305 and 16.404-2.

The contractor receives its costs, a base fee which is fixed at award, and, possibly, an additional award fee based upon the quality of the contractor's performance.

- a. Award fee is determined unilaterally by the contracting officer or Award Fee Determining Official.

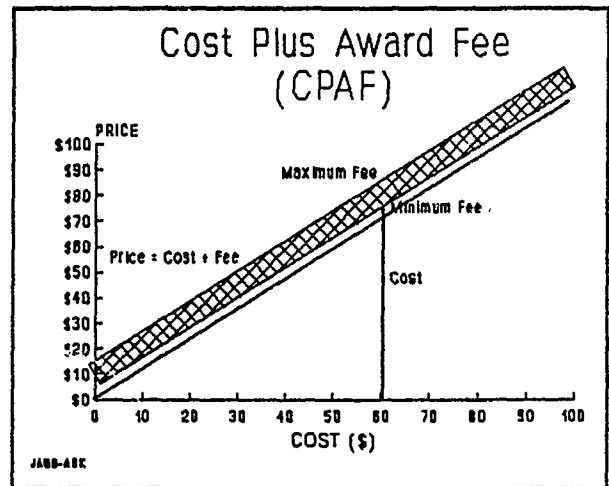


Figure 7

- (1) The typical award fee clause states that the award fee decision is not subject to the Disputes clause of the contract.
 - (2) The Armed Services Board of Contract Appeals (ASBCA) has considered disputes regarding award fees and similar "non-disputable" decisions. Technical Support Servs., Inc., ASBCA No. 37976, 89-2 BCA ¶ 21,861 (availability of the award fee); ICSD Corp., ASBCA No. 28028, 90-3 BCA ¶ 23,027 (ASBCA may review award of collateral savings for a VECP despite "no disputes" language; test is whether arbitrary, capricious, or an abuse of discretion).
- b. Limitations on base fee. For DOD contracts, base fees may not exceed 3% of the estimated cost at the time of award. DFARS 216.404-2(c). But see FAR 15.901 (agencies shall not establish ceilings).
- c. Other types of contracts may include award fees, e.g., Firm Fixed-Price. DFARS 216.470.

6. Cost contract. FAR 16.302.

Contractor is paid its costs but no fee. Normally used where contractor will receive benefit from the contract effort and in contracts with educational institutions.

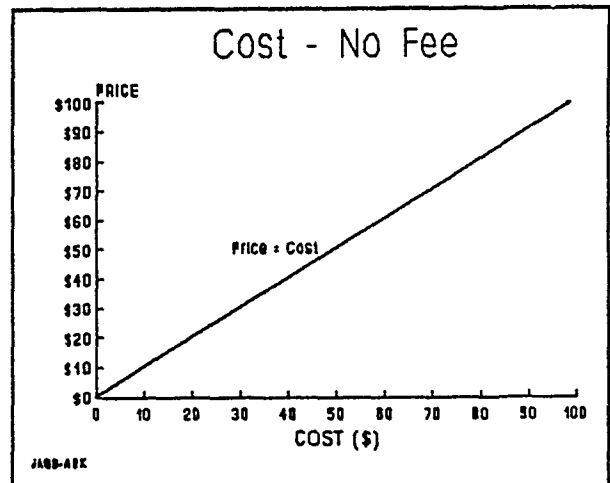


Figure 8

7. Cost sharing contract. FAR 16.303.

Contractor is paid only a portion of its costs. Therefore, it bears some of the risk of overruns. Normally used where the contractor will receive benefit from the effort.

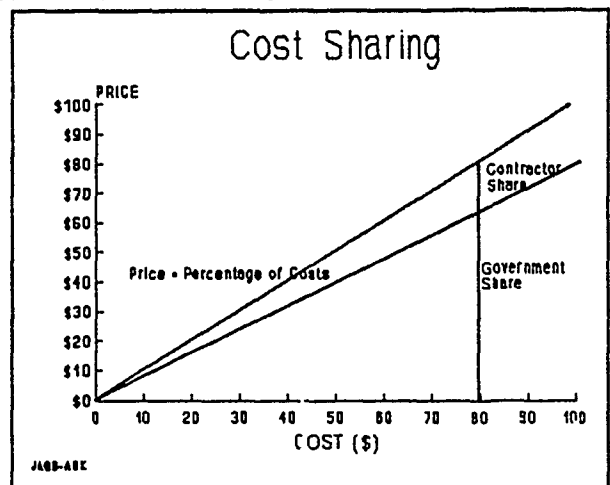


Figure 9

Chapter 4

C. Level of Effort Contracts. FAR 16.6.

1. Unlike the typical completion contract, the contractor need not accomplish a specific task to complete a level of effort contract. It need only devote a specific amount of labor towards the task.
2. Time and Materials (T&M), FAR 16.601, and Labor Hour (L-H) contracts, FAR 16.602.
 - a. The contract describes the work as a specified number of hours of effort by an individual possessing a certain skill level.
 - b. The contract is priced at a specified firm fixed-price per labor hour for each skill level. In a T&M contract, materials are priced at cost plus material overhead. JANA, Inc. v. United States, 936 F.2d 1265, 10 FPD ¶ 70 (Fed. Cir. 1991) (contractor had to repay payments on a T&M contract unsupported by labor records because it had a contractual duty to keep records).
 - c. Used when it is impossible at outset to estimate accurately the extent or duration of work. The contracting officer must prepare a Determination and Findings (D&F) that no other contract type is suitable. FAR 16.601(c); The Saxon Corp., B-232694, January 9, 1989, 89-1 CPD ¶ 17. Approval levels are set forth in AFARS 16.601; AFFARS 16.601.
3. Fixed-Price Level of Effort Term (FFP-LET). FAR 16.207, AFFARS 16.207. Government buys a level of effort for a certain period of time, i.e., a specific number of hours to be performed in a specific period. Useful for small R&D contracts.

4. Cost Plus Fee - Term. FAR 16.306(d). Similar to the FFP-LET with the price equal to cost incurred plus a fee.

III. CONTRACT TYPES - CATEGORIZED BY QUANTITY OR TIME OF DELIVERY.

A. Variable Quantity Contracts.

1. Occasionally, the quantity of work the agency requires is uncertain at contract award. Because of this uncertainty, the agency may desire to retain flexibility to order only the quantity desired, and potential bidders may lack adequate information to bid. In this situation, the agency may award a variable quantity contract. Compare Bean Dredging Corp., B-239952, October 12, 1990, 90-2 CPD ¶ 286 (contracting officer reasonably chose lump sum pricing); with Four Star Maint. Corp., B-240413, November 2, 1990, 91-1 CPD ¶ 70, 6 CGEN ¶ 105,556 (agency wrote A-76 solicitation for lump sum price for an indefinite amount of construction work causing contractors to assume unmeasurable risk).
2. Indefinite Quantity; Indefinite Delivery (also called Minimum Quantity). FAR 16.504.
 - a. The contract obligates the government to buy only the minimum quantity, but permits it to buy up to the maximum quantity. The government issues delivery orders as needs arise. Tennessee Soap Co. v. United States, 130 Ct. Cl. 154 (1954); Federal Elec. Corp., ASBCA No. 11726, 68-1 BCA ¶ 6,834; Federal Elec. Corp., B-160560, 47 Comp. Gen. 155 (1967).

Chapter 4

- b. FAR 16.504(a)(3)(b) no longer suggests limiting this type of contract to commercial items. See Sletager, Inc., B-237676, March 15, 1990, 90-1 CPD ¶ 298 (minimum quantity contract not limited to commercial items); Astronautics Corp. of America, B-242782, June 5, 1991, 70 Comp. Gen. 554, 91-1 CPD ¶ 531 (FAR does not prohibit cost plus fee indefinite quantity contract).
- c. The government has no obligation to estimate accurately the quantity it may buy. Crown Laundry & Dry Cleaners, Inc., ASBCA No. 39982, 90-3 BCA ¶ 22,993 (unlike requirements contract, reasonableness of estimates not an issue).
- d. The government may not use the Termination for Convenience clause to avoid breach damages for its failure to order the minimum quantity. PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (contracting officer may not terminate an indefinite quantity contract for convenience after end of contract term). The damages for failing to order the minimum quantity during the contract period are actual damages, such as recovery of unamortized fixed costs and lost profits, not the contract price for the unordered goods.

3. Requirements Contracts. FAR 15.603.

- a. The government promises to order all of its requirements, if any, from the contractor. Cleek Aviation v. United States, 19 Cl. Ct. 552 (1990) (government breaches requirements contract when it buys requirements elsewhere; where goods or services are different, then no breach); Systems Architects, Inc., ASBCA No. 28861, 90-3 BCA ¶ 23,175 (failure to order requirements is a constructive termination for convenience; Torncello doctrine did not

apply);¹ Air-Flo Cleaning Sys., ASBCA No. 39608, 90-3 BCA ¶ 23,071 (no termination costs for a requirements contract terminated for convenience prior to first order).

- b. In its solicitation for a requirements contract, the government must estimate the quantity in good faith based on the best information available. International Technology Corp., B-233742.2, May 24, 1989, 89-1 CPD ¶ 497.
- c. The government may owe compensation for a negligent government estimate even if the government attempts to insulate itself by the use of a variation of quantities clause. Chemical Technology, Inc. v. United States, 227 Ct. Cl. 120; 645 F.2d 934 (1981); Integrity Management Int'l, Inc., ASBCA No. 18289, 75-2 BCA ¶ 11,602.

B. Definite Quantity; Indefinite Delivery. FAR 16.502.

The contract fixes the quantity and price. The government issues delivery orders to specify delivery dates and locations.

C. Basic Agreements.

The government uses basic agreements and basic ordering agreements (BOA's) when it knows it will enter into a series of contracts with a contractor and wants standard terms and conditions to apply to them. FAR 16.702 and

¹ In Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982), the court held that a contracting officer could not terminate a contract for convenience absent a change in the circumstances of the bargain or in the expectations of the parties.

Chapter 4

16.703; AFFARS 16.703 (cannot be used to acquire, modify, or maintain major systems). While a BOA does not include all required terms for a contract, it contains many. A basic agreement and a BOA are not contracts. The actual contract is formed when orders are issued or the basic agreement is incorporated into new contracts by reference. See Modern Sys. Technology Corp. v. United States, 24 Cl. Ct. 360, 10 FPD ¶ 128 (1991) (blanket purchase agreement does not rise to the level of a contract because no intent by parties to agree; it was merely a framework for future contracts).

IV. LETTER CONTRACTS. FAR Subpart 16.3.

A. Defined.

The government uses letter contracts in exigent or emergency circumstances to get a contractor working on a project immediately.

B. Approval for Use.

Heads of Contracting Activities (HCAs) must approve letter contracts before award. DFARS 217.7404-1(a). Approved letter contracts must include a not-to-exceed (NTE) price.

C. Definitization.

The contract terms must be completely reduced to writing within 180 days after issuance. 10 U.S.C. § 2326; FAR 16.603; DFARS Subpart 217.7404-3. Until definitized, the government may not pay the contractor more than 50% of the NTE price.

V. OPTIONS.

A. Defined.

An option is an offer which is irrevocable for a fixed period. An option gives the government the unilateral right for a specified time to order additional supplies or services at a specified price. FAR 17.201; Young-Robinson Assocs., Inc., B-242229, March 22, 1991, 91-1 CPD ¶ 319 (contractor cannot protest agency's failure to exercise an option because it is a matter of contract administration); but see Mine Safety Appliances Co., B-238597.2, July 5, 1990, 69 Comp. Gen. 562, 90-2 CPD ¶ 11 (GAO will review failure to exercise an option which is in effect a source selection in a parallel development contract).

B. Unpriced Options.

"Unpriced options" and other agreements to agree are enforceable if conditioned upon an obligation to bargain in good faith. Aviation Contractor Employees, Inc. v. United States, 945 F.2d 1568, 10 FPD ¶ 114 (Fed. Cir. 1991), rev'g ASBCA No. 30154, 90-3 BCA ¶ 23,023 (contractor argued that the option price must be completely renegotiated prior to exercise of each option; the court agreed if the contractor was obligated to bargain in good faith). Otherwise, they are unenforceable. Restatement (Second) Contracts, § 33.

C. Total Contract Period.

A contract, including all options, may not extend more than 5 years. FAR 17.204(e). Military research and development contracts may extend for 10 years or more. 10 U.S.C. § 2352. Delco Elecs. Corp., B-244559, October 29, 1991, 91-2 CPD ¶ 391 (use of options with delivery dates 7 1/2 years later does not violate FAR 17.204(e), because the five year limit applies to five years worth of requirements in a supply contract).

Chapter 4

VI. CONCLUSION.

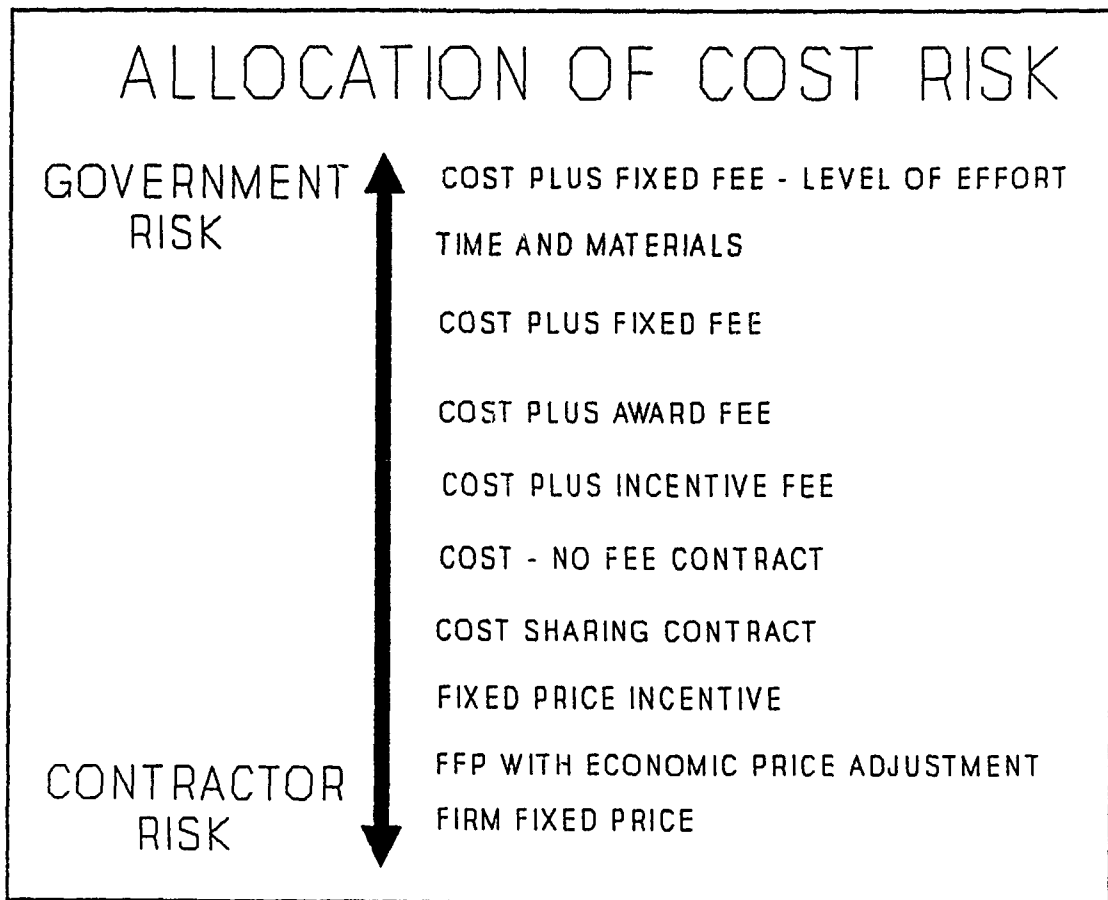
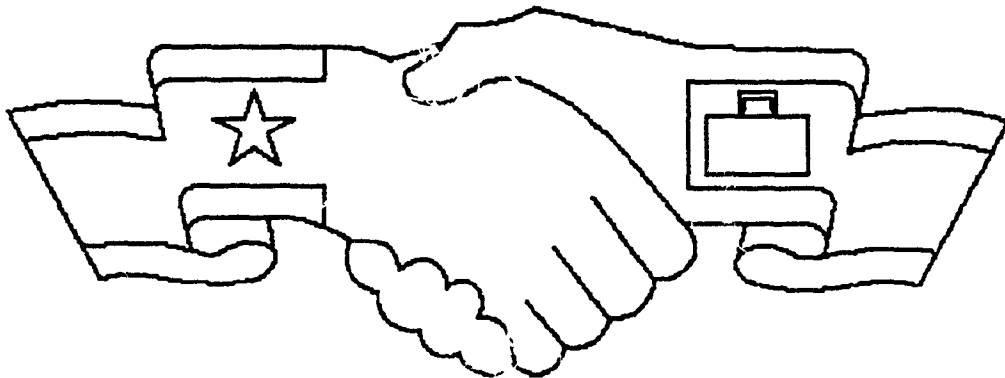


Figure 10

CHAPTER 5

OBLIGATING APPROPRIATED FUNDS



CHAPTER 5

OBLIGATING APPROPRIATED FUNDS

I.	INTRODUCTION	1
II.	REFERENCES	1
III.	FORMAL COMMITMENT ACCOUNTING	2
	A. Definitions	2
	B. Rules Governing Commitments	3
IV.	OBLIGATING APPROPRIATED FUNDS	6
	A. General Rules.	6
	B. Recording Obligations	8
	C. Adjusting Obligations	16
	D. Obligations and Terminated Contracts	19
	E. Miscellaneous Obligation Rules	20
	F. Service Contracts Extending Beyond the End of the Current Fiscal Year	23
V.	CONCLUSION	25
APPENDIX A:	Fund Distribution Process	27
APPENDIX B:	DA Form 3953 (Purchase Request and Commitment)	29
APPENDIX C:	DD Form 2406 (Miscellaneous Obligations Document)	31
APPENDIX D:	Memorandum for Under Secretary of Defense, Subject: DOD Accounting Guidance for Contract Changes, dated 20 April 1992	33

CHAPTER 5

OBLIGATING APPROPRIATED FUNDS

I. INTRODUCTION.

II. REFERENCES.

- A. Office of Management and Budget Circular A-34, pt.II, paras. 22 & 23 (Revised Aug. 26, 1985).
- B. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 7 (1992).
- C. DOD Directive 7200.1, Administrative Control of Appropriations (May 1984); and DOD Accounting Manual 7220.9-M, pt. II, chs. 24 & 25.
- D. Air Force Reg. (AFR) 172-1, USAF Budget Policies and Procedures (15 Oct. 1990); 170-8, Accounting for Obligations (15 Jan. 1990); and 170-13, Accounting for Commitments (30 July 1990).
- E. Army Reg. (AR) 37-1, Army Accounting and Fund Control, chs. 8 & 9 (30 Apr. 1991).
- F. Robert L. McGrath, An Introduction to Fiscal Law in Government Contracting, 29 A.F.L. Rev. 207 (1988).

MAJ Michael A. Killham
Fiscal Law Course

Chapter 5

III. FORMAL COMMITMENT ACCOUNTING.

A. Definitions.

1. **Initiation.** An administrative reservations of funds based on procurement directives, requests, or equivalent instruments. It allows for the preliminary negotiation of procurement actions, however, one must obtain certification of fund availability before making a commitment or incurring an obligation. AR 37-1, para. 8-1d.
2. **Commitment.** An administrative reservation of funds based upon firm procurement directives, orders, or requests that authorize the creation of obligations without further approval by the official responsible for certifying the availability of funds. AR 37-1, para. 8-1a. See also DOD Acct'g Manual 7220.9-M, ch. 24, para. B.2.a(1); AFR 170-13, para. 3.
3. **Unobligated commitment.** Commitment against a specific appropriation or fund account, or any subdivision thereof, which has been neither obligated nor cancelled (outstanding commitment). AFR 170-13, para. 3b.
4. **Certification of fund availability.** Authorization, by a person authorized to certify, that funds are available currently to cover the obligation authorized and that the obligation authorized is a proper and valid charge to the funds cited. AFR 170-13, para. 3e.
5. **Citation of funds.** An authorization by one activity to another, as part of a request for material or services, to incur obligations directly against the funds of the ordering activity. AFR 170-13, para. 3f.

6. **Obligation.** Any act that legally binds the United States Government to make payment. AR 37-1, para. 9-1. See also AFR 177-16; AFR 170-8, para. 2; OMB Cir. A-34, sec. 22.1; DOD Acct'g Manual 7220.9-M, ch. 24, para. B.3.a(1).

B. Rules Governing Commitments.

1. DOD activities must use commitment accounting procedures for military construction, research, development and test, and procurement appropriations. DOD Acct'g Manual 7220.9-M, ch. 24, para. B.2.a(5). Army regulations mandate the use of commitment accounting for all Army appropriations except merged appropriations. AR 37-1, para. 8-1c. Air Force regulations require commitment accounting for all Air Force appropriations, apportioned stock fund divisions, management funds, contract authorizations, administrative and direct cite foreign military sales (FMS) trust funds, and special fund appropriations. AFR 170-13, para. 5.
2. Issuing a commitment authorizing obligations in excess of a formal subdivision of funds could result in an antideficiency violation of 31 U.S.C. § 1341 or 31 U.S.C. 1517. AR 37-1, para. 8-1b. See also AFR 170-13, para. 7; Deskbook, ch. 6; DOD Acct'g Manual 7220.9-M, ch. 24, para. B.2.a(6).
3. Activities may commit funds only to acquire goods, supplies, and services that meet the bona fide needs of the period for which the funds were appropriated, or to replace stock used during that period. AR 37-1, para. 8-4a(1); AFR 170-13, para. 4c. See Deskbook, ch. 3.
4. The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment. DOD Acct'g Manual 7220.9-M, ch. 24, para. B.2.a(1).

Chapter 5

5. Reduce outstanding commitments when the funds for which they exist are obligated. AR 37-1, para. 8-4a(5); AFR 170-13, para. 18.
6. Cancel outstanding commitments when committed funds expire for obligation unless specifically justified for retention. DOD Acct'g Manual 7220.9-M, ch. 24, para. B.2.a(7); AR 37-1, para. 8-4a(6); AFR 170-13, para. 5d. See AR 37-1, para. 8-3b for making committed funds available prior to the appropriation expiration date.
7. Maintain current and accurate commitment registers for designated appropriations. Reconcile them at least monthly. AR 37-1, para. 8-6. See also AFR 170-13, para. 5.
8. Determining the amount to commit. See DOD Acct'g Manual 7220.9-M, ch. 25, para. B; AR 37-1, para. 8-4; and AFR 170-13, paras. 10 through 33.
 - a. General. Record as a commitment the cost estimate set forth in the commitment document. DOD Acct'g Manual 7220.9-M, ch. 25, para. B.1; AR 37-1, para. 8-4b; AFR 170-13, para. 18.
 - b. Contingent liabilities. Commit funds to cover contingent liabilities, as required. Include in contingent liabilities, estimates for--
 - (1) fixed-price contracts with price escalation, price redetermination, or incentive clauses. AR 37-1, para. 8-4b(2)(a); AFR 170-13, para. 25a.;

- (2) contracts authorizing variations in quantities to be delivered. AR 37-1, para. 8-4b(2)(b); AFR 170-13, para. 28; and
 - (3) contracts on which allowable interest may become payable for contractor claims under the Disputes clause (FAR 52.233-1). AR 37-1, para. 8-4b.
 - (4) Commit an amount supported by a reasonable, conservative estimate. DOD Acct'g Manual 7220.9-M, ch. 25, para. B.2.a; AR 37-1, para. 8-4a(2); AFR 170-13, para. 25. Cf. Director, United States Veterans' Bureau, A-27641, 8 Comp. Gen. 654 (1929).
- c. Letter contracts and letters of intent. Commit funds to cover the difference between the maximum legal liability of the government under the interim agreement and the maximum estimated cost of the definitized contract. DOD Acct'g Manual 7220.9-m, ch. 25, para. B.2.b; AFR 170-13, para. 27.
- d. Indefinite delivery-type contracts and option agreements. Commit funds only when the amount estimated is reasonably firm. DOD Acct'g Manual 7220.9-M, ch. 25, para. B.2.c; AR 37-1, para. 8-4b(2)(b); AFR 170-13, para. 26.
- e. Engineering changes, prior to execution of formal contract modifications. Commit an amount sufficient to cover the work that the contractor is authorized to perform without further approval. DOD Acct'g Manual 7220.9-M, ch. 25, para. B.2(d); AFR 170-13, para. 30. But see AR 37-1, para. 8-4a(2).

Chapter 5

- f. Intra-governmental requisitions and orders. Commit the amount of the order. DOD Acct'g Manual 7220.9-M, ch. 25, para. B.2(e); AFR 170-13, para. 31.
- g. Imprest Funds. Record advances to imprest fund cashiers as commitments or reservations against a current appropriation. Record as an obligation when cashiers use the funds and obtain reimbursement from a current appropriation. Appropriations Accounting for Imprest Fund Advances Issued to Cashiers, B-240238, May 8, 1991, 70 Comp. Gen. 481. See also AR 37-1, para. 20-15 (stating that imprest funds are advances of funds without charge to an appropriation.)

9. Commit no funds for--

- a. Potential termination charges on multi-year contracts that provide for cancellation charges if the government must cancel the contract for reasons other than contractor liability (DFARS 52.249-7000). AR 37-1, para. 8-4a(4); AFR 170-13, para. 32.
- b. Blanket Purchase Agreements. AFR 170-13, para. 21.

IV. OBLIGATING APPROPRIATED FUNDS.

A. General Rules.

- 1. Obligate funds only for the purposes for which they were appropriated. 31 U.S.C. § 1301(a); AR 37-1, para. 9-5a(1); AFR 170-8, para. 4c. See Deskbook, ch. 2.

2. Obligate funds only to satisfy the bona fide needs of the current fiscal year. 31 U.S.C. § 1502(a); AR 37-1, para. 9-5c(2); AFR 170-8, para. 4c. See Deskbook, ch. 3.
3. Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. AR 37-1, para. 9-5c(3); AFR 170-8, para. 7c.
4. Generally, obligate using funds current when the U.S. Government's obligation (liability) is incurred. AR 37-1, para. 9-5c(6). Some exceptions include:
 - a. contract award following an unsuccessful bid protest when authorized by 31 U.S.C. § 1558. AR 37-1, para. 9-5i;
 - b. replacement contracts for contracts that have been terminated for default. AR 37-1, para. 9-5g; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976); and
 - c. "in-scope" contract changes. DOD Acct'g Manual 7220.9-M, ch. 25, para. 11a; AR 37-1, tbl. 9-9, para. 1a.
5. Do not obligate funds in advance of an appropriation or in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. §§ 1341, 1517; AR 37-1, para. 9-5k; AFR 177-16, para. 40b(2). Obtain a DA Form 1323, Fund Allowance Document (FAS)/Fund Authorization Document (FAD) before obligating funds. AR 37-1, paras. 6-13a and 9-5n. See also AR 37-1, fig. 6-1 (Appendix A).

Chapter 5

6. Execute contracts "subject to the availability of funds" (SAF) if administrative lead time requires contract award prior to the receipt of funds to ensure timely delivery of the goods or services. If a SAF clause (e.g., FAR 52.232-18 or 52.232-19) is used, accept no services or supplies until after receipt of funds. FAR 32.703-2; AR 37-1, para. 9-51. See AFR 170-13, para. 9.

B. Recording Obligations.

1. Obtain documentary evidence of the transaction before recording an obligation. 31 U.S.C. § 1501; DOD Acct'g Manual 7220.9-M, ch. 25, para. C.2; AFR 170-8, para. 3. See generally AR 37-1, paras. 9-5b(1) - (9).
 - Contracts, purchase orders, rental agreements, travel orders, bills of lading, civilian payrolls, and interdepartmental requisitions are common contractual documents supporting obligations. AR 37-1, para. 9-5b(1); AFR 170-8, para. 4a.
2. General rule for recording obligations.
 - Record obligations, which normally do not include contingent liabilities, in the full amount of the legal liability of the United States. GAO, Policy and Procedures Manual For Guidance of Federal Agencies: Fiscal Procedures, § 16; Jeffcoat, The Army Accountant's Handbook, 5-21 (1988); OMB Cir. A-34, § 22.1; AR 37-1, ch. 9; AFR 170-8, sec. F, AFR 177-16, para. 36.

3. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it.

a. Firm-fixed-price contracts. Obligate the contract price on the date of contract award. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.1; AR 37-1, tbl. 9-1; AFR 170-8, para. 19.

b. Fixed-price contracts with escalation, price redetermination, or incentive provisions. Obligate the target or billing price on the date of contract award, even if the contract has a higher ceiling price. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.2; AR 37-1, tbl. 9-1; AFR 170-8, para. 19; Secretary of Defense, B-121982, 34 Comp. Gen. 418 (1955).

-- Adjust the obligation on the date the contract is modified to reflect the new price. Adjustments may be upward or downward.

c. Cost-reimbursement contracts, including cost, cost-plus-fixed-fee, award fee or incentive fee, labor-hour, and time & materials contracts. Obligate the total estimated costs, including fixed, base, or target fees. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.3; AR 37-1, tbl. 9-1; AFR 170-8, para. 19.

d. If the government increases the ceiling price of the contract under the Limitation of Cost clause (FAR 52.232-20), obligate additional (currently available) funds to cover the new maximum liability of the government. Environmental Protection Agency - Request for Clarification, B-196732, 61 Comp. Gen. 609 (1982).

Chapter 5

- Adjust the obligation to reflect changes in cost. Obtain the contractor's approval before deobligating funds when evidence shows that costs will be less than originally anticipated. Magnavox-Use of Contract Underrun Funds, B-207433, September 16, 1983, 83-2 CPD ¶ 401.

e. Indefinite Contracts.

- (1) Indefinite delivery - definite quantity contracts. Obligate the full amount of the definite quantity at the time of contract award. AR 37-1, tbl. 9-1; AFR 170-8, para. 19.
- (2) Indefinite delivery - indefinite quantity contracts (see FAR 16.504). Obligate the amount of the stated minimum quantity at the time of contract award. Obligate additional funds for each additional order at the time the order is issued. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.4; AR 37-1, tbl. 9-1; AFR 170-8, para. 19d(3); cf. Federal Elec. Corp., B-160560, 47 Comp. Gen. 155 (1967).

- f. Requirements contracts. Record as separate obligations when each order is issued. AR 37-1, tbl. 9-1; AFR 170-8, para. 19d(2).

- g. Letter contracts. Obligate current funds in the amount of the maximum liability authorized in the letter contract. When the contract is definitized, adjust the obligation to equal the final amount. In adjusting the balance, use funds currently available for obligation. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.7; AR 37-1, tbl. 9-1; AFR 170-8, para. 19h; Obligating Letter Contracts, B-197274, September 23, 1984, 84-1 CPD ¶ 90.
- h. Contracts allowing variations in quantity to be delivered. Obligate for the value of the quantity specified for delivery, excluding variations. Adjust the obligations to the value of quantities delivered and accepted. AR 37-1, tbl. 9-1; AFR 170-8, para. 19i.
- i. Purchase orders. The rules of obligation for purchase orders depend upon the amount of the order and whether the order creates a binding liability when issued. See DOD Acct'g Manual 7220.9-M, ch. 25, para. D.10; AR 37-1, tbl. 9-8; AFR 170-8, para. 22.
 - (1) Purchase orders for \$25,000 or less issued without formal advertising and specifically requesting the delivery of goods or performance of work or services are obligations when issued. AR 37-1, tbl. 9-8; AFR 170-8, para. 22a.
 - (2) When the government requires written acceptance by the vendor. Record an obligation in the amount of the order when the vendor accepts the order in writing, or at the time of constructive acceptance based on delivery. AR 37-1, tbl. 9-8; AFR 170-8, para. 22d.

Chapter 5

- (3) If the government is accepting a vendor's binding offer to sell specific goods or services at a specific price, obligate funds when the government accepts. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.10; AR 37-1, tbl. 9-8; AFR 170-8, para. 22c.
- j. Rental agreements and leases of real or personal property. Obligate for one month at a time throughout the term of the rental agreement. Determine the amount of the obligation by analyzing the government's rights to terminate the rental agreement or lease. DOD Acct'g Manual 7220.9-M, ch. 25, para. E; AR 37-1, tbl. 9-2; AFR 170-8, para. 16.
 - (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 Acct'g Manual 7220.9-M, ch. 25, para. E.2; AFR 170-8, para. 16a.
 - (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 Acct'g Manual 7220.9-M, ch. 25, para. E.3; AFR 170-8, paras. 16b & c.
 - (3) If the rental agreement provides for a specified payment in the event of termination, obligate the monthly rental amount plus the amount of the termination payment. DOD Acct'g Manual 7220.9-M, ch. 25, para. E.4; AFR 170-8, para. 16c.

- (4) If a domestic or foreign rental agreement has no termination provision and is financed with an annual appropriation, obligate the full amount of the rental agreement (up to 12 months), even if the rental agreement extends into the next fiscal year. DOD Acct'g Manual 7220.9-M, ch. 25, para. E.5; AR 37-1, tbl. 9-2, para. 5; AFR 170-8, para. 16.
- (5) The government may enter into leases of structures and real property in foreign countries for periods up to 5 years (10 years for military family housing). 10 U.S.C. § 2675. Obligations for such leases may not exceed the period of availability of the funds with which the lease is financed. A lease for more than 12 months, or one which crosses fiscal years, requires obligation of funds in the full amount of the lease, limited by the period of availability of the funds being used, i.e., obligation of funds for the total number of months remaining in the period of availability is required. Obligate for the months after the end of the period of availability in subsequent fiscal years. DOD Acct'g Manual 7220.9-M, ch. 25, para. E.5; AFR 170-8, para. 16f.

k. Reimbursable orders placed with DOD components or other United States government agencies.

- (1) Reimbursable orders. The requiring agency records an obligation when the procuring agency accepts the order in writing. DOD Acct'g Manual 7220.9-M, ch. 25, para. F.1; AR 37-1, tbl. 9-3; AFR 170-8, para. 20a.

Chapter 5

- (2) Direct citation method. Record the obligation when the procuring agency notifies the requiring agency in writing that the contract has been awarded. DOD Acct'g Manual 7220.9-M, ch. 25, para. F.2; AR 37-1, tbl. 9-3; see also DFARS Subpart 8.70.

- (3) Orders required by law to be placed with another U.S. governmental agency, such as the Federal Prison Industries (18 U.S.C. § 4124), or the Government Printing Office (44 U.S.C. § 111). Record as an obligation by the requiring agency in the amount stated in the order when the order is issued. DOD Acct'g Manual 7220.9-M, ch. 25, para. F.4; AR 37-1, tbl. 9-3; AFR 170-8, para. 20c.

- (4) Orders placed with other U.S. governmental agencies under the Project Order Law (41 U.S.C. § 23) or the Economy Act (31 U.S.C. § 1535). DOD Acct'g Manual 7220.9-M, ch. 25, para. F.3; AFR 170-8, para. 20c.
 - (a) Project orders. When the performing activity accepts the order in writing, obligate funds in the amount stated in the order. DOD Acct'g Manual 7220.9-M, ch. 25, para. F.3.a; AR 37-1, tbl. 9-3; AFR 170-8, para. 20c(1).

 - (b) Economy Act orders. Obligate funds when the performing activity accepts the order in writing. Adjust undelivered Economy Act orders issued against annual or multiple year appropriations downward at the end of the period

of availability of the funds. DOD Acct'g Manual 7220.9-M, ch. 25, para. F.3.b; AR 37-1, tbl. 9-3; AFR 170-8, para. 20(c)(2).

1. Stock fund orders. Record as an obligation when the order is placed. AR 37-1, para. 9-5j. If the item does not have a stock number, record at the time the stock fund accepts the order. DOD Acct'g Manual 7220.9-M, ch. 25, para. G.1.b; AFR 170-8, para. 21d.
 - (1) Adjust obligations for stock fund orders when a change notice affecting price, quantity, or an acceptable substitution is received. DOD Acct'g Manual 7220.9-M, ch. 25, para. G.1.a; AR 37-1, tbl. 9-8; AFR 170-8, paras. 21d(3) & (4).
 - (2) 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 Acct'g Manual 7220.9-M, ch. 25, para. G.2.a; AFR 170-8, para. 21d(3).
 - (3) If the requiring agency's appropriation on a stock fund order for a non-stock-numbered item expires, the order also expires. DOD Acct'g Manual 7220.9-M, ch. 25, para. G.3; AFR 170-8, para. 21d(4).

Chapter 5

4. The bona fide needs rule affects the obligation of funds.

- a. Severable service contracts. When the contract is signed, obligate current funds in the amount of the contract or the amount necessary to fund the contract to the end of the period of availability of the appropriation, whichever is less. AR 37-1, tbl. 9-2, para. 1; AR 170-8, para. 4c(2).
- b. Nonseverable service contracts. When the contract is executed, obligate current funds for the full amount of the contract. AR 37-1, tbl. 9-2, para. 3; AFR 170-8, para. 4c(2).
- c. DOD contracts for the maintenance of tools, equipment, and facilities; the lease of real or personal property; depot maintenance; and the operation of equipment. Obligate current funds for contracts 12 months or less in duration. 10 U.S.C. § 2410a; AR 37-1, para. 9-5c(2) & tbl. 9-2.

C. Adjusting Obligations.

- 1. Adjust obligation records when changes in circumstance create differences between the original amount obligated and any new liability of the government. See generally AR 37-1, para. 9-7 and tbl. 9-9; AFR 170-8, para. 33.

2. Relation-back theory.

- The "relation-back theory" is based upon the rationale that the price adjustment is not the result of a new liability, but that it "renders fixed and certain the amount of the government's pre-existing liability to adjust the contract price." Administrator, Small Business Administration, B-155876, 44 Comp. Gen. 399, 401 (1965); Environmental Protection Agency - Request for Clarification, B-195732, September 23, 1982, 61 Comp. Gen. 609, 82-2 CPD ¶ 491.
- a. Fixed-price contract changes authorized by the Changes clause (within-scope changes). (see FAR 52.243-1).
 - Adjust the obligation to reflect the changed requirement. Obligate funds from the fiscal year cited on the original contract. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.11.a; AR 37-1, tbl. 9-9, note 1; AFR 170-8, para. 33.
- b. Cost-reimbursement contract changes.
 - (1) If the change does not require an increase in ceiling price in the contract, obligate funds from the fiscal year cited in the original contract. AR 37-1, tbl. 9-9; AFR 170-8, para. 34.
 - (2) If the change requires an increase in the ceiling price, obligate funds available for obligation when the contracting officer approves the change. Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986).

Chapter 5

- c. Correction of mistakes and formalization of informal agreements.
 - Adjust the obligation to reflect the correct amount, using funds from the fiscal year cited on the original contract. If these adjustments are the result of a change in the scope of the contract or are new procurements, use funds current at the time of the adjustments. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.11.b; AR 37-1, tbl. 9-9; AFR 170-8, para. 33g.
- d. Contingent liabilities. Obligate funds from the fiscal year cited on the original contract. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.11.c; AR 37-1, tbl. 9-9; AFR 170-13, para. 25.
- e. Changes outside the scope of the contract. Obligate funds current at the time the change is directed. Environmental Protection Agency-Request for Clarification, B-195732, 61 Comp. Gen. 609, September 23, 1982, 82-2 CPD ¶ 491; AR 37-1, tbl. 9-8; AFR 170-8, para. 33.
- f. Claims approved by contracting officers under the Contract Disputes Act of 1978. AR 37-1, tbl. 9-8, para. 16; AFR 170-8, para. 28c.
 - (1) Within scope changes (claims based on antecedent liability). Obligate funds from the fiscal year originally cited on the contract.

(2) Outside-the-scope changes. Obligate from appropriations current when the claim is paid. See Appendix D.

- g. Incrementally funded contracts. Obligate current funds for each new fiscal year. See generally, AR 70-6, ch. 2.
- h. 31 U.S.C. § 1553(c) imposes restrictions on the use of expired funds to pay for certain contract changes involving additional work. The Army's implementing regulations are very detailed. AR 37-1, paras. 9-5c(5) and 9-5t.

D. Obligations and Terminated Contracts.

1. Termination for convenience. In the termination modification, deobligate all funds in excess of the estimated termination settlement costs. DOD Acct'g Manual 7220.9-M, ch. 25, para. D.12; AR 37-1, tbl. 9-9; AFR 170-8, para. 37. Generally, deobligated funds are unavailable for obligation if they have expired. But see AR 37-1, paras. 9-5h and 9-5i.

2. Termination for default.

a. The originally obligated funds remain available for obligation for a reprocurement contract, notwithstanding the expiration of the normal period of availability, if:

- (1) The replacement contract is awarded without undue delay;

Chapter 5

- (2) There is still a bona fide need for the goods or services;
- (3) The replacement contract is awarded on the same basis as the original contract, except for the total cost; and
- (4) The replacement contract is substantially similar to the defaulted contract in nature, size, and scope. Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 82-1 CPD ¶ 33; AR 37-1, para. 9-5g.

E. Miscellaneous Obligation Rules.

a. Contract litigation.

- (1) Settlements. Obligate funds from the fiscal year originally cited in the contract for within scope changes. AR 37-1, para. 9-5t(4)(c)(5) and tbl. 9-8; AFR 170-8, para. 28c. Obligate current funds for out-of-scope changes. Appendix D.
- (2) Judgments. Initially, the government pays judgments from a permanent appropriation called the Permanent Indefinite Judgment Fund. 31 U.S.C. § 1304. The Contract Disputes Act (CDA) requires agencies to reimburse the Judgment Fund for CDA judgments. 41 U.S.C. § 612(c). Reimbursements are made from funds available for obligation when the judgment is entered. AR 37-1, tbl. 9-8; AFR 170-8, para. 28b; Bureau of Land Mgt. - Reimbursement of CDA Payments, B-211229, April 24, 1984, 63 Comp. Gen. 308 (1984).

- (3) Litigation costs. Obligate funds available at the time the service or supply is needed. If the litigation costs are included in the amount of a settlement or the monetary award of a court or board, obligate funds current at the time of the settlement or the award decision. AR 37-1, tbl. 9-8; AFR 170-8, para. 28h.
- (4) Attorney fees and other expenses. These costs are not payable by the Judgement Fund. Record obligations against current funds at the time the awards are made by the deciding official or by the court. AR 37-1, tbl. 9-8, para. 18; AFR 170-8, para. 28d.
- (5) Bid protests filed at the General Accounting Office (GAO) before contract award. Funds available but not obligated at the time of protest remain available for obligation for 90 days after the GAO renders a ruling on the final protest. 31 U.S.C. §1558; AR 37-1, tbl. 9-8, para. 7.
- (6) Agencies need not reimburse the Judgment Fund for protest costs and attorneys fees awarded by the GSBICA under the provisions of the Brooks Act, 40 U.S.C. § 759(h)(5)(C); but see Federal Computer Corp., GSBICA No. 10527-C (10389-P), 1991 BPD ¶ 222; Julie Research Labs., Inc., GSBICA No. 9075-C(8919-P), 1988 BPD ¶ 208 (GSBICA found authority to order an agency to reimburse the Judgment Fund, by virtue of the board's authority to revise the agency's delegation of procurement authority under 40 U.S.C. § 959(h)(5)(B)).

Chapter 5

b. Extraordinary contractual relief.

- P.L. 85-804. Obligate appropriations current at the time of the original contract or commitment. FAR 50.302-3; AR 37-1, tbl. 9-9, para. 2.

c. Ratification of actions without a formal contract.

- Charge against the funds that would have been charged had the obligation been valid from its inception. FAR 1.602-3; AFR 170-8, para. 30; Fish and Wildlife Serv. - Fiscal Year Chargeable on Ratification of Contract, B-208730, January 6, 1983, 83-1 CPD ¶ 75; Selective Serv. Sys.- Yankelovich, Skelly & White, Inc., B-205415, March 19, 1982, 82-1 CPD ¶ 259; cf. Nordair Ltd., B-201635, February 25, 1981, 81-1 CPD ¶ 134.

d. Liquidated damages. Reduce obligations by the amount of liquidated damages withheld from the contractor. If the contractor objects to the assessment of liquidated damages, commit the amount of the liquidated damages deobligated. Reobligate the amount of the liquidated damages if the contractor's objection to the assessment is sustained by government admission or by a judgment. AR 37-1, tbl. 9-9, para. 8.

- Recovered liquidated damages may be used to fund a replacement contract. Cf. National Park Serv. - Disposition of Performance Bond Forfeited to Government by Defaulted Contractor, B-216688, 64 Comp. Gen. 625 (1985).

e. Multi-year contract cancellation charges.

- (1) Do not commit or obligate funds for the amount of the cancellation charge unless the contract is cancelled. AR 37-1, tbl. 9-8 and para. 8-4(a)(4); AFR 170-8, para. 191. But see Navy Indus. Fund: Obligations in Connection with Long-Term Vessel Charters, B-174839, 62 Comp. Gen. 143 (1983).
- (2) When a contract is cancelled, obligate the amount stated in the written estimate of liability, but no more than the cancellation ceiling.
- (3) Obligate funds from appropriations that are current at time of cancellation.

F. Service Contracts Extending Beyond the End of the Current Fiscal Year.

1. References.

- a. FAR Subpart 32.7, Contract Financing.
- b. FAR Subpart 17.2, Options.
- c. FAR Subpart 37.1, Service Contracts - General.

Chapter 5

2. Options.

- a. Contracts with options provide a means of ensuring continuity of services from fiscal year to fiscal year because the contractual relationship between the parties can cross the end of a fiscal year. See Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327; Contel Page Servs., Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540.
- b. There are restrictions on the use and exercise of options. FAR Subpart 17.2.
 - (1) Exercise of the option cannot be automatic.
 - (2) There must be a determination that the option is the most advantageous means of filling a requirement.
 - (3) Contracts must contain a Subject to Availability of Funds clause, FAR 32.703-2. Cf. Blackhawk Heating, Inc. v. United States, 622 F.2d 539 (Ct. Cl. 1980).
 - (4) Obligate funds for each option period after funds become available. Obligations must be consistent with all normal limitations on the obligation of appropriated funds, e.g., bona fide need rule, period of availability, type of funds. See Cessna Aircraft Co. v. Dept. of the Navy, 744 F.2d 260 (D. Kan. 1990).

3. Requirements or indefinite quantity contracts:

- a. Requirements contracts and indefinite quantity contracts also allow the contractual relationship to cross fiscal years. FAR 37.106.
- b. Use of a "subject to availability of funds" clause is mandatory. FAR 32.705-1.
- c. Obligate funds for each order using current year appropriations.

V. CONCLUSION.

Chapter 5

APPENDIX A
Fund Distribution Process

Fund Distribution Process

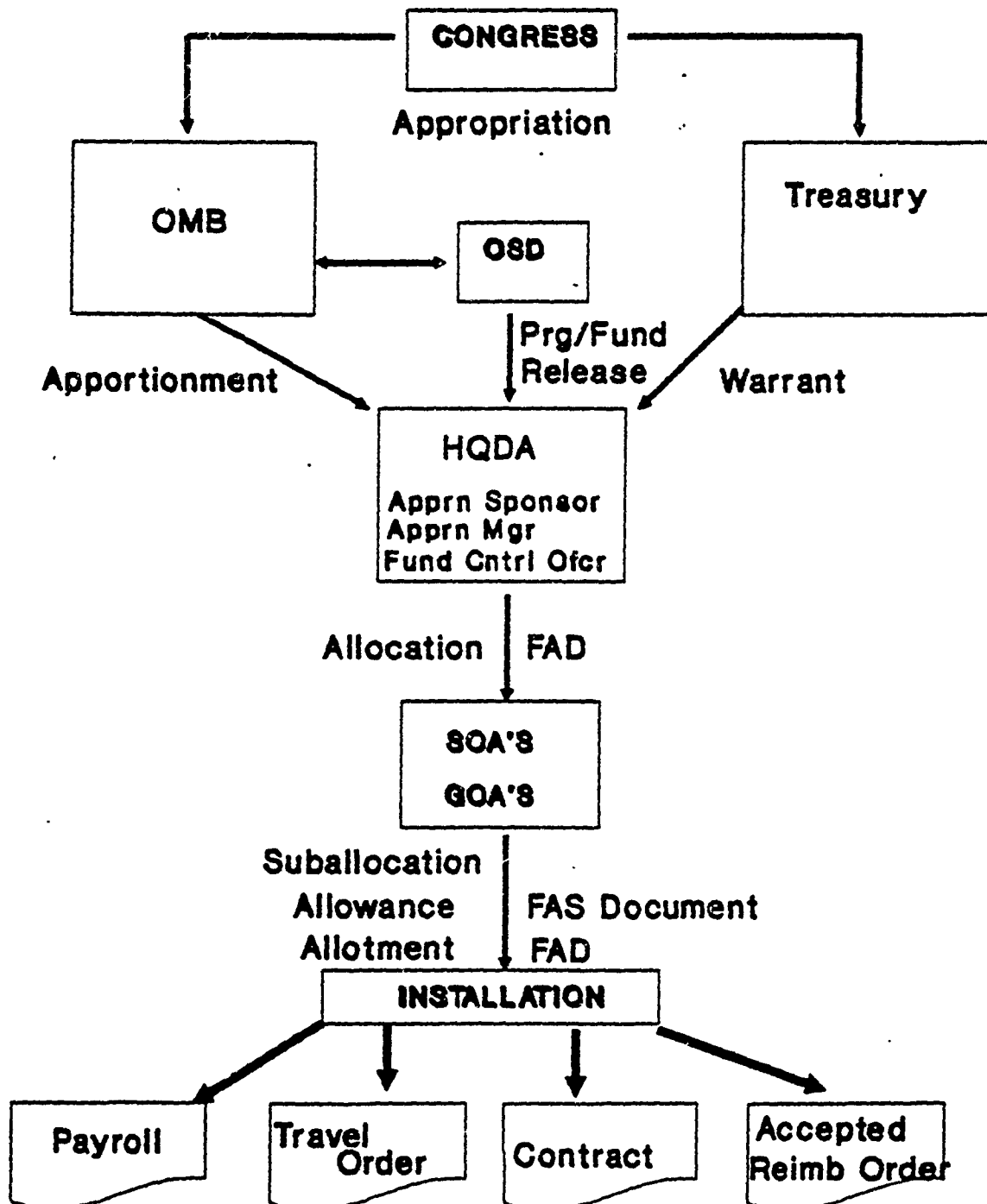


Figure 6-1. Fund distribution flow chart

APPENDIX B

DA Form 3953 (Purchase Request and Commitment)

Figure 8-1.

Completion instructions by number for DA Form 3953

- (1) Purchase instrument number.
- (2) Requisition number, developed per local procedures.
- (3) Date of requisition.
- (4) Name/address of approving authority, follow local procedures.
- (5) Name/address of ordering organization.
- (6) Name of organization for which supplies/services are being purchased.
- (7) Organization/address where supplies will be delivered.
- (8) Latest date when delivery/performance is required.
- (9) Point of contact concerning this requisition.
- (10) Authority for local purchase. Check and complete appropriate block.
- (11) Ordering information: by item number, describe the item/service requested including quantity, number of units, unit price, and total

cost. Includes data needed for preparation of procurement document, discount terms, purchase order number, and delivery schedule.

(12) Fund certification: In the appropriate block enter the accounting classification to be charged, the dollar amount, the name and title of officer approving use of funds, date of signature, and signature of fund approving officer. If applicable, indicate the foreign currency conversion rate and amount as converted into US Dollars.

(13) Purpose of purchase, follow local procedures.

(14) Delivery requirements

(15) In appropriate block, name, title and grade of requesting officer, signature, and date.

(16) In appropriate block, name, title and grade, and signature of responsible supply officer.

(17) Name and grade of approving officer, signature, and date.

(Note: Reverse side of DA Form 3953 is designed for maintaining a record of obligations and a record of procurement data. Refer to local procedures for use.)

PURCHASE REQUEST AND COMMITMENT				PURCHASE INSTRUMENT NO.		REQUISITION NO.		DATE		PAGE 1 OF 1 PAGES	
For use of this form, see AR 37-11 the predecessor agency is USAFAC						W53C47 8208-0302		18 NOV 90			
TO: Purchasing and Contracting Officer				THRU: DIS (4)		FROM: SUPPLY AND STORAGE (5)					
It is requested that the supplies and services enumerated below or on attached list be:											
PURCHASED FOR DIS (6)				DELIVERED TO BLDG T-108 (7)				NOT LATER THAN (Date) (8)			
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 such, therefore, local procurement is necessary for the following reason: check appropriate box and complete item.)								NAME AND TELEPHONE NO. OF PERSON TO CALL FOR ADDITIONAL INFORMATION			
LOCAL PURCHASES AUTHORIZED AS THE NORMAL MEANS OF SUPPLY FOR THE FOREGOING BY X AR 420-17 (10)								REQUISITIONING DISCLOSES NONAVAILABILITY OF ITEM AND LOCAL PURCHASE IS AUTHORIZED BY			
EMERGENCY SITUATION PRECLUDES USE OF REQUISITION CHANNELS FOR SECURING ITEM								Fund Certification			
ITEM DESCRIPTION/SOURCE OF SUPPLY OR SERVICES QUANTITY UNIT ESTIMATED Unit Price Total Cost								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.			
1 REQUEST MODIFICATION TO CONTRACT DABT15-88-M-4000 TO REPAIR 3 SELF CONTAINED BREATHING APPARATUS REGULATORS. ea \$76.96 \$230.88								ACCOUNTING CLASSIFICATION AND AMOUNT			
								2182020 0000 0 50 1000 940000000000 2572 000000 ABCD00000153C47 000000 513102 \$230.88			
								(12) TYPED NAME & TITLE OF CERTIFYING OFFICER SIGNATURE			
								BUCK A. PLENTY B.A. Plenty			
								MAJ, FC, FAO 18 NOV 90			
								DISCOUNT TERMS			
								PURCHASE ORDER NO.			
								DELIVERY REQUIREMENTS (14)			
								ARE MORE THAN 7 DAYS REQUIRED TO INSPECT AND ACCEPT THE REQUESTED GOODS OR SERVICES? YES NO X			
								IF YES, NUMBER OF DAYS REQUIRED			
THE FOREGOING ITEMS ARE REQUIRED NOT LATER THAN AS INDICATED ABOVE FOR THE FOLLOWING PURPOSE (13)								TYPED NAME AND GRADE OF APPROVING OFFICER OR DESIGNEE SIGNATURE			
DATE 18 NOV 90		TYPED NAME AND GRADE OF INITIATING OFFICER I. N. NEED, GS-11		SIGNATURE I. N. Need (15)		DATE 18 NOV 90		TYPED NAME AND GRADE OF APPROVING OFFICER OR DESIGNEE O. N. TOPP, LTC, EN		SIGNATURE O. N. Topp (17)	
DATE 18 NOV 90		TYPED NAME AND GRADE OF SUPPLY OFFICER Warran Peace, Cpt.		SIGNATURE W. Peace (16)							

DA FORM 3953

PREVIOUS EDITIONS OF THIS FORM WILL BE USED UNTIL EXHAUSTED

Figure 8-1. Sample DA Form 3953, Purchase Request and Commitment

APPENDIX C

DD Form 2406 (Miscellaneous Obligations Document)

DD Form 2406, OCT 85

Figure 9-1. Sample D8 Form 2406 (Miscellaneous Obligations Document)

APPENDIX D

Memorandum for Under Secretary of Defense, Subject: DOD
Accounting Guidance for Contract Changes, dated 20 April 1992.

Chapter 5



OFFICE OF THE COMPTROLLER OF THE DEPARTMENT OF DEFENSE

WASHINGTON, DC 20301-1100

APR 20 1992

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE (ACQUISITION)
ASSISTANT SECRETARY OF DEFENSE (PRODUCTION AND LOGISTICS)
ASSISTANT SECRETARY OF THE ARMY (FINANCIAL MANAGEMENT)
ASSISTANT SECRETARY OF THE NAVY (FINANCIAL MANAGEMENT)
ASSISTANT SECRETARY OF THE AIR FORCE (FINANCIAL MANAGEMENT AND COMPTROLLER)
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTOR, WASHINGTON HEADQUARTERS SERVICES

SUBJECT: DoD Accounting Guidance for Contract Changes

In a separate memorandum, updated guidance was recently provided regarding whether to charge expired or current funds for contract changes.

Essentially that guidance indicated that DoD Components should follow the provisions of Chapter 25 of the DoD Accounting Manual. Attached, for your convenience, is a matrix which summarizes the provisions of Chapter 25. The matrix is only a summary and represents a generalization of more specific guidance contained in Chapter 25. As such, the guidance should not be used as a sole source of reference by itself. Rather, it should be used in conjunction with all other applicable guidance regarding the use of current, expired, and canceled accounts.

Questions on the attached matrix may be directed to the Director for Accounting Policy, Mr. Nelson Toye, or to Ms. Susan Williams of his staff. Mr. Toye may be reached at (703) 695-7000 (DSN 225-7000). Ms. Williams may be reached at (703) 697-3193 (DSN 227-3193).

Alvin Tucker
Deputy Comptroller
(Management Systems)

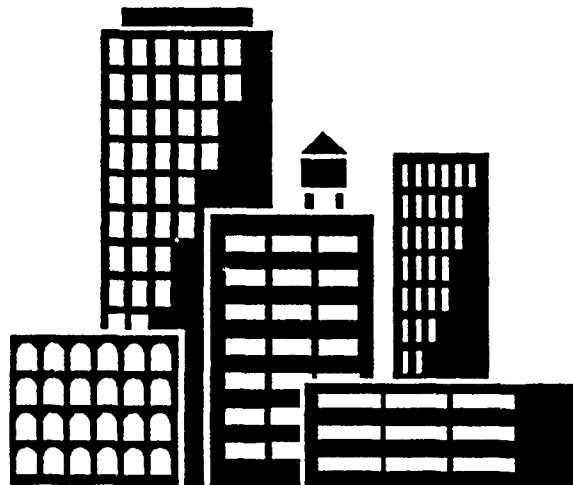
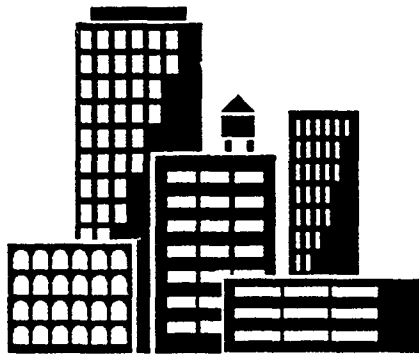
Attachment

FUNDING POLICY FOR CONTRACT CHANGES

Type of Change (After Funds Have Expired for New Obligations)	Funding Source	Report Required to be Submitted to DoD Comptroller (If Change Exceeds \$4 Million); or to Congress (If Change Exceeds \$25 Million)
Incentive, Award Fees, and Target-to-Ceiling Cost Growth on Incentive Fee Contracts	Expired Funds, M Account	No
Price Inflation (Escalation or Economic Price Adjustments)	Expired Funds, M Account	No
Within-Scope Contract Changes to Include:		
a. Within-scope contract amendments	Expired Funds, M Account	Yes
b. Within-scope error corrections or formalization of an informal agreement that do not result in a new procurement	Expired Funds, M Account	Yes
c. Within-scope claims and settlements	Expired Funds, M Account	Yes
Change-in-Scope (Out-of-Scope) Contract Changes to Include:		
a. Increases in quantities	Current Year Funds	No
b. Increases in required levels of service performance	Current Year Funds	No
c. Change-in-scope claims and settlements	Current Year Funds	No
Contract Defaults Resulting in Reprocurement Contract Actions	Expired Funds, M Account	Yes
Billing for Work Performed before Fund Expiration. (If work is performed--i.e., an obligation is incurred--but not documented before funds expire, expired funds are the proper funding source.)	Expired Funds, M Account	Yes
Amounts Which Would Otherwise be Chargeable to a Canceled Account Were It Not Canceled. (Subject to lesser of 1% of current year funds or the unexpended balance of the original appropriation.)	Current Year Funds	No

CHAPTER 6

CONSTRUCTION FUNDING



Built by MILCON, Inc.

CHAPTER 6

CONSTRUCTION FUNDING

I.	REFERENCES	1
II.	INTRODUCTION	2
III.	MILITARY CONSTRUCTION APPROPRIATIONS	2
	A. Congressional Oversight of the Military Construction Program	2
	B. The Military Construction Codification Act	2
	C. Statutory Restriction on Contract Type	3
	D. The Operation and Maintenance (O&M) Appropriation	4
	E. Statutory Restriction on Renovation of Facilities	6
	F. Statutory Authorization to Restore or Replace a Facility That Is Damaged or Destroyed	6
	G. Statutory Restriction on Base Closure and Realignment Construction	7
	H. Prohibition on Use of O&M Funds for Minor Construction Outside the United States	7
	I. Notification Requirement for Military Exercise Construction Spending in Excess of \$100,000	10
	J. Emergency Construction Authority	10
IV.	A METHODOLOGY FOR REVIEW OF MINOR MILITARY CONSTRUCTION ACQUISITIONS	12
V.	CLASSIFYING CONSTRUCTION WORK	13
	A. Statutory Definition of "Military Construction.	13
	B. Statutory Definition of "Minor Military Construction.	13

C.	Services' Definition of "Construction.	14
D.	<u>An Illustrative Case:</u> The Letterkenny Army Depot Case.	15
E.	Maintenance and Repair	16
VI.	FUNDED v. UNFUNDED COSTS: PROJECT LIMITS APPLY ONLY TO "FUNDED" COSTS	17
A.	Funded Costs	17
B.	Unfunded Costs	17
C.	All Other Costs	18
VII.	PROJECT LIMITATIONS AND APPROVAL LEVELS	18
A.	Key Limitations	18
B.	Approval of Construction Projects in the Army	19
C.	Approval of Maintenance & Repair Projects . .	20
D.	Renovation of Facilities	20
E.	Restoration or Replacement of Damaged or Destroyed Facilities	20
VIII.	COST VARIATIONS	20
A.	Variation from the Approved Cost	20
B.	Congressional Notification of Cost Variations	21
C.	Application of Cost Variation Rules	21
IX.	CONGRESSIONAL CONCERN OVER USE OF O&M FUNDS	22
X.	CONCLUSION	23

CHAPTER 6

CONSTRUCTION FUNDING

I. REFERENCES.

- A. 10 U.S.C. §§ 2801-2861 (West 1983 & Supp. 1992) (Military Construction Codification Act); 41 U.S.C. § 12 (West 1987); 10 U.S.C. § 401 (West Supp. 1989).
- B. Dep't of Defense Directive 4270.24, Unspecified Minor Construction, Emergency Construction, and Restoration of Damaged or Destroyed Facilities (21 Mar. 1983).
- C. Army Reg. 415-15, Military Construction, Army (MCA) Program Development (1 Jan. 1984).
- D. Army Reg. 415-35, Minor Construction, Emergency Construction, and Replacement of Facilities Damaged or Destroyed (15 Oct. 1983).
- E. Army Reg. 420-10, Management of Installation Directorates of Engineering and Housing (2 July 1987).
- F. Army Reg. 37-1, Army Accounting and Fund Control (30 Apr. 1991).
- G. Air Force Reg. 86-1, Volume 1, Programming Civil Engineer Resources--Appropriated Fund Resources (May 1984), ch. 5.
- H. Air Force Reg. 172-1, Volume 1, USAF Budget and Procedures (Oct. 1990), ch. 9.
- I. SECNAVINST 11013.13E, Unspecified Minor Construction, Emergency Construction, and Restoration or Replacement of Facilities Damaged or Destroyed (14 Oct. 1983).
- J. OPNAVINST 11010.20E, Facilities Projects Manual (9 July 1985).
- K. Munns, An Analysis of the Military Construction Codification Act, The Army Lawyer, Nov. 1987.

MAJ Michael K. Cameron
Fiscal Law Course
April 1993

Chapter 6

II. INTRODUCTION.

III. MILITARY CONSTRUCTION APPROPRIATIONS.

- A. Congressional oversight of the Military Construction Program is extensive and pervasive. Service secretaries may accomplish only minor construction projects (projects costing \$1.5 million or less) without prior approval of Congress.
- B. The Military Construction Codification Act.
 - 1. The purpose of the Act was to revise and codify in a new chapter (Chapter 169) of Title 10, United States Code, recurring and permanent provisions of law related to military construction and military family housing.
 - 2. In the "Specified" Military Construction Program, Congress provides annual approval and funding for the DOD military construction program. Congress funds specific construction projects, in the annual Military Construction Appropriation (MCA) Act by making a lump sum appropriation. The annual military construction program consists of construction projects that are projected to exceed \$1.5 million.

3. In the "Unspecified" Minor Construction Program, Congress provides annual funding and approval to each military department for minor construction projects that are not specified in the conference report on the military construction appropriation act. Such Minor Military Construction (MMC) funds are appropriated for each of the Military Departments. The Army's share of these funds is titled "Minor Military Construction, Army" (MMCA) in the appropriation acts. Pursuant to the "unspecified" minor construction authority of 10 U.S.C. § 2805a, the Secretary concerned may use these MMC funds for minor projects not specifically approved by Congress. This authority is limited to \$1.5 million for each project.
4. The Secretary of the Department may have to approve and notify Congress before a minor military construction project is commenced, depending on the size of the MMC project.

C. Statutory Restriction on Contract Type.

1. Section 101, Military Construction Appropriations (MCA) Act for 1993, Pub. L. No. 102-380, 106 Stat. 1369; DFARS 236.271, prohibits the award of a cost-plus-fixed-fee contract if:
 - a. The activity uses MCA funds;
 - b. Performance will occur in the United States (Alaska excluded);
 - c. The requiring activity expects the contract to exceed \$25,000.
2. The Secretary of Defense may waive this restriction on a case-by-case basis.

Chapter 6

D. The Operation and Maintenance (O&M) Appropriation.

1. Military construction activities are performed in furtherance of specific operational requirements of the Military Departments pursuant to the directions of Congress.
 - a. 41 U.S.C. § 12 provides that no public contract relating to erection, repair, or improvements to public buildings shall bind the government for funds in excess of the amount specifically appropriated for that purpose.
 - b. The GAO has interpreted this code provision to require that Congress specifically authorize in an Appropriations Act all military construction projects, and that general appropriations are not ordinarily available for such projects. The authorization of 10 U.S.C. § 2805(c) to use O&M funds of up to \$300,000 for MMC projects is a statutory exception to this requirement.
2. Most installations are funded with Operation and Maintenance (O&M) funds, which cannot be spent for construction work except as specifically authorized by law.
3. 10 U.S.C. § 2805(c)(1) authorizes use of O&M funds for unspecified minor construction projects. This authorization is limited to \$300,000 for each project. National Defense Authorization Act for Fiscal Year 1992 and 1993, Pub. L. 102-190, § 2807, 105 Stat. 1563, (1991).

4. In FY 1992, Congress established and funded the Real Property Maintenance (RPM), Defense Account to finance only the backlog of maintenance and repair projects. Department of Defense Appropriations Act for 1992, Pub. L. No. 102-172, 105 Stat. 1152 (1991). The DOD Appropriations Act for 1993 provides the RPM, Defense Account funds are available to finance the backlog of maintenance and repair projects, minor construction projects and major repair of real property. Pub. L. No. 102-396, 106 Stat. 1885 (1992).
 - a. **Prior Guidance:** Installations used to finance projects with a funded cost of \$300,000 or less from the O&M appropriation. Use of MCA or MMCA funds for projects in this category required HQDA (COE) written approval. DOD Dir. 4270.24; AR 415-35, para. 2-1; AFR 172-1, vol. 1, ch. 9.
 - b. **Current Guidance:**
 - (1) The DOD Comptroller has taken the position that the RPM Defense Account is the sole source of funding available for major repair projects costing more than \$15,000 and minor construction projects costing between \$15,000 and \$300,000. Memorandum, Deputy Comptroller for Program and Budget, Department of Defense, subject: Real Property Maintenance, Defense Account (November 24, 1992).
 - (2) Installations may continue to finance a minor construction project with operation and maintenance funds if the the project's funded cost is less than \$15,000.

Chapter 6

E. Statutory Restriction on Renovation of Facilities.

1. 10 U.S.C. § 2811 provides that operation and maintenance funds may be used for renovation projects that combine maintenance, repair, and minor military construction:
 - a. For an entire single purpose-facility.
 - b. For one or more functional areas of a multi-purpose facility.
2. The amount of O&M money expended on such a renovation project cannot exceed the maximum amount specified by law for a minor military construction project under 10 U.S.C. § 2805(a)(1).¹
3. Construction of new facilities and additions to existing facilities are not renovation projects covered by this provision.

F. Statutory Authorization to Restore or Replace a Facility That Is Damaged or Destroyed.

1. 10 U.S.C. § 2854 provides that a service's secretary may repair, restore, or replace a facility that is damaged or destroyed. Operation and Maintenance funds will be used if the cost of replacement is less than \$300,000. See DOD Dir.

¹The Nov. 24, 1992 OSD memorandum, cited in para. D.4., above, seems to indicate that installations seeking to renovate under § 2811 would have to fund the project from the RPM, Defense account, also.

4270.24; AR 415-35, ch. 4; AFR 172-1, vol 1, ch. 9.²

2. If the cost of such repair, restoration, or replacement exceeds the maximum amount for a minor military construction project, the secretary must notify Congress of the amount and the source of the funds to be used at least twenty-one days prior to commencement of the project.
 3. The service secretary may carry out such projects only after the end of the 21-day period, or after congressional approval, if received prior to the expiration of the 21-day period.
- G. Statutory Restriction on Base Closure and Realignment Construction.
- Unspecified minor construction projects required in connection with base closures and realignments shall comply with 10 U.S.C. § 2687.
- H. Prohibition on Use of O&M Funds for Minor Construction Outside the United States.
1. In a deployment scenario, the type of deployment determines the types of funds available for construction projects.

²The Nov. 24, 1992 OSD memorandum, cited in para. D.4., above, seems to indicate that installations seeking to restore or replace under § 2854 would have to fund the project from the RPM, Defense account, also.

Chapter 6

2. Single service exercise.

- a. Unit may use O&M funds only on minor construction projects costing no more than \$15,000.
- b. Units must use the Real Property Maintenance (RPM), Defense Account funds for major repair projects costing more than \$15,000 and minor construction projects costing between \$15,000 and \$300,000.³
- c. Units must use Unspecified Minor Military Construction funds for minor construction projects costing between \$300,000 and \$1,500,000. 10 U.S.C. § 2805c(2); DOD Dir. 4270.24; AR 415-35, para. 2-1.

3. JCS exercise.

- a. Units may use O&M, Defense Agencies funds to finance the construction of minor and temporary structures such as tent platforms, field latrines, shelters, and range targets that the services remove once the exercise is completed.
- b. DOD must fund from unspecified minor construction accounts all other exercise-related construction projects coordinated by the JCS outside the United States. Furthermore, Congress has limited the authority for exercise-related construction

³See Memorandum, Deputy Comptroller for Program and Budget, Department of Defense, subject: Real Property Maintenance, Defense Account (November 24, 1992).

to no more than \$5 million per department.
10 U.S.C. § 2805(c)(2).

- c. This statute resulted from an opinion issued by the General Accounting Office (GAO) regarding construction and related activities undertaken during joint-combined exercises in Honduras in 1983 -the Ahuas Tara (Big Pine) II exercise. To The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422 (1984).
- d. Currently, all exercise-related construction is funded from unspecified minor military construction, Defense Agencies.

4. Operations.

- a. Units may use O&M funds for the acquisition of materials and/or cost of erection of structures which:
 - (1) are of a temporary operational nature and operational forces intend to use for only a temporary period as required to facilitate operations; and
 - (2) will not be used to sustain permanent or contingency operations at the conclusion of the relief efforts.
 - (3) Example: Operation Restore Hope.
 - (4) Military construction criteria apply in all other situations, including construction for which the United States would have a follow-on or contingency use after the termination of the military operations necessitating the construction.

Chapter 6

I. Notification Requirement for Military Exercise Construction Spending in Excess of \$100,000.

-- Congress has directed that the Secretary of Defense give prior notice to Congress of the plans and scope of any proposed military exercise involving United States personnel if the amounts expended for construction, either temporary or permanent, are projected to exceed \$100,000. 1993 Military Construction Appropriations Act, Pub. L. 102-380, § 113, 106 Stat. 1371 (1992).

J. Emergency Construction Authority.

1. 10 U.S.C. § 2808 provides that, upon Presidential Declaration of National Emergency, the Secretary of Defense may undertake construction projects, not otherwise authorized by law, that are necessary to support the armed forces.
 - a. Such projects are to be funded with any unobligated military construction and family housing appropriations.
 - b. On November 14, 1990, President Bush invoked emergency construction authority under 10 U.S.C. § 2808 for support of Operation Desert Shield. See Executive Order 12734 of November 14, 1990, 55 Fed. Reg. 48,099.
2. There are two other emergency construction provisions which require prior notice and waiting periods:

- a. Emergency Construction, 10 U.S.C. § 2803.
 - (1) Requires prior notification to Congressional appropriations committees;
 - (2) Must justify project as vital to national defense;
 - (3) Must wait 21 days after notification before beginning projects; and
 - (4) Must use unobligated military construction funds and must not exceed \$30 million in any fiscal year.
- b. Contingency Construction, 10 U.S.C. § 2804.
 - (1) Requires prior notification to Congressional appropriations committees;
 - (2) Must justify the project;
 - (3) Must wait 21 days after notification before beginning project; and
 - (4) Must use funds appropriated for this purpose.
- 3. During Operation Desert Shield, emergency construction authorities were not timely exercised.

Chapter 6

IV. A METHODOLOGY FOR REVIEW OF MINOR MILITARY CONSTRUCTION ACQUISITIONS.

- A. Define the scope of the project - work needed to produce a complete and useable facility or improvement to an existing facility.
- B. Define the work - determine its nature in terms of statutory and regulatory definitions of military construction and minor military construction:
 - 1. Maintenance?
 - 2. Repair?
 - 3. Construction?
 - 4. Combination of above?
- C. Determine the funded cost of the project.
- D. Select the proper appropriation.
 - 1. Statutes (10 U.S.C. § 2805c).
 - 2. Regulations (AR 415-35).
 - 3. Messages, Funding Authorization Documents, etc.
- E. Verify who is the proper approval authority for the project and that approval to undertake the project is obtained before the project is commenced.

V. CLASSIFYING CONSTRUCTION WORK.

A. Statutory Definition of "Military Construction." 10 U.S.C. § 2801.

1. It includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation.⁴
2. It includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility.

B. Statutory Definition of "Minor Military Construction." 10 U.S.C. §§ 2801, 2805. Congress distinguished "minor military construction project" from "military construction project" by adding restrictive terms to the definition of the former.

1. It includes the two factors defining military construction (V.A.1 & 2 above).
2. It is for a single undertaking at the installation.
3. It has an approved cost equal to or less than \$1,500,000.

⁴"Military installation" includes any base, camp, post, station, yard, center, or other activity . . . in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense. 10 U.S.C. § 2801(b) and (c)(2).

Chapter 6

C. Services' Definition of "Construction." AR 415-35, sec. II, Glossary; AFR 172-1, vol. 1, para. 9-2.

1. The erection, installation, or assembly of a new facility.
2. Includes work on an "existing facility."
 - a. A change to a real property facility, such as addition, expansion, or extension of the facility, that adds to its overall external dimensions.
 - b. Alteration of the interior or exterior arrangements of a facility to improve its current purpose. This includes installation of equipment made a part of the existing facility. Additions, expansions, and extensions of facilities are not alterations.
 - c. Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility.
 - d. Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair.

3. Includes relocation of a facility from one installation to another.
 - a. Construction encompasses projects to move a building or structure from one site to another.
 - b. The facility may be moved intact or disassembled and later reassembled. This includes connection of new utility lines and excludes relocation of roads, pavements, or airstrips.
 - c. Relocation of two or more facilities into a single facility will be considered to be a single project.
 - d. Section 107 of the MCA Act, 1992, prohibits the use of funds appropriated in this Act for minor construction to transfer or relocate any activity from one base or installation to another, without prior notification to Senate and House Committees on Appropriations. Pub. L. No. 102-136, 105 Stat. 641.
4. Includes installed equipment that is made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements.

- D. An Illustrative Case: The Letterkenny Army Depot Case. GAO/NSIAD-87-112BR (May 1987).

The Letterkenny Automated Storage and Retrieval System was installed within a building specifically constructed to contain it; therefore, the facility should have been classified as a military construction project, not as an industrial equipment acquisition.

Chapter 6

The Army's expenses in completing the Letterkenny project should have been charged to appropriations available for military construction and not to Army industrial (AIF) funds. By improperly charging construction costs to AIF funds, the Army violated the funding purpose restriction of 31 U.S.C. 1301(a). In addition, because the Army expenditures should have been from military construction funds but such monies had never been appropriated by Congress, this project violated the Antideficiency Act.

- E. Maintenance and Repair. Maintenance and repair are not construction. AR 420-10; AFR 172-1, vol. 1, ch. 9.
1. Maintenance is recurrent work to prevent deterioration. It is work required to preserve or maintain a facility in such condition that it may be used for its designated purpose.
 2. Repair is restoration for use for a designated purpose by overhaul, reprocessing, or replacing parts or materials that have deteriorated by action of the elements or by wear and tear in use, and which have not been corrected through maintenance.
 3. Construction work accomplished simultaneously with maintenance or repair - where does maintenance or repair end and construction begin? AR 415-35, para. 2-2.
 4. Caveat: The replacement of a real property facility that has been destroyed or damaged is construction. 10 U.S.C. § 2854.

5. Scenario: After many years of non-use and neglect, a large multi-story barracks facility at an installation was proposed for conversion to an administration facility. The DEH advises that the work involved will include: (a) replacement of the roof, the flooring, several interior walls, and the heating system; (b) repair of numerous other failing components of the building; (c) installation of a new central air conditioning unit; and (d) construction of new walls to accommodate the new configuration. The DEH proposes to classify the project work as mostly K-account (repair) work with a small amount of L-account (construction) work. The total funded cost of the project is estimated to be \$1.8 million. Since the L-account work will only cost \$257,000, the DEH contends that the entire project can be approved and funded at the installation. Is the DEH right?
6. Scenario: The road to the post fuel supply point is in urgent need of repair. The post's training mission was increased substantially last year, so the road has been getting greater use by heavier vehicles than it was designed for. Heavy delivery trucks used by the fuel supplier that has the current requirements contract for diesel and gasoline have been breaking up the road. The Post Engineer feels that in addition to filling up the holes in the road, two additional inches of asphalt should be added to adequately support the increased and heavier traffic. The Post Engineer estimates that a paving contractor will charge \$330,000 to fill the holes and to add two inches of asphalt. The Post Engineer insists that Operation and Maintenance funds can be used. Is the Post Engineer correct?

Chapter 6

VI. FUNDED v. UNFUNDED COSTS: PROJECT LIMITS APPLY ONLY TO "FUNDED" COSTS. See AR 415-35, para. 2-2; AFR 172-1, vol 1, ch. 9.

A. Funded Costs. They do not include:

1. Costs funded by Military Personnel, Army (MPA) Appropriations, e.g., salaries of military personnel. But see, AR 420-10, para. 5-5, regarding troop labor.
2. Planning and design costs. AR 415-35, para. 3-7.
3. Depreciation of government equipment used in the project, but equipment maintenance and operation costs are funded costs.
4. Materials, supplies, and equipment received for the project as excess distributions from another military department or government agency on a non-reimbursable basis, but transportation costs are funded costs.
5. Nonappropriated funds, but Secretary of the Army approval is required. AR 415-35, App. B.

B. Unfunded Costs. Unfunded costs must be reported, even though they do not apply toward the military construction appropriation limitations. See AR 415-35, App. E; AFR 172-1, vol 1, ch. 9.

C. All Other Costs. They are funded, for example:

1. Materials and supplies applicable to the project.
2. Labor (except that of military personnel).
3. Costs for temporary duty (TDY) of military personnel.
4. Maintenance and operation costs of government equipment used in the project.
5. Value of real property relocated within an installation.
 - a. The purchase cost of new land is funded.
 - b. Transportation and relocation costs of moving buildings are funded.

VII. PROJECT LIMITATIONS AND APPROVAL LEVELS.

A. Key Limitations.

1. No project may be subdivided in order to reduce the cost per project to meet construction funding limitations.
2. Planned incremental construction or phasing of construction is prohibited.

Chapter 6

3. Minor construction authority will not be used to begin or complete projects financed under other authorizations. AR 415-35, para. 2-5a.
 4. Approval authority for a minor military construction project over \$300,000 expires unless a contract for the project is awarded within eight months of the project approval date. AR 415-35, para. 3-9.
 5. The Secretary of the Army must approve any project that previously was proposed in military construction authorization legislation but was denied by Congress. AR 415-35, para. 2-5h.
 6. Commercial Activities Program (CAP) issue: FAR 36.101(c) permits inclusion of minor construction tasks in a services contract. See A.J. Fowler Corp., B-227955, November 13, 1987, 87-2 CPD ¶ 482.
- B. Approval of Construction Projects in the Army.
AR 415-35, para. 2-6; AFR 172-1, vol. 1, para. 9-2f.
1. MACOM Commanders can approve projects up to \$300,000. Delegation is permitted, and this authority usually is delegated to the installation commander.
 2. The Assistant Chief of Engineers can approve projects over \$300,000 and up to \$500,000.
 3. The Secretary of the Army can approve construction projects over \$500,000 and up to \$1,500,000.

4. Congressional notification is required on projects over \$500,000; the project cannot be commenced for 21 days to permit Congress time to disapprove.
- C. Approval of Maintenance & Repair Projects. AR 420-10, para. 3-2.
1. MACOM commanders normally approve projects costing \$2 million or less.
 2. Projects exceeding MACOM approval level must be approved by the Secretary of the Department.
- D. Renovation of Facilities. 10 U.S.C. § 2811; AR 415-35, app. B; see III.E, supra, p. 5.
- E. Restoration or Replacement of Damaged or Destroyed Facilities. 10 U.S.C. § 2854; AR 415-35, ch 4. see III.F, supra, p. 5.
- VIII. COST VARIATIONS. AR 415-35, paras. 2-7, 3-8d-f; 10 U.S.C. § 2853.
- A. Variation from the Approved Cost. Variation from the approved cost of the MMC project, after the project is approved, is permitted only if:
1. An increase is required solely to meet unusual variations in cost.

Chapter 6

2. The cost variation could not have been reasonably anticipated.
 3. The cost variation is not requested to increase the scope of the project.
 4. The cost variation meets percentage of increase/total cost limitations.
- B. Congressional Notification of Cost Variations.
Congress must be notified of cost variations when the total project value exceeds \$1.5 million.
- C. Application of Cost Variation Rules:
1. If the amount approved for a project is less than the minor construction project ceiling, the approved amount may be increased to the amount of such ceiling if the Secretary concerned determines (1) that such an increase is required for the sole purpose of meeting unusual variations in cost, and (2) that such variations in cost could not have been reasonably anticipated at the time the project was originally approved.
 2. If, based upon offers received, the adjusted estimate of the cost of a MMC project is more than the amount of the minor construction ceiling and is more than 125 percent of the original approved amount for the project, the project may not be placed under contract until the Secretary concerned notifies Congress and receives approval.

IX. CONGRESSIONAL CONCERN OVER USE OF O&M FUNDS.

- A. In 1989, the House Armed Services Committee criticized the Department of Defense's use of operation and maintenance funding for renovation and repair projects in the following terms (H.R. Rep. No. 101-21, 101st Cong., 1st Sess., 188-189):

Limits on the use of operation and maintenance funding for maintenance and repair are inadequate and effectively allow both circumvention of military construction oversight and inappropriate use of O&M funds. . . . [I]n many cases the construction funding review does not occur because these projects are categorized as repair and maintenance even though, in many cases, their cost is far greater than major construction. . . .

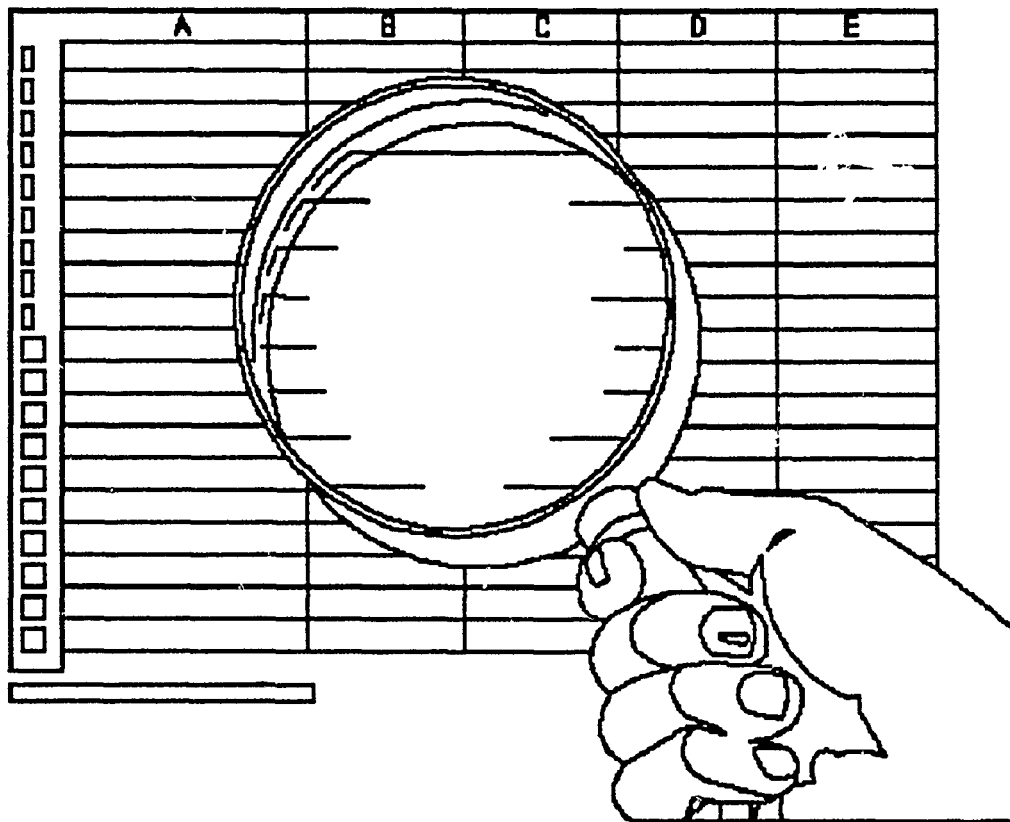
- B. The committee cited three of the numerous examples it had uncovered "of installation commanders substituting O&M funds for construction funds because of expediency or concern that these projects would not survive the budget competition with other major construction projects."
1. The Air Force built a new officers club using \$10 million in O&M funds.
 2. An Army installation used over \$26 million in O&M funds to gut a building and then completely upgrade the interior.
 3. The Navy used over \$13 million in O&M funds to completely restore the exterior of a building.

Chapter 6

X. CONCLUSION.

CHAPTER 7

FISCAL CONTROL: DEPARTMENT OF THE ARMY OFFICE OF GENERAL COUNSEL PERSPECTIVE



EXPENSE/INVESTMENT CRITERIA

TIMELINE OF STATUTORY EXPENSE/INVESTMENT THRESHOLDS

8 NOVEMBER 1985 - 30 SEPTEMBER 1986: \$5,000
SEC 303, NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 86 PROVIDED
THAT FY 86 O&M FUNDS MAY NOT BE EXPENDED TO PURCHASE ANY
ITEM WITH UNIT COST OF \$5,000 OR MORE IF FY 85 PURCHASES OF THE
ITEM WERE CHARGED AGAINST PROCUREMENT ACCOUNTS.

1 OCTOBER 1986 - 3 DECEMBER 1987: NONE

4 DECEMBER 1987 - 30 SEPTEMBER 1989: \$15,000
IAW SECTION 303, DEFENSE AUTHORIZATION ACT FOR FY 88 & 89,
PURCHASES OF ITEMS WITH UNIT COST EQUAL OR GREATER THAN
\$15,000 (FOR FY 88 & 89) OR CHARGED TO PROCUREMENT ACCOUNTS
IN PREVIOUS YEAR.

1 OCTOBER 1989 - 28 NOVEMBER 1989: NONE
SECTION 315, NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 90 & 91
REPEALED SECTION 303, NATIONAL DEFENSE AUTHORIZATION ACT FOR
FY 88 & 89, EFFECTIVE NOVEMBER 29, 1989.

CHRONOLOGY OF EXPENSE/ INVESTMENT RULES

<u>TIME PERIOD</u>	<u>LIMITATION</u>	<u>AUTHORITY</u>
9/1/66 - 9/30/80	\$ 1,000	DOD 7040.5, 1 SEP 66
10/1/80 - 11/7/75	\$ 3,000	DACA-OMO MGS R 132200ZNOV80
11/8/85 - 9/30/86	\$ 5,000	P.L. 99-145, SECTION 303
10/1/86 - 12/3/87	\$ 3,000	NO STATUTE; REVERT TO DACA-OMO MGS NOV 80
12/4/87 - 9/30/89	\$15,000	P.L. 101-180, SECTION 303
10/1/89 - 11/28/89	\$ 5,000	P.L. 101-180, SECTION 303
11/29/89 - PRESENT	\$15,000	P.L. 101-189, SECTION 315, REPEALED P.L. 101-189, SECTION 303. SEE ALSO DOD 7110-1-M, MAY 1990, P. 241-7

APPROPRIATION

- **CONGRESS OR REGULATION
ESTABLISHES THRESHOLD**
- **\$15K OR MORE IS AN
INVESTMENT**
- **LESS THAN \$15K IS AN
EXPENSE**

- A SYSTEM/END ITEM COSTING IN EXCESS OF THE DOLLAR THRESHOLD (\$15K IN FY 91) IS AN INVESTMENT
- A SYSTEM/END ITEM COSTING LESS THAN THE DOLLAR THRESHOLD IS AN EXPENSE
- ANY SYSTEM/END ITEM WHICH IS CENTRALLY-MANAGED IS AN INVESTMENT REGARDLESS OF THE COST

TOTAL SYSTEM CONCEPT

- A NUMBER OF COMPONENTS WILL BE INTERCONNECTED
- AND/OR DESIGNED PRIMARILY TO OPERATE TOGETHER
- WITH THE INTENT TO SATISFY A SPECIFIC REQUIREMENT
- MUST NOT BE ACQUIRED IN A PIECEMEAL MANNER
- THE COMPONENTS OF A SYSTEM CANNOT BE PURCHASED IN A PIECEMEAL MANNER TO CIRCUMVENT THE TOTAL SYSTEM CONCEPT

DEFINITIONS

REQUIREMENT. This is the basic determining factor for all expense/investment criteria decisions. A requirement consists of the set of capabilities which are necessary to perform the mission. This set of capabilities directs the decision as to what is or is not part of a system, or what is an independent upgrade. Neither the capability nor the requirement will be fragmented to circumvent application of the expense/investment criteria.

DEFINITIONS

SYSTEM. There are two considerations for the definition of a system. The first consists of an automation capability which is centrally managed and must be considered by a Major Automated Information Systems Review Committee (MAISRC). The second is generic and could be any combination of components/items which work together to perform a function or to satisfy an approved requirement as defined above.

DEFINITIONS

CENTRALIZED ITEM MANAGEMENT AND ASSET

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

TOTAL SYSTEM COST

**AGGREGATE COST OF ALL NEW
EQUIPMENT ITEMS ADDED TO THE
SOFTWARE COSTS BEING
ACQUIRED TO MEET A SPECIFIC
REQUIREMENT**

Q: MAY MY COMMAND USE O&M FUNDS TO ACQUIRE A STAND- ALONE PERSONAL COMPUTER WHICH IS COMPOSED OF SEPARATE COMPONENTS AND OFF-THE-SHELF SOFTWARE WITH A TOTAL COST OF \$10K?

A: YES; O&M FUNDS ARE APPROPRIATE SINCE THE TOTAL COST OF THE SYSTEM IS UNDER THE \$15K EXPENSE/INVESTMENT THRESHOLD

Q: OUR COMMAND HAS 50 INTEL COMPUTERS WHICH WERE PURCHASED WITH INVESTMENT FUNDS. AT A LATER DATE WE INTEND TO PURCHASE PERIPHERAL DATA PROCESSING EQUIPMENT SUCH AS WORKSTATION TERMINALS, PRINTERS, ETC. AT A COST OF \$600K. SINCE WE ALREADY HAVE THE INTEL COMPUTERS MAY WE USE O&M FUNDS TO PURCHASE THE PERIPHERAL EQUIPMENT AS INDIVIDUAL ITEMS OF EQUIPMENT?

A: NO; THE PERIPHERAL EQUIPMENT IS TO BE ACQUIRED TO WORK AS A SYSTEM WITH THE 50 INTEL COMPUTERS AND, AS SUCH, IS SUBJECT TO THE EXPENSE/INVESTMENT CRITERIA. THE \$600K EXCEEDS THE THRESHOLD AND OPA FUNDS SHOULD BE USED.

Q: OUR COMMAND HAS A VALID REQUIREMENT FOR A LOCAL AREA NETWORK (LAN). THE LAN WILL CONSIST OF HARDWARE, TELECOMMUNICATIONS, AND SOFTWARE WITH A TOTAL ESTIMATED COST OF \$60K. WHAT TYPE OF FUNDS SHOULD WE USE?

A: INVESTMENT FUNDS ARE APPROPRIATE. THE AGGREGATE COST OF ALL NECESSARY EQUIPMENT AND UNMODIFIED OFF-THE-SHELF SOFTWARE TO BE PROCURED WILL BE THE FACTORS USED TO DETERMINE THE TOTAL SYSTEM COST.

Q: OUR COMMAND REQUIRES FOUR CENTRAL PROCESSORS, 50 WORKSTATION TERMINALS AND FOUR PRINTERS TO AUTOMATE MY DIVISION. SINCE EACH CONTRACT LINE ITEM IS LESS THAN THE \$15K EXPENSE/ INVESTMENT THRESHOLD, MAY WE USE O&M FUNDS EVEN THROUGHH THE TOTAL COST EXCEEDS THE THRESHOLD?

A: NO; THE WORKSTATION TERMINALS AND PRINTERS ARE AN INTEGRAL PART OF THE TOTAL SYSTEM. THE TOTAL SYSTEM COST IS THE DETERMINING FACTOR IN APPLYING THE EXPENSE/ INVESTMENT CRITERIA EVEN THOUGH YOU MAY HAVE MORE THAN ONE CONTRACT LINE ITEM AND INTEND TO USE MORE THAN ONE VENDOR.

**Q: WHAT COLOR MONEY MAY
OUR COMMAND USE TO BUY
OFF-THE-SHELF SOFTWARE?**

SOFTWARE ACQUISITION

CONDITION

**OPTION 1: ONE-TIME
UP-FRONT PAYMENT**

USE

**USE OF THE SW OVER
THE LIFE OF THE SYSTEM
WITH NO FURTHER
PAYMENTS FOR MAINTENANCE/MODIFICATIONS
INITIATED BY VENDOR**

FUNDING

APPROPRIATION

**SUBJECT TO THE
EXPENSE/INVESTMENT
CRITERIA**

SOFTWARE ACQUISITION

CONDITION

**OPTION 2: ONE-TIME
UP-FRONT PAYMENT**

USE

PURCHASE OF LICENSE

FUNDING

APPROPRIATION

SUBJECT TO THE

EXPENSE/INVESTMENT

CRITERIA

**WITH ADDITIONAL FEES FOR MAINTENANCE/
MODIFICATIONS EXPENSE**

SOFTWARE ACQUISITION

CONDITION:

OPTION 3: ANNUAL FEES

USE

**USE OF THE LICENSE
ITSELF WITH ADDITIONAL
ANNUAL FEES FOR
MAINTENANCE AND
MODIFICATIONS PROVIDED
BY THE VENDOR**

**FUNDING
APPROPRIATION
EXPENSE**

**Q: MAY OUR COMMAND BY MIPR OR RO
PROVIDE FUNDS TO A STATE
ACTIVITY OR FEDERAL AGENCY TO
USE ITS CONTRACT FOR ACQUIRING
ADP SUPPORT?**

A: YES

**Q: IT DOES NOT MATTER WHAT COLOR
OF FUNDS WE USE-RIGHT?**

A: WRONG

Q: OUR COMMAND REQUIRES AN OFF-THE-SHELF SOFTWARE PACKAGE TO USE ON GENERAL PURPOSE HARDWARE. THE VENDOR REQUIRES A ONE-TIME UP-FRONT PAYMENT FOR THE LICENSE (\$16K) AND ADDITIONAL FEES FOR MAINTENANCE/MODIFICATIONS. SHOULD WE USE INVESTMENT FUNDS SINCE THE \$16K EXCEEDS THE THRESHOLD?

A: YES; YOU MUST USE INVESTMENT FUNDS FOR THE ONE-TIME UP-FRONT PAYMENT. NO; YOU SHOULD USE O&M FOR THE ADDITIONAL FEES SINCE SERVICES RENDERED ARE CONSIDERED AN EXPENSE.

Q: WHAT IS THE RELATIONSHIP BETWEEN THE CAPITALIZATION, APPROPRIATION, AND OBJECT CLASSIFICATION RULES, AS THEY PERTAIN TO THE EXPENSE/INVESTMENT CRITERIA?

A: THE CAPITALIZATION AND OBJECT CLASSIFICATION RULES PERTAIN TO ACCOUNTING WHEREAS THE APPROPRIATION RULES ARE USED TO DETERMINE ELIGIBILITY FOR FINANCING FROM SPECIFIC APPROPRIATIONS TO BE USED FOR ACQUISITION OF ADPE AND SOFTWARE.

RESPONSIBILITIES

- MUST CHALLENGE AND QUESTION
 - IF GOING OUTSIDE THE COMMAND, WHY?
 - WHAT DOES THE ORDER INCLUDE?
 - WHAT IS THE END ITEM?
 - AN INVESTMENT BURIED UNDER A SERVICE CONTRACT?
 - A PIECEMEAL BUY OF A SYSTEM?
 - WHAT ARE THE HIDDEN COSTS - ARE YOU TAKING ON A RECURRING COST, SUCH AS:
 - AN ANNUAL SOFTWARE LICENSE FEE?
 - AN ANNUAL SOFTWARE MAINTENANCE COST?

- **WHAT IS IMPROPER?**

- **IN MANY CASES THE ACQUISITION IS IN CONTRAVENTION OF THE EXPENSE/INVESTMENT CRITERIA**

- **SOME MIPRs OR ROs ARE NOT SPECIFIC IMPLYING THAT A SERVICE IS BEING PURCHASED WHEN IN FACT IT IS HARDWARE AND/OR SOFTWARE**

- **SOME APPEAR TO LAUNDER FUNDS TO CHANGE THE COLOR OR EXTEND THE LIFE OF THE APPROPRIATION**

- **COULD RESULT IN A VIOLATION OF THE ANTIDEFICIENCY ACT IF THE PROPER APPROPRIATION IS NOT AVAILABLE**

- **COMMANDS USING A STATE ACTIVITY OR ANOTHER FEDERAL AGENCY TO ACQUIRE ADP EQUIPMENT AND SOFTWARE**
- **HOW THIS IS DONE:**
 - **MIPR OR RO USING O&M IS SUBMITTED TO THE STATE ACTIVITY OR AGENCY FOR ACQUISITION OF ADP EQUIPMENT, SOFTWARE, OR BOTH**
 - **THE STATE/FEDERAL ACTIVITY/AGENCY DOES NOT CHALLENGE THE COLOR OF FUNDS**
 - **THE STATE/FEDERAL ACTIVITY/AGENCY THEN PLACES THE ORDER AGAINST AN EXISTING CONTRACT, PERMITS THE EXISTING CONTRACTOR TO SUBCONTRACT, OR AWARDS A CONTRACT**

CORRECTION TO AR 37-100-90

AR 37-100-91, ELEMENTS OF RESOURCE

EOR 2600 DEFINITIONS STATES:

**THAT THE EXPENSE/INVESTMENT THRESHOLD FOR
ADP SOFTWARE IS \$25K. THIS IS INCORRECT; \$15K
IS CORRECT. THE OBJECT CLASSIFICATION HAS
NOTHING TO DO WITH FUND DETERMINATION**

EOR 3100, AR 37-100-90, STATES:

**...WHEN ONE ITEM CAN BE CONNECTED OR PLUGGED
INTO ANOTHER ITEM OR ITEMS, EACH WILL BE
TREATED AS SEPARATE FOR PURPOSE OF FUND
DETERMINATION... THIS IS INCORRECT**

1993 FISCAL LAW COURSE

I. OPERATION RESTORE HOPE

II. OPERATION ANDREW

III. REAL PROPERTY MAINTENANCE, DEFENSE ACCOUNT

I. OPERATION RESTORE HOPE

1. CONSTRUCTION

- a. Title 10, United States Code, Chapter 169 (10 U.S.C. 2801 thru 2865), Military Construction and Military Family Housing.
- b. Title 10, United States Code, Chapter 1, (10 U.S.C. 101), Definitions, Section 101(47), Contingency Operation.

Operations funds are the appropriate funding source to be utilized for acquisition of materials and/or cost of erection of structures which are clearly of a temporary operational nature and intended to be used for only a temporary period by operational forces as required to facilitate operations in connection with the Somalia relief effort, and which will not be used to sustain permanent or contingency operations at the conclusion of the relief effort.

MILCON criteria apply in all other situations, including construction for which the United States would have a follow-on or contingency use after the termination of the military operations necessitating the construction.

2. WEAPONS

Department of Defense Appropriation Act, 1993, Title III.

Operations funds are the appropriate funding source to be utilized for acquisition of weapons from Somalians rather than the Procurement of Weapons and Tracked Combat Vehicles, Army appropriation.

3. HUMANITARIAN ASSISTANCE

National Defense Authorization Act for Fiscal Year 1993, Section 304 amended subchapter II of chapter 152 of Title 10, United States Code, by adding 10 U.S.C. § 2551, which provides, in part, that "To the extent provided in defense authorization Acts, funds authorized to be appropriated to the Department of Defense for a fiscal year for humanitarian assistance shall be used for the purpose of providing transportation of humanitarian relief and for other humanitarian purposes worldwide."

II. OPERATION ANDREW

1. Emergency Response Fund, Defense (DERF)

Department of Defense Appropriations Act, 1990, Title V

For the "Emergency Response Fund, Defense" \$100,000,000, to remain available until expended. The Fund shall be available for providing reimbursement to currently applicable appropriations of the Department of Defense for supplies and services provided in anticipation of requests from other Federal Departments and agencies and from State and local governments for assistance on a reimbursable basis to respond to natural or manmade disasters. The Fund may be used upon a determination by the Secretary of Defense that immediate action is necessary before a formal request for assistance on a reimbursable basis is received. There shall be deposited to the Fund: (a) reimbursements received by the Department of Defense for the supplies and services provided by the Department in its response efforts and (b) appropriations made to the Department of Defense for the Fund. Reimbursements and appropriations deposited to the Fund shall remain available until expended.

2. STAFFORD DISASTER RELIEF AND EMERGENCY ASSISTANCE ACT

a. Public Law 93-288, 42 U.S.C. 5121, et seq.

b. THE FEDERAL RESPONSE PLAN (FRP)

The FRP is a Memorandum of Understanding between FEMA and other Federal agencies which provide domestic disaster assistance, including DoD. The FRP implements the FEMA Director's authority under E.O. 12148 to "establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies."

c. 12 EMERGENCY SUPPORT FUNCTIONS (ESF)

ESF 3 - Public Works

ESF 9 - Urban Search and Rescue

d. DOD IMPLEMENTING REGULATIONS

DoD 3025.1 Use of Military Resources During Peacetime Civil Emergencies within the United States, its Territories, and Possessions, May 23, 1980.

AR 500-60, Disaster Relief, 1 August 1981.

e. REIMBURSEMENT

44 CFR § 206.8

FRP, Financial Management Annex (FM-1)

FEMA mission assignment, taskings, letters

Fund cites are contained in FEMA tasking letters

3. Temporary Tours of Active Duty versus Active Duty for Special Work (TTAD-ADSW)

- a. Title I of the 1993 DoD Appropriations Act provides that the RPA appropriation may be used:

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army Reserve . . . while serving on active duty under section 672(d) of Title 10, United States Code, in connection with performing duty specified in section 678(a) of Title 10, United States Code, or while undergoing reserve training, or while performing drills or equivalent duty or other duty (1993 DoD Appropriations Act, Pub. L. 102-396, 105 Stat. 1877 (1992)) (emphasis added)).

- b. As set forth in Title I of the 1993 DoD Appropriations Act, the NGPA appropriation may be used:

For pay, allowances, clothing, subsistence, gratuities, travel, and related expenses for personnel of the Army National Guard . . . while serving on duty under section 672(d) of Title 10, United States Code or section 502(f) of Title 32, United States Code, in connection with performing duty specified in section 678(a) of Title 10, United States Code, or while undergoing training, or while performing drills or equivalent duty or other duty (1992 DoD Appropriations Act, Pub. L. 102-396, 106 Stat. 1878 (1993) (emphasis added)).

- c. 10 U.S.C. 672(d): Under this statute, the Secretary of the Army may order members of a reserve component to active duty (or retain them) with their consent. Although 10 U.S.C. 672(d) may

be used as the authority for the voluntary order to active duty of any reserve, it is also used as the authority to order to voluntary active duty participants in specific Army programs. Such programs include:

- (1) ADSW Under AR 135-200, paragraph 6-1, ADSW tours of active duty are performed under 10 U.S.C. 672(d) and are authorized in connection with projects which specifically support ARNG and USAR programs such as: support of annual screening; operation of training activities, centers and sites; operation of training shops; unit conversions to new weapons systems; study groups; support at training sites and exercises; and short term mission administrative support (purposes which also fall within the categories of duty listed in 10 U.S.C. 678(a)).
- (2) TTAD As stated in AR 135-210, paragraphs 3-3 and 3-11, the TTAD program is designed to provide voluntary active duty, normally performed under 10 U.S.C. 672(d), by ARNGUS and USAR soldiers in support of the Active Army, a Unified or Specified Command, Office of the Joint Chiefs of Staff, or an active force mission of the Office of the Secretary of Defense.
- (3) AGR As provided in AR 135-18, paragraph 1-1, participants in the AGR program serve on active duty under 10 U.S.C. 672(d), or on full-time National Guard duty under 32 U.S.C. 502(f), for the purpose of organizing, administering, recruiting, instructing, or training the ARNG, ARNGUS, or the USAR (see 10 U.S.C. 678(a), as referenced in the purpose descriptions of the RPA and NGPA appropriations).
 - (a) The AGR Program: In 1980, Congress established the AGR program by including the following provision within the DoD Authorization Act of 1980: "Within the average strengths prescribed by subsection 9(a) [i.e., programmed strengths of the Selected Reserve], the reserve components of the Armed Forces are authorized as of September 30, 1980, the following number of Reserves to be serving on full-time active duty for the purpose of organizing, administering, recruiting, instructing, or training the

reserve components...." (1980 DoD Authorization Act, Pub. L. No. 96-107, section 401(b), 93 Stat. 807 (1979)).

- (b) Implementation of the AGR program within the Army. Authorized AGR duties (i.e., organizing, administering, recruiting, instructing, or training the reserve forces) are set forth in AR 135-18, paragraph 3-1. The underlying authorization for placing individual soldiers on active duty within the AGR program is provided yearly. See, e.g., 1992/1993 DoD Authorization Act, Pub. L. No. 102-190, section 412, 105 Stat. 1351 (1991)). It should be noted that the Army uses the term "AGR" to refer to those tours of active duty described in paragraph 3c(1) which exceed 180 days (see Consolidated Glossary, Reserve Components Personnel Update 23, 1 June 1990). Despite this regulatory limitation, I believe that both the Army's ADSW and AGR programs properly fall within the broad statutory language of 10 U.S.C. 678(a) for purposes of determining the proper source of funding for such tours.
- d. 10 U.S.C. 678: 10 U.S.C. 678(a) pertains only to reserves ordered to active duty under 10 U.S.C. 672(d) in connection with organizing, administering, recruiting, instructing, or training the reserve components. Consequently, the descriptions of the RPA/NGPA appropriations contained in the 1993 DoD Authorization Act, which discuss active duty performed under 10 U.S.C. 672(d), in connection with the duties specified in 10 U.S.C. 678, merely require that the RPA or NGPA appropriations be used to fund voluntary active duty performed under 10 U.S.C. 672(d) when such duty is performed in connection with the AGR or ADSW programs.
- e. Funding of TTAD. Title I of the DoD Appropriation Act, 1993, provides that the Military Personnel, Army (MPA) appropriation is available for "pay, allowances, individual clothing...permanent change of station travel...and expenses of temporary duty travel...for members of the Army on active duty (except members of reserve components provided for elsewhere)" (emphasis added). We are advised by OSD OGC that if the RPA/NGPA appropriations are interpreted to provide for pay, allowances,

clothing, subsistence, travel and related expenses for Army reserves on active duty under 10 U.S.C. 672(d) only if they are performing functions specified in 10 U.S.C. 678, it follows that the MPA appropriation is available to cover these expenses for Army Reserves on active duty for the purpose of supporting the Active Army, a Unified or Specified Command, Office of the Joint Chiefs of Staff, or an active force mission of OSD. DoD plans to propose legislation remedying the current absence of affirmative authorization to fund TTAD-type programs with active component appropriations.

- f. Conclusion: ASDW = RPA/NGPA
TTAD = MPA & OMA

III. REAL PROPERTY MAINTENANCE, DEFENSE ACCOUNT

Prior Guidance

OMA FUNDING:

1. May be used for major repair projects costing more than \$15,000.
2. Unspecified Minor Military Construction projects costing not more than \$300,000, in accordance with 10 U.S.C. 2805(c).
3. Statutory limitation on minor construction and administrative approval levels from maintenance and repair projects continue in effect.

FY 1993 Law and Guidance

DODRPM FUNDING:

1. Maintenance and Repair projects costing \$15,000 and above.
2. Minor Construction projects which cost between \$15,000 and \$300,000.
3. Project and administrative approval authority levels for maintenance and repair projects remains the same as OMA funded projects.

OSD letter of 24 November 1992 negates the majority of the guidance espoused in the OMA funding letters. It specifically states, "funding from the RPM Defense Account is the sole source of funding for major repair projects costing more than \$15,000 and minor construction projects costing between \$15,000 and \$300,000. OMA and RDT&E funding cannot supplement maintenance and repair projects and minor construction projects falling in this price range."

OSD letter of 27 April 1993 clarifies the use of funding real property maintenance efforts. It specifically states: "environmental RPM-type projects will continue to be funded where other environmental efforts are funded, RPM at research facilities will be funded in the Research, Development, Test and Evaluation (RDT&E) appropriation, RPM at health care facilities will be funded from the Defense Health Program, while RPM projects funded through the DoD

revolving funds, should continue to be funded in these accounts."

Further, with regard to the source of funding for the design of RPM projects, "the Operation and Maintenance appropriation is the proper source for the design of Real Property Maintenance, Defense projects. The design of projects funded from sources other than Real Property Maintenance, Defense account will continue to be funded from the account from which RPM funds were appropriated, i.e., RDT&E, Health, etc."

Current Guidance

OMA FUNDING:

1. Can only be used on repair and minor construction projects up to \$15,000.
2. Maintenance projects of any value can be accomplished with OMA resources.
3. OMA is the proper source for the design of Real Property Maintenance, Defense Projects.

DODRPM FUNDING:

1. Maintenance projects cannot be accomplished with these funds.
2. DODRPM funds must be used for repair projects costing \$15,000 and above and minor construction projects costing between \$15,000 and \$300,000.

OTHER FUNDING

1. Environmental. Environmental RPM-type projects will continue to be funded where other environmental efforts are funded.
2. RDT&E. RPM at research facilities will be funded in the Research, Development, Test and Evaluation (RDT&E) appropriation.
3. Health. RPM at health care facilities will be funded from the Defense Health Program.

4. DOD Revolving Funds. RPM projects funded through the DoD revolving funds should continue to be funded in these accounts.
5. Miscellaneous. The Operation and Maintenance, Army Appropriation is the proper source for the design of Real Property Maintenance, Defense projects. The design of projects funded from sources other than the Real Property Maintenance, Defense account will be funded in the account for which RPM funds are appropriated.

OPERATING/ CAPITAL LEASES

OPERATING/CAPITAL LEASES

OMB BULLETIN 91-02 DEFINES AN OPERATING LEASE AS:

- OWNERSHIP REMAINS WITH THE LESSOR AND IS NOT TRANSFERRED AT OR SHORTLY AFTER THE END OF THE LEASE TERM
- THERE IS NO BARGAIN PRICE PURCHASE OPTION
- ALL RISKS OF OWNERSHIP OF THE ASSET REMAIN WITH THE LESSOR, ABSENT GOVERNMENT NEGLIGENCE
- THE LEASE TERM DOES NOT EXCEED 75% OF THE ESTIMATED ECONOMIC LIFE OF THE ASSET
- THE PRESENT VALUE OF THE MINIMUM LEASE PAYMENTS OVER THE LEASE LIFE DOES NOT EXCEED 90% OF THE ASSET'S FAIR MARKET VALUE AT THE INCEPTION OF THE LEASE
- THE ASSET HAS A GENERAL, RATHER THAN A SPECIFIC GOVERNMENT PURPOSE, AND IS NOT BUILT TO UNIQUE GOVERNMENT SPECIFICATIONS
- THERE IS A PRIVATE SECTOR MARKET FOR THE ASSET
- THE ASSET IS NOT CONSTRUCTED ON GOVERNMENT LAND

OPERATING/CAPITAL LEASES

- 1. OWNERSHIP REMAINS WITH THE LESSOR
AND IS NOT TRANSFERRED AT OR
SHORTLY AFTER THE END OF THE LEASE
TERM**

OPERATING/CAPITAL LEASES

- 2. THERE IS NO BARGAIN PRICE
PURCHASE OPTION**

OPERATING/CAPITAL LEASES

- 3. ALL RISKS OF OWNERSHIP OF THE
ASSET REMAIN WITH THE LESSOR,
ABSENT GOVERNMENT NEGLIGENCE**

OPERATING/CAPITAL LEASES

- 4. THE LEASE TERM DOES NOT EXCEED
75% OF THE ESTIMATED ECONOMIC
LIFE OF THE ASSET**

EXAMPLE

- Street sweeper
- Useful life (assumed) is 10 years
- Lease term
 - One year
 - Option renewable each year, 4 additional years
- "Lease term"
 - $1 + 4 = 5$
 - $5 < 10$
 - $50\% < 75\%$
- Qualifies as an operating lease on this point

OPERATING/CAPITAL LEASES

- 5. THE PRESENT VALUE OF THE
MINIMUM LEASE PAYMENTS OVER
THE LEASE LIFE DOES NOT EXCEED
90% OF THE ASSET'S FAIR MARKET
VALUE AT THE INCEPTION OF THE
LEASE**

EXAMPLE

- Street sweeper
 - FMW - or cost if bought upfront - \$200,000
 - Annual lease payment - \$40,000
 - Five years (5 X 40,000 - \$200,000)
 - Present Value (PV)
- $$\frac{\text{PMT } 1}{(1+r)} + \frac{\text{PMT } 2}{(1+r)^2} + \frac{\text{PMT } 3}{(1+r)^3} + \frac{\text{PMT } 4}{(1+r)^4} + \frac{\text{PMT } 5}{(1+r)^5}$$
- r = Treasury rate for 5 year notes (equal to lease term) e.g., 8%
 - $PV = \$159,708$
 - 159,708 divided by 200,000 equals 79.8%
 - 79.8% < 90%
 - Qualifies as operating lease on this point

OPERATING/CAPITAL LEASES

- 6. THE ASSET HAS A GENERAL, RATHER THAN A SPECIFIC GOVERNMENT PURPOSE, AND IS NOT BUILT TO UNIQUE GOVERNMENT SPECIFICATIONS**

OPERATING/CAPITAL LEASES

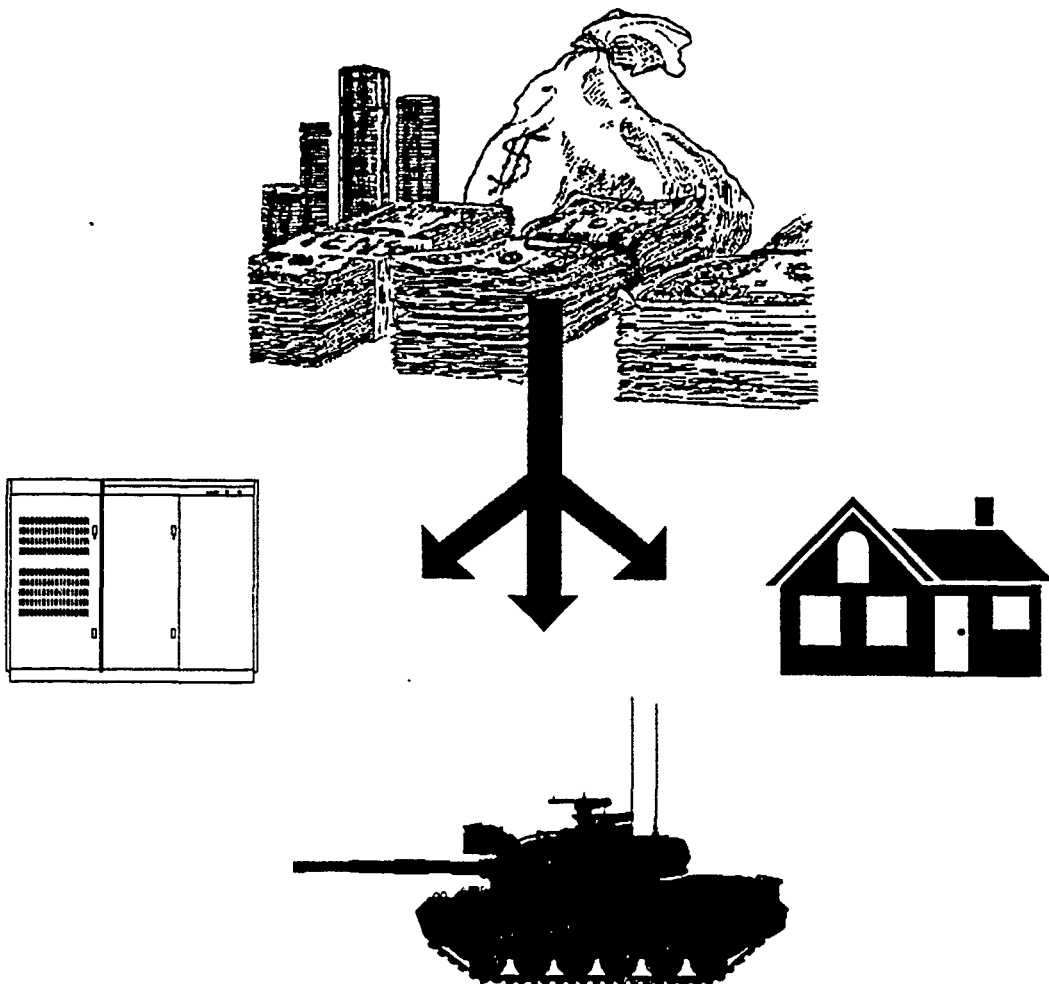
- 7. THERE IS A PRIVATE SECTOR
MARKET FOR THE ASSET**

OPERATING/CAPITAL LEASES

- 8. THE ASSET IS NOT CONSTRUCTED
ON GOVERNMENT LAND**

CHAPTER 8

USE OF EXPIRED APPROPRIATIONS



CHAPTER 8

USE OF EXPIRED APPROPRIATIONS

I.	INTRODUCTION	1
II.	REFERENCES	1
	A. Statutory References	1
	B. Secondary Sources	1
	C. Overview	1
III.	PRE-FISCAL YEAR 1991 RULES	2
	A. General	2
	B. Accounting for Appropriations After the Period of Availability	4
IV.	FISCAL YEAR 1991 CHANGES TO EXPIRED APPROPRIATIONS	6
	A. General	6
	B. Transition Rules for Existing Closed Accounts	7
	C. Use of Expired Funds	9
	D. Adjustments Before Closure Using Expired Funds	10
	E. Closing of Accounts	12
	F. Adjustments After Closure Using Current Funds	13
	G. Antideficiency Act Implications	14
	H. 1993 National Defense Authorization Act Amendments.	15
V.	CONCLUSION	17
	Appendix 8-A: Chart of Pre-1991 Account Closing Procedures	19
	Appendix 8-B: Chart of Current Account Closing Procedures	23

CHAPTER 8

USE OF EXPIRED APPROPRIATIONS

I. INTRODUCTION.

II. REFERENCES.

A. Statutory References.

1. 31 U.S.C. §§ 1551-1557.
2. 31 U.S.C. § 1301.
3. 10 U.S.C. § 2782.

B. Secondary Sources.

1. AR 37-1, paras. 7-6, and 9-5.
2. AFR 177-16, Interim Message Change 92-1, dated 28 February 1992.
3. GAO, Principles of Federal Appropriations Law, pp. 4-33 to 4-43 (1st Ed. 1982) and pp. 5-57 to 5-64 (2d Ed. 1991).

C. Overview.

1. The 1991 Defense Authorization Act radically alters the manner in which funds are accounted for and used after the end of the period of availability. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1405-1406, 104 Stat. 1676 (1990), codified at 31 U.S.C. §§ 1551 through 1557.

LTC Harry L. Dorsey
Fiscal Law Course

Chapter 8

2. The revised rules apply to all executive agencies.
3. While the former rules concerning the operation of surplus authority, merged surplus authority, and the "M" accounts have changed, an understanding of the law as it existed prior to the enactment of the 1991 Defense Authorization Act is essential to understanding the new rules governing expired appropriations and the transition rules under which the existing surplus authority, merged surplus authority, and "M" accounts will be converted to the new system of management of expired appropriations.

III. PRE-FISCAL YEAR 1991 RULES.

A. General.

1. This history of the pre-1991 rules governing the use of expired accounts is based in large part upon two General Accounting Office documents:
 - a. Control and Financial Management of Expired Appropriations Accounts, 1990, Hearings Before the Senate Committee on Governmental Affairs, 101st Cong. 2nd Sess. (statement by Milton J. Socolar, Special Assistant to the Comptroller General, United States General Accounting Office, on August 2, 1990) (hereafter referred to as the Socolar Testimony); and
 - b. Lapsed Accounts: Army, Navy and Air Force "M" and Merged Surplus Authority Account Balances, B-238041, May 22, 1990 (unpub.), also referred to as GAO, Lapsed Accounts: Army, Navy and Air Force "M" and Merged Surplus Authority Account Balances, GAO Rep. No. NSIAD-90-170, available from the U.S.

General Accounting Office (hereafter referred to as the 1990 GAO Study).

2. Congress created this structure of surplus authority, merged surplus authority, and "M" Accounts in 1956. A flow chart of the Pre-Fiscal Year 1991 procedures is at Appendix 8-A of this Chapter.
3. The surplus authority account, the merged surplus authority account, expired appropriations, and the "M" account were accounts into which obligational authority and undisbursed balances of appropriations were transferred after the period of availability expired. 1990 GAO Study.
4. When Congress established these accounts, there was little expectation that they would accumulate substantial balances. 1990 GAO Study at p. 1. Current balances were difficult to ascertain with precision because funds lost fiscal year identification two years after expiration. Funds in the Surplus Authority and the Merged Surplus Authority Accounts retained their general purpose identity, e.g., operation and maintenance, procurement, construction, but lost all other accounting classification identification. Socolar Testimony.
5. 1990 estimates of the DOD Merged Account balances total \$43,893,334,000, broken out as follows:
 - a. "M" Account - \$18,498,882,000;
 - b. Merged Surplus Authority Account - \$25,394,462,000. 1990 GAO Study, at p. 3.

Chapter 8

B. Accounting for Appropriations After the Period of Availability.

1. Appropriations that had definite periods of availability, e.g., annual appropriations, expired for purposes of making new obligations at the end of the fiscal year in which the funds were appropriated. Appropriations available for more than one year, but having a definite period of availability, e.g., Procurement funds, available for 2 years, also expired at the end of the two years. GAO, Principles of Federal Appropriations Law, p. 4-33 (1982).
2. Whether the funds had been obligated determined how they were treated after the expiration of the period of availability.
 - a. Unobligated Balances - Surplus Authority and Merged Surplus Authority Accounts.
 - (1) After the period of availability expired, the unobligated balances expired and were withdrawn to the Treasury where they were designated as Surplus Authority."
 - (2) Funds in the Surplus Authority Account retained their fiscal year identity for 2 years, after which time any remaining balances were transferred to an account known as the Merged Surplus Authority Account.
 - b. Deobligated funds were treated as if they were unobligated funds and were transferred to into surplus authority or merged surplus authority accounts. Lapsed Accounts: Army, Navy and Air Force "M" and Merged Surplus Authority Account Balances, B-238041, May 22, 1990 (unpub.).

- c. No-year appropriations also were withdrawn to the Treasury, if no disbursements had been made from the fund within a two year period.
- d. Surplus Authority and Merged Surplus Authority accounts were available for restoration to an expired appropriation or an "M" Account to pay for upward adjustments in obligations.
- e. Obligated Balances - Expired Appropriations and "M" Accounts.
 - (1) The obligated balances that were not disbursed during the period of availability remained available for adjustment to prior obligations and disbursement or expenditure, but not for new obligation. These appropriations also retained their original fiscal year identity for two years after the expiration of the funds. These accounts were referred to as an expired appropriations.
 - (2) After two years, undisbursed obligated balances merged with similar balances from other fiscal years and were available indefinitely to liquidate obligations and to effect adjustments to prior obligations. These merged accounts were referred to as "M" Accounts.
 - (3) Funds in the "M" Accounts retained only their purpose identification. Socolar Testimony.
- f. Funds accumulated in the "M" Accounts indefinitely. Socolar Testimony.

Chapter 8

3. Use of Expired Funds.

- a. Funds in the "M" Account and expired appropriations were obligational authority. They were available only to pay valid pre-existing obligations or to make valid adjustments to those obligations.
- b. Agencies could restore balances from the Surplus Authority and Merged Surplus Authority Accounts to the "M" Account for payment of upward adjustments to prior obligations previously incurred by the agency.
- c. Balances in closed accounts did not represent cash set aside by the Treasury. The balances represented authority to adjust obligations and to authorize payment.

4. Congress perceived that these accounts were subject to potential and actual abuse by executive agencies. In the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. 101-189, Congress required the Secretary of Defense, or the service Secretaries, to approve restorations to the "M" Account for late contract changes in excess of \$4 million in a fiscal year. 10 U.S.C. § 2782. (Congress repealed this section of Title 10 the following year).

IV. FISCAL YEAR 1991 CHANGES TO EXPIRED APPROPRIATIONS.

A. General.

1. The 1991 Defense Authorization Bill, contains sweeping revisions in the treatment of expired funds and closed accounts. National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1405-1406, 104 Stat. 1676 (1990), codified at 31 U.S.C. §§ 1551 through 1557.

2. The revised rules primarily apply to "fixed appropriations." A "fixed appropriation" is defined as an appropriation available for obligation for a definite period of time. The term encompasses annual appropriations and multiple year appropriations. The rules also apply to indefinite appropriations that have been inactive for more than 2 years. 31 U.S.C. § 1555.
3. The revised rules require fully auditable identification of funds. 31 U.S.C. § 1553(a).

B. Transition Rules for Existing Closed Accounts.

1. The 1991 Authorization Act contains complex rules for the transition of existing unobligated and obligated, but unexpended funds in the "M" Account and in the surplus authority and the merged surplus authority accounts. See generally, AR 37-1, para. 9-5v.
2. The transition rules are not codified. The transition rules appear in the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405(b), 104 Stat. 1676 (1990).
3. Transition Rules are Phased-In.
 - a. The new rules concerning are being phased-in between November 1990 and September 1993.
 - b. The operation of the new rules depends on the status of funds in a given account on the day prior to the enactment of the 1991 DOD Authorization Act. The Authorization Act was passed on 5 November 1990. Accordingly, the critical date for the transition period is 4 November 1990.

Chapter 8

- c. How funds are managed during the transition period is determined by whether the funds were obligated or unobligated on 4 November 1990.

4. Transition Rules Governing Unobligated Balances.

- a. All unobligated balances, previously withdrawn (to the Surplus Authority Account) under the authority of 31 U.S.C. § 1552(a)(2) (Old Rules) from accounts, the obligated balance of which has not been transferred (to the "M" Account) under 31 U.S.C. § 1552(a)(1)(Old Rules), are restored to the appropriate expired account as of 4 November 1990.
- b. All unobligated funds previously withdrawn (to the Merged Surplus Authority Account) under 31 U.S.C. § 1552(a)(2) (Old Rules), except those restored by operation of subpara. (a) above, are cancelled as of 4 November 1990.

5. Transition Rules Governing Obligated Balances.

- a. On September 30, 1993, all obligated balances previously transferred (to "M" Accounts) under 31 U.S.C. § 1552(a)(1) (Old Rules) will be cancelled.
- b. After enactment of the 1991 DOD Authorization Act, all balances previous transferred (to "M" Accounts) under 31 U.S.C. § 1552(a)(1) (Old Rules) will be subject to the limitations and notice requirements of 31 U.S.C. § 1553(c) (New Rules).

c. Thirty days after the submission of the FY 1992 Budget by the President to Congress, (which occurred on 4 February 1991) any obligated amount that had been transferred (to a "M" Account) under 31 U.S.C. § 1552(a)(1) (Old Rules) and which had been in that account (the "M" Account) for greater than five years was deobligated and withdrawn as provided by 31 U.S.C. § 1552(a)(2) (Old Rules). The funds were cancelled as of 5 March 1991.

(1) Funds deobligated under this subsection may not be restored.

(2) Funds were deobligated if the amount obligated was to be paid out within 180 days of enactment, i.e., by 5 May 1991, or if they are needed to pay severance pay to foreign national employees.

(3) This scrub of old funds in the "M" Accounts was repeated on 30 September 1991 and 1992. It will occur for the last time on 30 September 1993.

6. No later than 31 December 1991, the Secretary of Defense was required to audit all accounts created under 31 U.S.C. § 1552(a) and determine which amounts are valid and which are no longer validly in the accounts. Those amounts determined by the Secretary to be no longer valid shall be deobligated and cancelled.

C. Use of Expired Funds.

1. Expired funds may be used to pay for some types of adjustments to and liquidation of previously recorded obligations. These transactions may be made after the end of the period of availability, but before the closing of the account. 31 U.S.C. § 1553(a); AR 37-1, para. 9-5u(1).

Chapter 8

2. Congress placed strict limits on the use of expired funds to pay for contract changes. 31 U.S.C. § 1553(c).

D. Adjustments Before Closure Using Expired Funds.

1. Congress provided a statutory definition of a "contract change" for purposes of using expired funds to pay for such changes.
2. A "change" is defined as "a change to a contract that requires the contractor to perform additional work." 31 U.S.C. § 1553(c)(3).
3. The definition of a "change" specifically excludes adjustments necessary to pay claims or increases in contract price due to the operation of an escalation clause in the contract. 31 U.S.C. § 1553(c)(3).
4. In a 13 June 1991, policy memorandum the DOD Comptroller expanded the definition of a contract "change" to include any change that results in increases in contractor billable costs. On 20 April 1992, the OSD Comptroller reversed this policy, leaving the statutory language to define a "change."¹

¹AR 37-1, change 2, effective 30 April 1992, embodies the June 1991 OSD memorandum definition of a "change" as including any change that results in additional contractor billable costs. Unfortunately, Change 2 was distributed before receipt of the 20 April 1992 reversal of the June 1991 memorandum. Change 2 was issued by Memorandum dated 18 February 1992, from the Defense Finance & Accounting Service.

5. If the period of availability for a fixed appropriation has ended, and if an obligation of funds from that expired appropriation is required to provide funds for a program, project, or activity to cover a contract "change":
 - a. The head of the agency must approve all changes in excess of \$4 million;
 - b. Additionally, if the change is in excess of \$25 million: The head of the agency must notify Congress of the intent to obligate the expired funds; give legal and policy justifications in support of the proposed obligation; and, wait 30 days before obligating the funds. 31 U.S.C. § 1553(c).
6. Administrative Restrictions.
 - a. Army policy requires that Finance and Accounting Officers approval all individual transactions resulting in an upward adjustment of \$100,000 or more, using expired appropriations. The approval must be permanently retained and supported by specific information, including the reason for the adjustment and identification of the appropriation, program, project, or activity, and the amount of the adjustment. AR 37-1, para. 9-5t(1).
 - b. All changes using expires appropriations must contain a written determination that the use of expired funds is legitimate. The determination must include comprehensive factual support for the following conclusions:
 - (1) That the adjustment does not involve additional work by the contractor;
 - (2) That the change is within the scope of the contract; and

Chapter 8

- (3) That no additional billable costs are involved in the adjustment.²

The determination must specifically identify the name and title of the individual making these determinations.

E. Closing of Accounts.

1. The revised rules require final closure of all fixed accounts five years after the expiration of the period of availability. 31 U.S.C. § 1552.
2. On 30 September of the fifth (5th) year after the period of availability of a fixed appropriation ends:
 - a. The account is closed;
 - b. All remaining obligated and unobligated balances in the account are cancelled; and
 - c. No funds from the closed account are available thereafter for obligation or expenditure for any purpose. 31 U.S.C. § 1552.
3. Cancellation of the appropriation does not effect the government's underlying legal liability or the duty to maintain auditable records concerning the appropriation. AR 37-1, para. 9-5u.

²See Fn.1, above.

4. Collections authorized or required to be credited to an account, but received after an account is closed will be deposited to the Treasury as miscellaneous receipts. 31 U.S.C § 1552(b).

F. Adjustments After Closure Using Current Funds.

1. After an account is closed, obligations and adjustment to obligations that would have been properly chargeable to that account, both as to purpose and amount, before the closing of the account and that are not otherwise chargeable to any current appropriation of the agency, may be charged to any current account of the agency available for the same general purpose. 31 U.S.C. § 1553(b).
2. The authority to charge current accounts discussed in the paragraph above is limited by statute to 1% of the total appropriations for that account or the amount of the unobligated balance of the original appropriation, whichever is less. 31 U.S.C. § 1553(b)(2).
3. AR 37-1, para. 9-5c implements this statutory restriction. The authority to use current accounts is limited to the lesser of:
 - a. The undisbursed balance of the original appropriation; or
 - b. One percent (1%) of the current appropriation available for the same purpose;³ or

³Program, project, or activity is defined as the budget line or program element (P-1 or R-1) level for procurement and RDT&E appropriations; the appropriation level for military personnel, operation & maintenance, and military construction appropriations; and the most specific level of budget items

Chapter 8

c. The unused and unobligated balance of the current appropriation to be used for the adjustment. AR 37-1, para. 9-5c.

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

G. Antideficiency Act Implications.

1. The revised rules create several new possibilities for violation of the Antideficiency Act. The situations are most likely to result in an over obligation of funds in violation of 31 U.S.C. § 1517 or 31 U.S.C. § 1514(a)(1).

2. The following transactions involving closed accounts violate the Antideficiency Act:

a. Obligations or expenditures from a closed account.

b. Obligations, expenditures, or adjustments to obligations made or authorized that are in excess of the amount available in the original account. AR 37-1, para. 7-6a(5). This restriction is cumulative, i.e., no payment may be made that causes cumulative outlays to exceed the unexpended balance of the original appropriation. AR 37-1, para. 7-6f.

identified in the DOD Appropriation Act for all other appropriations. AR 37-1, para. 9-5t(4)(b).

3. Obligation of current funds, for adjustments to obligations under closed accounts, in excess of 1% of the unobligated current account of the same type violates the Antideficiency Act. AR 37-1, para. 7-6f.
4. An agency may not use current funds to "cover" an over obligation in an expired or closed account. The Honorable Andy Ireland, B-245856.7, August 11, 1992, 71 Com. Gen. 502. The Ireland opinion contains an excellent discussion of the application of the bona fide need rule and its application to expired appropriations and closed accounts.

H. 1993 National Defense Authorization Act Amendments.

1. The National Defense Authorization Act for Fiscal Year 1993 makes two changes in the rules controlling expired accounts. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, §§ 1003, 1004, 106 Stat. 2481 (1992).
2. Section 1003 of the National Defense Authorization Act for Fiscal Year 1993 imposes reciprocal cancellation and notice requirements.
 - a. The Defense Department may not reobligate any sum in a merged account, created under the former rules, until it cancels an equal sum currently existing in a merged account. This requirement appears to focus on limiting disbursements from the merged accounts.
 - b. If the Secretary of Defense proposes to reobligate more than \$10,000,000.00 from a merged account for a single purpose, the

Chapter 8

Secretary must notify Congress and wait 30 days before incurring the obligation.

- c. These restrictions remain in effect until all of the audits and reports required by the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1406, 104 Stat. 1680 (1990) are completed.
3. Section 1004 of the National Defense Authorization Act for Fiscal Year 1993 amends the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405(b), 104 Stat. 1676 (1990)(the transition rules).
- a. Section 1004 authorizes the use of current appropriations for adjustments in expired but not yet closed accounts if:
 - (1) The obligation would have been properly chargeable to the expired account, except as to amount; and,
 - (2) The obligation is not otherwise chargeable to a current account.
 - b. Section 1004 limits this authority to the lesser of:
 - (1) 1% of the total current appropriation, or
 - (2) 1% of the total of expired appropriation.
 - c. If the agency uses this authority, it must notify Congress and wait 30 days prior to incurring the obligation. Moreover, this authority may not be used until the Secretary of Defense certifies to Congress that the Defense Department is complying with 31

U.S.C. § 1341 and that all violations of 31 U.S.C. § 1341, whether intentional or inadvertent, are being reported immediately to the President and to Congress.

- d. This provision substantially undercuts the Comptroller General's opinion in The Honorable Andy Ireland, B-245856.7, Aug. 11, 1992, 71 Comp. Gen. 502.
- e. This amendment to the transition rules should expire because it applies only to pre-fiscal year 1992 appropriations, that have expired but not been cancelled, and have not been cancelled under section 1405(b)(4) of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 1405(b), 104 Stat. 1676 (1990)(cancellation of amounts in merged accounts greater than five years).

V. CONCLUSION.

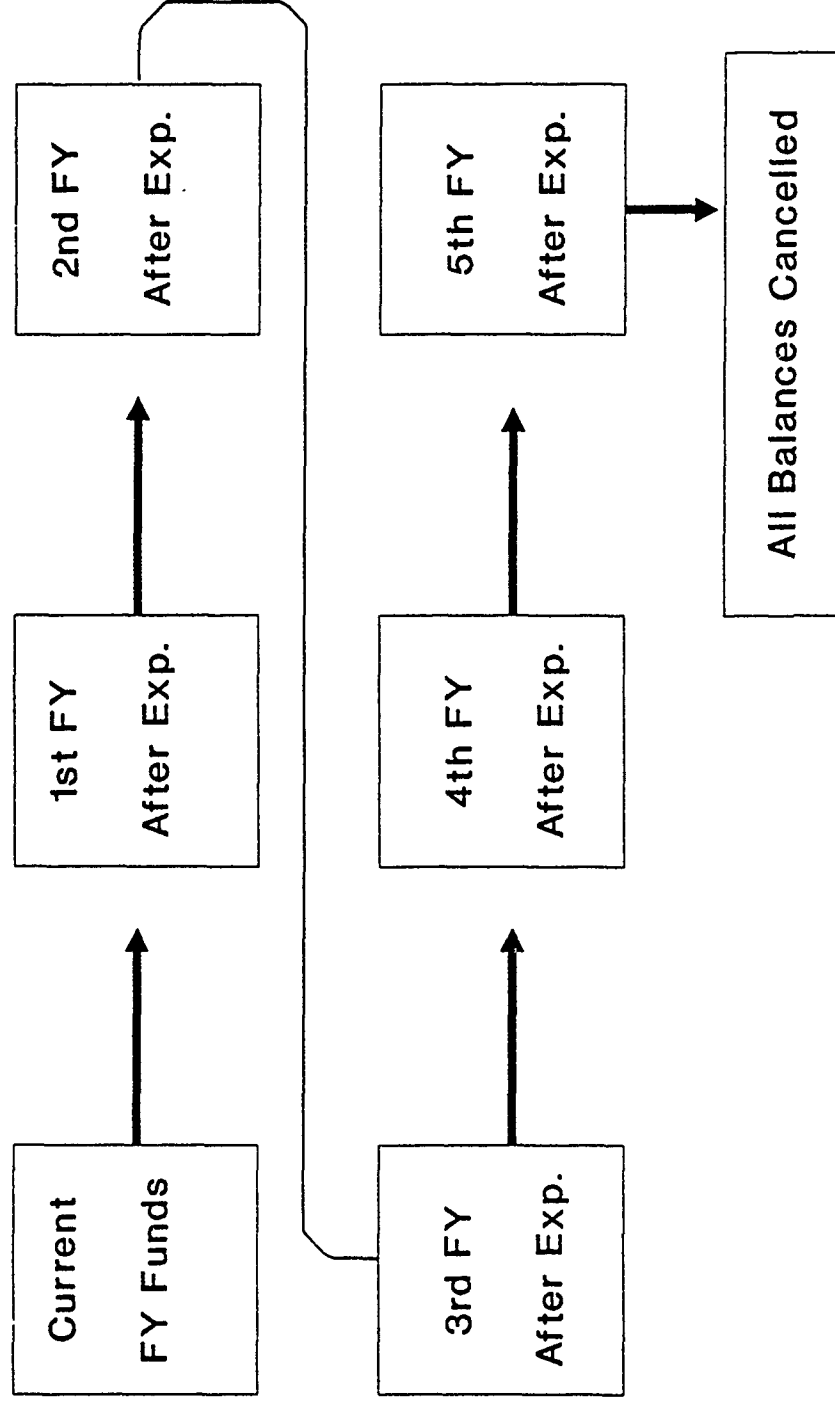
Chapter 8

Appendix 8-A: Chart of Pre-1991 Account Closing Procedures.

Chapter 8

1991 DOD Authorization Act

Closing Accounts



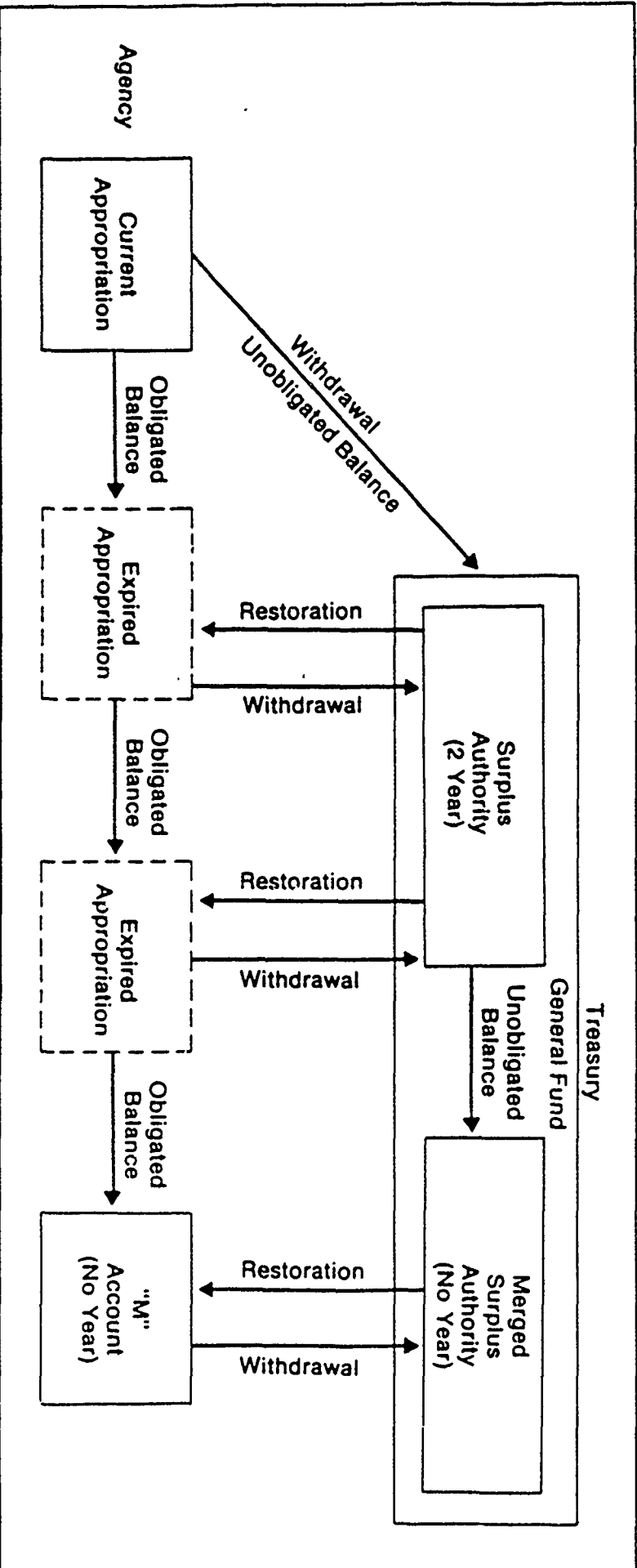
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Chapter 8

Appendix 8-B: Chart of Current Account Closing Procedures.

Chapter 8

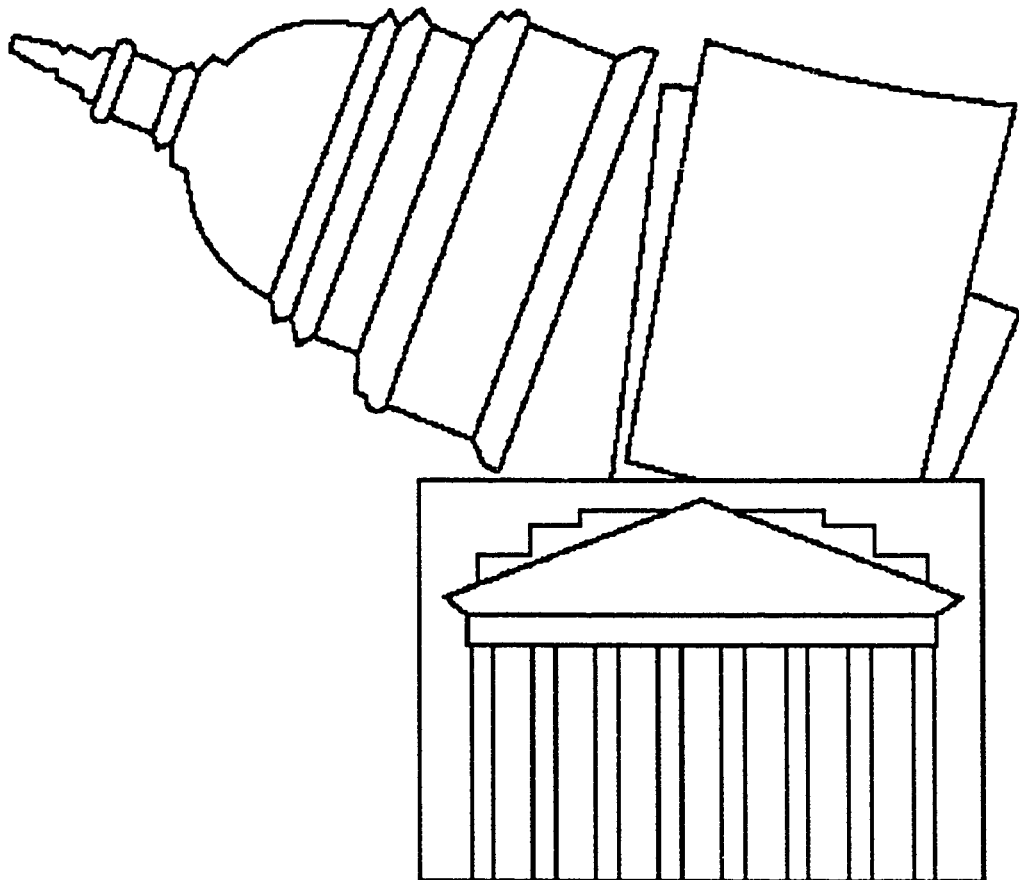
Figure 1: The Process of Withdrawals, Restorations, and Transfers of Appropriation Balances



Chapter 8

CHAPTER 9

THE ANTIDEFICIENCY ACT



CHAPTER 9

THE ANTIDEFICIENCY ACT

I. INTRODUCTION	1
II. REFERENCES	1
III. APPORTIONMENT	2
A. Definition	2
B. Purpose of Apportionment	2
IV. ADMINISTRATIVE DIVISION OF APPORTIONMENTS	3
A. Administrative Fiscal Controls	3
B. Administrative Subdivisions of Funds	4
V. ADDITIONAL STATUTORY FISCAL CONTROLS	5
A. Further Limitations on Expenditures/Obligations	5
B. Limitation on Voluntary Services	10
C. Gratuitous Services Distinguished	11
D. Voluntary Creditor Rule	12
E. Passenger Carrier Use	13
VI. SANCTIONS FOR ANTIDEFICIENCY VIOLATIONS	15
A. Adverse Personnel Actions	15
B. Criminal Penalties	16
VII. REPORTING AND INVESTIGATING VIOLATIONS	16
A. Flash Report	16
B. Investigations	16
C. Establishing Responsibility	17
D. Reports to the President and Congress	18
VIII. CONTRACTOR RECOVERY WHEN THE ACT IS VIOLATED	19
A. Recovery Under the Contract	19

B. Quasi-Contractual Recovery	19
C. Referral of Claims to Congress	20
IX. DISCUSSION SCENARIO	20
X. CONCLUSION	20

CHAPTER 9

THE ANTIDEFICIENCY ACT

I. INTRODUCTION.

II. REFERENCES.

- A. 31 U.S.C. § 1341 (prohibiting obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).
- B. 31 U.S.C. § 1342 (prohibiting government employees from accepting voluntary services).
- C. 31 U.S.C. § 1344 (prohibiting the unofficial use of passenger carriers).
- D. 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).
- E. OMB Circular A-34, Instructions on Budget Execution (Aug. 1985).
- F. DOD Directive 7200.1, Administrative Control of Appropriations (May 1984); DOD Accounting Manual 7220.9-M (Oct. 1983).
- G. Air Force Reg. (AFR) 172-1, USAF Budget Policies and Procedures (15 Oct. 1990); Air Force Reg. 177-16, Administrative Control of Appropriations (30 Nov. 1988).
- H. Army Reg. (AR) 37-1, Army Accounting and Fund Control (30 Apr. 1991).
- I. Hopkins and Nutt, The Anti-Deficiency Act (Revised Statute 3679) and Funding Federal Contracts: An Analysis, 80 Mil. L. Rev. 51 (1978), 15 YPA 939 (1978).

MAJ Anthony M. Helm
Fiscal Law Course

Chapter 9

III. APPORTIONMENT. 31 U.S.C. §§ 1512 - 1513.

A. Definition. An apportionment is a distribution by the Office of Management and Budget (OMB) of amounts available in an appropriation into amounts available for specified time periods, activities, projects, or objects. OMB Cir. A-34, para. 21.1.1.

1. An officer or employee of the United States may not make or authorize an expenditure or obligation that exceeds an apportionment. 31 U.S.C. § 1517 (a)(1).
2. The statute does not prohibit obligation in advance of an apportionment. See Cessna Aircraft Co., ASBCA No. 43196 (12 Mar. 1993), 93-2 BCA ¶ _____. But see AR 37-1, para. 6-11(a) (requiring apportionment before obligation).

B. Purpose of Apportionment.

1. The OMB apportions funds to prevent obligation at a rate that would create a need for a deficiency or supplemental appropriation. As a general rule, an agency may not request an apportionment that will create a need for a deficiency or supplemental appropriation. 31 U.S.C. § 1515.
2. Apportionment at a rate that would create a need for a deficiency or supplemental appropriation is permitted by 31 U.S.C. § 1515 for:
 - a. Military and civilian pay increases;
 - b. Laws enacted after budget submission which require additional expenditures; or

c. Emergencies involving life or property.

3. 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).

IV. ADMINISTRATIVE DIVISION OF APPORTIONMENTS. 31 U.S.C. § 1514.

- A. Administrative Fiscal Controls. 31 U.S.C. § 1514 requires agency heads to establish administrative controls that (1) restrict obligations or expenditures to the amount of apportionments and (2) enable the agency to fix responsibility for exceeding an apportionment. These regulations include:
 1. OMB Circular A-34, Instructions on Budget Execution, para. 31.5. This circular applies to all agencies and requires OMB approval of fund control systems.
 2. DOD Directive 7200.1, Administrative Control of Appropriations; DOD Accounting Manual 7220.9-M, Part II, Chapters 21-28.
 3. AR 37-1, Army Accounting and Fund Control; AFR 177-16, Administrative Control of Appropriations; NAVCOMPT 7300.101; MCOs P4200.15 & P7300.8.

Chapter 9

B. Administrative Subdivisions of Funds. OMB Circular A-34, para. 21.1, DOD Directive 7200.1, encl. 5, paras. H and I.

1. Allocations and Allotments. AFR 177-16, para. 20; AR 37-1, paras. 6-13 & 6-15. These are subdivisions that 31 U.S.C. § 1514 prescribes generally. The Army transmits these funds on a computer generated form (DA Form 1323) called a Fund Authorization Document or FAD. The Air Force uses AF Form 401, Budget Authority/Allotment; AF Form 402, Obligation Authority/Suballotment; and AF Form 1449, Operating Budget Authority (for O&M funds).
2. Allowance/Target/Advisory Guide. AFR 177-16, para. 24; AR 37-1, paras. 6-13 & 6-15. These distributions do not create administrative subdivisions. The Army also uses DA Form 1323 to distribute an allowance, but for this type of distribution, the form is called a Fund Allowance Document or FAS.
3. An officer or employee may not make or authorize an obligation or expenditure that exceeds a subdivision established by regulations. See 31 U.S.C. § 1517(a)(2).
4. Activities must report violations. See § VII, infra, for reporting requirements.

V. ADDITIONAL STATUTORY FISCAL CONTROLS.

A. Further Limitations on Expenditures/Obligations.

1. 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). Department of Labor-- Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); To Glenn English, B-223857, Feb. 27, 1987 (unpub.).
 - a. The scope of this statute is broader than that of the apportionment statutes. It includes appropriations not subject to apportionment, e.g., expired appropriations.
 - b. The GAO has opined that this statute prohibits obligations in excess of appropriated amounts and obligations that violate statutory restrictions or other limitations on obligations or spending. Reconsideration of B-214172, B-214172, 64 Comp. Gen. 282 (1985); Customs Serv. Payment of Overtime Pay in Excess of Limit in Appropriation Act, B-201260, 60 Comp. Gen. 440 (1981).
2. An officer or employee may not involve the government in a contract or obligation for payment of money before an appropriation is made unless authorized by law. 31 U.S.C. § 1341(a)(1)(B); Propriety of Continuing Payments under Licensing Agreement, B-225039, 66 Comp. Gen. 556 (1987) (20 year agreement violated this provision because the agency had only a one-year appropriation); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).

Chapter 9

3. An officer or employee may not make or authorize an expenditure or obligation or involve the government in a contract for the payment of money required by law to be sequestered. 31 U.S.C. § 1341(a)(1)(C) & (D).
4. A contracting officer may obligate in excess of, or contract in advance of, an appropriation if authorized by law.
 - a. Statutory authority specifically must authorize entering into a contract prior to, or in excess of, an appropriation. The Army Corps of Eng'rs' continuing contracts, B-187278, 56 Comp. Gen. 437 (1977); To the Secretary of the Air Force, B-144641, 42 Comp. Gen. 272 (1962).
 - (1) Example: 41 U.S.C. § 11 permits DOD and the Coast Guard to contract without an appropriation for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current fiscal year (FY). See DOD Directive 7220.8; AFR 177-16, Section F; AR 37-1, para. 9-8.
 - (2) Example: 41 U.S.C. § 11a permits the Secretary of the Army to contract for fuel for one year and pay for it with current FY funds or the ensuing year's funds.
 - b. Caveat: General authority to enter into multiyear contracts (10 U.S.C. § 2301(a)(2)) is not an exception, but the specific authority granted by 10 U.S.C. § 2306(g) & (h) is an exception. See DFARS 217.103-1; DLA Multiyear Contract for Storage and Rotation of Sulfadiazine Silver Cream, B-224081, 67 Comp. Gen. 190 (1988) (DLA

lacked authority to execute multiyear contract).

5. Contracts conditioned upon the availability of funds. FAR 32.703-2; AR 37-1, para. 9-51; To the Secretary of the Interior, B-140850, 39 Comp. Gen. 340 (1959); To the Postmaster Gen., B-20670, 21 Comp. Gen. 864 (1942).
 - a. Activities may initiate certain contracting actions prior to an appropriation if the solicitation and contract includes the clause, FAR 52.232-18, Availability of Funds. See To Charles R. Hartgraves, B-235086, Apr. 24, 1991 (unpub.) (award without clause caused an antideficiency violation).
 - b. Requirements and indefinite quantity contracts funded by annual appropriations may extend into the next fiscal year if the agency will order specified minimum quantities in the initial fiscal year and the contract incorporates FAR 52.232-19, Availability of Funds for the Next Fiscal Year. See DFARS 237.106(2)(iv).
 - c. The government may not accept supplies or services under these contracts until the contracting officer has given notice that funds are available.
6. Antideficiency issues.
 - a. A violation of the Purpose Statute, 31 U.S.C. § 1301(a), may cause a violation of 31 U.S.C. § 1341. Department of Labor--Interagency Agreement Between Employment and Training Admin. and Bureau of Int'l Labor Affairs, B-245541, 71 Comp. Gen. 402 (1992); To Bill

Chapter 9

Alexander, B-213137, 63 Comp. Gen. 422 (1984). Obligation of funds for an improper purpose does not create an antideficiency violation if:

- (1) Proper funds were available at the time of the erroneous obligation;
- (2) Proper funds were available continuously after the agency incurred the erroneous obligation; and
- (3) Proper funds were available when the agency discovered the erroneous obligation and corrected it. See AR 37-1, para. 7-9. Cf. AFR 177-16, para. 39.

b. A violation of the "Bona Fide Needs" statute, 31 U.S.C. § 1502, also may result in a violation of 31 U.S.C. § 1341. See AFR 177-16, para. 40c.

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

- d. A court or board of contract appeals may order judgment in excess of an amount available in an appropriation or a subdivision of funds. This is not a violation. Bureau of Land Management, Reimbursement of Contract Disputes Act Payments, B-211229, 63 Comp. Gen. 308 (1984); Availability of funds for payment of intervenor attorney fees, B-208637, 62 Comp. Gen. 692 (1983).
- e. Contracts that include separate charges for failure to exercise options violate the Antideficiency Act. Honeywell Info. Sys., Inc., B-186940, 56 Comp. Gen. 167 (1976); Burroughs Corp., B-186313, 56 Comp. Gen. 142 (1976).
- f. The obligation or expenditure of operations and maintenance funds for construction in excess of \$300,000 may violate 31 U.S.C. § 1341(a). DOD Accounting Manual 7220.9-M, Chapter 21, para. E.4.e; AR 37-1, para. 7-6b. Cf. AFR 177-16, para. 23c.
- g. If the law requires an obligation or expenditure in excess of an appropriation or subdivision of funds, there is no antideficiency violation. Department of Education: Recording of obligations under the Guaranteed Student Loan Program, B-219161, 65 Comp. Gen. 4 (1985) (payments required on student loan guarantees).
- h. Would an unauthorized commitment trigger an antideficiency violation? See AFR 177-16, para. 46. What about an advance of funds to an imprest fund cashier? See Appropriations Accounting for Imprest Fund Advances Issued to Cashiers, B-240238, 70 Comp. Gen. 481 (1991).

Chapter 9

B. Limitation on Voluntary Services. 31 U.S.C. § 1342; AFR 177-16, para. 45g(2); AR 37-1, para. 7-6a(4).

1. 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.).
 - a. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Army's authority to accept servs. from the American Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).
 - b. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). Cf. T. Head & Co. v. Department of Educ., GSBGA No. 10828-ED, 93-1 BCA ¶ 25,241.
2. Examples of voluntary services authorized by law.
 - a. 5 U.S.C. § 593 (agency may accept voluntary services in support of administrative dispute resolution).
 - b. 5 U.S.C. § 3111 (student intern programs).
 - c. 10 U.S.C. § 1588 (military departments may accept voluntary services to 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. § 4541/9538 (Army/Air Force Reserve officer services for training and consultation).
 - f. 33 U.S.C. § 569c (Corps of Engineers may accept voluntary services on civil works projects).
3. Application of the emergency exception. This exception is limited to situations where immediate danger exists. Voluntary Servs. -- Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923) (exception applied). 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 free services from a person who agrees, in writing, to waive entitlement to compensation. Army's authority to accept servs. from the American Assoc. of Retired Persons/Nat'l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.); To the Adm'r of Veterans' Affairs, B-44829, 24 Comp. Gen. 314 (1944); To the Chairman of the Fed. Trade Comm'n, A-23262, 7 Comp. Gen. 810 (1928).
 - 2. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int'l Dev.-

Chapter 9

-waiver of compensation fixed by or pursuant to statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries,; In the matter of waiver of compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm'n, B-66664, 26 Comp. Gen. 956 (1947).

3. Acceptance of gratuitous services may be an improper augmentation of an appropriation if federal employees normally would perform the work, unless a statute authorizes gratuitous services. Compare Community Work Experience Program--State Gen. Assistance Recipients at Fed. Work Sites, B-211079.2, Jan. 2, 1987 (unpub.) (augmentation would occur), with Senior Community Serv. Employment Program, B-222248, Mar. 13, 1987 (unpub.) (augmentation would not occur).

D. Voluntary Creditor Rule. See AFR 177-102, para. 20-1; Air Force Pamphlet (AFP) 110-4, para. 24-15; AR 37-1, para. 20-205.

1. A voluntary creditor is one who uses personal funds to pay a perceived valid obligation of the government.
2. 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).

3. Recoverability of claims. AR 37-1, para. 20-205; Lieutenant Colonel Tommy B. Tompkins, B-236330, Aug. 14, 1989 (unpub.); Claim of Bradley G. Baxter, B-232686, Dec. 7, 1988 (unpub.); Irving M. Miller, B-210986, May 21, 1984 (unpub.); 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. Cf. Use of Imprest Fund to Reimburse Employee for Small Purchase, B-242412, July 22, 1991 (unpub.). Claims are recoverable if:
 - a. The claimant shows a public necessity;
 - b. The underlying expenditure is authorized;
 - c. The claim is for goods or services; but see Reimbursement of Selective Serv. Employee for Payment of Fine, B-239511, 70 Comp. Gen. 153 (1990); and
 - d. The expenditure is not for a personal use item.
- E. Passenger Carrier Use. 31 U.S.C. § 1344; 41 C.F.R. Subparts 101-6.4 and 101-38.3.
1. An agency may expend funds for the maintenance, operation, and repair of passenger carriers only to the extent that the use of passenger carriers is for official purposes. Federal Energy Regulatory Comm'n's Use of Gov't Motor Vehicles and Printing Plant Facilities for Partnership in Educ. Program, B-243862, 71 Comp. Gen. 469 (1992); Use of Gov't vehicles for transp. between home and work, B-210555, 62 Comp. Gen. 438 (1983). Violations of this statute are not antideficiency violations, but significant sanctions do exist. See Felton v. Equal Employment Opportunity Comm'n, 820 F.2d 391 (Fed. Cir. 1987); Campbell v. Department of Health and Human Servs., 40 M.S.P.R. 525 (1989); Gotshall v. Department of Air Force,

Chapter 9

37 M.S.P.R. 27 (1988); Lynch v. Department of Justice, 32 M.S.P.R. 33 (1986).

2. Generally, the statute prohibits domicile-to-duty transportation of appropriated and nonappropriated fund personnel.
3. The agency head may determine that domicile-to-duty transportation is necessary in light of a clear and present danger, emergency condition, or compelling operational necessity. 31 U.S.C. 1344(b)(8).
4. The statute authorizes domicile-to-duty transportation if it is necessary for field work or is essential to safe and efficient performance of intelligence, law enforcement, or protective service duties. 31 U.S.C. § 1344(a)(2).
5. 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.
6. 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, Dec. 8, 1983 (unpub.).
7. Administrative Sanctions. Commanders shall suspend without pay for at least one month any officer or employee who willfully uses or

authorizes the use of a government passenger carrier for unofficial purposes or otherwise violates 31 U.S.C. § 1344. Commanders also may remove violators from their jobs summarily. 31 U.S.C. § 1349(b)

8. Criminal Penalties. Title 31 does not prescribe criminal penalties for unauthorized passenger carrier use. But see UCMJ art. 121 [10 U.S.C. § 121] (misappropriation of government vehicle; maximum sentence is a dishonorable discharge, total forfeiture of pay and allowances, and 2 years confinement); 18 U.S.C. § 641 (conversion of public property; maximum punishment is 10 years confinement and a \$10,000 fine).

VI. SANCTIONS FOR ANTIDEFICIENCY VIOLATIONS.

- A. Adverse Personnel Actions. 31 U.S.C. §§ 1349(a), 1518; AFR 177-16, para. 52; AR 37-1, para. 7-8.

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. Good faith or mistake of fact does not relieve an individual from responsibility for a violation. Factors such as "a heavy workload at year end" or an employee's "past exemplary record" generally are relevant only to determine the appropriate level of discipline, not to determine whether the commander should impose discipline. See AFR 177-16, para. 51c; AR 37-1, para. 7-8.

Chapter 9

- B. Criminal Penalties. 31 U.S.C. §§ 1350, 1519; AFR 177-16, para. 52; AR 37-1, para. 7-8.

-- A knowing and willful violation of the Antideficiency Act is a Class E felony. See 18 U.S.C. § 3359(a)(1)(E). Punishment may include a \$5,000 fine, two years imprisonment, or both. Knowing and willful concealment of a violation is a felony. 18 U.S.C. § 4.

VII. REPORTING AND INVESTIGATING VIOLATIONS. 31 U.S.C. §§ 1351, 1517; OMB Circular A-34, para. 32.1, DOD Directive 7200.1, Enclosure 5, para. Q; AFR 177-16, Section E; AR 37-1, paras. 7-7 and 29-16.

- A. Flash Report. AR 37-1, para. 7-7, requires submission of a flash report within 15 working days of discovery of the violation. The Air Force must issue an interim report within 10 days. AFR 177-16, para. 49a. The report includes:

1. Administrative information;
2. A brief, but comprehensive, statement of known facts; and
3. The anticipated date for submission of a formal report.

B. Investigations.

1. The commander must appoint a board of officers within 30 days of discovery of the alleged violation. The Army conducts investigations per AR 15-6; Air Force investigators must comply with AFR 120-3.

2. Because criminal penalties exist for violations of the Antideficiency Act, investigators must advise responsible individuals of their rights.
3. The rights include those afforded under Article 31, UCMJ, if applicable, and the Fifth Amendment. Additionally, if found responsible, an individual has a right to review the report of investigation and to submit a statement regarding the alleged violation. AFR 177-16, para. 55; AR 37-1, para. 29-16c(12).

C. Establishing Responsibility.

1. Responsibility for a violation is fixed at the moment when the improper activity occurs, e.g., overobligation, overexpenditure, etc. Cf. AR 37-1, para. 7-6k.
2. A responsible party is the person who has authorized or created the overdistribution, obligation, commitment, or expenditure in question. Reports should not name commanders, budget officers, or finance officers merely because of their positions. Any investigation should "lead to a specific determination of the one act that caused the violation, and the one individual who committed the act." DOD Accounting Manual 7220.9-M, Chapter 21, para. E.5.b. Compare AFR 177-16, para. 54e (provisions imply that more than one person may be responsible).
 - a. Generally, the responsible party will be the highest ranking official in the decision making process who had either actual or constructive knowledge of precisely what actions were taken and the impropriety or questionable nature of such actions. Cf. To Dennis P. McAuliffe, B-222048, Feb. 10, 1987 (unpub.).

Chapter 9

- b. There often will be officials who had knowledge of either factor. The person in the best position to prevent the ultimate error, however, is the highest ranking official who was aware of both factors.
- c. If an accounting error triggers a violation, the person who made the accounting error will be responsible, assuming no other official should have detected the mistake. DOD Accounting Manual 7220.9-M, Chapter 21, para. E.4.c.

D. Reports to the President and Congress.

- 1. The head of the agency (Secretary of Defense) must report to the President and Congress violations of 31 U.S.C. § 1341(a), § 1342, or § 1517. OMB Cir. A-34, para. 32.2; DOD Dir. 7200.1, Encl. 5, para. R; AFR 177-16, para. 54c; AR 37-1, paras. 7-6b & 7-7.
- 2. Contents of the report.
 - a. Administrative information;
 - b. Nature of the violation;
 - c. Identification of the responsible individual;
 - d. Cause and circumstances of the violation;
 - e. Administrative discipline imposed;
 - f. Actions taken to correct the violation; and
 - g. Statement of the responsible individual.

VIII. CONTRACTOR RECOVERY WHEN THE ACT IS VIOLATED.

A. Recovery Under the Contract.

1. A contract may be null and void if the contractor knew, or should have known, of a funding limitation. Hooe v. United States, 218 U.S. 322 (1910) (contract funded with specific appropriation). Cf. John Reiner & Co. v. United States, 325 F.2d 438 (Ct. Cl. 1963); Maintenance Serv. & Sales Corp., B-242019, 70 Comp. Gen. 664 (1991).
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, 183 Ct. Cl. 694, 392 F.2d 984 (1968); Anthony P. Miller, Inc. v. United States, 172 Ct. Cl. 60, 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 some 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).

Chapter 9

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

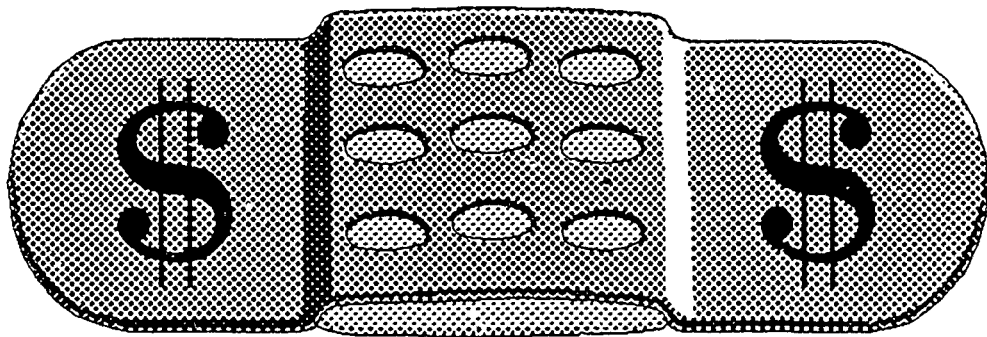
IX. DISCUSSION SCENARIO.

For years, the Army has owned a sewage treatment facility located adjacent to Fort Mojave. Several months ago, the Environmental Protection Agency mandated certain upgrades to the system. Fort Mojave's Engineer obtained funds for the project and forwarded a purchase request to the contracting officer. This document certified that \$70,000 O&M was available for the project. Two months later, the contracting officer awarded an \$82,000 contract to Constructors, Limited. To date, the contractor has received \$40,000 in progress payments. Yesterday, the Engineer learned that, in keeping with the installation closure plan, the Corps of Engineers had conveyed the facility to the State one month before award of the renovation contract. Any problems here?

X. CONCLUSION.

CHAPTER 10

CONTINUING RESOLUTION AUTHORITY STATUTES AND FUNDING GAPS



CHAPTER 10

CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS

I. INTRODUCTION	1
II. DEFINITIONS	1
A. Continuing Resolution Authority (CRA)	1
B. Funding Gap	1
III. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS	2
A. Continued Operations - Potential Antideficiency Act (ADA) Violation	2
B. Continued Operations - Permissible Activities	2
IV. CONTINUING RESOLUTION AUTHORITY STATUTES	7
A. Legal Implications of CRA	7
B. Comparison of CRA Statutes with Appropriations Acts	8
C. Governmental Operations During CRA Statute Periods	9
D. Determining Purpose Under a CRA Statute	13
E. Relationship of CRA Statutes to Other Legislation	13
F. Duration of CRA Statute	14
V. CONCLUSION	15
APPENDIX A: <u>Gladys Noon Spellman</u> , B-197841, March 3, 1980 (unpub)	16
APPENDIX B: ATTORNEY GENERAL OPINION, 25 APRIL 1980	17
APPENDIX C: 1990 Omnibus Budget Reconciliation Amendment of 31 U.S.C. § 1342.	27
APPENDIX D: H.J. Res. 553 (Fiscal Year 1993 CRA).	30

CHAPTER 10

CONTINUING RESOLUTION AUTHORITY AND FUNDING GAPS

I. INTRODUCTION.

II. DEFINITIONS.

A. Continuing Resolution Authority (CRA).

- "An interim appropriation until permanent appropriations are enacted. Authorizes continuation of normal operations at a rate not to exceed the latest congressional action or the previous year's rate and no new starts or expansions to a program." Army Regulation (AR) 37-1, Glossary, Section II, Terms.

B. Funding Gaps.

1. A funding gap may occur under two circumstances:
 - a. When Congress has neither enacted an appropriations act nor passed a continuing resolution; or
 - b. The President vetoes a duly enacted appropriations act or continuing resolution, before 1 October, or at other times during the year when an appropriations act or continuing resolution has expired.

MAJ Steven N. Tomanelli
Fiscal Law Course

Chapter 10

III. GOVERNMENTAL OPERATIONS DURING FUNDING GAPS.

A. Continued Operations - Potential Antideficiency Act (ADA) Violations.

1. The Comptroller General has opined that permitting federal employees to work after the end of one fiscal year and before the enactment of a new appropriations act or a CRA violates the ADA, 31 U.S.C. §§ 1341, 1342. Representative Gladys Noon Spellman, B-197841, March 3, 1980 (unpub.). A copy of this decision is at Appendix A.
2. The Attorney General has opined that absent an appropriations act or a continuing resolution, executive agencies must take immediate steps to cease normal operations. Opinion of the Attorney General, 25 April 1980. A copy of this opinion is at 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 multiple year or no-year appropriations;

- (2) Activities that protect life and property. See, e.g., 31 U.S.C. § 1342, 41 U.S.C § 11; and
 - (3) Activities necessary to begin phase-down of other activities.
- 2. In 1990, Congress amended the ADA, 31 U.S.C. 1342, to restrict significantly the authority of agencies to cite the protection of life and 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. Appendix C.
 - a. Examples of permissible activities:
 - (1) National security activities, including the conduct of foreign relations essential to the safety of life and property (AR 37-1, para. 9-5(1)).
 - (2) Payments and the performance of contract obligations under no-year and multi-year authority, or expenditures from other funds still available for those purposes (5 Op. Off. Legal Counsel 1).
 - (3) Activities considered essential to the protection of life and property, including (31 U.S.C. § 1342):
 - (a) Medical care of inpatients and emergency outpatient care;

Chapter 10

- (b) Activities essential to ensuring continued public health and safety, including safe use of food, drugs, and hazardous materials;
 - (c) Border and coastal protection and surveillance;
 - (d) Protection of federal lands, buildings, waterways, equipment, and other government property;
 - (e) Care of prisoners and other persons in the custody of the United States;
 - (f) Law enforcement and criminal investigations;
 - (g) Emergency and disaster assistance;
 - (h) Activities essential to the preservation of the essential elements of the money and banking system of the United States, including borrowing and tax collection activities of the Treasury;
 - (i) Activities that ensure production of power and maintenance of the power distribution system; and
 - (j) Activities necessary to maintain government owned research property.
- b. DOD provides national security as required by the Constitution. AR 37-1, para. 9-5(1) and AFR 110-4, para. 1-27, provide the following

guidance concerning operations during a funding gap.

- (1) Obligations may continue in the new fiscal year.
- (2) All personnel will continue to report to work, unless otherwise instructed.
- (3) The Defense Finance and Accounting Service (DFAS) will issue detailed guidance on actions to be taken by DOD agencies during funding gaps.

c. AR 37-1, para. 13-6(b) and AFR 110-4, para. 1-26, provide additional details concerning disbursements permitted during funding gaps. The Army and the Air Force may not make disbursements in support of new fiscal year obligations during a funding gap except as set forth in these subparagraphs. Authorized activities for which these agencies may make disbursements during a funding gap include:

- (1) Emergencies involving death or personal hardship;
- (2) Initial health and comfort needs of the Active Army, Army National Guard, and Army Reserve and Air Force counterparts;
- (3) Mission-essential travel;
- (4) PCS travel entitlements;
- (5) Recruitment, retention, and transition of military personnel expenses, including bonuses for reenlistment; and

Chapter 10

- (6) Revolving fund operations, with certain restrictions.

3. Unresolved problems:

- a. Agencies generally cannot predict whether a funding gap will occur or estimate its duration. Consequently, it is difficult for agencies to plan their response.
- b. What does Congress really expect agencies to do. See, e.g., Department of Defense Appropriations Act, 1989, § 8025, Pub. L. No. 100-463.
- c. Personnel disruption varies from agency to agency, but at a minimum, there is lost efficiency due to need to publish shutdown instructions.
- d. Overall lack of guidance.
- e. Dependence on Washington for information, e.g., congressional language in conference reports or lack of availability of CRA statutory language. HQDA and HQ USAF messages provide day-to-day operating instructions.
- f. Efficient operation of government is clearly compromised. See GAO, Government Shutdown: Permanent Funding Lapse Legislation Needed, B-241730 (No. GGD-91-76), June 6, 1991; GAO, Funding Gaps Jeopardize Federal Government Operations, No. PAD-81-31, 3 Mar 1981.

IV. CONTINUING RESOLUTION AUTHORITY STATUTES.

A. Legal Implications of CRA Statutes.

1. If Congress fails to pass and 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 legislation is referred to as a Continuing Resolution Authority statute. It is a statute that has the force and effect of law. Oklahoma v. Weinberger, 360 F. Supp. 724 (W.D. Okla. 1973); Secretary of State - Agency for Int'l Dev., B-152554, December 15, 1970 (unpub.); see also AR 37-1, para. 13-6. The CRA statute pertaining to FY 1993 begins as follows:

-- Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 1993, and for other purposes, namely:

Sec. 101. (a) Such amounts as may be necessary under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in the fiscal year 1992 and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

. . .

Chapter 10

The Department of Defense Appropriations Act, 1993, notwithstanding section 504(a)(1) of the National Security Act of 1947;

. . .

The Military Construction Appropriations Act, 1993;" H.J. Res. 552 (hereinafter the FY 1993 CRA).

2. A CRA statute provides budget authority:
 - a. Until an appropriations act replaces it; or
 - b. For an entire fiscal year, if no appropriations act is passed.
- Sec. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) the enactment of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 5, 1992, whichever first occurs. FY 1993 CRA.

B. Comparison of CRA Statutes with Appropriations Acts.

1. Appropriations acts appropriate specified sums of money.
2. CRA statutes normally appropriate "such amounts as may be necessary" for continuing projects or activities at a certain "rate for operations."

C. Governmental Operations During CRA Statute Periods.

1. CRA statutes frequently authorize operations at the "current rate." CRA statutes generally attempt to limit expansion of existing programs and rates of production.
- Sec. 102. No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for new production of items not funded for productions in fiscal year 1992 or prior years, for the increase in production rates above those sustained with fiscal year 1992 funds, or to initiate, resume, or continue any project, activity, operation, or organization which are defined as any project, subproject, activity, program element, and subprogram within a program element and for investment items are further defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item which includes a program element and subprogram element within an appropriation account, for which appropriations, funds, or other authority were not available during the fiscal year 1992, except projects, activities, operations, or organizations relating to "Operation Desert Shield/ Desert Storm": Provided, That no appropriations or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later. FY 1993 CRA.
2. The term "current rate," as used in CRA statutes, indicates the level of spending that Congress desires.
 - a. The current rate is equivalent to the amount of funds which were available for obligation for an activity during the fiscal year

previous to the one for which the CRA statute is enacted.

- b. When the program in question has been 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-194063.2, 58 Comp. Gen. 530 (1979). However, 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 CRA equals 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. CETA, supra; National Comm. for Student Financial Assistance-Fiscal Year 1982 Funding Level, B-206571, 61 Comp. Gen. 473 (1982).
3. CRA statutes use the "current rate" to establish the upper limit at which agencies may continue to fund a project or activity.
- Sec. 101(a). [W]henever the amount which would be made available or the authority which would be granted in these Acts is greater than that which would be available or granted under current operations, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate. FY 1993 CRA.
4. Special problems arise when the House version of an Act funds a project or activity at a different rate than the Senate version or when one version omits a project or activity entirely. In either situation, expenditures must not exceed the "current rate."

- Sec. 101(b). Whenever the amount which would be made available or the authority which would be granted under an Act listed in this section as passed by the House as of October 1, 1992, is different from that which would be available or granted under such Act as passed by the Senate as of October 1, 1992, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate or the rate permitted by the action of the House or the Senate, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145; Provided, That where an item is included in only one version of an Act as passed by both Houses as of October 1, 1992, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-15 (emphasis added). FY 1993 CRA.
5. Similar guidance is provided when only the House has passed a version of an appropriations Act as of 1 October 1992.
- Sec. 101(c). Whenever an Act listed in this section has been passed by only the House as of October 1, 1992, the pertinent project or activity shall be contained under the appropriation, fund, or authority granted by the House, at a rate for operations not exceeding the current rate or the rate permitted by the action of the House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145: Provided, That where an item is funded in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145 and not included in the version passed by the House as of October 1, 1992, the pertinent project of activity shall be continued under the appropriation, fund, or authority granted by applicable appropriations Acts for the fiscal year 1992 or in Public Law

Chapter 10

102-145, at a rate for operations not exceeding the current rate and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145 (emphasis added). FY 1993 CRA.

6. OMB apportions the funds appropriated by CRA statutes. 31 U.S.C. § 1512; AR 37-1, para. 6-9(b); AFR 177-16, para. 43(c). However, agencies are not required to comply with the time limitations concerning apportionments prior to using CRA appropriations and funds.
- Sec. 110. Appropriations and funds made available by or authority granted pursuant to the joint resolution may be used without regard to the time limitations for submission and approval of apportionments set forth in section 1513 of title 31, United States Code, but nothing herein shall be construed to waive any other provision of law governing the apportionment of funds. FY 1993 CRA.
7. CRA statutes appropriate funds necessary to liquidate debts that become due during the CRA period, based on validly executed contracts of a previous year, e.g., multiyear contracts. See AFR 110-4, para. 1-25.
8. Obligations incurred under CRA statutes remain valid even if the appropriations finally passed by Congress are less than the amounts authorized by the CRA statute. Treasury Withdrawal of Appropriation Warrants for Programs Operating Under Continuing Resolution, 62 Comp. Gen. 9 (1982); Staff Sergeant Frank D. Carr, USMC-Transferred Service Member-Dislocation Allowance, 67 Comp. Gen. 474 (1988).

D. Determining Purpose Under a CRA Statute.

1. CRA statutes provide interim funding for projects or activities conducted in the prior fiscal year. In determining whether a given program or activity is covered by the CRA statute the Comptroller General may look to the total funds available for obligation in the prior year and the level of funding provided in the prior year's appropriation. Special Defense Acquisition Fund, B-214236, 66 Comp. Gen. 484 (1987). Generally, the scope of a CRA statute's applicability is quite broad.

-- Sec. 107. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity during the period for which funds are available under this joint resolution. FY 1993 CRA.

2. Alternatively, a CRA statute may cover a specific activity. The Comptroller General has looked to whether the activity was authorized or carried out in the previous year. See Chairman, Nat'l Advisory Council on Extension and Continuing Educ., B-169472, 52 Comp. Gen. 270 (1972).

3. Generally, no new starts are permitted during a CRA period. AR 37-1, para. 9-5(k); AFR 177-16, para. 43.

-- Sec. 104. No appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during the fiscal year 1992. FY 1993 CRA.

E. Relationship of CRA Statutes to Other Legislation.

1. A CRA statute may refer to budget estimates or other legislation. Conflicts between the CRA statute and these other documents should be

Chapter 10

resolved in favor the CRA statute because it is a later expression of Congressional intent.

2. Specific inclusion of a program in a CRA statute provides authorization and funding to continue the program despite expiration of authorizing legislation. See Authority to Continue Domestic Food Programs Under Continuing Resolution, B-176994, 55 Comp. Gen. 289 (1975).
3. When the applicable appropriations act becomes law, expenditures made pursuant to the CRA statute must be charged against the appropriations act.
- Sec. 108. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law. FY 1993 CRA.

F. Duration of CRA Statute.

1. A CRA statute remains in effect until:
 - a. Congress enacts a regular appropriation;
 - b. A fixed cut-off date; or
 - c. The end the fiscal year. When a CRA statute appropriates a full annual amount of funding it is referred to as an omnibus CRA.
- Sec. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until (a)

enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) the enactment of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 5, 1992, whichever first occurs." FY 1993 CRA.

V. CONCLUSION.

Chapter 10

APPENDIX A: Gladys Noon Spellman, B-197841, March 3, 1980
(unpub.)

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FLITE UNPUB. U. G. DECISIONS - SEQUENCED C. DATE AND B-NUMBER. 1955 TO PRESENT

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B-197841 L/M, MAR 3, 1980

HEADNOTES-UNAVAILABLE
PRECIS-UNAVAILABLE

GLADYS MOON SPELLMAN, HOUSE OF REPRESENTATIVES:

"YOU HAVE REQUESTED OUR INTERPRETATION OF SECTION 665(A) OF TITLE 31 OF THE UNITED STATES CODE, PART OF THE SO-CALLED 'ANTI-DEFICIENCY ACT.' SPECIFICALLY, YOU ASKED WHETHER UNDER THIS ACT, AN AGENCY CAN LEGALLY PERMIT ITS EMPLOYEES TO COME TO WORK AFTER THE EXPIRATION OF THE AGENCY'S APPROPRIATION FOR ONE FISCAL YEAR AND PRIOR TO THE ENACTMENT OF EITHER A REGULAR APPROPRIATION OR A CONTINUING RESOLUTION APPROPRIATING FUNDS FOR THE SUBSEQUENT FISCAL YEAR.

FOR THE REASONS INDICATED BELOW, IT IS OUR OPINION THAT ANY SUPERVISORY OFFICER OR EMPLOYEE, INCLUDING THE HEAD OF AN AGENCY, WHO DIRECTS OR PERMITS AGENCY EMPLOYEES TO WORK DURING ANY PERIOD FOR WHICH THE CONGRESS HAS NOT ENACTED AN APPROPRIATION FOR THE PAY OF THESE EMPLOYEES VIOLATES THE ANTI-DEFICIENCY ACT.

SECTION 665(A) OF TITLE 31 OF THE UNITED STATES CODE PROVIDES:

"NO OFFICER OR EMPLOYEE OF THE UNITED STATES SHALL MAKE OR AUTHORIZE AN EXPENDITURE FROM OR CREATE OR AUTHORIZE AN OBLIGATION UNDER ANY APPROPRIATION OR FUND IN EXCESS OF THE AMOUNT AVAILABLE THEREIN; NOR SHALL ANY SUCH OFFICER OR EMPLOYEE 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."

AS WE STATED AT 42 COMP. GEN. 272, 275 (1962), THIS AND OTHER SIMILAR 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 EXPENDITURES 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 OF 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 ..."

AS APPLICABLE TO YOUR INQUIRY, SECTION 665(A) PROHIBITS ANY OFFICER OR EMPLOYEE, UNLESS SPECIFICALLY AUTHORIZED BY STATUTE, FROM INCURRING ANY OBLIGATION ON THE PART OF THE UNITED STATES TO PAY MONEY FOR ANY PURPOSE PRIOR TO THE ENACTMENT OF AN APPROPRIATION FOR THAT PURPOSE.

WE ARE AWARE OF NO STATUTE WHICH PERMITS FEDERAL AGENCIES TO INCUR OBLIGATIONS FOR THE PAY OF EMPLOYEES IN THE ABSENCE OF AN APPROPRIATION FOR THAT PURPOSE. THEREFORE, THE "UNLESS" CLAUSE OF SECTION 665(A) IS NOT APPLICABLE.

FOR THE PURPOSES OF YOUR INQUIRY, WE SHALL ASSUME THAT EACH OF THE AGENCY'S EMPLOYEES HAS BEEN PROPERLY APPOINTED TO AN AUTHORIZED POSITION, HAS TAKEN THE OATH OF OFFICE, HAS ENTERED ON DUTY, AND HAS EXECUTED THE AFFIDAVITS CONCERNING LOYALTY, STRIKING, AND PURCHASE OF OFFICE REQUIRED BY STATUTE. UNDER THESE CIRCUMSTANCES, AN EMPLOYEE WHO REPORTS FOR WORK UNDER THE DIRECTION OR WITH THE CONSENT OF HIS OR HER SUPERVISOR IS ENTITLED TO BE PAID FOR THE TIME WORKED, AND THE UNITED STATES IS LEGALLY BOUND TO PAY THE EMPLOYEE. THE ENTITLEMENT OF THE EMPLOYEE AND THE LIABILITY OF THE GOVERNMENT EXIST INDEPENDENTLY OF ANY APPROPRIATION ALTHOUGH, OF COURSE, FUNDS MAY NOT BE DISBURSED TO PAY THE EMPLOYEE UNLESS AN APPROPRIATION FOR THAT PURPOSE IS ENACTED. CF. *STRONG V. UNITED STATES*, 60 CT. CL. 627, 630 (1925); *COLLINS V. UNITED STATES*, 15 CT. CL. 22, 36 (1879).

IT FOLLOWS THAT IN PERMITTING EMPLOYEES TO WORK DURING A PERIOD OF EXPIRED APPROPRIATIONS, A SUPERVISORY OFFICER OR EMPLOYEE INCURS AN OBLIGATION ON BEHALF OF THE GOVERNMENT TO PAY THE SALARIES OF THESE EMPLOYEES FOR THE PERIOD OF TIME WORKED. SINCE THERE ARE NO FUNDS AVAILABLE AT THE TIME THE OBLIGATION WAS INCURRED, HE HAS VIOLATED THE ANTI-DEFICIENCY ACT.

IT MAKES NO DIFFERENCE LEGALLY THAT SOME OR ALL OF THE EMPLOYEES INVOLVED ARE WILLING TO WORK WITHOUT PAY, TAKING A CHANCE THAT THE CONGRESS WILL EVENTUALLY RESCUE THE AGENCY BY ENACTING AN APPROPRIATION TO COVER THE DEFICIENCY OBLIGATIONS INCURRED. SUBSECTION (B) OF SECTION 665 WAS ENACTED PRECISELY TO COVER THIS KIND OF SITUATION. IT PROVIDES:

"NO OFFICER OR EMPLOYEE OF THE UNITED STATES SHALL ACCEPT VOLUNTARY SERVICE FOR THE UNITED STATES OR EMPLOY PERSONAL SERVICE IN EXCESS OF THAT AUTHORIZED BY LAW, EXCEPT IN CASES OF EMERGENCY

INVOLVING THE SAFETY OF HUMAN LIFE OR THE PROTECTION OF PROPERTY."

IN THE ABSENCE OF EXPRESS STATUTORY AUTHORITY TO THE CONTRARY, WE HAVE HELD THAT UNLESS THERE IS AN AGREEMENT IN WRITING THAT THE PERSON RENDERING THE SERVICES DOES SO GRATUITOUSLY (A TERM NOT NECESSARILY SYNONYMOUS WITH "VOLUNTARILY") WITH NO EXPECTATION OF EVER BEING PAID, ACCEPTANCE OF SUCH SERVICES IS A VIOLATION OF SECTION 665(B). SEE 26 COMP. GEN. 956 (1947); 7 COMP. GEN. 810, 811 (1928). A VIOLATION OF EITHER SUBSECTION SUBJECTS THE OFFICIAL COMMITTING THE VIOLATION TO THE ADMINISTRATIVE OR POSSIBLY EVEN CRIMINAL PENALTIES OF SECTION 665(C)(1).

DURING A PERIOD OF EXPIRED APPROPRIATIONS, THE ONLY WAY THE HEAD OF AN AGENCY CAN AVOID VIOLATING THE ANTI-DEFICIENCY ACT IS TO SUSPEND THE OPERATIONS OF THE AGENCY AND INSTRUCT EMPLOYEES NOT TO REPORT TO WORK UNTIL AN APPROPRIATION IS ENACTED.

HOWEVER, WE DO NOT BELIEVE THAT THE CONGRESS INTENDS THAT FEDERAL AGENCIES BE CLOSED DURING PERIODS OF EXPIRED APPROPRIATIONS. FOR EXAMPLE, AT THE START OF THE PERIOD OF EXPIRED APPROPRIATIONS AT THE BEGINNING OF THE CURRENT FISCAL YEAR, SENATOR MAGNUSON, THE CHAIRMAN OF THE SENATE COMMITTEE ON APPROPRIATIONS, CITED WITH APPROVAL A MEMORANDUM TO EMPLOYEES FROM GAO'S DIRECTOR OF GENERAL SERVICES AND CONTROLLER. SENATOR MAGNUSON REQUESTED THAT THE MEMORANDUM BE PRINTED IN THE CONGRESSIONAL RECORD AS A GUIDE TO OTHER AGENCIES. THE MEMORANDUM BEGAN AS FOLLOWS:

"EVEN THOUGH CONGRESS HAS NOT YET PASSED AN FY 1980 GAO APPROPRIATION OR CONTINUING RESOLUTION, WE DO NOT BELIEVE THAT IT IS THE INTENT OF CONGRESS THAT GAO CLOSE DOWN UNTIL AN APPROPRIATE MEASURE HAS BEEN PASSED." (125 CONG. REC. S13784 (DAILY ED., OCTOBER 1, 1979)).

FURTHER, IN ENACTING A CONTINUING RESOLUTION AFTER THE START OF A FISCAL YEAR, THE CONGRESS GENERALLY MAKES IT EFFECTIVE RETROACTIVE TO THE BEGINNING OF THE FISCAL YEAR, AND INCLUDES LANGUAGE RATIFYING OBLIGATIONS INCURRED PRIOR TO THE RESOLUTION'S ENACTMENT. FOR EXAMPLE, THE FIRST FISCAL YEAR 1980 CONTINUING RESOLUTION, PUBLIC LAW 96-86, PROVIDED AS FOLLOWS IN SECTION 117:

"ALL OBLIGATIONS INCURRED IN ANTICIPATION OF THE APPROPRIATIONS AND AUTHORITY PROVIDED IN THIS JOINT RESOLUTION ARE HEREBY RATIFIED AND CONFIRMED IF OTHERWISE IN ACCORDANCE WITH THE PROVISIONS OF THE JOINT RESOLUTION."

IT THUS APPEARS THAT THE CONGRESS EXPECTS THAT THE VARIOUS AGENCIES OF THE GOVERNMENT WILL CONTINUE TO OPERATE AND INCUR OBLIGATIONS DURING A PERIOD OF EXPIRED APPROPRIATIONS.

DESPITE WHAT WE PERCEIVE AS THE INTENT OF CONGRESS THAT FEDERAL AGENCIES CONTINUE TO OPERATE DURING PERIODS OF EXPIRED APPROPRIATIONS, SUCH OPERATIONS LEGALLY PRODUCE WIDESPREAD VIOLATIONS OF THE ANTI-DEFICIENCY ACT. FOR THIS REASON, WE RECENTLY COMMENTED FAVORABLY ON THE GENERAL INTENT OF BOTH H.R. 5995 AND H.R. 5704, IN BILL REPORTS TO THE CHAIRMAN OF YOUR COMMITTEE. SEE B-197584, FEBRUARY 5, 1980; B-197059, FEBRUARY 5, 1980.

APPENDIX B: ATTORNEY GENERAL OPINION, 25 APRIL 1980.



Office of the Attorney General
Washington, D. C. 20530

April 25, 1980

The President
The White House
Washington, D.C. 20500

My Dear Mr. President:

You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980 opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer or employee of the United States to:

involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations. 1/ On its face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times. 2/ 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 Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms. 3/

1/ An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. See 15 Op. A.G. 209 (1877). See also 25 U.S.C. § 99 and 31 U.S.C. § 668.

2/ Act of March 3, 1905, Ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, Ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, Ch. 896, § 1211, 64 Stat. 765; Pub. L. 85-170, § 1401, 71 Stat. 440 (1957); Pub. L. 93-198, § 421, 87 Stat. 789 (1973); Pub. L. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. 93-618, § 175(a)(2), 88 Stat. 2011 (1975).

3/ The prohibition against incurring obligations in excess of appropriations was enacted in 1870, amended slightly in 1905 and 1906, and reenacted in its modern version in 1950. The relevant legislative debates occur at Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-298, 1623-624 (1906); 96 Cong. Rec. 6725-731, 6835-837, 11369-370 (1950).

The apparent mandate of the Antideficiency Act notwithstanding, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956. 4/ On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse. 5/ However, the legislative history of these provisions does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations. 6/ Neither are we aware that the Executive branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year. 7/ Various agencies of the Executive

4/ In 1954 and 1956, Congress enacted temporary appropriations measures later than July 1, the start of fiscal years 1955 and 1957. Act of July 6, 1954, ch. 460, 68 Stat. 448; Act of July 3, 1956, ch. 516, 70 Stat. 496. In 1952, Congress enacted, two weeks late, supplemental appropriations for fiscal year 1953 without having previously enacted a temporary appropriations measure. Act of July 15, 1952, ch. 758, 66 Stat. 637.

5/ Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

6/ In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor.

In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954).

In 1956, Congress's temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

7/ Pub. L. 94-473, 90 Stat. 2055 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-487, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

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 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, grantmaking, nonemergency travel, and other nonessential obligations.

When the General Accounting Office suffered a lapse in its own appropriations last October, the Director of General Services and Controller issued a memorandum, referred to in the Comptroller General's opinion, 8/ indicating that GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations." Employees could continue to work, however, because of the Director's determination that it was not "the intent of Congress that GAO close down."

In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

First, as a matter of logic, any "rule of thumb" excepting employee pay obligations from the Antideficiency Act would have to rest on a conclusion, like that of the Comptroller General, that such obligations are unlawful, but also authorized. I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act.

8/ The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

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 eventual appropriations. 9/ Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the Government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the apparent authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing legal authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) [remarks of Rep. Dawes].

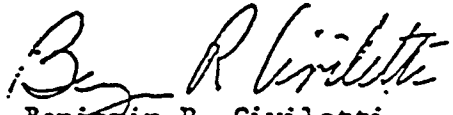
9/ Pub. L. 94-473, § 108, 90 Stat. 2066 (1976); Pub. L. 95-130, § 108, 91 Stat. 1154 (1977); Pub. L. 95-482, § 108, 92 Stat. 1605 (1978); Pub. L. 96-86, § 117, 93 Stat. 662 (1979).

Having interpreted the Antideficiency Act, I would like to outline briefly the legal ramifications of my interpretation. It follows first of all that, on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted. 10/

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

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.

Very respectfully,


Benjamin R. Civiletti
Attorney General

10/ See 21 Op. A.G. 288 (1896).

**APPENDIX C: 1990 OMNIBUS BUDGET RECONCILIATION ACT
AMENDMENT OF 31 U.S.C. § 1342.**

31 U.S.C. § 1342. Limitations on voluntary services

An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of the government the suspension of which would not imminently threaten the safety of human life or the protection of property.

Chapter 10

**APPENDIX D: H.J. RES. 553, A JOINT RESOLUTION MAKING
CONTINUING APPROPRIATIONS FOR THE FISCAL YEAR 1993, AND FOR
OTHER PURPOSES.**

H.J. Res. 553

One Hundred Second Congress of the United States of America
AT THE SECOND SESSION

Begun and held at the City of Washington on Friday, the
third day of January, one thousand nine hundred and ninety-two

Joint Resolution

Making continuing appropriations for the fiscal year 1993, and
for other purposes.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 1993, and for other purposes, namely:

Sec. 101. (a) Such amounts as may be necessary under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145 for continuing projects or activities including the costs of direct loans and loan guarantees (not otherwise specifically provided for in this joint resolution) which were conducted in the fiscal year 1992 and for which appropriations, funds, or other authority would be available in the following appropriations Acts:

The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, notwithstanding section 15 or the State Department Basic Authorities Act of 1956, section 201 of Public Law 99-64 and section 701 of the United States Information and Educational Exchange Act of 1948;

The Department of Defense Appropriations Act, 1993, notwithstanding section 504(a)(1) of the National Security Act of 1947;

The District of Columbia Appropriations Act, 1993;

The Energy and Water Development Appropriations Act, 1993;

The Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993, notwithstanding section 10 of Public Law 91-672 and section 15(a) of the State Department Basic Authorities Act of 1956;

The Department of the Interior and Related Agencies Appropriations Act, 1993;

The Department of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act, 1993;

The Legislative Branch Appropriations Act, 1993;

The Military Construction Appropriations Act, 1993;

The Treasury, Postal Service, and General Government Appropriations Act, 1993; and

The Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act,

1993:

Provided, That whenever the amount which would be made available or the authority which would be granted in these Acts is greater than that which would be available or granted under current operations, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate.

(b) Whenever the amount which would be made available of the authority which would be granted under an Act listed in this section as passed by the House as of October 1, 1992, is different from that which would be available or granted under such Act as passed by the Senate as of October 1, 1992, the pertinent project or activity shall be continued at a rate for operations not exceeding the current rate or the rate permitted by the action of the House or the Senate, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145; Provided, That where an item is included in only one version of an Act as passed by both Houses as of October 1, 1992, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House, but at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-15.

(c) Whenever an Act listed in this section has been passed by only the House as of October 1, 1992, the pertinent project or activity shall be contained under the appropriation, fund, or authority granted by the House, at a rate for operations not exceeding the current rate or the rate permitted by the action of the House, whichever is lower, and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145: Provided, That where an item is funded in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145 and not included in the version passed by the House as of October 1, 1992, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145, at a rate for operations not exceeding the current rate and under the authority and conditions provided in applicable appropriations Acts for the fiscal year 1992 or in Public Law 102-145.

Sec. 102. No appropriation or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used for new production of items not funded for productions in fiscal year 1992 or prior years, for the increase in production rates above those sustained with fiscal year 1992 funds, or to initiate, resume, or continue any project, activity, operation, or organization which are defined as any project, subproject, activity, program element, and subprogram within a program element and for investment items are further defined as a P-1 line item in a budget activity within an appropriation account and an R-1 line item which includes a program element and subprogram element within an appropriation account, for which

appropriations, funds, or other authority were not available during the fiscal year 1992, except projects, activities, operations, or organizations relating to "Operation Desert Shield/Desert Storm": Provided, That no appropriations or funds made available or authority granted pursuant to section 101 for the Department of Defense shall be used to initiate multi-year procurements utilizing advance procurement funding for economic order quantity procurement unless specifically appropriated later.

Sec. 103. Appropriations made by section 101 shall be available to the extent and in the manner which would be provided by the pertinent appropriations Act.

Sec. 104. No appropriation or funds made available or authority granted pursuant to section 101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during the fiscal year 1992.

Sec. 105. No provision which is included in an appropriations Act enumerated in section 101 but which was not included in the applicable appropriations Act for fiscal year 1992 or in Public Law 102-145, and which by its terms is applicable to more than one appropriation, fund, or authority shall be applicable to any appropriation, fund, or authority provided in this joint resolution.

Sec. 106. Unless otherwise provided for in this joint resolution or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this joint resolution shall be available until (a) enactment into law of an appropriation for any project or activity provided for in this joint resolution, or (b) the enactment of the applicable appropriations Act by both Houses without any provision for such project or activity, or (c) October 5, 1992, whichever first occurs.

Sec. 107. Appropriations made and authority granted pursuant to this joint resolution shall cover all obligations or expenditures incurred for any program, project, or activity are available under this joint resolution.

Sec. 108. Expenditures made pursuant to this joint resolution shall be charged to the applicable appropriation, fund, or authorization whenever a bill in which such applicable appropriation, fund, or authorization is contained is enacted into law.

Sec. 109. No provision in any appropriations Act for the fiscal year 1993 referred to in section 101 of the joint resolution that makes the availability of any appropriation provided therein dependent upon the enactment of additional authorizing or other legislation shall be effective before the date set forth in section 106(c) of this joint resolution.

Sec. 110. Appropriations and funds made available by or authority granted pursuant to the joint resolution may be used without regard to the time limitations for submission and approval of apportionments set forth in section 1513 of title 31, United States Code, but nothing herein shall be construed to waive any other provision of law governing the apportionment of funds.

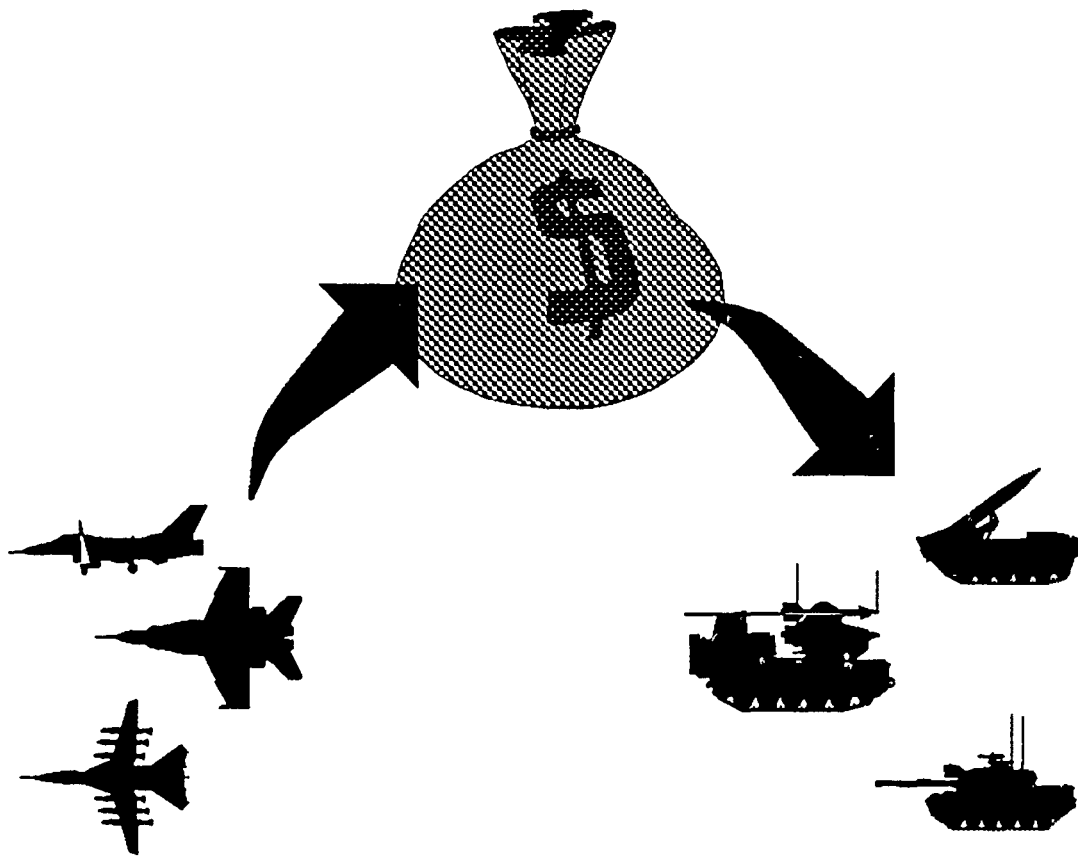
Sec. 111. Notwithstanding any other provision of this joint resolution, except section 106, or any other law, each agency, office, and instrumentality of the District of Columbia government, except the District of Columbia Courts, shall furlough each employee of the respective agency, office, or instrumentality for one day in each month of the fiscal year ending September 30, 1993, or a proportional number of hours for part-time employees.

Sec. 112. Notwithstanding any other provision of this joint resolution, except section 106, or any other law, no employee of any agency, office, or instrumentality of the District of Columbia government shall receive within-grade salary increases during the fiscal year ending September 30, 1993, and no time during the fiscal year ending September 30, 1993, shall accrue toward the waiting period for advancement to the following rate within the grade.

Sec. 113. Notwithstanding any other provision of this joint resolution, except section 106, activities funded in the Federal Communications Commission's Salaries and Expenses account shall be maintained at the current rate of operations.

CHAPTER 11

REPROGRAMMING



CHAPTER 11
REPROGRAMMING

I.	INTRODUCTION	1
II.	REFERENCES	1
III.	DEFINITIONS	1
	A. Reprogramming Defined	1
	B. Transfer Defined	2
IV.	REPROGRAMMING DISTINGUISHED FROM TRANSFERS	2
	A. Transfers	2
	B. Reprogrammings	3
V.	REPROGRAMMING TYPES	5
	A. Reprogramming Actions Requiring Prior Congressional Approval	5
	B. Reprogramming Actions That Require Congressional Notification	6
	C. "Internal" Reprogrammings	7
	D. Below Threshold Repprogrammings	8
	E. Letter Notifications	8
	F. Tactical Intelligence and Related Activities (TIARA) Repprogrammings	8
	G. Special Operations Forces (SOF) Reprogramming	9
VI.	MILITARY CONSTRUCTION REPROGRAMMING	10
	A. Authority	10
	B. Restrictions on Repprogrammings	11

VII. CONCLUSION	12
APPENDIX A.	13

CHAPTER 11
REPROGRAMMING

I. INTRODUCTION.

II. REFERENCES.

- A. Dep't of Defense Directive 7250.5, Reprogramming of Appropriated Funds (9 January 1980).
- B. Dep't of Defense Instruction 7250.10, Implementation of Reprogramming of Appropriated Funds (10 January 1980).
- C. Dep't of Defense Instruction 7250.14, Reprogramming of Military Construction and Family Housing Appropriated Funds (May 7, 1986).
- D. Dep't of Defense Appropriations Act (Annually).
- E. Dep't of Defense Manual 7110-1-M, Budget Guidance Manual (May 1990).
- F. Dep't of the Army, Reprogramming Directive (November 1989).

III. DEFINITIONS.

- A. Reprogramming Defined. Reprogramming is the use of funds in an appropriations account for purposes other than those contemplated at the time of the appropriation. Dep't of Defense Manual 7110-1-M, Budget Guidance Manual, ch. 113, Budget Concepts (May 1990); AR 37-1, para. 6-7; AFR 172-1, para. 2-5.

MAJ Michael K. Cameron
Fiscal Law Course

Chapter 11

- B. **Transfer Defined.** A transfer is a legal transaction that moves appropriated funds from one appropriation account with the treasury to another account. Dep't of Defense Manual 7110-1-M, Budget Guidance Manual, ch. 113, Budget Concepts (May 1990); AR 37-1, par. 6-10; AFR 172-1, para. 2-4.

IV. REPROGRAMMING DISTINGUISHED FROM TRANSFERS.

- A. **Transfers.** GAO, Principles of Federal Appropriations Law, 2-20 (2d Ed., Vol. 1, July 1992).

1. Shifts money between appropriations accounts.
2. There are three types of transfers.
 - a. Transfers between accounts within same agency, e.g., Operation and Maintenance to Military Personnel.
 - b. Transfers between agencies, e.g., Department of Defense to Department of State.
 - c. Transfer within accounts, e.g., where Congress has enacted legal subdivisions of funds (line Items) within an account.
3. Requires statutory authority. 31 U.S.C. § 1532.
 - a. Transfers are prohibited without statutory authority; this rule applies to all types of transfers.

- (1) Congress provides general transfer authority in each appropriations acts.
- (2) See Department of Defense Appropriations Act, 1993, Pub. L. No. 102-396, §§ 9006-9007, 9014 , 106 Stat. 1876, 1901-1903.
- (3) See Department of Defense Appropriations Act, 1992, Pub. L. No. 102-172, 105 Stat. 1169, authorizing the transfer of \$60,000 from the MX Missile Program in "Missile Procurement, Air Force, 1991/1993" to the "Drug Interdiction and Counter-Drug Activities, Defense account."

- b. Rule applies even though the transfer is intended as a temporary expedient and the agency contemplates reimbursement. To the Secretary of Commerce, B-129401, November 9, 1956, 36 Comp. Gen. 386.
- c. An unauthorized transfer also violates 31 U.S.C. § 1301(a) and would constitute an unauthorized augmentation of the receiving appropriation.
- d. The exception. 31 U.S.C. § 1534 authorizes an agency to charge temporarily one appropriation for an expenditure benefiting another appropriation of the same agency.

B. Reprogrammings. GAO, Principles of Federal Appropriations Law, 2-20 (2d Ed., Vol. 1, July 1992).

1. Reprogramming shifts money within an appropriations account.
 - a. There is no change in the total amount available in the appropriation account.

Chapter 11

- b. It is not a request for additional funds, rather, reprogramming is a reapplication of funds.
- 2. When Congress merely 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 as to how the funds should or are expected to be spent. LTV Aerospace Corp., B-183851, October 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203.
- 3. Subdivisions of an appropriation contained in the agency's budget request or in committee reports are not legally binding upon the department or agency concerned unless they are specified in the appropriations act itself. In the matter of the Newport News Shipbldg and Dry Dock Co., B-184830, February 27, 1976, 55 Comp. Gen. 812.
- 4. Reprogramming is an informal process.
 - a. Still must comply with the requirements of 31 U.S.C. § 1301.
 - b. Check appropriations act for statutory prohibitions to proposed reprogramming.
- 5. Items eligible for reprogramming. Actions may only be submitted for higher priority requirements based on unforeseen military requirements than those for which originally appropriated. DODI 7250.10, Implementation of Reprogramming of Appropriated Funds, para. C.2. (10 January 1980). See also the general provisions of the authorization and appropriation acts for items eligible for reprogramming.

6. Items ineligible for reprogramming. DODD 7110-1-M, pt. IV, sec. 3, chapter 431; AFR 172-1, para 2-5c(4) and (5). Actions may not be submitted for:
 - a. Items that were specifically denied by Congress.
 - b. The application of funds to any new program, new line, or increase in quantity or enlargement of scope of existing approved programs after the first year of availability of an appropriation.

V. REPROGRAMMING TYPES.

- A. Reprogramming Actions Requiring Prior Congressional Approval. DODI 7250.10, sec. E (10 January 1980); DOD Manual 7110-1-M, sec. 431.4.A (May 1990); AFR 172-1, vol. I, para. 2-5(c)(1).
 1. Any reprogramming that makes use of general transfer authority.
 - a. There are three types of transfer authority.
 - (1) Specific transfer authority.
 - (2) Ceiling on total transfer authority.
 - (3) Hybrid.

Chapter 11

2. Any reprogramming that involves an item designated as a Congressional interest item.
3. Any reprogramming that increases the quantity of a procurement line item for which Congress authorizes under 10 U.S.C. § 114(a). See Appendix A.

B. Reprogramming Actions That Require Congressional Notification. DODI 7250.10, sec. F (10 January 1980); DOD Manual 7110-1-M, sec. 431.4.A (May 1990).

1. Any reprogramming that involves moving funds within an appropriation above the threshold listed below.
 - a. Cumulative increases in a budget activity¹ of \$10 million for Military Personnel and Operations & Maintenance, e.g., moving funds out of the permanent change of station account into the pay account.
 - b. Cumulative increase of \$10 million in a procurement line item or creation of a new procurement line item of \$2 million or more, or costing \$10 million or more within the first 3 years, e.g., increasing the funding level for the carrier replacement program.

¹Budget activities are defined as categories within each appropriation and fund account which identify the purposes, projects, or types of activities financed by the appropriation or fund. Dep't of Defense Manual 7110-1-M, Budget Guidance Manual, ch. 113, Budget Concepts (May 1990).

- c. Cumulative increase of \$4 Million in an RDT&E program, or a new RDT&E program² of \$2 million or more, or costing \$10 million or more within the first 3 years, e.g., increases in the Ship Self-Development program.

C. "Internal" Reprogrammings. DODI 7250.10, sec. H (10 January 1980); DOD Manual 7110-1-M, sec. 431.4.B (May 1990).

1. Are actions involving a reclassification or realignment of funds within budget activities or within budget line items/program elements.
2. While certain increases in program elements totals are considered "reprogrammings" under DOD Instruction 7250.10., funding changes within program elements are not regarded as "reprogramming." The Honorable Roy Dyson, House of Representatives, B-220113, February 28, 1986, 65 Comp. Gen. 360.
3. Are not subject to dollar thresholds.
4. Do not require congressional prior approval or notification, but are approved by Comptroller, Office of the Secretary of Defense.

²A new program is defined as any new program which has not been justified previously to congress.

Chapter 11

- D. Below Threshold Reprogrammings. DODI 7250.10, sec. I, para. 2 (10 January 1980); DOD Manual 7110-1-M, sec. 431.8. (May 1990).
 - 1. Are those reprogrammings that do not exceed the thresholds identified above, in paragraph IV.B., individually or when combined with other below-threshold reprogrammings.
 - 2. Congressional oversight is through the DOD's semiannual submission of its DD 1416, Report of Programs.
- E. Letter Notifications. DOD Manual 7110-1-M, sec. 431.8.E. (May 1990).
 - 1. Applies to Below-Threshold Reprogramming for new programs or line items not otherwise requiring prior approval or notification.
 - 2. Comptroller or budget officer of the component notifies the appropriate House and Senate Committees on Appropriations.
- F. Tactical Intelligence and Related Activities (TIARA) Reprogrammings. Dep't of the Army Reprogramming Directive (November 1989).
 - 1. Generally, the same rules as other reprogramming actions applies.

2. Special rules apply to TIARA reprogrammings.

- a. The deputy Assistant Secretary of Defense (Intelligence) must be made aware of all adjustments to intelligence programs, to include below-threshold action, prior to initiation.
- b. Prior approval actions must be submitted for:
 - (1) any action considered to be an item of special congressional interest;
 - (2) any proposed action that has not been specifically authorized;
 - (3) any action which could have a significant international implications; and
 - (4) any proposed action that transfers funds between appropriations.

3. Congressional notification is required for actions that exceed established thresholds or represent new starts that exceed thresholds.

G. Special Operations Forces (SOF) Reprogramming. Dep't of the Army Reprogramming Directive (November 1989).

- 1. Below-threshold reprogramming to or from any SOF line is prohibited without the prior approval of the Secretary or Deputy Secretary of Defense.

Chapter 11

2. Normal above-threshold reprogramming to or from any SOF line is in accordance with normal reprogramming procedures.

VI. MILITARY CONSTRUCTION REPROGRAMMING.

A. Authority.

1. 10 U.S.C. § 2853. Authorizes a reprogramming request when the cost of an approved project must be increased over certain thresholds or in certain circumstances.
2. 10 U.S.C. § 2803. Provides permanent authority to obligate and reprogram up to \$30 million annually for emergency construction if:
 - a. Project is not otherwise authorized by law;
 - b. Project is vital to national security; and
 - c. Project is so urgent that waiting until the next budget submission would be inconsistent with national security.
3. 10 U.S.C. § 2854. Provides permanent authorization for the restoration or replacement of facilities due to natural disasters.

4. 10 U.S.C. § 2672a. Provides permanent authority to acquire interest in land that:
 - a. Is needed in the interest of national defense;
 - b. Is required to maintain the operational integrity of military installations;
 - c. Given considerations of urgency do not permit the delay necessary to include the required acquisition in an annual Military Construction Authorization Act.
5. 10 U.S.C. § 2827. Provides permanent authority to relocate existing military family housing units from any location where the number of such units exceeds requirements for military family housing to any military installation where there is a housing shortage.

B. Restrictions on Reprogrammings. DOD Manual 7110-1-M, sec. 432.3.C. (May 1990).

1. DOD will not submit a request for reprogramming when any of the following conditions exist:
 - a. For any project or effort that has not been authorized.
 - b. For any project or effort that has been denied specifically by Congress.

Chapter 11

- c. To initiate programs of major scope or base realignment actions, when such larger efforts have not been authorized by Congress.
- 2. MILCON reprogrammings are sent to the House and Senate Armed Services Committees and the House and Senate Appropriations Committees for approval.
 - a. Generally, committee review process is non-statutory.
 - b. An agency will generally observe committee review and approval procedure as part of its informal arrangements with the various committees, although they would not be legally binding. B-196854.3, March 19, 1984.

VII. CONCLUSION.



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

Appendix A



19 April 1990

MEMORANDUM FOR THE COMPTROLLER OF THE DEPARTMENT OF DEFENSE

SUBJECT: Reprograming Action, Procurement Weapons and Tracked
Combat Vehicles, Army 88/90 and 89/91, (WTCV, A),
Number FY 90-12 PA--ACTION MEMORANDUM

PURPOSE: To obtain approval of Army proposed FY 1988 and
FY 1989 prior approval reprograming action.

DISCUSSION: The 1990 Joint Appropriations Committee Report
directed that a total of \$109.4M from the terminated Improved
Recovery Vehicle FY88 Advance Procurement and FY89 Procurement
and Advance Procurement lines be used to procure 33 additional
Abrams tanks in FY 1990. This reprograming action allows the
Department of the Army to comply with the direction of the
committee report. This reprograming action is urgent, as it is
required for funding the current Multi-Year option and long lead
items for the follow on FY 1990 contract award.

This action requires Congressional approval because it
increases the quantity of an existing budget line item which has
been appropriated but not authorized. ODCSOPS, PA&E, and
OASA(FM) concur in this reprograming request.

This reprograming has been cleared by the Director of
Freedom of Information and Security Review, Office of the
Assistant Secretary of Defense (Public Affairs) and the Deputy
Chief of Staff for Intelligence. This item is not intelligence
related.

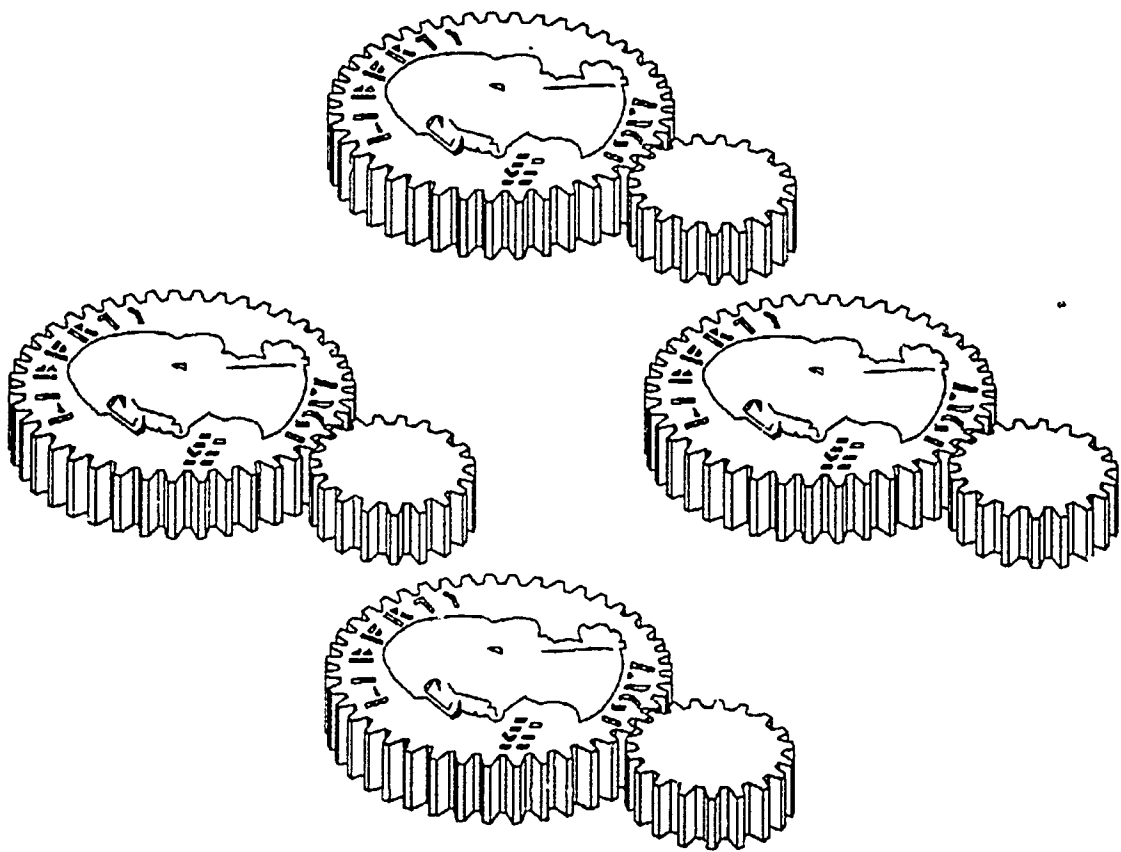
RECOMMENDATION: That the attached reprograming action be
approved and forwarded to Congress.

Douglas A. Brook
Assistant Secretary of the Army
(Financial Management)

Attachment

CHAPTER 12

INTRA-GOVERNMENT AND REQUIRED SOURCE ACQUISITIONS



CHAPTER 12

INTRAGOVERNMENTAL AND REQUIRED SOURCE ACQUISITIONS

I.	INTRODUCTION	1
II.	ECONOMY ACT ORDERS	1
	A. Purpose of the Act	1
	B. Statutory Provisions	1
	C. General Regulatory Guidance	3
	D. Ordering Under the Economy Act	5
	E. Accepting Orders	6
	F. Payment and Billing	7
	G. Problem Areas	7
III.	PROJECT ORDERS	8
	A. Statutory Provisions	8
	B. General Regulatory Guidance	9
	C. Ordering Procedures	10
	D. Acceptance and Performance	10
IV.	BROOKS ACT ORDERS	11
V.	THE GOVERNMENT EMPLOYEES TRAINING ACT	12
VI.	REQUIRED SOURCES	12
	A. Source Priorities	12
	B. Federal Prison Industries, Inc	13
	C. Committee for Purchase from the Blind and Other Severely Handicapped	14
	D. DOD Coordinated Acquisition	16
VII.	FISCAL ISSUES	18
	A. Miscellaneous Receipts Statute	18
	B. Rules of Obligation	18

C. Economy Act Orders vs. Other Orders	19
D. Problem Areas	20
VIII. CONCLUSION	21
APPENDIX A: DD Form 1144, Support Agreement	22
APPENDIX B: DD Form 448, Military Interdepartmental Purchase Request (MIPR)	24
APPENDIX C: DD Form 448-2, Acceptance of MIPR	25
APPENDIX D: SARDA Message, Subject: Contract Offloading, 26 December 1991	26

CHAPTER 12

INTRAGOVERNMENTAL AND REQUIRED SOURCE ACQUISITIONS

I. INTRODUCTION.

II. ECONOMY ACT ORDERS. 31 U.S.C. § 1535. See Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, 70 Comp. Gen. 592 (1991).

A. Purpose of the Act.

B. Statutory Provisions.

1. An agency may place an order for goods or services with another agency or with a major organizational unit within the same agency if:
 - a. Funds are available;
 - b. The order is in the best interests of the government;
 - c. The agency or unit filling the order can provide the goods or services; and
 - d. The ordering agency decides that contracting directly for the goods or services is not as convenient or as cost effective as meeting the requirement through another agency. 31 U.S.C. § 1535(a). See Dictaphone Corp., B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380.

MAJ Anthony M. Helm
Fiscal Law Course

Chapter 12

2. The ordering agency must pay the performing agency the actual costs of the goods or services provided. See 31 U.S.C. § 1535(b); David P. Holmes, B-250377, Jan. 28, 1993 (unpub.). Cf. AR 37-60, Pricing for Materiel and Services (3 May 1989).
3. The performing agency must comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5)(B); 41 U.S.C. § 253(f)(5)(B).
4. The Economy Act is also authority for interagency details of employees. Mr. John W. Rensbarger, B-247348, June 22, 1992 (unpub.) (unauthorized detail caused antideficiency violation); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986). Details shall be on a reimbursable basis unless:
 - a. A law authorizes nonreimbursable details; see The Honorable William D. Ford Chairman, Comm. on Post Office and Civil Serv. House of Representatives, B-224033, Jan. 30, 1987 (unpub.);
 - b. The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission; Details to Congressional Comms., B-230960, Apr. 11, 1988 (unpub.), or
 - c. The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Department of Health and Human Servs. Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985). See 5 U.S.C. § 3341 (authority for intra-agency details). Cf. 10 U.S.C. § 377 (generally, military personnel support to law enforcement agencies must be on a reimbursable basis).

5. From a fiscal standpoint, the Economy Act may form the basis for interservice agreements that involve recurring support between military departments or between a military department and another federal agency. See DOD Directive 4000.19, Interservice, Interdepartmental, and Interagency Support (Oct. 1980); DOD Regulation 4000.19-R, Defense Regional Interservice Support (DRIS) Regulation (Mar. 1984); AFR 172-1, Section C; AR 5-16, Army Supplement to DRIS Regulation (Aug. 1985).
 - a. Memorialize support agreements with DD Form 1144, Support Agreement (Appendix A); do not use this form to transfer funds, however. See DOD Reg. 4000.19-R, Chapter 1, paras. B.10 & 11; AR 5-16, para. B.16.
 - b. Normally, if a host-tenant relationship exists, support will be on a reimbursable basis. DOD Reg. 4000.19-R, ch. 1, para. B.16a. Consult the regulation to determine which activity bears the cost of goods or services.
- C. General Regulatory Guidance. FAR Subpart 17.5; DFARS Subpart 217.5; AFR 172-1, para. 7-23; AR 37-1, para. 12-5r.
1. An "interagency acquisition" under the Economy Act is a transaction by which one agency (requesting/ordering agency) obtains goods and services from another agency (servicing/performing agency). FAR 17.501.
 2. Economy Act acquisitions also may include orders placed within a military department or between military departments. See AR 37-1, para. 12-5r (2); AR 37-1, Glossary (defining "Military Inter-Departmental Purchase Request" as Economy Act orders between commands within the Army and with

Chapter 12

other services). See also Obligation of Funds Under Military Interdepartmental Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980); Washington Nat'l Airport; Fed. Aviation Admin., B-136318, 57 Comp. Gen. 674 (1978); To the Secretary of Defense, B-121982, 34 Comp. Gen. 418 (1955).

3. Determination requirements. FAR 17.503; DFARS 217.503(b); AR 37-1, para. 12-5r. In addition to determining that an interagency acquisition is in the best interests of the government, the head of the requesting agency, or designee, must find that:
 - a. Authority for the purchase exists;
 - b. The action does not conflict with another agency's authority or responsibility; and
 - c. The action conforms to the requirements of FAR Subpart 7.3, Contractor versus Government Performance, if the performing activity intends to fill the order with a commercial or industrial activity it operates. Under the DFARS, ordering activities must find that it is not as convenient or as economical to contract for the requirement.
4. If the performing activity contracts for a requirement, it must ensure compliance with competition requirements. FAR 17.504(d); AR 37-1, para. 12-5r(7)(c). Cf. FAR 6.002 (no agency shall contract with another agency to avoid competition requirements).

D. Ordering Under the Economy Act.

1. The requesting agency contracting officer shall approve Economy Act acquisitions unless agency regulations direct otherwise. DFARS 217.502; AR 37-1, para. 12-5r(4)(a) (requiring contracting officer approval).
2. Issuing orders. FAR 17.504; DFARS 217.504; AR 37-1, paras. 12-5a through 12-5q.
 - a. The requesting activity must obtain all required determinations before ordering.
 - b. The activity should issue orders far enough in advance of the desired delivery or start date to ensure adequate lead time. The activity also should negotiate orders for services in advance. AR 37-1, paras. 12-5b. and 12-5d.
 - c. Normally, ordering activities issue orders on DD Form 448, Military Interdepartmental Purchase Request (MIPR) (see Appendix B). AR 37-1, para. 12-5e; AFR 177-16, para. 27a.
 - d. Orders must include a description of the requirement, delivery terms, fund citation, and payment provisions. FAR 17.504(b); AR 37-1, para. 12-5r(5).

Chapter 12

E. Accepting Orders. AFR 172-1, para. 7-17; AR 37-1, para. 12-7.

1. The accepting officer must be a duly authorized employee of the performing activity.
2. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR (see Appendix C). Otherwise, the terms of the interagency agreement will determine the method of acceptance.
3. If the activity issues a MIPR on a reimbursable basis, acceptance establishes fund obligation authority in the performing activity account, and the activity may incur costs in accordance with the terms of the order. See AFR 177-16, para. 27b; AR 37-1, para. 12-7i.
4. Acceptance must indicate whether reimbursement will be on a "fixed-price" or "cost-incurred" basis. Acceptance on a fixed-price basis is required if:
 - a. The order specifications are stable/specific;
 - b. Each item or service ordered is separately priced;
 - c. The price does not include substantial contingencies;
 - d. The cost estimating included consideration of expected variances;
 - e. Neither activity expects many change orders; and

- f. The requirement is of the type for which a fixed-price basis is practicable.

F. Payment and Billing. FAR 17.505; AFR 172-1, paras. 7-18f(2)(d) & 7-18g(2)(d); AR 37-1, paras. 12-5r(8) and 20-48.

1. The performing activity may require advance payment for all or part of the estimated cost of the supplies or services.
2. The ordering activity may pay by check after receiving the goods or services. Ordering activities within DOD also may use automated billing and payment.
3. The ordering activity must pay bills within 15 days of receipt. Bills or requests for advance payment are not subject to audit before payment. The GAO resolves disputed bills.

G. Problem Areas. See DOD Inspector General Audit Report No. 90-085, June 19, 1990; message from the Assistant Secretary of the Army (RD&A), subject: Contract Offloading to the Tennessee Valley Authority. (Appendix D.)

1. Failing to obtain proper approval. See DFARS 217.502; AR 37-1, para. 12-5r(4)(a).
2. Issuing orders to DOE for common supplies and services, the acquisition of which did not require the special expertise of DOE management and operating contractors.

Chapter 12

3. Failing to determine whether an intragovernmental acquisition was the most economical and efficient method to obtain goods and services.
4. Ordering in excess of the maximum quantities specified in a performing activity's requirements contract. Liebert Corp., B-232234.5, Apr. 29, 1991, 70 Comp. Gen. 449, 91-1 CPD ¶ 413.
5. Ordering from nonappropriated fund instrumentalities. Department of Agriculture Graduate Sch.--Interagency orders for training, B-214810, 64 Comp. Gen. 110 (1984); Obtaining Goods and Servs. from Nonappropriated Fund Activities Through Intra-Departmental Procedures, B-148581, 58 Comp. Gen. 94 (1978). Cf. AR 37-1, para. 12-5k(5).

III. PROJECT ORDERS.

- A. Statutory Provisions. 41 U.S.C. § 23; 14 U.S.C. § 151 (Coast Guard).
 1. All orders placed with government-owned establishments shall be treated as if placed with commercial activities.
 2. Appropriations shall remain available for the payment of the obligations, as if the obligations arose under a contract with a commercial activity.
 3. The statute does not require special determinations, as with Economy Act orders.

B. General Regulatory Guidance. DOD Instruction (DODI) 7220.1; AFR 170-2; AR 37-1, para. 12-5o.

1. A project order is an order for specific types of goods or services. A project order may remain open until the work is done. DODI 7220.1, para. III. A.; AR 37-1, Glossary.
2. Activities may issue project orders only to government-owned and operated (GOGO) facilities and only for the following types of goods and services:
 - a. Production, maintenance, or overhaul of:
 - (1) Missiles and other weapons;
 - (2) Vehicles;
 - (3) Ammunition, clothing, and machinery;
 - (4) Other military supplies or equipment;
and
 - (5) Component and spare parts for the above.
 - b. Research, development, test and evaluation.
 - c. Minor construction or the maintenance of real property.
3. Activities shall not issue project orders for:
 - a. Major new construction;
 - b. Education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, or communications; and

Chapter 12

- c. Any requirement where a contractual relationship cannot exist.

C. Ordering Procedures.

1. No specific form is required, but DOD activities often use MIPRs. The order must be specific, definite, and certain.
2. Activities must issue orders on a reimbursable basis to DOD GOGOs. If possible, activities also should issue project orders to non-DOD GOGOs on a reimbursable basis.
3. The order must indicate whether it will be performed on a cost basis or fixed-price basis. Follow the guidance set forth above for Economy Act orders to determine whether a fixed-price basis is required. See § II.E.4, supra.

D. Acceptance and Performance.

1. Acceptance must be in writing. If the ordering activity issues a MIPR, the performing activity accepts on a MIPR. DODI 7220.1, para. VI.A.1; AR 37-1, para. 12-7a.
2. At the time of acceptance, there must be evidence that the work will commence within a reasonable time. DODI 7220.1, para. VI.A.3. For the Army, 90 days is reasonable. AR 37-1, para. 12-7h.

3. A GOGO facility must be "substantially in a position" to meet the ordering activity's requirement. Regulations permit only subsidiary ordering within the government and/or incidental subcontracting. DODI 7220.1, para. VI.A.7.

IV. BROOKS ACT ORDERS. 40 U.S.C. § 759.

-- General.

1. Activities may issue orders to the General Services Administration (GSA) for automatic data processing equipment (ADPE) or resources. This is not an Economy Act order, so there is no requirement to recover funds that GSA has not obligated within their period of availability. See An Interagency Agreement--Admin. Office of the U.S. Courts, B-186535, 55 Comp. Gen. 1497 (1976).
2. The Brooks Act does not apply to all ADPE acquisitions. If the acquisition fits one of the Brooks Act exclusions, a requiring activity may not issue an intragovernmental order under this authority.
3. If applicable, the Brooks Act preempts the Economy Act when ADPE or resources are involved and GSA has not delegated procurement authority to an agency to execute an Economy Act transaction. See Amdahl Corp., GSBGA No. 7859-P, 85-2 BCA ¶ 18,111. Cf. FAR 17.503(a)(2) (contracting officer must determine that an action does not conflict with another agency's authority).

Chapter 12

- V. THE GOVERNMENT EMPLOYEES TRAINING ACT (GETA). 5 U.S.C. § 4104. The GETA authorizes interagency training on a reimbursable or non-reimbursable basis. To Walter L. Jordan, B-241269, Feb. 28, 1991 (unpub.). The GETA also provides independent fund transfer authority; thus, Economy Act requirements and restrictions are inapplicable.

VI. REQUIRED SOURCES.

- A. Source Priorities. 41 C.F.R. § 101-26.107; FAR 8.001. Generally, agencies shall adhere to the following orders of precedence when obtaining supplies or services:

1. Supplies.

- a. Agency inventory;
- b. Excess from other agencies;
- c. Federal Prison Industries, Inc.;
- d. Committee for Purchase from the Blind and Other Severely Handicapped;
- e. Wholesale supply sources;
- f. Federal Supply Schedules; and
- g. Commercial sources.

2. Services.

- a. Committee for Purchase from the Blind and Other Severely Handicapped;
- b. Federal Supply Schedules and GSA term contracts for property rehabilitation; and

- c. Federal Prison Industries, Inc. or commercial sources.

- B. Federal Prison Industries, Inc. (FPI or UNICOR).
18 U.S.C. §§ 4121-4128; 28 C.F.R. §§ 301-345; FAR
Subpart 8.6.

1. All federal agencies and institutions shall purchase FPI products that meet their requirements and are available. A purchase may not exceed the current market price. 18 U.S.C. § 4124. See Hiltronics Corp., B-238142, Apr. 11, 1990, 90-1 CPD ¶ 384; Forest Serv.--Requirement to procure from Fed. Prison Indus. Inc., A-67190, 62 Comp. Gen. 617 (1983); Minx Prods., Inc., B-175249, Apr. 11, 1972 (unpub.).
2. FPI lists its products and services in the "Schedule of Products made in Federal Penal and Correctional Institutions (Schedule)."
3. The Schedule sets forth ordering procedures. Generally, however, order less-than-carload lots of common-use items from GSA. Otherwise, order directly from FPI.
4. An activity must obtain clearance from FPI to acquire Schedule supplies from other sources unless:
 - a. Exigent circumstances arise;
 - b. Used or excess supplies are available;
 - c. Goods are acquired and used outside the United States; or
 - d. Orders total \$25.00 or less and the activity needs them within 10 days.

Chapter 12

5. FPI will not issue a clearance merely because the contracting officer obtains a lower price from an alternative source.
 6. Disputes regarding price, quality, and suitability of supplies are subject to arbitration.
- C. Committee for Purchase from the Blind and Other Severely Handicapped (Committee). 41 U.S.C. §§ 46-48c; 41 C.F.R. Part 51; FAR Subpart 8.7.
1. Like FPI, the Committee publishes a "Procurement List" of supplies and services. These products and services are available from nonprofit agencies for the blind or severely handicapped. The Committee may request that a contracting activity assist in determining whether a workshop has the capability to perform a requirement. See FAR 9.107. An agency must consider acquiring services from a workshop only if the agency otherwise intends to contract for them. See Rappahannock Rehabilitation Facility, Inc., B-222961.3, Sept. 10, 1986, 86-2 CPD ¶ 280; Kings Point Mfg. Co., B-185802, Mar. 11, 1977, 77-1 CPD ¶ 184.
 2. Activities must purchase listed supply requirements from applicable nonprofit agencies (workshops) at prices established by the Committee, unless the supply also is available from FPI. The Committee, however, has priority over FPI for listed services. See Western States Management Servs., Inc., B-233576, Dec. 8, 1988, 88-2 CPD ¶ 575; Abel Converting Inc., B-229581, Mar. 4, 1988, 67 Comp. Gen. 307, 88-1 CPD ¶ 233.
 3. Agencies may obtain requirements from commercial sources only if specifically authorized by the applicable central nonprofit agency or the

Committee. The central nonprofit agency must grant an exception if:

- a. The workshops cannot timely perform, and the commercial sources can; or
 - b. The workshops cannot produce economically the quantities required.
4. Activities place orders for supplies with the GSA, Defense Logistics Agency (DLA), or the Department of Veterans Affairs (VA). In some cases, an activity may order directly from a nonprofit agency/workshop. The governing central nonprofit agency must authorize a direct purchase.
 5. Address complaints about the quality of supplies distributed by GSA or DLA to the pertinent agency. For supplies or services obtained directly from a workshop, address complaints to the workshop, with a copy to the central nonprofit agency. Contact the central nonprofit agency, and, if necessary, the Committee.
 6. Workshops may compete against commercial sources on acquisitions for supplies or services not included in the Procurement List.
 7. The GAO will not review an agency's decision to purchase goods or services from workshops.
Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460.

Chapter 12

- D. DOD Coordinated Acquisition. 10 U.S.C. §§ 2308-2309; DFARS Subpart 208.70; DOD Directive 4140.26, Integrated Materiel Management of Consumable Items.
1. DOD agencies may obligate funds for the acquisition of supplies only under regulations prescribed by the Secretary of Defense. 10 U.S.C. § 2202(a).
 2. Under coordinated acquisition procedures, a DOD component ("requiring activity") may be required to obtain commodities through another DOD component or GSA ("acquiring activity"). DFARS 208.7003-2. See Tracor, Inc., B-195736, Jan. 24, 1980, 80-1 CPD ¶ 69.
 3. Assignments under the Integrated Materiel Management (IMM) Program. DFARS 208.7003-1; DOD 4140.26M. Activities must obtain assigned items from the IMM manager unless:
 - a. There is an unusual and compelling urgency;
 - b. The IMM manager codes an item for local purchase;
 - c. Purchase by the requiring activity is in the best interest of the government. This exception does not apply to:
 - (1) Items related to a weapon system or its support equipment;
 - (2) Items with special security characteristics;
 - (3) Dangerous items; and
 - (4) Items required for deployment or war reserve, or needed to support the industrial base.

4. Assignments under the Coordinated Acquisition Program. DFARS 208.7003-2. Activities must submit all contracting requirements for assigned items to the acquiring activity, unless:
 - a. The activity must obtain the item from a FAR 8.001 required source;
 - b. The activity obtains the item from the IMM manager;
 - c. The requirement does not exceed the small purchase limit, and direct contracting is in the interest of the government;
 - d. The activity needs the item in an emergency; or
 - e. The acquiring activity delegates authority to the requiring activity.

5. Normally, under the Coordinated Acquisition Program, requiring activities use MIPRs to place orders. DFARS 208.7004-1. The GAO has determined that the Economy Act authorizes the transfer of funds under this program. Obligation of Funds Under Military Interdepartmental Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980); To the Secretary of Defense, B-121982, 34 Comp. Gen. 418 (1955).
 - a. The acquiring activity determines whether the order will be on a reimbursable (category I) or direct citation (category II) basis. DFARS 208.7004-2(b).
 - b. Use a reimbursable order if delivery is from existing inventories or by diversion from existing contracts of the acquiring activity; production or assembly is at government-owned plants; the requirement involves assembly of end items by the acquiring department; or the acquiring activity will

Chapter 12

make contract payments without reference to deliveries of end items.

- c. If a direct citation MIPR cites funds that will expire after 30 September, the acquiring activity must receive the MIPR by 31 May. DFARS 208.7004-4(a).
- d. The acquiring activity must accept MIPRs within 30 days. DFARS 208.7004-2(a).

VII. FISCAL ISSUES.

A. Miscellaneous Receipts Statute. 31 U.S.C. § 3302. See Walter L. Jordan, Director Fin. Div., Dep't of the Treasury, B-241269, Feb. 28, 1991 (unpub.).

- 1. Generally, an activity must deposit into the Treasury money received from sources outside the activity.
- 2. An agency augments its appropriations improperly by retaining and crediting to its own accounts funds that it should have deposited as miscellaneous receipts.
- 3. The Economy Act, Brooks Act, and the project order statute are exceptions to this rule.

B. Rules of Obligation.

- 1. Direct citation orders. Obligate funds current when the performing activity awards a contract to

meet the ordering activity requirement. Record obligations for direct citation orders when the ordering activity receives a copy of the contract. 31 U.S.C. § 1501(a)(1); DFARS 208.7009; DOD Manual 7220.9-M, ch. 25, para. F(2); AR 37-1, para. 9-7g and tbl. 9-3.

2. Economy Act orders, reimbursable orders, and project orders. Obligate funds current when the performing activity accepts the order. Record obligations upon receipt of written acceptance, e.g., an executed DD Form 448-2. 31 U.S.C. § 1501(a)(1); DFARS 208.7009; DOD Manual 7220.9-M, ch. 25, para. F(1); AR 37-1, tbl. 9-3.
3. Required source orders. Obligate funds current when an activity issues an order if the law requires placing the order with a particular source, e.g., FPI or non-profit work center. Record obligations in the amount stated in the order at the time the order is issued. 31 U.S.C. § 1501(a)(3); DOD Manual 7220.9-M, ch. 25, para. F(2); AR 37-1, para. 9-7h and tbl. 9-3.

C. Economy Act Orders vs. Other Orders.

1. Under the Economy Act, if the performing activity has not incurred obligations to fill an order, the ordering activity must recover (deobligate) funds at the end of the period of availability. See AFR 177-16, para. 27e; AR 37-1, paras. 9-5s and 12-5r (3); The Honorable Augustus F. Hawkins, Chairman, Comm. on Educ. and Labor, House of Representatives, B-223833, Nov. 5, 1987 (unpub.).
2. Under other statutes, once a performing activity accepts an order, the funds remain available even if performance extends beyond the period of availability. There is no requirement to recover

Chapter 12

funds at the end of the period of availability, as with the Economy Act. See AFR 172-1, para. 7-15d; To the Secretary of Defense, B-121362, Mar. 4, 1955 (unpub.).

3. Under the Economy Act, an agency may require advance payment, but the project order statute does not authorize advances.

D. Problem Areas.

1. A requiring activity cites Operations and Maintenance (O&M) funds on a MIPR for purchase of investment/capital end items.
2. A requiring activity misuses the intragovernmental purchase process to dump year end funds.
3. An activity misclassifies an Economy Act order as a project order to avoid recovery requirements.
4. Under an Economy Act order, an ordering activity pays more than the "actual cost" of the goods or services provided. See 31 U.S.C. § 1535(b); Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, 70 Comp. Gen. 592 (1991). See also David P. Holmes, B-250377, Jan. 28, 1993 (unpub.).

VIII. CONCLUSION.

APPENDIX A: DD Form 1144, Support Agreement.

SUPPORT AGREEMENT		1 DOCUMENT IDENTIFIER ("X" one)			
		X NEW		REVIEW NO	REVISION NO
2 SUPPLIER (Name, Office Symbol & complete address) Yokota Air Base 475 Air Base Wing/LGX APO San Francisco 96328 GEOGRAPHICAL AREA OR COUNTRY CODE JA		2a MAJOR COMMAND CODE FB52XX		2b SUBORDINATE COMMAND CODE FB52AX	
		3 PRESENT AGREEMENT NUMBER FB5209-82257-011		4 TERMINATION DATE (Month and Year) 0988	
		3a SUPERSEDED AGREEMENT NUMBER FB5209-78249-139			
		5 RECEIVER (Name, Office Symbol & complete address) DoD Dependents Schools Pacific Region Yokota Complex Schools APO San Francisco 96328 GEOGRAPHICAL AREA OR COUNTRY CODE JA		5a DODAAC FEOSTRIP NUMBER HE6001	
		5b MAJOR COMMAND CODE HE1254		5c SUBORDINATE COMMAND CODE HE1260	
6 SUPPORT AGREEMENT RESOURCE SUMMARY					
a CATEGORY CODES	b. MAN YEARS				
	c. GROSS ADDITIONAL COSTS				
	MILITARY	CIVILIAN	TOTAL	NON REIMBURSEABLE	REIMBURSEABLE
AA	0.1	0.2	\$11,805	\$1,120	\$10,685
AB	0	5.2	84,744	0	84,744
AC	0	6.0	93,656	0	93,656
AD	0.2	0	4,578	4,578	0
AJ	0	0	Common Service Item		
TOTAL	0.3	11.4	\$194,783	\$5,698	\$189,085
6d RECEIVER DATA (When applicable, provide similar data required in blocks 6a, b and c)					
7 SAVINGS ACCRUED COSTS INCURRED MAN YEARS SAVED EXPENDED TO FEDERAL GOVERNMENT					
7a SAVINGS		7b COSTS		7c MAN YEARS SAVED	
FY 83		FY 83		FY 83	
\$2000		0		0	
FY 83		FY 83		FY 83	
0		0		0	
8 FUNDING AND REIMBURSEMENT ARRANGEMENT (Include all details concerning billing/reimbursement procedures, funding limitations, and the appropriate "billing/submit thru" addresses. Also list those references which specifically apply to the type of organization being supported.)					
<p>Support is provided in accordance with DoD 1342.6-M-1 and applicable Air Force directives. The Accounting and Finance Office, 475 Air Base Wing, APO San Francisco 96328, will submit reimbursable billings monthly on SF 1080, no later than 30 days after the end of the month to the Coordinating Principal, Yokota Complex Schools, APO San Francisco 96328, for certification that the services were received. After certification the SF 1080s will be forwarded to the DoD Dependents Schools-Pacific Region (Financial Management). DoDDS-P will provide the billings to the A&FO, 18TFW, APO SF 96239 for payment. 18TFW provides accounting support to DoDDS-P under a separate agreement.</p>					

<p>9 GENERAL PROVISIONS (Complete blank spaces) The following general provisions, as set forth in Chapter III DOD 4000.19-M, apply to this agreement unless otherwise specified in "Remarks" block below:</p> <p>a. The Receiving Activity will provide the Supplying Activity projections of support required to accomplish its mission. Significant changes in the Receiving Activity function, mission or support requirements will be submitted by the Receiving Activity in a manner that will permit timely modification of resource requirements.</p> <p>b. It is the responsibility of each agency providing support under this agreement to bring any required or requested change in support to the attention of <u>DoDDS-P/JA & 475ABW/LGX</u> prior to providing/reducing unilaterally such additional/reduced support.</p> <p>c. Activities providing reimbursable support in this agreement will submit a monthly statement of costs to <u>475ABW/ACFS</u> for preparation of billing document, SF 1080.</p> <p>d. Manpower required in support of this agreement which is subject to return to the lending activity upon termination of the agreement: <u>None</u> (Enter number or if no manpower is required, enter "None")</p> <p>e. All rates expressing the unit cost of services provided in this agreement are based on current rates which may be subject to change for uncontrollable reasons, such as Congressional legislation, DOD directives, commercial utility rate increases, etc. The receiver will be notified immediately of such rate changes.</p> <p>f. This agreement will be reviewed biennially at least 120 days prior to the anniversary date. It may be revised at any time upon the mutual consent in writing of the parties concerned.</p> <p>g. This agreement may be cancelled at any time by mutual consent of the parties concerned. This agreement may also be cancelled by either party upon giving at least 180 days written notice to the other party.</p> <p>h. In case of mobilization or other emergency, this agreement will remain in force within supplier's capabilities, subject to normal cancellation provisions and will be subject to review at that time. This agreement will not be terminated if such action impairs the combat mission of the receiving activity as determined by higher headquarters.</p>		
<p>10 REMARKS</p> <p>The following DoDAACs apply to the DoD Dependents Schools located at Yokota Air Base. The supporting activity will cite on the reimbursement documents the applicable DoDAACs and this agreement number. HE6001 Office of the Education Program Administrator, Japan; HE6606 Yokota High School, HE6651 Yokota East Elementary School; HE6652 Yokota West Elementary School.</p> <p>Programmed manpower authorizations for the DoD Dependents Schools, YAB are: USCE: 101, MLC 26.</p> <p>Requiring regulatory documents; DoD 4000.19-R and DoD 1432.6-M-1.</p> <p>Attachments:</p> <p>A. Specific Provisions. B. Real Property and Facilities Assigned Receiver. C. Computations for Utilities. D. Manpower Annex.</p> <p>Distribution:</p> <p>1 - CINCPAC/J42, Camp Smith, HI 96861 1 - DLSC, ATTN: DLSC-JBB (DRIS), Battle Creek, MI 49016 2 - HQ PACAF/LGXP, Hickam AFB, HI 96853 1 - 5AF/LGX, APO 96328 1 - DET 2, 6004MES, APO 96328 5 - Ofc of Education Program Administrator, Japan, APO 96328 1 - DoD Office of Dependents Schools, 2461 Eisenhower Ave, Alexandria, VA 22331 45 - 475ABW/LGX, APO 96328 5 - DoD Dependents Schools, Pacific Region, FPO Seattle 98772</p>		
11 CONTROLLER CONCURRENCE (Supplier Signature & Date)		12 CONTROLLER CONCURRENCE (Receiver Signature & Date)
13 TYPED NAME AND ORGANIZATION OF SUPPLIER APPROVING AUTHORITY	13a SIGNATURE	13b DATE
14 TYPED NAME AND ORGANIZATION OF RECEIVER APPROVING AUTHORITY	14a SIGNATURE	14b DATE

Chapter 12

APPENDIX B: DD Form 448, Military Interdepartmental Purchase Request (MIPR).

MILITARY INTERDEPARTMENTAL PURCHASE REQUEST					1. PAGE 1 OF PAGES	
2. FSC		3. CONTROL SYMBOL NO.		4. DATE PREPARED		5. MIPR NUMBER
7. TO:				8. FROM: (Agency, name, telephone number of originator)		
9. ITEMS <input type="checkbox"/> ARE <input type="checkbox"/> ARE NOT INCLUDED IN THE INTERSERVICE SUPPLY SUPPORT PROGRAM AND REQUIRED INTERSERVICE SCREENING <input type="checkbox"/> HAS <input type="checkbox"/> HAS NOT BEEN ACCOMPLISHED.						
ITEM NO.	DESCRIPTION <small>(Federal stock number, nomenclature, specification and/or drawing No., etc.)</small>	QTY	UNIT	ESTIMATED UNIT PRICE	ESTIMATED TOTAL PRICE	
a	b	c	d	e	f	
10. SEE ATTACHED PAGES FOR DELIVERY SCHEDULES, PRESERVATION AND PACKAGING INSTRUCTIONS, SHIPPING INSTRUCTIONS AND INSTRUCTIONS FOR DISTRIBUTION OF CONTRACTS AND RELATED DOCUMENTS.						11. GRAND TOTAL
12. TRANSPORTATION ALLOTMENT <small>(Used if FOB Contractor's plant)</small>				13. MAIL INVOICES TO <small>(Payment will be made by)</small>		
				PAY OFFICE DODAAD		
14. FUNDS FOR PROCUREMENT ARE PROPERLY CHARGEABLE TO THE ALLOTMENTS SET FORTH BELOW, THE AVAILABLE BALANCES OF WHICH ARE SUFFICIENT TO COVER THE ESTIMATED TOTAL PRICE						
ACRN	APPROPRIATION	LIMIT SUB-EAC	SUPPLEMENTAL ACCOUNTING CLASSIFICATION		ACCTG STA DODAAD	AMOUNT
15. AUTHORIZING OFFICER <small>(Type name and title)</small>				16. SIGNATURE		17. DATE

APPENDIX C: DD Form 448-2, Acceptance of MIPR.

ACCEPTANCE OF MIPR					
1. TO: Requiring Activity Address (Include ZIP Code)			2. MIPR NUMBER		3. AMENDMENT NO
			4. DATE (MIPR Signature Date)	5. AMOUNT (As Listed on the MIPR)	
6. The MIPR identified above is accepted and the items requested will be provided as follows (Check as Applicable) <ul style="list-style-type: none"> <input type="checkbox"/> ALL ITEMS WILL BE PROVIDED THROUGH REIMBURSEMENT (Category I) <input type="checkbox"/> ALL ITEMS WILL BE PROCURED BY THE DIRECT CITATION OF FUNDS (Category II) <input type="checkbox"/> ITEMS WILL BE PROVIDED BY BOTH CATEGORY I AND CATEGORY II AS INDICATED BELOW <input type="checkbox"/> THIS ACCEPTANCE, FOR CATEGORY I ITEMS, IS QUALIFIED BECAUSE OF ANTICIPATED CONTINGENCIES AS TO FINAL PRICE. CHANGES IN THIS ACCEPTANCE FIGURE WILL BE FURNISHED PERIODICALLY UPON DETERMINATION OF DEFINITIZED PRICES, BUT PRIOR TO SUBMISSION OF BILLINGS 					
7. <input type="checkbox"/> MIPR ITEM NUMBER(S) IDENTIFIED IN BLOCK 13, "REMARKS" IS NOT ACCEPTED (IS REJECTED) FOR THE REASONS INDICATED.					
8. TO BE PROVIDED THROUGH REIMBURSEMENT CATEGORY I			9. TO BE PROCURED BY DIRECT CITATION OF FUNDS CATEGORY II		
ITEM NO a	QUANTITY b	ESTIMATED PRICE c	ITEM NO. a	QUANTITY b	ESTIMATED PRICE c
d. TOTAL ESTIMATED PRICE			d. TOTAL ESTIMATED PRICE		
10. ANTICIPATED DATE OF OBLIGATION FOR CATEGORY II ITEMS			11. GRAND TOTAL ESTIMATED PRICE OF ALL ITEMS		
12. FUNDS DATA (Check if Applicable) <ul style="list-style-type: none"> a. <input type="checkbox"/> ADDITIONAL FUNDS IN THE AMOUNT OF \$ _____ ARE REQUIRED (See Justification in Block 13) b. <input type="checkbox"/> FUNDS IN THE AMOUNT OF \$ _____ ARE NOT REQUIRED AND MAY BE WITHDRAWN 					
13. REMARKS					
14. ACCEPTING ACTIVITY (Complete Address)			15. TYPED NAME AND TITLE OF AUTHORIZED OFFICIAL		
			16. SIGNATURE		17. DATE

Chapter 12

APPENDIX D: SARDA Message, Subject: Contract Offloading, 26 December 1991.

P 261130Z DEC 91
FM HQDA WASH DC / SARD-PP//
TO ARSTAF
AIG 9127
AIG 12143
AIG 7405
INFO RUEADWD/HQDA WASH DC//SARD-ZR/SARD-ZE/SARD-ZC/
SARD-ZS/SARD-ZT/
SARD-PC,SFRD-ZK//
BT
UNCLAS
PASS TO ALL LEGAL OFFICES, COMPTROLLERS/RESOURCE MANAGERS AND
FINANCE AND ACCOUNTING OFFICES
UNCLAS
SUBJECT. CONTRACT OFFLOADING TO TENNESSEE VALLEY AUTHORITY (TVA)
A. SFRD-KP MEMORANDUM DATED JANUARY 14, 1991. SIGNED BY
HONORABLE STEPHEN K. CONVER, ASA (DAI), SUBJECT. CONTRACT OFFLOADING.
B. AUDIT OF DOD PROCUREMENTS THROUGH THE TENNESSEE VALLEY AUTHORITY
(TVA) TECHNOLOGY BROkering PROGRAM, CODIG PROJECT NO. 2CH-5003,
OCTOBER 1991.
1. INITIAL INFORMATION GENERATED UNDER REFERENCE B REVEALS CONTINU-
ING IMPROPER OFFLOADING PRACTICES AND POSSIBLE SERIOUS VIOLATIONS BY
ARMY ACTIVITIES. TO INCLUDE HQDA AND PEOS, FMOS. THESE PRACTICES
MUST CEASE IMMEDIATELY
2. PENDING REVISION OF DOD/ARMY REGULATIONS, ALL MIPRS TO NON-DOD
AGENCIES, AND RELATED INTERAGENCY AGREEMENTS, SHALL BE APPROVED
IN WRITING BY AN ARMY CONTRACTING OFFICER, WHO SHALL CITE THE
AUTHORITY USED, AND SHALL BE REVIEWED BY LEGAL COUNSEL. IF THE
ECONOMY ACT (31 U.S.C. 1535) IS THE AUTHORITY FOR THE ACTION, AN
ARMY CONTRACTING OFFICER SHALL MAKE THE DETERMINATION REQUIRED BY
FAR/DFARS 17.502. CERTIFY TO SAME ON THE DD FORM 448 (MIPR), AND
ENSURE THAT THE PROPOSED MIPR IS REVIEWED AND ANNOTATED BY LEGAL
COUNSEL. MIPRS ARE NOT AUTHORIZED FOR DISPATCH UNLESS AND UNTIL
APPROVED AS REQUIRED HEREIN. OFFICIALS CERTIFYING TO THE AVAIL-
ABILITY OF FUNDS TO BE TRANSFERRED TO NON-DOD AGENCY BY A MIPR
(E.G., PEOP/FM RESOURCE MANAGERS) SHALL BE RESPONSIBLE FOR ENSURING
COMPLIANCE WITH THIS REQUIREMENT. HQDA (SAFM AND SARDA) WILL
SPONSOR CHANGE TO DOD FINANCE SERIES REGULATIONS AND ANY DELEGATIONS
OF COMPTROLLER AUTHORITY, AS APPROPRIATE, TO CITE THIS RESPONSIBILITY
3. IN THIS REGARD, I WOULD LIKE A DETAILED REPORT FROM ANY PROGRAM/
PROJECT MANAGER, REQUIRING ACTIVITY MANAGER, COMMANDER, STAFF OR
ACTIVITY DIRECTOR WHOSE ORGANIZATION HAS SENT WORK/FUNDS TO TVA IN
FY90 OR FY91. THE REPORT SHALL PROVIDE INFORMATION ON:
A. THE NATURE OF THE WORK OR DELIVERABLES REQUESTED;
B. TYPE AND AMOUNT OF FUNDS INVOLVED;
C. RATIONALE FOR RELECTION OF TVA AS THE SOURCE OF SUPPORT;
D. WHETHER OR NOT AN ECONOMY ACT DETERMINATION (SEE FAR SJEPART
17.5) WAS PROPERLY EXECUTED AND APPROVED BY A CONTRACTING OFFICER AS
REQUIRED BY DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT (DFARS)
217.502;
E. THE AMOUNT OF BROKER OR PLACEMENT FEE (S) PAID TO TVA;
F. WHETHER ANY INTERAGENCY AGREEMENT WITH TVA, OR THE TRANSFER
OF THE REQUIREMENT ITSELF TO TVA, WAS APPROVED BY THE REQUESTING
ACTIVITY'S LEGAL COUNSEL AND THE ASSIGNED CONTRACTING OFFICE AS
REQUIRED BY REFERENCE A. REPORTS SHALL BE PROVIDED BY THE MOST
EXPEDITIOUS MEANS AVAILABLE (E.G., MSG/FAX) TO SFRD-KP NO LATER
THAN JANUARY 10, 1992.
4. AS THE ARMY'S AGENCY HEAD FOR ACQUISITION MATTERS, AND THE ARMY
ACQUISITION EXECUTIVE, I AM ULTIMATELY RESPONSIBLE FOR THE
'ACQUISITION' PRACTICES OF ALL ARMY ACTIVITIES. UNAUTHORIZED AND
ILL-CONSIDERED OFFLOADING OF ARMY ACQUISITION REQUIREMENTS TO OTHER
AGENCIES, PARTICULARLY TO AGENCIES NOT SUBJECT TO THE FEDERAL
ACQUISITION REGULATION AND THE COMPETITION IN CONTRACTING ACT (CICA)
(THUS CIRCUMVENTING THE COMPETITION REQUIREMENTS OF CICA), ARE

PAGE 32 OF 02 RUEADWD 1944 042769 07/20412

ACTIONS CLEARLY CONTRARY TO POLICY AND REGULATION. THEY COST THE ARMY MILLIONS OF DOLLARS IN FEES FOR PERFORMANCE OF A FUNCTION (CONTRACTING) THAT WE ALREADY PAY A HIGHLY TRAINED, PROFESSIONAL STAFF TO PERFORM PROPERLY. IN ADDITION, BECAUSE TVA ROUTINELY REQUESTS ADVANCE PAYMENT (ACTUAL TRANSFER OF FUNDS) IN ADVANCE OF CONTRACT REQUIREMENTS, THE TREASURY CANNOT AVOID INTEREST PAYMENTS ON THOSE BORROWED FUNDS PRIOR TO DISBURSEMENT. WICH IT WOULD IF THE FUNDS REMAINED WITHIN DOD. UNLIKE MANY FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER (FFROC) ARRANGEMENTS, THERE IS NO RESTRICTION ON DIRECT ARMY CONTRACTING WITH TVA'S CONTRACTORS. IS JUSTIFIABLE. YET NO APPARENT ATTEMPT WAS MADE TO CONTRACT DIRECTLY WITH THESE COMMERCIAL FIRMS THROUGH ASSIGNED CONTRACTING SUPPORT OFFICES.

5. TRANSFERS OF EXPIRING FUNDS IN THE 4TH QUARTER OF THE FISCAL YEAR WITH THE PRINCIPAL PURPOSE OF ACHIEVING TECHNICAL OBLIGATION AND "DISBURSEMENT" OF THOSE FUNDS UNDER GUISE OF THE ECONOMY ACT, AND ABSENT APPROVALS REQUIRED BY DOD AND ARMY REGULATIONS, IS A CLEAR VIOLATION. IN SOME CASES EXPIRING O&M FUNDS WERE TRANSFERRED FOR USE FOR REQUIREMENTS TO BE ORDERED AND PERFORMED IN THE NEXT FISCAL YEAR, OR FOR CAPITAL EXPENDITURES. IT ALSO APPEARS THAT INSUFFICIENT REQUIREMENTS STATEMENTS WERE PROVIDED TO THE TVA, WITHOUT A CLEAR STATEMENT OF REQUIREMENTS AND REQUIRED DELIVERABLES, INCLUDING REPORTS AND APPROPRIATE COST AND PERFORMANCE REPORTING. THERE CAN BE NO TRACKABILITY FROM THE VALUE OF WORK REQUIRED AND RECEIVED TO THE DOLLARS EXTENDED. IN ADDITION, ILLEGAL PERSONAL SERVICED ARRANGEMENTS MAY HAVE RESULTED.

6. THE LEGITIMATE CHECKS AND BALANCES OF THE DEFENSE/ARMY PROCUREMENT PROCESS SERVE A PURPOSE BEYOND FRUSTRATING THOSE REQUIRORS WHO WANT EVERYTHING "YESTERDAY". BUT WHO REFUSE TO PLAN, OR TO PREPARE "CONTRACT-ABLE" REQUIREMENTS STATEMENTS. IT IS THE FUNCTION OF OUR HIGHLY REGULATED CONTRACTING PROCESS TO PROTECT THE INTERESTS OF BOTH THE ARMY AND THE TAXPAYERS IN THE PUBLIC TRUST WHILE ACQUIRING OUR VALID MISSION NEEDS AS EFFECTIVELY AS POSSIBLE AND AT THE BEST VALUE FOR THE GOVERNMENT.

7. EVERY ARMY COMMANDER, DIRECTOR AND MANAGER IS ACCOUNTABLE FOR THEIR ACQUISITION ACTIONS. WE CANNOT AFFORD TO WORRY MERELY ABOUT SPENDING (OBLIGATING) OUR SCARCE FUNDS; WE MUST ACCEPT RESPONSIBILITY FOR VALIDATING OUR NEEDS, HOW MUCH IS SPENT, AND THE VALUE RECEIVED. WE WILL NOT IGNORE THE LAW AND REGULATIONS FOR SOME PERCEIVED SHORT TERM GAIN. IF WE DO NOT MAINTAIN HIGH STANDARDS IN EXECUTING OUR FIDUCIARY RESPONSIBILITIES, WE SHALL NOT BE ENTRUSTED WITH THOSE RESPONSIBILITIES AND AUTHORITY IN THE FUTURE. IN THE PAST I ASKED FOR YOUR COOPERATION IN PUTTING A STOP TO THESE PRACTICES. NOW I MUST DEMAND IT.

8. THE FOC FOR THIS MESSAGE IS MR. JOHN R. CONKLIN, SFRD-PP AT ODN 227-0723, COMM'L 703/697-0723. THE FOC FOR REPORTING REQUIREMENTS IS MR. RAY KELLY, SFRD-KP, ODN 209-7563, COMM'L 703/756-7563.

9. SIGNED: STEPHEN K. CONVER, ASSISTANT SECRETARY OF THE ARMY (RESEARCH, DEVELOPMENT AND ACQUISITION), ARMY ACQUISITION EXECUTIVE

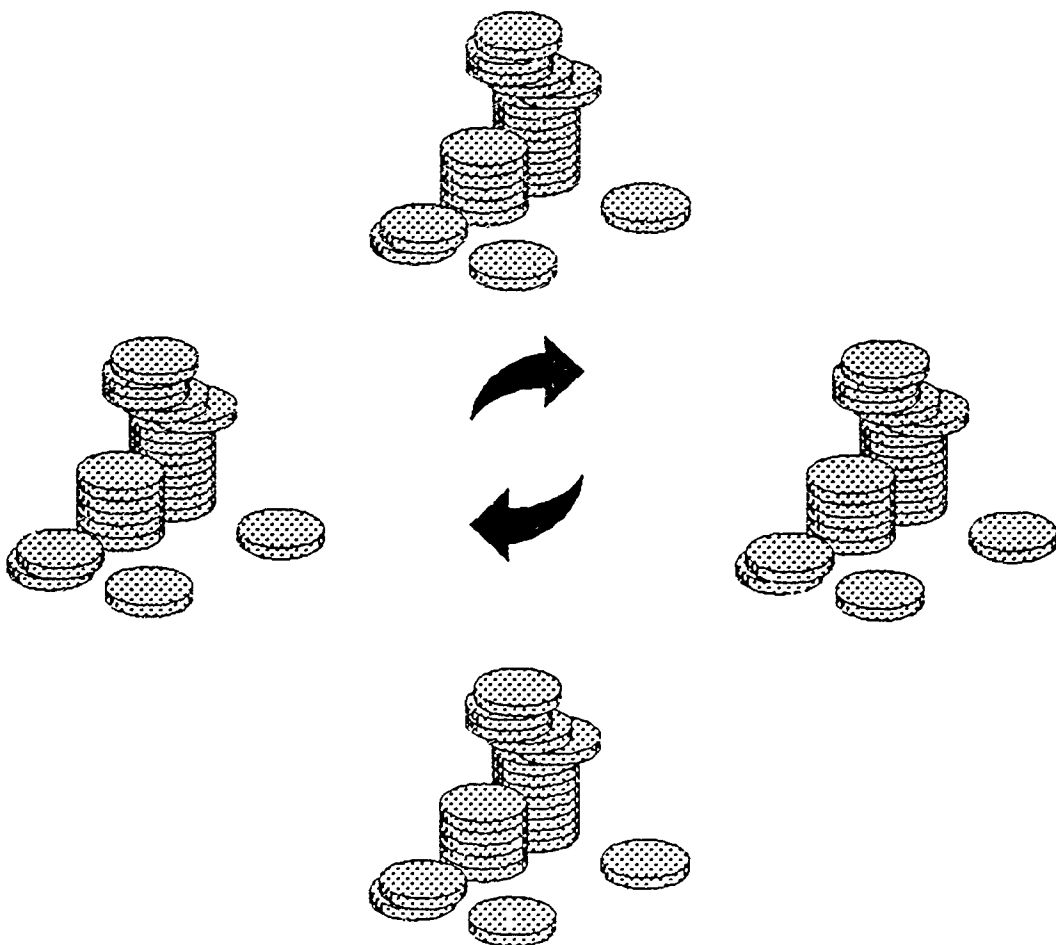
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CHAPTER 13

REVOLVING FUNDS



CHAPTER 13

REVOLVING FUNDS

I. INTRODUCTION	1
II. STATUTORY BASIS	1
III. GENERAL CONCEPT OF A REVOLVING FUND	2
A. Definition	2
B. General Characteristics of a Revolving Fund	2
IV. BASIC TYPES OF REVOLVING FUNDS	3
A. <u>Stock Funds</u> (SF)	3
B. <u>Industrial Funds</u>	5
V. DEFENSE BUSINESS OPERATION FUND (DBOF)	7
A. General	7
B. Accounting Procedures for Stock and Industrial Fund DBOF Business Areas	8
VI. GENERAL FUND PRINCIPLES RELATED TO REVOLVING FUNDS	10
A. Miscellaneous Receipts, 31 U.S.C. § 3302(b) (1982)	10
B. The Purpose Statute	11
C. Time	11
D. Amount	12
VII. REVOLVING FUNDS AND THE RULES OF OBLIGATION	12
A. Stock Funds	12
B. Industrial Funds	12
VIII. REVOLVING FUNDS AND VIOLATIONS OF TITLE 31 U.S.C. (THE ANTIDEFICIENCY ACT)	13
A. Violation of 31 U.S.C. § 1517 in Stock Funds	13
B. Violation of 31 U.S.C. § 1517 in industrial funds or the Civil Works Revolving Fund	14

C.	Application of Title 31 to Reimbursable Orders	14
D.	Other Bases For Violations of Title 31 U.S.C	15
IX.	CONCLUSION	15

CHAPTER 13

REVOLVING FUNDS

I. INTRODUCTION.

Revolving or working-capital funds in the Department of Defense provide goods and services at a fixed or standard price to the customer. Under the revolving fund concept, receipts are credited directly to the fund and are available, without further appropriation by Congress, for expenditures to carry out the purpose of the fund.

II. STATUTORY BASIS. 10 U.S.C. 2208, Working-Capital Funds.

- A. 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 the Secretary 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.

MAJ Michael Cameron
Fiscal Law Course

Chapter 13

B. Working-capital funds shall be charged, when appropriate, with the cost of:

1. Supplies that are procured or otherwise acquired, manufactured or repaired, issued, or used, and services or work performed, including applicable administrative expenses; and
2. Customers of the fund shall be reimbursed the revolving fund from available appropriations, or otherwise credited for those costs, including applicable administrative expenses and cost of using equipment.

III. GENERAL CONCEPT OF A REVOLVING FUND.

A. Definition. DOD 7220.9-M; Army Regulation (AR) 37-1, Glossary, Section II, Terms; Air Force Regulation (AFR) 170-1, ch. 4-11.

1. A revolving fund is a fund established to finance and hold inventory or to operate industrial type facilities.
2. Inventory or services are sold to customers with the proceeds deposited back into the fund.
3. Income from the sale of goods or services is used to finance the fund's continuing operations.

B. General Characteristics of a Revolving Fund.

1. OSD must approve a charter before financing an activity with a revolving fund.
 - The MACOM will prepare the proposed charter for submission to The Office of Director of Defense Finance and Accounting Service-Indianapolis Center, ATTN: DFAS-I-PA, Indianapolis, Indiana 46249-1026.
2. Appropriations are usually provided to start, increase the size, or replace significant losses of a revolving fund.
 - a. Existing resources in other accounts may be transferred to a revolving fund as capitalized assets to serve the same purposes as the appropriations.
 - b. These resources are commonly referred to as "the corpus of the revolving fund."
3. Revenues to the revolving funds are generated from reimbursable actions on behalf of authorized beneficiaries.

IV. BASIC TYPES OF REVOLVING FUNDS.

- A. Stock Funds (SF). 10 U.S.C. § 2208; AR 37-1, ch.7-12; AFR 172-1, vol. 1, ch. 18; AFR 170-25.

Chapter 13

1. Established to provide a means of accounting for and financing the purchase, storage and sale of common use items. As of 1 OCT 90, this includes depot level repair assemblies.
2. The SF is organized by division and each division is managed under its own charter.
 - a. The charter will:
 - (1) contain a description of the items managed by the activity;
 - (2) provide the approximate number of items and dollar amounts within each material category; and
 - (3) provide an estimate of the amount of inventory to be capitalized by the stock fund and the appropriation from which the inventory was originally financed.
3. Supplies are acquired with stock fund appropriations, which increases inventory and decreases stock fund cash.
 - When supplies are issued to consumer activities, the supplies are charged to the consumer activity account, resulting in an increase in stock fund cash but a decrease in stock fund inventory.
4. Stock funds may estimate the cost of inventories.

5. Stock funds within the Department of Defense:

- a. X4921 Air Force Stock Fund;
- b. X4991 Army Stock Fund;
- c. X4911 Navy Stock Fund; and
- d. X4961 Defense Stock Fund.

6. Use of the stock fund. AR 37-1, ch. 12-17; AFR 172-1, Volume 1, ch. 18-1.

- a. Retail divisions may supply support to requiring activities within the local delivery area of their branch offices.
- b. All stock fund operations must cite the stock fund funds when ordering both consumable and reparable material from commercial suppliers for the wholesale stock fund.
- c. Examples of stock fund materials include nonstandard end items of equipment having a standard unit price of less than \$15,000 and which are centrally managed; assemblies, spares, and repair parts which are reparable at depot level or below; nonreparable spares and repair parts; food, clothing, and petroleum products.

7. Funding the operating cost of the stock fund. AR 37-1, ch. 12-21; AFR 172-1, Volume 1, ch. 18.

- a. All costs related to providing supplies and materials to customers will be funded by the stock fund.

Chapter 13

- b. Operating costs currently funded by the Operations and Maintenance, Army appropriations will continue to be charged to that appropriation with funding provided on a reimbursable basis.
- c. A standard price will be established for each stock numbered item.

B. Industrial Funds. 10 U.S.C. § 2208; AR 37-1, para. 7-12; AFR 170-24; AFR 172-1, vol. 1, ch. 19.

- 1. Industrial funds are used to finance operating costs of major service units, such as arsenals, depots, and shipyards that produce goods and services to meet the needs of users.
- 2. Users include governmental agencies, individuals and private concerns under certain conditions.
- 3. Services are provided on a reimbursable basis to authorized customers.
- 4. The collections for the performance of services are available immediately for use in the performance of other services.
- 5. Prior to commencing operations, each industrial fund must have a charter that defines its mission and is approved by OSD.

6. Industrial fund activities also receive their initial working capital through an appropriation or a transfer of resources from existing appropriations of funds.
 - a. Capital resources are used to finance the initial cost of products or services.
 - b. Inventories of finished products are not maintained for subsequent sale. Work is generated by the acceptance of customer orders.
7. The industrial fund is to operate on a break-even basis over the long run.
8. Formal cost accounting system required.
9. Industrial fund appropriations remain available for obligation without fiscal year limitation for their specified purpose until expended or withdrawn.
10. Industrial funds within the Department of Defense:
 - a. X4922 Air Force Industrial Fund;
 - b. X4992 Army Industrial Fund;
 - c. X4912 Navy Industrial Fund; and
 - d. X4962 Defense Industrial Fund.

Chapter 13

V. DEFENSE BUSINESS OPERATION FUND (DBOF).

A. General.

1. Congress established the DBOF as a revolving fund, effective 1 Oct 91, and authorized its existence through April 15, 1993. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 316, 105 Stat. 1338 (1991).
2. The DBOF incorporates nine stock and industrial funds, including those of each of the services, the Defense Finance and Accounting Service (DFAS), the Defense Industrial Plant Equipment Service, the Defense Commissary Agency (DeCA), and others. Department of the Army, Defense Business Operations Fund (DBOF), An Army Primer, Sept. 1992.¹
3. The DBOF currently operates under financial policies and responsibilities in effect for stock and industrial funds, except as modified by the Comptroller, DOD Memorandum, Subject: Fiscal Year 1992 Defense Business Operations Fund (DBOF) Financial Management Guidance, dated 19 August 1991. See also Director of Accounting, DFAS Memorandum No. 4, Subject: Capital Asset Accounting and Depreciation/Amortization Policy for Army Activities Operating the Defense Business Fund.

¹DOD intends to bring within the DBOF other activities, such as the Defense Contract Management Command, Defense Contract Audit Agency, and other operations programs which support combat forces.

4. Under the DBOF, all direct, indirect, and general and administrative costs incurred shall be collected and identified to the product or service benefitting from the costs.
 - a. Previously, the revolving funds only charged its customers the direct cost of providing a good or service, not the full cost.
 - b. DBOF uses a complex unit-cost methodology to determine the full cost of goods and services.
 5. The designated DBOF business area shall provide identifiable goods and services for DBOF and non-DBOF customers on a reimbursable basis.
 6. Individual activities and business areas can continue to incur costs as long as the total cost for all activities and business areas in the Component do not exceed the total cost authority for that Component as of fiscal year end.
- B. Accounting Procedures for Stock and Industrial Fund DBOF Business Areas.
1. Effective October 1, 1991 Treasury fund symbols for DOD stock and industrial funds shall no longer be valid for Treasury and Budgetary reporting purposes. All financial transactions and subsequent reporting shall reflect 97X4930, the new DBOF Treasury fund symbol.
 2. Each stock and industrial fund shall transfer to the DBOF Treasury fund symbol effective October 1, 1991 all:

Chapter 13

- a. Undelivered orders and accounts payable balances as of September 30, 1991;
 - b. Unfilled orders and accounts receivable balances as of September 30, 1991; and
 - c. Other funds' assets, liabilities, and capital balances as of September 30, 1991.
3. Obligations and obligation adjustments, which would have been chargeable to a stock or industrial fund Treasury fund symbol valid prior to October 1, 1991, but not identified until after October 1, 1991, shall be charged to the DBOF Treasury fund symbol.
4. Reimbursable Orders. Amendments to reimbursable orders, which have been chargeable to a Treasury fund symbol valid prior to October 1, 1991, shall be charged to the DBOF Treasury fund symbol.
5. Disbursements and Collections.
 - a. All stock and industrial fund disbursements and collection transactions processed after September 30, 1991, shall cite the DBOF Treasury fund symbol and be reported as DBOF disbursements or collections on DOD disbursing reports.
 - b. Disbursements or collections chargeable to a Treasury fund symbol valid prior to October 1, 1991 but not identified and matched with a valid obligation until after October 1, 1991, shall be charged to the DBOF Treasury fund symbol.

VI. GENERAL FUND PRINCIPLES RELATED TO REVOLVING FUNDS.

- A. Miscellaneous Receipts, 31 U.S.C. § 3302(b) (1982).
The statute requires that money received from any source shall be deposited in the Treasury without any deductions.
1. Exception for revolving funds: The fund shall be reimbursed or credited with advance payments, from amounts available to the Department or from other sources, for supplies and services at rates that will equal the 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. 31 U.S.C. § 322(d) (1982); 10 U.S.C. § 2208(h).
 2. The income and the proceeds from the disposition of property, derived from operations financed out of the revolving fund represent moneys collected for the use of the United States and can be withdrawn or expended only in consequence of an appropriation made by law. Hence, in the absence of specific provision in the Act . . . or other statutory authority, such moneys must be deposited into the general fund of the Treasury. Comptroller General Warren to the Secretary of the Interior, 23 Comp. Gen. 986, 989 (1944); Walter L. Jordan, Director Finance Division, Department of the Treasury, B-241269, February 28, 1991 (Unpub.).
- B. The Purpose Statute. 31 U.S.C. § 1301.
1. Revolving funds may be used solely for the purpose for which they are authorized by law. See, To the Administrator, Veterans Administration, 40 Comp. Gen. 356, 358 (1960).

Chapter 13

2. Corollary: Money generated by using revolving funds for an unauthorized purpose must be deposited into the Treasury as miscellaneous receipts. 40 Comp. Gen. 356, 358 (1960) (VA proposed to finance and operate a centralized silver reclamation program as a revolving supply fund activity, and to retain and use the proceeds derived from the sale of silver. GAO said the revolving fund was set up to develop X-rays, not to recover precious metals).

C. Time. Application of the Bona Fide Needs Rule to Revolving Funds.

1. 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. 10 U.S.C. § 2210.
 - a. Revolving funds are "no year" funds.
 - b. Revolving funds are not dependent upon annual appropriations.
2. The Bona Fide Needs Rule does apply to requestor's funds used to pay for supplies from the revolving fund.

D. Amount. Contracts must be supported by a certification that the revolving fund contains a sum sufficient to cover the amount to be obligated.

VII. REVOLVING FUNDS AND THE RULES OF OBLIGATION.

A. Stock Funds. See 31 U.S.C. § 1501(a)(1); DFARS 208.7009; DOD Manual 7220.9-M; AR 37-1, para. 9-7; AR 37-1, Table 9-3; AFR 172-1, vol. 1, ch. 18.

1. If the obligation is for a project order under 41 U.S.C. § 23, or an Economy Act (31 U.S.C. § 1535) or a procurement order to another military department for reimbursable procurement, obligate the amount of the order using funds current when the performing agency accepts it.
2. If the obligation is for a procurement order to another military department accepted as a direct citation procurement, obligate the amount of the order using funds current when the contract is signed.

B. Industrial Funds. See 31 U.S.C. § 1501(a)(1); DFARS 208.7009; DOD Manual 7220.9-M; AR 37-1, para 9-7; AR 37-1, Table 9-3; AFR 172-1, vol. 1, ch. 19.

1. If the obligation is for an order placed with an industrially funded activity, obligate on written acceptance of project order.
2. Project order cannot be accepted unless evidence of the recipient's intent and capability to begin work within 90 days and complete the work within the projected period exists.

Chapter 13

- a. Start of work is defined as cost incurred or other action that cannot be performed legally without an accepted project order.
- b. These steps, however, do not qualify as a valid start of work if they are taken earlier than necessary to support completion of the work.

VIII. REVOLVING FUNDS AND VIOLATIONS OF TITLE 31 U.S.C. (THE ANTIDEFICIENCY ACT).

A. Violation of 31 U.S.C. § 1517 in Stock Funds. Occurs when:

1. Apportionment, allocations, or allotments are overobligated or overexpended; or
2. Disbursements exceed appropriation-level cash balances in a stock fund cash account or in the ammunition working capital funds. See AR 37-1, para. 7-6a(1) and (2).
3. See 31 U.S.C. § 1516 for exemptions.

B. Violation of 31 U.S.C. § 1517 in Industrial Funds or the Civil Works Revolving Fund. Occurs when disbursements exceed the appropriation-level cash balance (including unallocated balances) of the fund. See AR 37-1, para. 7-6a(2).

C. Application of Title 31 to Reimbursable Orders. AR 37-1, para. 12-5 and 12-7. AR 37-1, Glossary, Section II, Terms, provides:

1. Reimbursable order is an agreement to provide goods or services to certain activities, tenant activities, or individuals when the support is initially provided using mission funds and reimbursed to the installation through a billing procedure.
2. Reimbursable orders will not be administered or accounted for as separate subdivisions of funds, as allotments are.
 - a. The ordering activity will perform appropriation-type accounting for the order as if it were a contract.
 - b. 31 U.S.C. § 1517 is not violated if applicable obligations, costs, or expenditures incurred by the performing fiscal entity exceed the amount stated in a single reimbursable order.
 - c. The total obligation authority of the performing fiscal entity or subdivision, however, may not be exceeded.
3. Reimbursable orders (including appropriate amendments thereto) issued for work or services done on a cost-reimbursable basis will contain a cost ceiling for billing purposes.
 - This will limit the liability of the ordering activity if costs incurred by the performing activity exceed that ceiling. AR 37-1, para. 12-5o(6).

Chapter 13

D. Other Bases For Violations of Title 31 U.S.C.

1. Construction. See AR 37-1, para. 7-6b and d.

-- e.g., use of AIF funds for construction up to \$300,000.

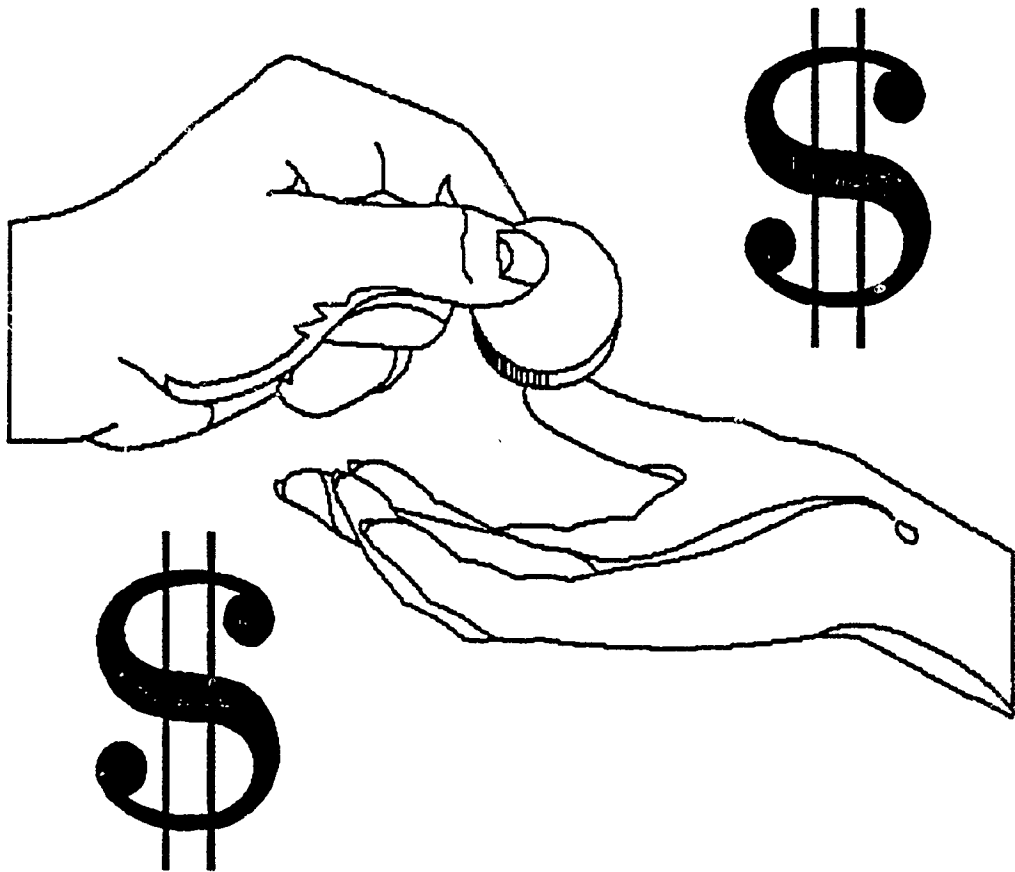
2. Voluntary Services. 31 U.S.C. § 1342; AR 37-1, para. 7-6a(4).

-- e.g., 31 U.S.C. § 1342 prohibition concerning acceptance of voluntary services or employing personal services exceeding that authorized by law is equally applicable to revolving funds.

IX. CONCLUSION.

CHAPTER 14

PAYMENT AND COLLECTION



CHAPTER 14

PAYMENT AND COLLECTION

I.	INTRODUCTION	1
A.	Contractor and Government Interests	1
B.	Invoice Payments v. Finance Payments	1
II.	CONTRACT FINANCING METHODS	2
A.	Partial Payments	2
B.	Advance Payments	3
C.	Progress Payments	4
D.	Progress Payments Under Construction Contracts	5
E.	Loan Guarantees	6
F.	Interim Payments under Cost-Type Contracts . .	6
III.	CONTRACT PAYMENT PROCEDURES AND THE PROMPT PAYMENT ACT	6
A.	Applicability of the Prompt Payment Act (FPA)	6
B.	Invoice Payment Procedure	8
C.	Fixed-Price Construction Contracts	13
D.	Fixed-Price Architect-Engineer Contracts . . .	13
E.	Prompt Payment Discounts	14
IV.	FAST PAYMENT PROCEDURES	14
A.	Purpose	14
B.	Contract Requirements	14
C.	Conditions for Use	15
V.	PAYMENTS IN COST-TYPE CONTRACTS	16
A.	Allowable Cost and Payment Clause	16

B.	Disallowance of Costs	17
C.	Retroactive Disallowances	17
D.	Invoicing for Interim Payments	18
E.	Final Payments	20
VI.	ASSIGNMENT OF CLAIMS	23
A.	General Rule	23
B.	Protection For the Assignee.	24
VII.	DEBT DETERMINATION AND COLLECTION PROCEDURES	25
A.	Debts Covered by Contract Collection Procedures	25
B.	Determination of Contractor Debt	26
C.	Enforcing Government Claims--Collecting the Debt	28
D.	The Debt Collection Act of 1982	31
VIII.	CONCLUSION	33

Appendix A	35
Appendix B	37
Appendix C	40
Appendix D	44

CHAPTER 14

PAYMENT AND COLLECTION

I. INTRODUCTION.

A. Contractor and Government Interests.

1. Finance and accounting considerations.
2. Contract considerations.
3. Avoidance of interest penalties.
4. Debt collection by the government.
5. Effect on contract performance.

B. Invoice Payments v. Finance Payments.

1. Invoice payments are payments made by the contractor upon delivery of goods or performance

MAJ Steven N. Tomanelli
Fiscal Law Course

Chapter 14

of services, and acceptance thereof by the government. Invoice payments include:

- a. Final payments of the contract price, costs, or fee in accordance with the contract or as agreed upon by the government and the contractor.
 - b. Payments for partial deliveries or partial performance under fixed-price contracts.
2. Contract financing payments are payments made to a contractor before government acceptance of goods or services. Such payments are a means of financing the contractor's performance. Finance payments include:
- a. Advance payments.
 - b. Progress payments. Note: Progress payments under fixed-price construction and fixed-price architect-engineer contracts are considered invoice payments under the Prompt Payment Act.
 - c. Interim payments under cost-type contracts.

II. CONTRACT FINANCING METHODS. 41 U.S.C. § 255; 10 U.S.C. § 2307; FAR Subpart 32.1.

A. Partial Payments.

1. Partial payments are payments, made under fixed-price contracts for supplies or services

accepted by the government, that constitute only part of the contract requirements. FAR 52.232-1, Payments; FAR 52.232-2, Payments Under Fixed-Price Research and Development Contracts.

2. Unless the contract specifies otherwise, the government must make payment under fixed-price contracts when it accepts partial deliveries if:
 - a. The amount due on the deliveries warrants it; or
 - b. The amount due on partial deliveries is at least \$1,000 or 50% of the total contract price and the contractor requests payment. FAR 52.232-1.

B. Advance Payments. FAR Subpart 32.4; FAR 52.232-12, Advance Payments.

1. Advance payments are advances of money by the government to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts.
2. Advance payments are the method of contract financing least preferred by the government.
3. Requirements for making advance payments (10 U.S.C. § 2307, 41 U.S.C. § 255):
 - a. The contractor must give adequate security;
 - b. Advance payments may not exceed the unpaid contract price;

contractual terms, specifications, or price are not definite, i.e., under undefinitized contract actions.

3. Customary v. unusual progress payments. FAR 32.501-1 and FAR 32.501-2. DFARS 232.5 provides customary and uniform progress payment rates.
 4. Consideration for progress payments. FAR 32.501-4.
 - a. If the parties include progress payment terms in the contract when awarded, no specific consideration is required to include those terms in the contract or for subsequent changes in progress payment or liquidation rates as provided by the contract. FAR 32.501-4(a).
 - b. However, the contractor must provide new monetary or nonmonetary contract consideration, if the contract is amended by adding progress payment provisions.
 5. Subcontract progress payment arrangements. The contracting officer must encourage the prime contractor to provide progress payments to its subcontractors on terms that meet the standards established by FAR 32.502-1. FAR 32.504.
- D. Progress Payments Under Construction Contracts. FAR 32.103; FAR 52.232-5, Payments Under Fixed-Price Construction Contracts.
1. When a construction contract provides for progress payments and the contractor fails to achieve

Chapter 14

satisfactory performance for a period for which a progress payment is to be paid, the government may retain a percentage of the progress payment.

2. The retainage shall not exceed 10 percent of the progress payment.

E. Loan Guarantees.

Federal Reserve Banks make loan guarantees on behalf of one or more specific guaranteeing agencies to enable contractors to obtain financing from private sources under contracts for the acquisition of supplies or services for the national defense. 50 U.S.C. App. § 2091, Defense Production Act of 1950, § 301; FAR Subpart 32.3.

F. Interim Payments under Cost-Type Contracts.

III. CONTRACT PAYMENT PROCEDURES AND THE PROMPT PAYMENT ACT. 31 U.S.C. §§ 3901-3906, as amended by the Prompt Payment Act Amendments of 1988, Pub. L. No. 100-496 (102 Stat. 2455); OMB Cir. A-125; FAR Subpart 32.9.

A. Applicability of the Prompt Payment Act (PPA).

1. Contracts covered.

- a. The PPA applies to all government contracts (including small purchases as defined in FAR Subpart 13.1), except for contracts where payment terms and late payment penalties have been established by other governmental authority, e.g., tariffs.

- b. There are no geographical limitations to the applicability of the PPA. Held & Franke Bauaktiengesellschaft mbH, ASBCA No. 42463, 92-1 BCA ¶ 24,712 (1992). Contra FAR 32.901.

2. Applicability to types of payments.

- a. The PPA applies to invoice payments--those made for supplies or services that the government has accepted. For purposes of applying the PPA, invoice payments include (FAR 32.902):
 - (1) Final cost or fee payments where the amounts owed have been settled between the government and the contractor.
 - (2) Payments for partial deliveries accepted by the government under fixed-price contracts. FAR 32.902.
 - (3) Progress payments under fixed-price architect-engineer contracts.
 - (4) Progress payments under fixed-price construction contracts.
 - (5) Payments under a cost-reimbursement contract were for services already received. Northrop Worldwide Aircraft Servs., Inc. v. Dep't of Treasury, GSBCA No. 11162-TD, 92-2 BCA ¶ 24,765.
- b. The PPA does not apply to contract financing payments--those made by the government prior to acceptance of supplies or services. FAR 32.907-2. For purposes of applying the PPA, contract financing payments include (FAR 32.902):

Chapter 14

- (1) Advance payments;
- (2) Progress payments based on cost;
- (3) Progress payments based on percentage or stage of completion (except for those made under the fixed-price construction and fixed-price architect-engineer payments clauses noted above); and
- (4) Interim payments under cost-type contracts.

B. Invoice Payment Procedure

1. Proper invoice required. Contractors must submit a proper invoice. 31 U.S.C. § 3903(a). FAR 32.902; FAR 32.905(e). Siska Constr. Corp., VABCA No. 3381, 91-3 BCA ¶ 24,144.

a. A proper invoice includes:

- (1) Name and address of the contractor.
- (2) Invoice date.
- (3) Contract number or other authorization.
- (4) Description, quantity, unit of measure and cost of supplies delivered or services performed.
- (5) Shipping and payment terms.
- (6) Name and address of contractor official

to whom payment is to be sent.

(7) Name, telephone number, and mailing address of person to notify if the invoice is defective.

(8) Any other information or documentation required by the contract, such as evidence of shipment.

b. Notice of defective invoice. The government must notify the contractor of any defective invoice within seven days (less for certain perishable commodities) after receipt of the invoice at the designated payment office. The notice should include a statement identifying the defect in the invoice. FAR 32.905(e).

c. Supporting documentation is required. FAR 32.905(f).

(1) The contractor must support all invoice payments with a receiving report or some other government document authorizing payment. A receiving report is evidence that the government accepted the supplies delivered or services performed by the contractor.

(2) The contractor must forward supporting documentation by the 5th working day after government acceptance or approval, unless the parties have agreed otherwise. This period of time does not extend the payment due dates.

d. Exception: Contractors may collect PPA interest without submitting an invoice if circumstances indicate that the government will refuse payment. B.F. Carvin Constr. Co., VABCA No. 3224, 92-1 BCA ¶ 24,281.

Chapter 14

2. Payment due date. The payment due date for invoice payments is the later of (FAR 32.905):
 - a. The 30th day after the designated billing office receives a proper invoice; or
 - b. The 30th day after government acceptance of supplies delivered or services performed by the contractor.
 - (1) On a final invoice where the payment amount is subject to contract settlement actions, acceptance occurs on the effective date of the settlement.
 - (2) For the sole purpose of computing an interest penalty, government acceptance occurs constructively on the 7th day after the contractor has delivered the supplies or performed the services, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement.
 - (3) The contracting officer may specify a longer period for constructive acceptance.
 - c. Special payment periods. The payment period on contracts for perishable agricultural commodities is shorter. FAR 32.905(d).
 - d. It is DOD policy to assist small disadvantaged businesses by paying them as quickly as possible after receipt of a proper invoice. This policy does not alter the payment due date for purposes of the PPA. DFARS 232.903.

3. Interest penalty for late payment. The government incurs an interest penalty for late invoice payment, including late payment of progress payments under fixed-price architect-engineering contracts and fixed-price construction contracts. FAR 32.907-1.
 - a. Accrual. The interest penalty accrues when payment is made to the contractor after the contract payment due date. The government has no no grace period for payment (formerly there was a 15-day grace period).
 - b. Automatic payment. The interest penalty accrues automatically and without request by the contractor.
 - c. Late payment penalty on penalty.
 - (1) The interest penalty is increased if the agency fails to make a required interest penalty payment within 10 days after the date the invoice amount is paid and the contractor then makes a written demand for the penalty within 40 days after the payment.
 - (2) This additional penalty applies to contracts awarded on or after 1 October 1989.
 - d. Non-excusability. The government is not excused from paying the interest penalty because of the temporary unavailability of funds.
4. Distinguish Contract Disputes Act interest from Prompt Payment Act interest.

Chapter 14

- a. Under the Contract Disputes Act (CDA), the government pays interest on amounts found to be due to a contractor on claims submitted to the contracting officer. Such CDA interest accrues from the date the contracting officer receives a proper claim until payment of the amount due on the claim. 41 U.S.C. § 611. See Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349 (payment of CDA claim presumed to include interest).
- b. The interest payable under the Prompt Payment Act is an interest penalty that is payable when the agency fails to pay a business concern by the payment due date for property or services that have been delivered or completed.
 - (1) This interest penalty may also apply to a failure to pay interest due to a contractor by the due date of that interest.
 - (2) The government's obligation to pay PPA interest is not dependent on a contractor submitting a claim for the interest penalty; however, the contractor does have to submit a proper invoice or voucher for payment. 31 U.S.C. § 3902.
- c. Both PPA and CDA interest is based on the rate established by the Secretary of the Treasury, which is published in the Federal Register. 31 U.S.C. § 3902 and 41 U.S.C. § 611. Under the CDA the government pays simple interest and adjusts the rate every six months to accord with the current Treasury rate. In contrast, PPA interest is compounded and is constant during the one-year accrual period.

C. Fixed-Price Construction Contracts. FAR 52.232-5, Payments Under Fixed-Price Construction Contracts (APR 1989); FAR 52.232-27, Prompt Payment for Construction Contracts (APR 1989).

1. The government must pay interest on approved construction contract progress payments that remain unpaid for more than 14 days after the designated billing office receives a proper billing request. FAR 32.905(c).
 - a. The contracting officer may specify a longer period if necessary to inspect work in process adequately.
 - b. The contractor must certify such progress payment requests.
2. Similarly, the contractor must pay interest on unearned progress payments, e.g., when the government makes progress payments and the contractor's performance does not conform to contract terms.
3. The government must pay interest on any retained amount that is approved for release if the retained amount is not paid to the contractor by the 30th day (unless specified otherwise in contract) after release.

D. Fixed-Price Architect-Engineer Contracts. FAR 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts (AUG 1987); FAR 52.232-26, Prompt Payment for Fixed-Price Architect-Engineer Contracts (APR 1989). The government must pay interest penalties on approved contract progress payments that remain unpaid for more than thirty days after government approval of contractor estimates of work or services accomplished.

Chapter 14

E. Prompt Payment Discounts. FAR 32.903.

1. The government may take prompt payment discounts offered by a contractor only when it pays the contractor within the specified discount period.
2. The PPA imposes an interest penalty on improperly taken discounts, and the government must pay the penalty without request by contractor.

IV. FAST PAYMENT PROCEDURES. FAR Subpart 13.3.

A. Purpose.

1. In appropriate circumstances, the government may pay the contractor before it verifies that it has received and accepted supplies.
2. The government must issue payment within fifteen days after the date of receipt of the invoice. Interest penalties apply to late payments made under fast payment procedures.

B. Contract Requirements. FAR 13.303. Contracts, purchase orders, or blanket purchase agreements using the fast payment procedures must include the following terms and conditions:

1. The contractor must ship the supplies with transportation or postage prepaid.

2. The contractor must submit invoices directly to the designated finance or other office, or in case of unpriced orders, to the contracting officer.
3. A statement on the consignee's copy that the consignee will notify the government purchasing office promptly after the specified delivery date regarding any supplies that are not received, that are damaged in transit, or that do not conform to the specifications of the purchase order. The statement shall provide that the cosignee will make this notification not later than sixty days after the specified delivery date absent extenuating circumstances.
4. The contractor must mark "FAST PAY" on outer shipping containers.

C. Conditions for Use. FAR 13.302.

1. Individual orders do not exceed \$25,000.
2. The purchasing instrument is a firm-fixed-price contract, a purchase order, or a delivery order for supplies.
3. Title to supplies will vest in the government:
 - a. Upon delivery by the contractor to a post office or common carrier for mailing or shipment to destination; or
 - b. Upon receipt by the government if shipment is by means other than the Postal Service or a common carrier.

Chapter 14

4. The supplier agrees to replace, repair, or correct supplies not received, damaged in transit, or not conforming to purchase requirements.
5. Deliveries of supplies are to occur at locations where there is a geographical separation and a lack of adequate communications facilities between government receiving and disbursing activities that will make it impractical to make timely payment based on evidence of government acceptance.
6. The government paying activity has a system in place to:
 - a. Document evidence of contractor performance under fast payment acquisitions;
 - b. Provide timely feedback to the contracting officer in case of contractor deficiencies; and
 - c. Identify suppliers who currently abuse fast payment procedures.

V. PAYMENTS IN COST-TYPE CONTRACTS.

- A. Allowable Cost and Payment Clause. FAR 52.216-7, Allowable Cost and Payment (APR 1984); FAR 52.216-8 through 52.216-15 (cost contract fee clauses).

B. Disallowance of Costs. FAR Subpart 42.8--Disallowance of Costs.

1. FAR 52.242-1, Notice of Intent to Disallow Costs.
2. Although a contracting officer may disallow costs at any time prior to final payment, contractors are entitled to substantial procedural protections first.
3. Either the Defense Contract Audit Agency (DCAA) or the administrative contracting officer may issue a DCAA Form 1, Notice of Intent to Disallow Costs. The notice must identify the costs and the reasons for disallowing them. FAR 42.801.
4. The contractor may respond in writing and further justify the costs. The contracting officer must either withdraw the notice or issue a written determination disallowing the costs. FAR 32.801(f).
5. Cost disallowances are not final decisions under the disputes clause. A contractor must file a claim for the disallowed costs. FAR 42.803(b)(3).

C. Retroactive Disallowances.

1. A government disallowance of an incurred cost may have a significant impact on a contractor because the contractor may be unable to reallocate the costs to fixed-price contracts or closed cost-reimbursement contracts.

Chapter 14

2. Government actions may be evidence of the allowability of disputed costs. Martin Marietta Corp., ASBCA No. 25828, 84-1 BCA ¶ 17,119 (1984).
3. Government acquiescence in earlier costs may estop the government from retroactively disallowing the costs. Litton Sys. Inc. v. United States, 196 Ct. Cl. 133 (1974).
4. When retroactive disallowance is not permitted, the disallowance begins on the date of the DCAA Form 1 or the date of final decision. Litton Sys., Inc. v. United States, 196 Ct. Cl. 133 (1974).

D. Invoicing for Interim Payments.

1. Contractors may submit an invoice and the government shall make payment as often as every two weeks; small businesses may invoice for interim payments even more frequently.
2. Payments are based on an invoice or voucher supported by a statement of the claimed allowable costs for performance of the contract during the period covered by the interim invoice and payment.
3. The allowability of costs for payment in interim payment invoices is determined in accordance with FAR Part 32--Contract Cost Principles and Procedures.

a. Direct costs may be allowable if:

- (1) The contractor has incurred and paid the costs; or
- (2) The contractor has incurred (although not yet paid) the cost; the contractor is not delinquent in paying its bills in the ordinary course of its business; and the costs pertain to:
 - (a) Materials that have been issued from inventory and placed in production on this contract; or
 - (b) Direct labor or direct travel; or
- (3) The contractor has paid the costs to a subcontractor with a cost-type subcontract.

b. Indirect costs may be allowable based on:

- (1) The mutually agreed billing rate for indirect costs; or
- (2) The contractor's total incurred, allocable, and allowable costs.

4. Interim payment of fee.

- a. The government normally pays fixed fees (CPFF), base fees (CPAF), and target fees in increments. The contractor includes a percentage of fee in each interim payment equal to the estimated percentage of work completed (normally the percentage of

Chapter 14

estimated costs incurred during the billing period).

- b. Normally, the government does not pay award fees until the contracting officer makes a fee determination.
- c. The government and the contractor have some flexibility to agree to alternate payment schemes regarding the contract fee.

5. Administrative procedures.

- a. The contractor submits an invoice, Standard Form 1034 and 1035, to the payment office designated in the contract.
- b. The paying office may ask DCAA to audit the interim payment invoice; however, normally payment is normally made as invoiced, less any withholdings. Usually, interim payments are audited, if at all, in the final contract closeout or settlement audit.

E. Final Payments.

- 1. Final payment and contract closeout typically occur several years after the contract work is completed.
- 2. Indirect costs.
 - a. After the close of each accounting period, the contractor submits a final indirect cost rate proposal to the administrative contracting officer and the contract auditor.

These proposals impose a special certification requirement. DFARS 252.242-7003.

- b. The contracting officer negotiates the final indirect costs with the contractor and either agrees on rates with the contractor bilaterally, or unilaterally determines rates for the period. FAR Subpart 42.7.
- c. Educational institutions may negotiate predetermined rates with the (administrative) contracting officer. FAR 42.705-3. Predetermined rates are both the billing and the final rates. FAR 52.216-17.

3. Contract closeout.

- a. Within one year (or after negotiation of the final indirect cost rates for the final accounting period if authorized in writing) the contractor must submit a final invoice.
- b. DCAA typically audits the direct costs on the contract only after the contractor has submitted the closeout voucher.
- c. The administrative contracting officer and the contractor negotiate disputed costs, claims, credits, etc. The final contract price is agreed upon bilaterally or determined unilaterally.

4. Effect of Final Payment.

a. Allowability.

- (1) Final payment is a final determination of allowability. Chrysler Corp., ASBCA

Chapter 14

No. 17259, 75-1 BCA ¶ 11,236 (1975). The government may not later challenge the allowability of a cost that it included within a final payment. United States v. Mason & Hanger Co., 260 U.S. 323 (1922).

- (2) The government may avoid a final determination on allowability only for fraud, mistake of fact, lack of authority, or other common law justifications.

b. Claims.

- (1) A contractor must execute a release of claims as a condition precedent to final payment, although it can except specific claims in the release. FAR 52.216-7(h)(3).
- (2) Final payment acts as a bar to subsequent claims under certain remedy granting clauses in the contract. In A & A Insulation Contractors, Inc. v. United States, ____ U.S. ____, 11 FPD ¶ 81 (June 1992) (contractor's execution of a general release without reserving a claim for bond costs discharged the government from liability). Accord, Goetz Demolition Co., ASBCA Nos. 40605, 41346, 92-3 BCA ¶ ____ (the contractor could not recover costs allegedly attributable to a suspension of work because the contractor executed a modification that discussed the need for an extension in which the contractor released the government from all claims related thereto).

VI. ASSIGNMENT OF CLAIMS. FAR Subpart 32.8.

A. General Rule: A Contractor May Assign Its Right to be Paid by the Government for Contract Performance. FAR 32.802.

1. Under the Assignment of Claims Act (31 U.S.C. § 3727) and Assignment of Contracts Act (41 U.S.C. § 15), a contractor may assign monies due or to become due under a contract if all of the following conditions are met:

- a. The contract specifies payments aggregating \$1,000 or more.
- b. The contractor makes the assignment to a bank, trust company, or other financing institution, including any Federal lending agency.
- c. The contract does not prohibit the assignment.
- d. Unless the contract expressly permits otherwise, the assignment:
 - (1) Covers all unpaid amounts payable under the contract;
 - (2) Is made only to one party; and
 - (3) Is not subject to further assignment.
- e. The assignee sends a written notice of assignment together with a true copy of the assignment instrument to the:

Chapter 14

- (1) Contracting officer or agency head,
- (2) Surety on any bond applicable to the contract; and
- (3) Disbursing officer designated in the contract to make payment.

2. The provisions of the Acts are construed strictly. See United California Discount Corp. v. United States, 19 Cl. Ct. 504 (1990).

B. Protection For the Assignee. FAR 32.804

1. The government cannot recover payments made to the assignee based on the contractor's liability to the government.
2. No-setoff commitment. (Only in time of war or national emergency).
 - The assignee will receive contract payments free of reduction or setoff for any liability of the contractor arising independent of the contract and liability of the contract such as fines, penalties, and withheld taxes.

VII. DEBT DETERMINATION AND COLLECTION PROCEDURES. FAR Subpart 32.6--Contract Debts.

A. Debts Covered by Contract Collection Procedures. FAR 32.602.

1. Damages or excess costs arising from a contractor's default in performance.
2. Breaches of contract obligations by the contractor concerning progress payments, advance payments, or government-furnished property or material.
3. Expenses incurred by the government in correcting defects.
4. Government overpayments to contractors due to billing errors, such as stating an incorrect quantity, or deficiencies in quality.
5. Retroactive price reductions resulting from contract terms for price redetermination or for determination of prices under incentive-type contracts.
6. Delinquency in contractor payments due to the government under agreements for deferral or postponement of collections.

Chapter 14

B. Determination of Contractor Debt.

1. Cooperation among government officials.

- a. Contracting officers, contract financing offices, disbursing officials, and auditors shall cooperate fully with each other to properly identify and promptly collect contract debts. FAR 32.605(a).

2. Responsibility.

- a. Normally, the contracting officer has primary responsibility for determining the amount of a debt and for collecting it. FAR 32.605(b).
- b. For DOD agencies, the disbursing officer is responsible for determining the amount and collecting contract debts whenever the government makes overpayments or erroneous payments. DFARS 232.605(b).

3. Procedures.

- a. The responsible official determines the substantive basis for the government's entitlement.

(1) Contractual. Identify the specific contract provision(s) upon which the government's claim is based. Common bases include:

- (a) Defective pricing. See FAR 15.804-7, Defective Cost or Pricing Data.

- (b) Excess costs of reprocurement. See FAR Subpart 49.4, Termination for Default, particularly FAR 49.402-6, Repurchase Against Contractor's Account.
 - (c) Defective work. See FAR Part 46 and the inspection clauses FAR 52.246-1 through 52.246-14.
 - (d) Liquidated damages. See FAR Subpart 12.2, Liquidated Damages.
 - (e) Progress payments. See FAR Subpart 32.5, Progress Payments Based on Costs.
 - (f) Advance payments. See FAR Subpart 32.4, Advance Payments.
- (2) Other bases for government entitlement include:
- (a) Common law (breach of contract, consequential damages).
 - (b) Debts from other contracts.
- b. If the government's entitlement result from a unilateral determination, the contracting officer shall issue a final decision in accordance with FAR 33.211.
- (1) The final decision is essential for CDA jurisdiction. 41 U.S.C. § 605(a); Unimatic Mfg. Co., ASBCA No. 25212, 81-1 BCA ¶ 15,095.

Chapter 14

(2) Fraud claims. Contracting officers lack authority to render final decisions on fraud claims. 41 U.S.C. § 605(a); Martin J. Simko Constr. Inc. v. United States, 852 F.2d 540 (Fed. Cir. 1988).

- c. The responsible official must issue a demand letter notifying the contractor of the debt as soon as the responsible official has computed the amount of refund due. FAR 32.610. If the debt is a result of a unilateral determination by the government, the contracting officer's final decision shall include a demand for payment. FAR 33.211(a)(4)(vi).

C. Enforcing Government Claims--Collecting the Debt.

1. Collection methods.

- a. Voluntary payment by the contractor. After issuance of the demand letter, the contractor may pay voluntary or make arrangements to pay the amount due.
- b. Administrative setoff. If the disbursing officer is responsible for collection of a contract debt or is notified of the debt by the responsible official, and if the disbursing officer has contractor invoices on hand for payment by the government, the disbursing official shall make an appropriate setoff in the payment to the contractor. FAR 32.611. (But see AR 37-1 which prohibits an administrative offset without prior approval from the Defense Finance and Accounting Service, Banking and Contract Financing Policy).

- c. Withholding. If the contractor fails to make payment within 30 days, and has failed to request deferment, the government shall immediately initiate withholding of principal and interest. FAR 32.612.
- d. Referral to the Department of Justice (DOJ) for litigation and to the General Accounting Office for review and approval prior to submission to DOJ. Federal Claims Collection Standards, 4 C.F.R. Part 105.

2. Deferment of collection. FAR 32.613.

- a. The government and the contractor may agree to a debt deferment or installment payments if the contractor is unable to pay in full at once or if the contractor's operations under national defense contracts would be seriously impaired. FAR 32.613(f).
- b. The government grants deferments pursuant to a written agreement. FAR 32.613(h) specifies the necessary terms.
- c. If the contractor's appeal of the debt determination is pending when it requests deferment, any deferment/installment agreement must provide that the contractor will:
 - (1) prosecute the appeal diligently: and
 - (2) pay the debt in full when the appeal is decided or the parties agree on the debt amount. FAR 32.613(i).
- d. The filing of an action under the contract's Disputes clause shall not suspend or delay collection of government claims. Lockheed

Chapter 14

Corp v. Garrett, 37 C.C.F. ¶ 76,233 (C.D. Ca. 1991).

- e. To obtain deferment of a debt determination that the contractor has been appealed under the Disputes clause, the contractor must present a bond or other collateral in the amount of the claim to the government. FAR 32.613(1).

3. Statute of Limitations on Government Claims. 28 U.S.C. § 2415.

- a. The contractor must commence an action for damages within 6 years after the right of action accrues or within 1 year after a final decision in an administrative proceeding required by contract or law, whichever is later.

- (1) The limitation applies to recovery suits, but not to final decisions of a contracting officer. S.E.R. Jobs for Progress, Inc. v. United States, 759 F.2d 1 (Fed. Cir. 1985); Radiation Sys., Inc., ASBCA No. 41065, 91-2 BCA ¶ 23,971.

- (2) The 6-year limitation period begins to run when the cause of action accrues, not when a Board of Contract Appeals decision becomes final. United States v. Lincoln Eng'g, Inc., 586 F. Supp. 684 (1984).

- b. This statute of limitations does not apply to administrative setoffs; rather, the GAO/DOJ collection standards impose a 10-year limitation on setoffs. 4 C.F.R. 102.3(b)(3).

D. The Debt Collection Act of 1982. 31 U.S.C. § 3716, Administrative Offset; implemented jointly by the General Accounting Office and the Department of Justice in the Federal Claims Collection Standards, 4 C.F.R. ch. II, pursuant to 31 U.S.C. § 3711(e)(2).

1. The Debt Collection Act (DCA) provides that after an agency has tried unsuccessfully to collect a government claim for money or property from a person or business concern, the agency may collect the debt by administrative setoff.

-- Note that the DCA covers administrative offset of all types of debts owed to the government, not just government claims arising under contracts.

2. The statute and implementing regulations provide debtors with the following rights before an agency may collect a debt by administrative setoff:

a. Written notice of the type and amount of the government's claim and written notice that the agency intends to collect the debt by administrative setoff.

b. An explanation of debtor's rights under the DCA.

c. An opportunity to inspect and copy the agency's records relating to the claim.

d. An opportunity to request an agency review of the debt determination decision.

e. An opportunity to enter into a written agreement with the agency to repay the debt. But see Joan G. Morningstar, et al, ASBCA No. 41820, _____ BCA _____ (12 November 1992).

Chapter 14

3. The DCA does not apply unless the government is attempting to collect a debt by setoff against a contract other than the contract under which the debt arose:
 - a. Administrative setoff effected under government contracts is subject to the procedures established by the Debt Collection Act of 1982. DMJM/Norman Eng'g Co., ASBCA No. 28154, 84-1 BCA ¶ 17,226.
 - b. The United States Court of Federal Claims specifically held that Debt Collection Act (DCA) procedures and rights do not apply to intra-contractual disputes, because such a contractual government claim against the contractor does not constitute a debt under the terms of the DCA. Avco Corp. v. United States, 10 Cl. Ct. 665 (1986).
 - c. The GSBCA has held that when regulations require that the government setoff claims arising under a contract pursuant to the government's common law right of setoff (ie. from the same contract as the debt), then DCA procedures and rights do not apply. Sam's Elec. Co., GSBCA Nos. 9359, 10044, 90-3 BCA ¶ 23,128; see also Information Consultants, Inc., GSBCA Nos. 8130-COM, 8528-COM, 86-3 BCA ¶ 19,198.
 - d. Circumstances considered to be intra-contractual governmental claims not subject to the DCA include:
 - (1) Price reduction for defective pricing data. Fairchild Republic Co., ASBCA No. 29385, 85-2 BCA ¶ 18,047, aff'd on reconsid., 86-1 BCA ¶ 18,608.
 - (2) A price reduction under the Changes clause for deleted work. A. J. Fowler Corp., ASBCA No. 28965, 86-2 BCA

Corp., ASBCA No. 28965, 86-2 BCA
¶ 18,970.

(3) Withholding for liquidated damages.
Rivera Const. Co., ASBCA Nos. 29391,
30207, 88-2 BCA ¶ 20,750.

- e. When setoff of funds due on a contract is effected to recoup overpayments on an earlier contract, the DCA rights and procedures do not apply. Snowbird Indus., Inc., ASBCA No. 33171, 87-2 BCA ¶ 19,862.
- f. An anomaly: Withholding funds pursuant to a contract provision was not subject to the DCA, even though the basis for withholding arose under a different contract. B & A Elec. Co., Inc., ASBCA No. 33667, 88-2 BCA ¶ 20,533.

VIII. CONCLUSION.

APPENDIX A

FAR CLAUSE 52.232-1

PAYMENTS (APR 1984)

AND

FAR CLAUSE 52.232-2

PAYMENTS UNDER FIXED-PRICE

RESEARCH AND DEVELOPMENT CONTRACTS (APR 1984)

52.232-1 Payments.

As prescribed in 32.111(a)(1), insert the following clause, appropriately modified with respect to payment due date in accordance with agency regulations, in solicitations and contracts when a fixed-price contract, a fixed-price service contract, or a contract for nonregulated communication services is contemplated:

PAYMENTS (APR 1984)

The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by the Government if—

- (a) The amount due on the deliveries warrants it; or
- (b) The Contractor requests it and the amount due on the deliveries is at least \$1,000 or 50 percent of the total contract price.

(End of clause)

(R 7-103.7 1958 JAN)

(R 1-7.102-7)

52.232-2 Payments under Fixed-Price Research and Development Contracts.

As prescribed in 32.111(a)(2), insert the following clause, as appropriately modified with respect to payment due dates in accordance with agency regulations, in solicitations and contracts when a fixed-price research and development contract is contemplated:

PAYMENTS UNDER FIXED-PRICE RESEARCH AND DEVELOPMENT CONTRACTS (APR 1984)

The Government shall pay the Contractor, upon submission of proper invoices or vouchers, the prices stipulated in this contract for work delivered or rendered and accepted, less any deductions provided in this contract. Unless otherwise specified, payment shall be made upon acceptance of any portion of the work delivered or rendered for which a price is separately stated in the contract.

(End of clause)

(R 7-302.2 1959 JUN)

(R 1-7.302-2)

APPENDIX B

**FAR CLAUSE 52.232-5
PAYMENTS UNDER FIXED-PRICE
CONSTRUCTION CONTRACTS (APR 1989)**

accordance with subcontract agreements and the requirements of chapter 39 of Title 31, United States Code; and

(3) This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

(Name)

(Title)

(Date)

52.232-5 Payments under Fixed-Price Construction Contracts.

As prescribed in 32.111(a)(5), insert the following clause:

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (APR 1989)

(a) The Government shall pay the Contractor the contract price as provided in this contract.

(b) The Government shall make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished which meets the standards of quality established under the contract, as approved by the Contracting Officer. The Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, which shall substantiate the payment amount requested in order to provide a basis for determining progress payments, in such detail as requested by the Contracting Officer. In the preparation of estimates the Contracting Officer may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration if—

(1) Consideration is specifically authorized by this contract; and

(2) The Contractor furnishes satisfactory evidence that it has acquired title to such material and that the material will be used to perform this contract.

(c) Along with each request for progress payments, the Contractor shall furnish the following certification, or payment shall not be made:

I hereby certify, to the best of my knowledge and belief, that—

(1) The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract;

(2) Payments to subcontractors and suppliers have been made from previous payments received under the contract, and timely payments will be made from the proceeds of the payment covered by this certification, in

(d) If the Contractor, after making a certified request for progress payments, discovers that a portion or all of such request constitutes a payment for performance by the Contractor that fails to conform to the specifications, terms, and conditions of this contract (hereinafter referred to as the "unearned amount"), the Contractor shall—

(1) Notify the Contracting Officer of such performance deficiency; and

(2) Be obligated to pay the Government an amount (computed by the Contracting Officer in the manner provided in 31 U.S.C 3903(c)(1)) equal to interest on the unearned amount from the date of receipt of the unearned amount until—

(i) The date the Contractor notifies the Contracting Officer that the performance deficiency has been corrected; or

(ii) The date the Contractor reduces the amount of any subsequent certified request for progress payments by an amount equal to the unearned amount.

(e) If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds. Also, on completion and acceptance of each separate building, public work, or other division of the contract, for which the price is stated separately in the contract, payment shall be made for the completed work without retention of a percentage.

(f) All material and work covered by progress payments made shall, at the time of payment, become the sole property of the Government, but this shall not be construed as—

(1) Relieving the Contractor from the sole responsi-

bility for all material and work upon which payments
have been made or the restoration of any damaged
work; or

(2) Waiving the right of the Government to require
the fulfillment of all of the terms of the contract.

(g) In making these progress payments, the Government
shall, upon request, reimburse the Contractor for the
amount of premiums paid for performance and payment
bonds (including coinsurance and reinsurance agreements,
when applicable) after the Contractor has furnished evi-
dence of full payment to the surety. The retainage provi-
sions in paragraph (e) of this clause shall not apply to that
portion of progress payments attributable to bond premi-
ums.

(h) The Government shall pay the amount due the
Contractor under this contract after—

(1) Completion and acceptance of all work;

(2) Presentation of a properly executed voucher; and

(3) Presentation of release of all claims against
the Government arising by virtue of this contract,
other than claims, in stated amounts, that the
Contractor has specifically excepted from the opera-
tion of the release. A release may also be required of
the assignee if the Contractor's claim to amounts
payable under this contract has been assigned under
the Assignment of Claims Act of 1940 (31 U.S.C.
3727 and 41 U.S.C. 15).

(i) Notwithstanding any provision of this contract,
progress payments shall not exceed 80 percent on work
accomplished on undefinitized contract actions. A "con-
tract action" is any action resulting in a contract, as defined
in FAR Subpart 2.1, including contract modifications for
additional supplies or services, but not including contract
modifications that are within the scope and under the terms
of the contract, such as contract modifications issued pur-
suant to the Changes clause, or funding and other adminis-
trative changes.

(End of clause)

Chapter 14

APPENDIX C

FAR CLAUSE 52.232-7
PAYMENTS UNDER TIME-AND-MATERIAL
AND LABOR-HOUR CONTRACTS (APR 1984)

52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts.

As prescribed in 32.111(b), insert the following clause:
**PAYMENTS UNDER TIME-AND-MATERIALS AND
LABOR-HOUR CONTRACTS (APR 1984)**

The Government shall pay the Contractor as follows upon the submission of invoices or vouchers approved by the Contracting Officer:

(a) *Hourly rate.* (1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed. The rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis. Vouchers may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer), to the Contracting Officer or designee. The Contractor shall substantiate vouchers by evidence of actual payment and by individual daily job timecards, or other substantiation approved by the Contracting Officer. Promptly after receipt of each substantiated voucher, the Government shall, except as otherwise provided in this contract, and subject to the terms of (e) below, pay the voucher as approved by the Contracting Officer.

(2) Unless otherwise prescribed in the Schedule, the Contracting Officer shall withhold 5 percent of the amounts due under this paragraph (a), but the total amount withheld shall not exceed \$50,000. The amounts withheld shall be retained until the execution and delivery of a release by the Contractor as provided in paragraph (f) below.

(3) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis. If no overtime rates are provided in the Schedule and overtime work is approved in advance by the Contracting Officer, overtime rates shall be negotiated. Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract. If the Schedule provides rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(b) *Materials and subcontracts.* (1) Allowable costs of direct materials shall be determined by the Contracting Officer in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract. Reasonable and allocable material handling costs

may be included in the charge for material to the extent they are clearly excluded from the hourly rate. Material handling costs are comprised of indirect costs, including, when appropriate, general and administrative expense allocated to direct materials in accordance with the Contractor's usual accounting practices consistent with Subpart 31.2 of the FAR. The Contractor shall be reimbursed for items and services purchased directly for the contract only when cash, checks, or other forms of actual payment have been made for such purchased items or services. Direct materials, as used in this clause, are those materials which enter directly into the end product, or which are used or consumed directly in connection with the furnishing of the end product.

(2) The cost of subcontracts that are authorized under the subcontracts clause of this contract shall be reimbursable costs under this clause; *provided*, that the costs are consistent with subparagraph (3) below. Reimbursable costs in connection with subcontracts shall be limited to the amounts paid to the subcontractor in the same manner as for items and services purchased directly for the contract under subparagraph (1) above; however, this requirement shall not apply to a Contractor that is a small business concern. Reimbursable costs shall not include any costs arising from the letting, administration or supervision of performance of the subcontract, if the costs are included in the hourly rates payable under (a)(1) above.

(3) To the extent able, the Contractor shall—

(i) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and

(ii) Take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefits. When unable to take advantage of the benefits, the Contractor shall promptly notify the Contracting Officer and give the reasons. Credit shall be given to the Government for cash and trade discounts, rebates, allowances, credits, salvage, the value of any appreciable scrap, commissions, and other amounts that have accrued to the benefit of the Contractor, or would have accrued except for the fault or neglect of the Contractor. The benefits lost without fault or neglect on the part of the Contractor, or lost through fault of the Government, shall not be deducted from gross costs.

(c) *Total cost.* It is estimated that the total cost to the Government for the performance of this contract shall not exceed the ceiling price set forth in the Schedule and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all

other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall notify the Contracting Officer giving a revised estimate of the total price to the Government for performing this contract with supporting reasons and documentation. If at any time during performing this contract, the Contractor has reason to believe that the total price to the Government for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performing this contract, the Government has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

(d) *Ceiling price.* The Government shall not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that the ceiling price has been increased and shall have specified in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(e) *Audit.* At any time before final payment under this contract the Contracting Officer may request audit of the invoices or vouchers and substantiating material. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices or vouchers, that are found by the Contracting Officer not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. Upon receipt and approval of the voucher or invoice designated by the Contractor as the "completion voucher" or "completion invoice" and substantiating material, and upon compliance by the Contractor with all terms of this contract (including, without limitation, terms relating to patents and the terms of (f) and (g) below), the Government shall promptly pay any balance due the Contractor. The completion invoice or voucher, and substantiating material, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(f) *Assignment.* The Contractor, and each assignee under an assignment entered into under this contract and in

effect at the time of final payment under this contract, shall execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging the Government, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions:

(1) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible of exact statement by the Contractor.

(2) Claims, together with reasonable incidental expenses, based upon the liabilities of the Contractor to third parties arising out of performing this contract, that are not known to the Contractor on the date of the execution of the release, and of which the Contractor gives notice in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that the Government is prepared to make final payment, whichever is earlier.

(3) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of the Government against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.

(g) *Refunds*. The Contractor agrees that any refunds, rebates, or credits (including any related interest) accruing to or received by the Contractor or any assignee, that arise under the materials portion of this contract and for which the Contractor has received reimbursement, shall be paid by the Contractor to the Government. The Contractor and each assignee, under an assignment entered into under this contract and in effect at the time of final payment under this contract, shall execute and deliver, at the time of and as a condition precedent to final payment under this contract, an assignment to the Government of such refunds, rebates, or credits (including any interest) in form and substance satisfactory to the Contracting Officer.

(End of clause)

(R 7-901.6 1972 MAY)

Alternate I (APR 1984). If the nature of the work to be performed requires the contractor to furnish material that is regularly sold to the general public in the normal course of business by the contractor, and the price is under the limitations prescribed in 16.601(b)(3), add the following subparagraph (4) to paragraph (b) of the basic clause:

(b)(4) If the nature of the work to be performed requires the Contractor to furnish material which is regularly sold to the general public in the normal course of business by the Contractor, the price to be paid for such material, notwithstanding (b)(1) above, shall be on the basis of an established catalog or list price, in effect when the material is furnished, less all applicable discounts to the Government; *provided*, that in no event shall such price be in excess of the Contractor's sales price to its most favored customer

for the same item in like quantity, or the current market price, whichever is lower.

(AV 7-901.6 1972 MAY)

Alternate II (JAN 1986). If a labor-hour contract is contemplated, and if no specific reimbursement for materials furnished is intended, the Contracting Officer may add the following paragraph (h) to the basic clause:

(h) The terms of this clause that govern reimbursement for materials furnished are considered to have been deleted.

APPENDIX D

FAR CLAUSE 52.232-8

DISCOUNTS FOR PROMPT PAYMENT (APR 1989)

52.232-8 Discounts for Prompt Payment.

As prescribed in 32.111(c)(1), insert the following clause:

DISCOUNTS FOR PROMPT PAYMENT (APR 1989)

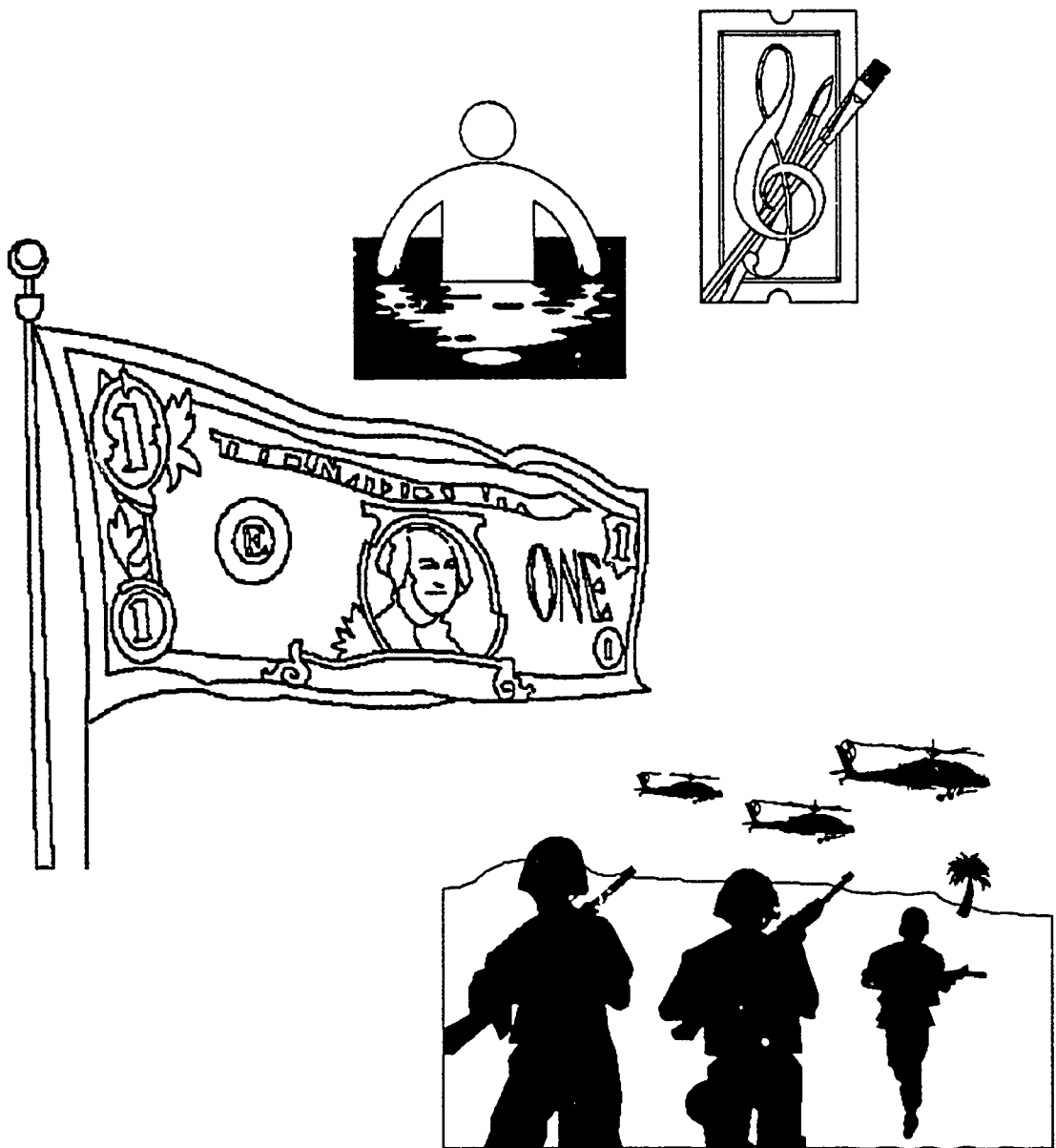
(a) Discounts for prompt payment will not be considered in the evaluation of offers. However, any offered discount will form a part of the award, and will be taken if payment is made within the discount period indicated in the offer by the offeror. As an alternative to offering a prompt payment discount in conjunction with the offer, offerors awarded contracts may include prompt payment discounts on individual invoices.

(b) In connection with any discount offered for prompt payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(End of clause)

CHAPTER 15

NONAPPROPRIATED FUNDS AND CONTINGENCY FUNDS



CHAPTER 15

NONAPPROPRIATED FUNDS AND CONTINGENCY FUNDS

I.	INTRODUCTION	1
II.	NONAPPROPRIATED FUNDS	1
	A. Purpose of the Morale, Welfare, and Recreation (MWR) Program	1
	B. Management and Funding	1
	C. Fiscal Management	2
	D. Funding Support of MWR Activities	3
	E. Use of Nonappropriated Funds	5
	F. Funding Support of MWR Programs	6
	G. Funding Programs for Construction	7
	H. Recent Issues	7
III.	CONTINGENCY FUNDS	8
	A. Definition	8
	B. Controls	9
	C. Army Procedures for Use of Contingency Funds .	11
	D. Community Relations and Public Affairs Funds .	13
IV.	CONCLUSION	13

CHAPTER 15

NONAPPROPRIATED AND CONTINGENCY FUNDING

I. INTRODUCTION.

II. NONAPPROPRIATED FUNDS.

A. Purpose of the Morale, Welfare, and Recreation (MWR) Program.

The Army MWR program is a quality of life program designed to promote the readiness of the force. It supports the military community, soldier, and family by providing social, fitness, recreational, educational, and other service-oriented activities. It enhances community life and soldier and unit readiness, promotes and maintains mental and physical fitness, and provides a working and living environment that is designed to attract and retain quality people. AR 215-1, para. 2-1a.

B. Management and Funding.

1. Installation commanders manage MWR activities. Resources available for funding MWR activities include authorized and available appropriated funds (APF) and those nonappropriated funds (NAF) that are generated locally or provided through the major Army command (MACOM) and the Army Morale Welfare and Recreation Fund (AMWRF). AR 215-1, para. 2-1b.

MAJ Bobby D. Melvin
MAJ Michael A. Killham
Fiscal Law Course

Chapter 15

2. Installation commanders are expected to generate sufficient NAF revenues to ensure that each Installation Morale Welfare and Recreation Fund (IMWRF) or "single fund" operates as a self-sufficient fund, using authorized APF support. AR 215-1, para. 2-1b. This requirement encourages commanders to operate profitable nonappropriated fund instrumentalities (NAFI) and to obtain appropriated fund support, as permitted.
 3. Some MWR activities, such as exchange activities, Civilian Post Restaurant Funds, Civilian Welfare Funds, and the Stars and Stripes newspaper, support the installation; however, their management structure is not within the purview of the IMWRF. AR 215-1, para. 2-1b.
- C. Fiscal Management. The following individuals and offices are responsible for fiscal management of MWR activities at the installation level.
1. Director of Personnel and Community Activities (DPCA). The DPCA is the primary installation staff officer for all the "people" programs designed to enhance morale and promote readiness. AR 215-1, para. 2-5.
 2. Assistant Director for Community and Family Activities (ADCFA). The ADCFA functions as the IMWRF business manager and has fiduciary responsibility for all funds (IMWRF fund manager). AR 215-1, para. 2-5a.

3. Community Activities Financial Management Division. AR 215-1, para. 2-5b.
4. Family Support Division. AR 215-1, para. 2-5c.
5. Services Division. AR 215-1, para. 2-5d.
6. Community Recreation Division. AR 215-1, para. 2-5e.
7. Chief, Community Operations Division. AR 215-1, para. 2-5h.

D. Funding Support of MWR Activities.

1. MWR programs on Army installations receive support from two sources: (1) NAFs generated primarily by sales, fees, and charges to authorized patrons, and (2) APFs provided primarily by military personnel Army (MPA), operations and maintenance Army (OMA), and military construction Army (MCA) appropriations.
2. Although some MWR programs are supported primarily with APF's (e.g. sports and libraries), there is substantial NAF financial support of other programs. AR 215-1, para. 2-6a.

Chapter 15

3. MWR activities are categorized (and funded) based principally on the relationship of the activity to readiness factors and the ability of the activity to generate revenue. There are four categories of MWR activity. They are:
 - a. Category A - Mission Sustaining Activities. These activities are supported almost entirely with APFs, with the use of NAFs limited to specific instances where APFs are prohibited by law or where the use of NAFs is essential to the operation of the facility or program. AR 215-1, para. 2-9.
 - b. Category B - Basic Community Support Activities. These activities provide community support systems that help to make military bases temporary home towns for base occupants. They receive a substantial amount of APF support, but can generate NAF revenue. AR 215-1, para. 2-10.
 - c. Category C - Enhanced Community Support Activities. These activities receive limited APF support. They have the capability of generating enough income to cover the majority of operating expenses, but they lack the ability to sustain themselves based purely on their business activity. AR 215-1, para. 2-11.
 - d. Category D - Business Activities. These activities are comparable to self-sustaining businesses and receive very limited direct APF support. However, they do receive indirect support such as common services for all installation activities. AR 215-1, para. 2-12.

- e. Additionally, there are Category D, Supplemental Mission NAF Activities. These are NAF activities which are established to provide funding for MWR adjuncts to official non-MWR AFT mission areas. This category receives almost no APF support. AR 215-1, para. 2-13.

E. Use of Nonappropriated Funds.

- 1. The use of NAFs is limited. For example:
 - a. All monies generated by NAFIs must be returned to authorized patrons. AR 215-1, para. 3-13.
 - b. Generally, resale activities should be self-sufficient except where APF support is authorized. AR 215-1, para. 3-13e.
 - c. NAFIs may accept gifts, contributions, or donations subject to certain restrictions. AR 215-1, para. 3-13k.
- 2. Prohibited use of NAFs. NAFs may not be used to:
 - a. Support private organizations. AR 215-1, para. 3-15a.
 - b. Contract with Government personnel, military or civilian, in violation of AR 600-50, and AR 215-4, para. 4-3. AR 215-1, para. 3-15j.

Chapter 15

- c. Fund the acquisition of items or services authorized to be paid from APFs when APFs are available or sufficient. AR 215-1, para. 3-15m.
- d. Violate AR 600-50. AR 215-1, para. 3-15n.
- e. Support programs and activities which have no connection or relationship to command morale and welfare. AR 215-1, para. 3-15o.

F. Funding Support of MWR Programs.

- 1. MWR programs are funded by a combination of APF and NAF support. See AR 215-1, app. C. See also AR 37-100.
- 2. Until 1 October 1991, reimbursement of NAFs using APFs was permitted, provided reimbursement was not used to circumvent any of the following:
 - a. Title 5 of the U.S. Code, which establishes procedures governing the recruitment and employment of APF personnel.
 - b. APF procurement procedures as set forth in the Federal Acquisition Regulation (FAR).
 - c. Fiscal law constraints set forth under Title 31, U.S. Code, including prohibitions on the unauthorized augmentation of APFs and restrictions on obligation authority.

- d. Any Congressionally-imposed manpower utilization ceilings or other such limitation on the number of APF personnel. AR 215-1, para. 4-2.
- G. Funding Programs for Construction. AR 215-1, para. 6-3.
 - 1. NAF. The NAF Capital Expenditure Program is composed of two parts, the NAF Major Construction (NAFMC) program, and the NAF Capital Purchase and Minor Construction (NAF-CPMC) program.
 - 2. APF. The construction programs funded from APFs are composed of two general parts, (1) the Military Construction, Army (MCA) programs, and (2) the minor construction programs.
 - 3. DOD funding policy for Construction of Community Facilities determines the funding source (APF-NAF) to be used. The designated funding source must be used for all construction projects regardless of the dollar level of funding (i.e., minor or major construction. AR 215-1, para. 6-3c.

Chapter 15

H. Recent Issues.

1. Improper reimbursement of NAFs with APFs.
2. Use of NAF employees to perform APF functions.
3. Permitting NAFIs to bid on APF business activities.
4. Passage of the NAF Antideficiency Act.

III. CONTINGENCY FUNDS.

A. Definition.

Contingency funds are appropriations made available to the executive branch which may be expended without the normal controls. Congress has provided contingency funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438. Contingency funds are tightly regulated because of their limited availability and potential for abuse.

B. Controls.

1. Appropriations' language. For DOD, contingency funds are provided as a separate item in the Operation and Maintenance appropriation. For example, the FY93 Appropriation Act provided the Secretary of the Army with:

...and not to exceed \$14,437,000 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;

- a. The Secretary of Defense receives money for the "CINC initiative fund account" in the O&M, Defense Agencies appropriation. For FY 93, this amount was \$25M, \$16.56M of which could be used for emergencies and extraordinary expenses.
- b. For other military departments, contingency funds are appropriated for "emergencies and extraordinary expenses."
- c. For other executive agencies, such contingency funds are generally referred to as "official reception and representation funds." See Pub. L. No. 88-136, § 905, 77 Stat. 224, 246 (1963) (HEW's FY 64 Appropriation Act). Not all agencies receive representation funds and other appropriations may not be used for representational purposes. See HUD Gifts, Meals, and Entertainment Expenses, B-231627, 68 Comp. Gen. 226 (1989); United States Embassy London-Use of Representational Funds for Reimbursement of Rental of Ceremonial Dress, B-235916, 68 Comp. Gen. 638 (1989) (State Department may use its representation allowances to pay the expenses of the

Chapter 15

Department in providing proper representation of the United States and its interests).

2. Statutory limitations.

- a. 10 U.S.C. § 127. Emergency and extraordinary expenses.
 - (1) Authorizes the Secretary of Defense and the Secretary of a military department to spend contingency funds on "any purpose he determines to be proper, and such a determination is final and conclusive upon the accounting officers...".
 - (2) Requires a quarterly report of such expenditures to the Congress.
- b. Other executive agencies may have similar controls. E.g. 22 U.S.C. § 2671 (Authorizes State Department to pay for "unforeseen emergencies").

3. Internal agency guidance.

- a. DOD Dir. 7250.13, Official Representational Funds (23 Feb. 1989).
- b. AR 37-47, Contingency Funds of the Secretary of the Army (15 Jan. 1990); AFR 11-16, Contingency Funds - Miscellaneous Current Expenses - Official Representational Funds (Feb 86); SECNAV 7042.7, Guidelines for Use of Official Representational Funds (2 May 86). Representational funds are an element of the contingency funds appropriated for the use of the Secretaries in the annual defense appropriations act.

C. Army Procedures for Use of Contingency Funds.

1. Administrative categories of contingency funds.

- a. Limitation .0012--Miscellaneous Expenses, Category A (Official Representational Funds). AR 37-47, para. 2-1a. These funds are available to extend official courtesies to dignitaries, officials, and foreign governments. AR 37-47, para. 2-4.
- b. Limitation .0014--Miscellaneous Expenses, Category B (other than official representation, such as ASBCA witness fees and settlements of claims). AR 37-47, para. 2-1b.
 - (1) Other examples.
 - (a) Acquisition of weapons from Panamanian civilians.
 - (b) Reward for search teams at the Gander air crash.
 - (c) Mitigation of erroneous tax withholding of soldiers pay.
- c. Limitation .0015--Criminal Investigation Activities (AR 195-4)(CID investigation support). AR 37-47, para. 2-1c.
- d. Limitation .0017--Intelligence Contingency Funds (AR 381-141). AR 37-47, para. 2-1d.
- e. Limitation .0019--Compartmented Special Operations. AR 37-47, para. 2-1e.

Chapter 15

2. Prohibitions. AR 37-47, para. 2-8.
 - a. Retirements and changes of command ceremonies, unless approved in advance by SA. United States Army School of the Americas -- Use of Official Representation Funds, B-236816, 69 Comp. Gen. 197 (1990) (new commander reception distinguished); NAVSEA 7303.3.
 - b. Classified projects and intelligence projects.
 - c. Entertainment of DOD personnel, except as specifically authorized by regulation.
 - d. Membership fees and dues.
 - e. Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.).
 - f. Gifts and mementos, except as authorized by regulation.
 - g. Guest telephone bills.
 - h. Repair, maintenance, and renovation of DOD facilities.

D. Community Relations and Public Affairs Funds. AR
360-61, Community Relations (15 Jan. 1987).

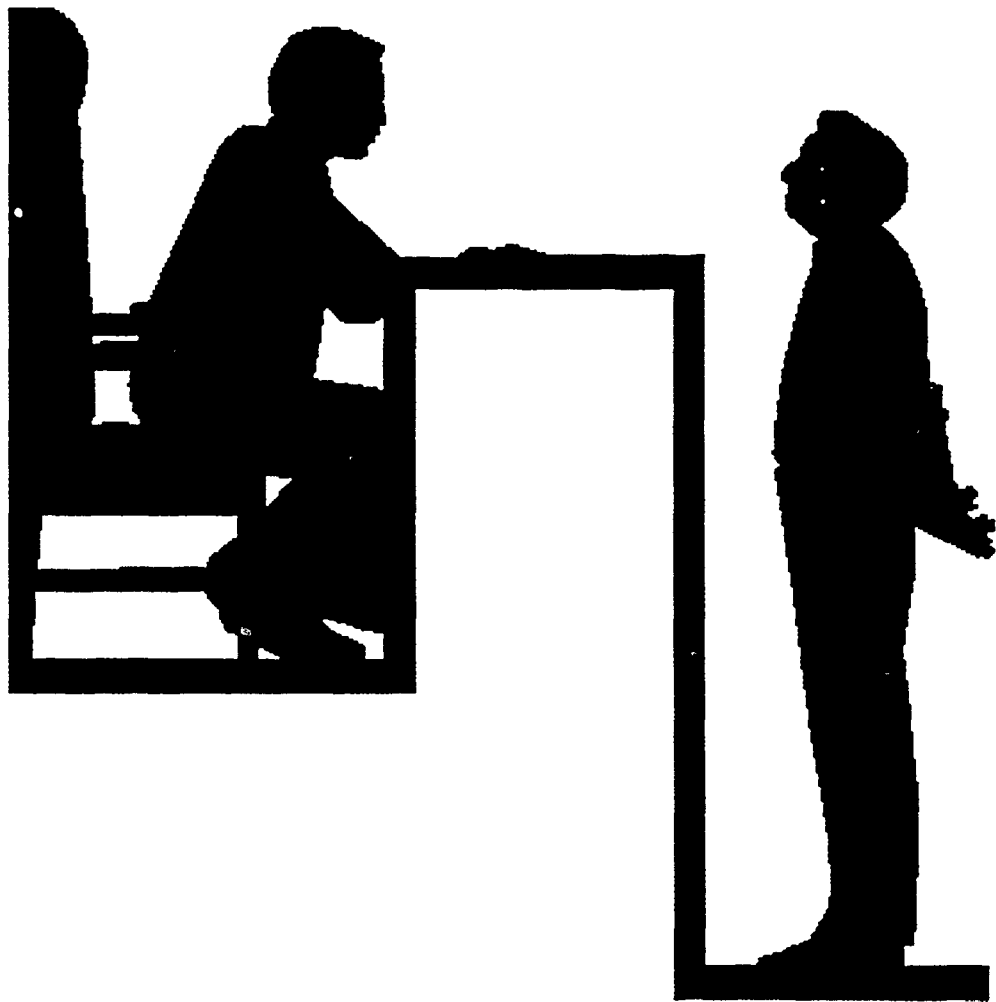
1. Public affairs funds are not a separate sub-division of the O&M account.
2. Do not use public affairs funds to supplement official representation funds. To do so is a violation of the 31 U.S.C. § 1301.

IV. CONCLUSION.

Chapter 15

CHAPTER 16

LIABILITY OF ACCOUNTABLE OFFICERS



CHAPTER 16

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES	1
II. TYPES OF ACCOUNTABLE OFFICERS	1
A. Definitions	1
B. Certifying Officers and Other Accountable Officers Distinguished	2
III. LIABILITY OF ACCOUNTABLE OFFICERS	3
A. Liability of Certifying Officers	3
B. Liability of Other Accountable Officers	4
IV. PROTECTION AND RELIEF FROM LIABILITY	5
A. Advance Decisions from the Comptroller General	5
B. Relief of Certifying Officers	6
C. Relief of Other Accountable Officers	7
D. Relief of DOD Disbursing Officers for Physical Losses	8
E. Relief of Disbursing Officers for Illegal, Improper, or Incorrect Payments	9
F. Relief for Payment of Uncollectible Checks	9
G. Judicial Relief	10
H. Legislative Relief	10
V. ESTABLISHING LIABILITY	10
A. Required Action	10
B. Statute of Limitations	11
VI. MATTERS OF PROOF	11
A. Evidentiary Showing	11
B. Standard of Care = Negligence	12
C. Proximate Cause	13
VII. CONCLUSION	13

CHAPTER 16

LIABILITY OF ACCOUNTABLE OFFICERS

I. REFERENCES.

- A. Air Force Reg. (AFR) 177-101, General Accounting and Finance Systems at Base Level (Feb. 1991).
- B. Army Reg. (AR) 37-1, Army Accounting and Fund Control (30 Apr. 1991).
- C. Army Reg. (AR) 37-103, Disbursing Operations for Finance and Accounting Offices (4 Dec. 1987).
- D. Air Force Pam. (AFP) 110-4, Fiscal Law (Sep. 1988).
- E. Nagle, Role of Certifying and Disbursing Officers in Government Contracts, 95 Mil. L. Rev. 1 (1982).

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 Lieutenant Commander Michael S. Schwartz, USN, B-245773, May 14, 1992 (unpub.) (GAO lacked authority to afford relief for loss of travel advance); Mr. Charles R. Hartgraves, B-234242, Feb. 6, 1990 (unpub.) (cashier was accountable officer, forest ranger was not).
- 2. Any government officer or employee, military or civilian, who physically handles government funds, even if only once or occasionally, is "accountable" for those funds while they are in his or her custody. Melvin L. Hines, B-247708,

MAJ Anthony M. Helm
Fiscal Law Course

Chapter 16

Nov. 3, 1992, 72 Comp. Gen. ____; Finality of Immigration and Naturalization Serv.'s decision on responsibility of accountable officer for physical losses of funds, B-195227, 59 Comp. Gen. 113 (1979).

B. Certifying Officers and Other Accountable Officers Distinguished.

1. Certifying Officer - A person who certifies that payment vouchers are correct and ready for payment. A certifying officer does not have public funds in his or her physical possession. AFR 177-101, ch. 6, § F.
2. Other Accountable Officers - Any other officer or employee, including one not involved directly in government fiscal operations, who has custody or control of federal funds. Other accountable officers include:
 - a. Disbursing Officer - A person who disburses funds and renders accounts in accordance with laws and regulations governing disbursement of public funds. See generally 31 U.S.C. § 3325; AR 37-103; AFR 177-101, ch. 7.
 - (1) A disbursing officer has physical possession or control of public funds.
 - (2) A disbursing officer is responsible for:
 - (a) Disbursing funds only upon, and in strict accordance with, duly certified vouchers; and
 - (b) 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. Cashier - An individual appointed to perform limited cash disbursing functions or other cash-handling operations to assist a finance officer or a Class B agent officer (a subordinate/assistant of the finance officer). Installation or tenant unit commanders appoint Army cashiers in writing. See AR 37-103, para. 2-6, 2-27; AFR 177-101, ch. 6, § E.
- c. Other agents and custodians.

III. LIABILITY OF ACCOUNTABLE OFFICERS.

A. Liability of Certifying Officers. 31 U.S.C. § 3528.

- 1. A certifying officer:
 - a. Is responsible for the correctness of the facts recited in the certificate or otherwise stated on the voucher or on its supporting papers;
 - b. Is responsible for the legality of the proposed payment under the appropriation or fund involved; and
 - c. Is accountable for the amount of any illegal, improper, or incorrect payment resulting from any false, inaccurate, or misleading certificate made by him.

Chapter 16

2. Certifying officers must ensure that vouchers are computed correctly.
3. Liability attaches when an official makes an improper payment based on the improperly certified voucher. In the matter of responsibilities and liabilities of certifying officers, B-184145, 55 Comp. Gen. 297 (1975).
4. By its terms, 31 U.S.C. § 3528 does not apply to DOD (except disbursements for departmental pay and expenses in the District of Columbia). The Army, however, applies the statutory standard of liability for its certifying officers. See AR 37-1, para. 20-3 and app. F; AFR 177-101, para. 6-13c(1).

B. Liability of Other Accountable Officers.

1. Accountable officers who have physical custody or control of government funds are strictly and automatically liable for losses or erroneous payments of those funds. These accountable officers are "insurers" of the public funds in their custody. Liability does not attach for losses due to acts of God or acts of the public enemy. United States v. Prescott, 44 U.S. 578 (1845); Serrano v. United States, 222 Ct. Cl. 52, 612 F.2d 525 (1979); Mr. Anthony Dudley, B-238898, Apr. 1, 1991; Sergeant Charles E. North - Relief of an Accountable Officer, B-238362, 69 Comp. Gen. 586; Frederick R. DeCesaris, B-214561.2 (2), 64 Comp. Gen. 606 (1985); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (1974).

2. Lack of fault or negligence, however, may provide a basis for relief from the obligation to repay the loss. Department of the Navy, B-238123, 70 Comp. Gen. 298 (1991); Personal Accountability of Accountable Officers, B-161457, 54 Comp. Gen. 112 (1974).
3. Does a commanding officer's order to issue a payment shield a disbursing officer from liability? Compare 10 U.S.C. § 7863 with AFR 177-101, attach. 2, para. A2-1d and AFR 110-4, para. 6-7.

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; AFR 177-101, ch. 12; AR 37-1, ch. 20.
 - a. Army officials should attempt to resolve doubts about payments locally. AR 37-1, para. 20-19a & 20-96.
 - b. If doubt remains concerning an amount in excess of \$100, request a Comptroller General decision through Defense Finance and Accounting Service (DFAS). AR 37-1, para. 20-19b & 20-96; AFR 177-101, para. 11-11; AFR 110-4, para. 4-15.
 - c. If the amount is \$100 or less, seek advice from DFAS. If doubts remain after coordination with DFAS, request an advance decision.

Chapter 16

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.

B. Relief of Certifying Officers. 31 U.S.C. § 3528(b).

1. The Comptroller General may relieve a certifying officer from liability if:
 - a. The officer based the improper certification on official records, and the officer did not know, or reasonably could not have known, that the information was incorrect; or
 - b. The obligation was in good faith; payment was legal; and the government received some benefit. Mr. William D. Back, B-236782, 70 Comp. Gen. 723 (1991); Mr. William L. Rice, B-237419, Dec. 5, 1989 (unpub.); The Honorable Dennis P. McAuliffe, B-222048, Feb. 10, 1987 (unpub.).
2. The Comptroller General will deny relief if the agency did not diligently attempt to collect an erroneous payment.
3. This relief provision does not apply to DOD certifying officials.

C. Relief of Other Accountable Officers. 31 U.S.C.
§ 3527(a).

1. The Comptroller General may relieve an accountable officer for the physical loss or deficiency of public money, vouchers, checks, securities, or records when:

a. The agency head finds that:

- (1) The officer or agent was carrying out official duties when the loss or deficiency occurred, or the loss or deficiency occurred because of an act or failure to act by a subordinate of the officer or agent; and
- (2) The loss or deficiency was not the result of fault or negligence of the officer or agent. See Melvin L. Hines, B-247708, Nov. 3, 1992, 72 Comp. Gen.
_____ (findings are jurisdictional).

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. Mr. John C. Lawn, B-238222, Feb. 21, 1990 (unpub.) (Comptroller General agrees but opines that request for relief was not required); Mr. John C. Lawn, B-233937, May 8, 1989 (relief denied for loss of operational expense money).

2. The Comptroller General has delegated to agency heads the authority to grant administrative relief for losses of less than \$3,000. See GAO, Policy and Procedures Manual for Guidance of Federal

Chapter 16

Agencies, title 7, § 8.9.C; Thomas M. Vapniarek, B-249796, Feb. 9, 1993 (unpub.).

3. Alternatively, the Comptroller General may authorize reimbursement of amounts paid by the responsible official as restitution.
- D. Relief of DOD Disbursing Officers for Physical Losses.
31 U.S.C. § 3527(b).
1. According to the statute, 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 or the secretary of a military department determines that the disbursing officer was carrying out official duties when the loss or deficiency occurred;
 - b. The loss or deficiency was not the result of fault or negligence by the official; and
 - c. The loss or deficiency was not the result of an illegal or incorrect payment.
 2. Under the statute, the finding of the secretary binds the Comptroller General. For this reason, the Comptroller General does not require that military departments forward relief determinations for approval. See To Heads of Military Dep'ts, B-198451, Feb. 5, 1981 (unpub.).

E. Relief of Disbursing Officers for Illegal, Improper, or Incorrect Payments. 31 U.S.C. § 3527(c).

1. The Comptroller General may, on his own initiative or on the written recommendation of the head of an agency, relieve a disbursing official responsible for a deficiency in an account because of an illegal, improper, or incorrect payment, when the Comptroller General decides that the payment was not made as a result of bad faith or lack of reasonable care by the official. Department of the Navy, B-238123, 70 Comp. Gen. 298 (1991); Mr. Roger B. Feldman, B-233276, Oct. 31, 1989 (unpub.) (relief considered but denied).
2. The Comptroller General may deny relief if the agency did not carry out diligent collection action. Brigadier General Robert B. Adams, Dep't of the Army, B-211440, 62 Comp. Gen. 476 (1984).

F. Relief for Payment of Uncollectible Checks. 31 U.S.C. § 3342.

1. This section authorizes disbursing officers to cash negotiable instruments and Treasury checks and to exchange currencies.
2. This section also authorizes appropriations necessary to adjust the account of a disbursing officer for net losses due to these transactions.
3. Negligence does not bar relief, but adjustment of accounts under this provision is discretionary. Department of the Air Force, B-239483.2, 70 Comp. Gen. 616 (1991); see AFR 177-101, attach. 2, para. A2-4c (no relief for negligent finance officers).

Chapter 16

G. Judicial Relief--U.S. Court of Federal Claims.

1. Disbursing officers. Under 28 U.S.C. § 1496, the court has jurisdiction to review disbursing officer cases. Whenever the court finds that a loss by a disbursing officer of the United States was without his fault or negligence, it shall render a judgment setting forth the amount. The General Accounting Office shall allow the officer such amount in settlement of his accounts. See 28 U.S.C. § 2512.
2. If an agency withholds the pay of any individual, that person may request that the General Accounting Office report the balance due to the Attorney General. The Attorney General shall then initiate a suit against the individual. See 5 U.S.C. § 5512(b); To The Honorable Edwin Meese, III, B-214561.2(1), 64 Comp. Gen. 605 (1985); To Frederick R. DeCesaris, B-214561.2(2), 64 Comp. Gen. 606 (1985).

H. Legislative Relief. Private and collective relief legislation.

V. ESTABLISHING LIABILITY.

A. Required Action. Department of the Air Force, B-239483.2, 70 Comp. Gen. 616 (1991).

1. Before initiating collection for a loss, the appropriate agency must permanently establish the accountable officer's liability.

2. "Permanently establish" means that the officer has agreed to repay the loss or the appropriate agency has denied relief.
3. Collection is pursuant to 5 U.S.C. § 5512(a). See 5 U.S.C. § 5514 (allowing payment by installment and limiting amount per period to 15%). See also 37 U.S.C. § 1007(a) (governing withholding of military officer pay).

B. Statute of Limitations. 31 U.S.C. § 3526(c)(1).

1. The statute of limitations for settling accounts of an accountable officer is three years after agency accounts are substantially complete. See Department of the Air Force, B-239483.2, 70 Comp. Gen. 616 (1991); Department of the Air Force, B-239483, 70 Comp. Gen. 420 (1991). After this period, the account is settled by operation of law, and an accountable officer has no personal financial liability for a loss in question. Gerald Murphy, B-248555, June 3, 1992 (unpub.).
2. The statutory period does not apply when the government has lost or may have lost money because the accountable officer acted fraudulently or criminally. 31 U.S.C. § 3526(c)(2).

VI. MATTERS OF PROOF.

- A. Evidentiary Showing. To qualify for relief from liability for a loss or deficiency under the statutes, generally, an accountable officer must prove that he was acting in an official capacity and was not negligent, or that any negligence was not the cause of the loss. Mr. Frank D. Derville, B-241478, Apr. 5, 1991 (unpub.).

Chapter 16

B. Standard of Care = Negligence.

1. Actual negligence. In determining whether an officer was negligent, the Comptroller General applies a "reasonable care" standard. In the matter of personal accountability of accountable officers, B-161457, 54 Comp. Gen. 112 (1974).
 - a. The standard is one of simple or ordinary negligence, not gross negligence.
 - b. The standard is whether the accountable officer did what a reasonably prudent and careful person would have done to safeguard his own property under similar circumstances.
 - c. This is an objective standard; it does not vary with such factors as the level of experience or the age of the particular accountable officer concerned. Mr. Frank D. Derville, B-241478, Apr. 5, 1991 (unpub.); Mr. Anthony Dudley, B-238898, Apr. 1, 1991 (unpub.).
 - d. Failure to follow regulations is negligence. Accountable officers have a duty to become familiar with applicable regulations.
2. Presumption of negligence. If there is no clear evidence of negligence, the fact that a loss or deficiency has occurred creates a presumption of negligence on the part of the accountable officer. This presumption arises from the accountable officer's strict liability for any loss or deficiency. The accountable officer must rebut the presumption of negligence by presenting affirmative evidence that he exercised due care. Serrano v. United States, 612 F.2d 525 (Ct. Cl. 1979); Mr. Melvin L. Hines, B-243685, July 1, 1991 (unpub.); To the Postmaster General, B-166174, 48 Comp. Gen. 566 (1969).

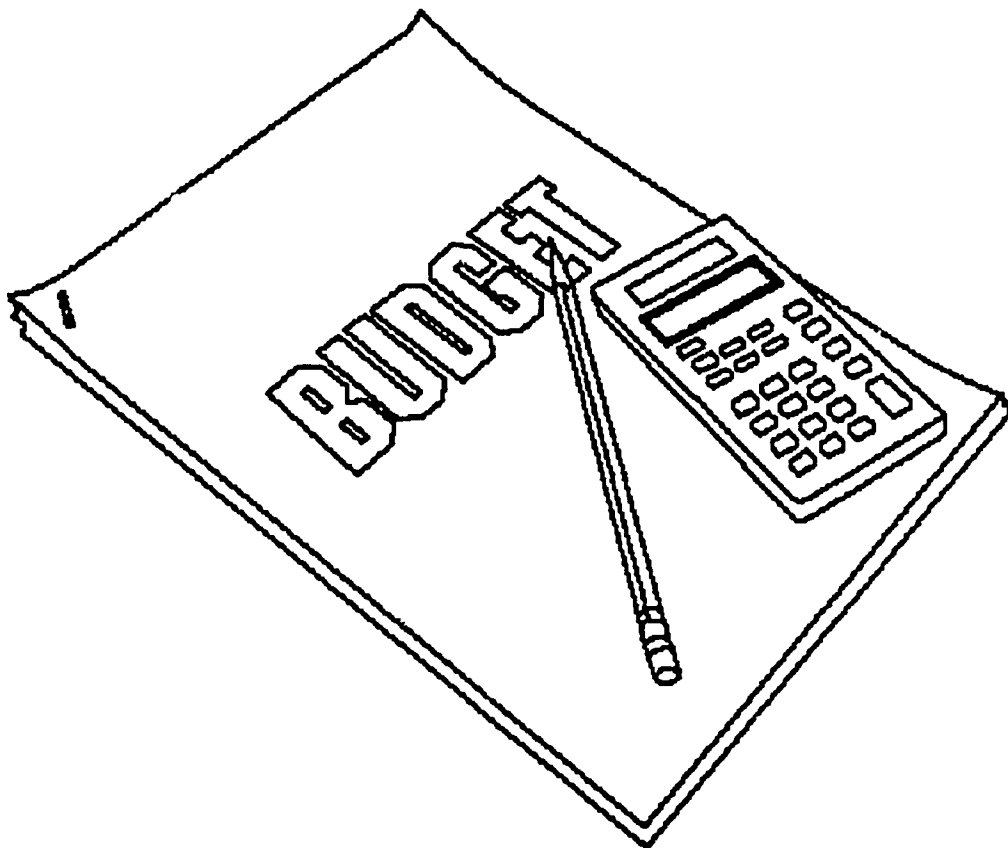
- C. Proximate Cause. If the accountable officer was negligent, the Comptroller General will consider whether the negligence was the proximate cause of the loss or deficiency.
1. If negligence occurred, and it was the proximate cause of the loss or deficiency, the Comptroller General may not grant relief from liability. Mr. William L. Kendig, B-240671, 70 Comp. Gen. 12 (1990).
 2. If an accountable officer was negligent, but the negligence was not the proximate cause of the loss or deficiency, the Comptroller General may grant relief under the statute. See Darold D. Foxworthy, B-241820, Jan. 2, 1991 (unpub.). Cf. Department of the Navy, B-238123, 70 Comp. Gen. 298 (1991).

VII. CONCLUSION.

Chapter 16

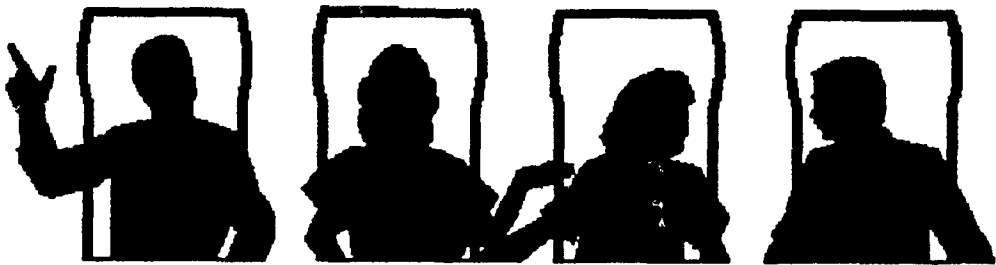
CHAPTER 17

FISCAL CONTROL: DEPARTMENT OF THE ARMY DEPUTY COMPTROLLER PERSPECTIVE



APPENDIX A

PROFESSIONAL RESPONSIBILITY SEMINAR



APPENDIX A

PROFESSIONAL RESPONSIBILITY AND COUNSELING THE GOVERNMENT

NOTES

FACTS

Mr. John Smith is the procurement attorney for the Cost Effectiveness Evaluation Agency. In this position, Mr. Smith provides contract and fiscal law advice to agency personnel. He is supervised by Colonel Jones, the agency chief counsel. Agency operations depend heavily on analyses performed using the agency's super computer.

The agency is finally completing a well run, high priority acquisition for a replacement super computer. The agency Director of Information Management comes into Smith's office and shows him a news article in a trade publication which states that Congress has just passed a ban on buying foreign super computers. The ban is reportedly part of an urgent supplemental appropriation. The Director of Information Management is concerned because the apparently successful offeror has proposed a super computer with significant foreign content. The Director of Information Management asks that Smith attend a meeting that afternoon with the Agency Director. After he leaves, Smith tried, in vain, to locate the bill's language.

Prior to the meeting, Colonel Jones and Smith met to discuss the issues. Smith counseled that the agency should delay the award until they determine whether the reported language affected the procurement. The Colonel opined that newspapers normally get legal matters wrong, and, even if true, the agency should award quickly before the Urgent Supplemental was signed into law. Colonel Jones also told Smith that he, Jones, would give the office advice and Smith was only to speak if he, Jones, asked.

Appendix A

NOTES

FACTS

At the afternoon meeting, Smith, Jones, the contracting officer and the Director of Information Management briefed the Agency Director and discussed options. After hearing the problem and the advice of all present, the Agency Director told the contracting officer to go ahead with the award. She did so.

Two weeks later, in a new issue of Federal Contract Reports (BNA), Smith read about the ban on foreign super computers. It stated "no funds appropriated by this or any other act may be obligated or expended for super computers not substantially manufactured in the United States from domestic components." The Urgent Supplemental Appropriation was signed by the President the day before the contract was awarded.

At Smith's insistence, the contracting officer, the Director of Information Management, met with him to discuss options. The DOIM said that the contract, as awarded, was not for a real super computer. Instead, he said, the awardee's machine was more like a "minisuper" computer, an entirely different machine. Upon mild questioning, he had trouble distinguishing between a super and a "minisuper" other than based on external dimensions, and he was unable to identify any provision in the contract referring to a "minisuper." He also said that upon review, the foreign components were not "substantial." He insisted, however, that this was a technical call and insisted that the law did not apply to the contract. He further stated that he had already briefed the agency director and the Director agreed with his assessment.

Smith returned to his office and briefed Colonel Jones. Jones remarked that he didn't know a super computer from a calculator and would just have to rely on the "expert." Smith returned to his office and drafted an memorandum for his files and shrugged the matter off as life in a bureaucracy.

NOTES

FACTS

Six months later, the super computer arrived and the contractor was paid. A few months later, investigators from the General Accounting Office and the DoD Inspector General arrived in the course of studying the Army's use of super computers. The investigators were quite surprised to find the particular make and model present at the agency. They began to ask various agency personnel how the agency acquired that particular model. Colonel Jones told Smith to handle the audit since he was primarily responsible for the acquisition. It is now 1300 and a GAO auditor and DoD IG investigator walk into Smith's office. They preface their questions with the remark that their next stop is the activity director's office.

APPENDIX B

OBLIGATION AND ANTIDEFICIENCY ACT SEMINAR



APPENDIX B

OBLIGATIONS AND ANTIDEFICIENCY PROBLEMS

NOTES

FACTS

I. THE DOALL CONTRACT.

As the newly assigned contracting officer for Fort Outpost, you are pouring yourself a cup of coffee on 27 September 1992, when the phone rings. Brigadier General (BG) Combat, the installation commander, is calling to say that he was delighted to hear on CNN that Congress had passed the FY 1993 DOD Authorization Act.

Of utmost concern to the commander is the installation base support services contract (for security, recreation activities, vehicle maintenance, janitorial services, and the like) currently held by Doall, Inc. General Combat wonders why we have not exercised Doall's options for services beginning 1 October 1992 through 30 September 1993. General Combat remarks that Mr. Einstein, Director of the U.S. Special Operations Test and Evaluation Command (USSOTEC), a tenant activity on Fort Outpost, has \$250,000 of unobligated FY 1992 Research, Development, Test, and Evaluation (RDTE) funds available because of delays in the Submersible Helicopter program (SUBHELP). Doall services USSOTEC under a separate line item in the contract. There were two options in the contract: one for installation services and one for the USSOTEC services.

General Combat wants the FY 1993 options exercised and the \$250,000 obligated by tomorrow. He remarks that Mrs. Combat and other members of the Women's Club need a sedan to attend their weekly luncheon at Lenny's on 2 October 1992 and Doall's vehicle dispatcher has refused to schedule sedans for October until the government exercises the option.

How do you respond to the general?

Contract Law Faculty
Fiscal Law Course

Appendix B

NOTES

FACTS

II. SOLAR HEATING DEVICES.

You are the local counsel for the U.S. Fish & Wildlife Service, Regional Office, Port Townsend, Washington. It's September 1992, and you are reviewing a number of contract awards. In your in-basket is a \$100,000 contract to Solar Cell, Inc. to remove solar collection devices at three remote nesting sites and to inspect, repair, and replace them, as necessary. The solar devices heat the nests of the endangered Spotted Owl in the Olympic National Forest. These devices have experienced persistent voltage generation problems during the past several months, and routine maintenance has not corrected them. The contract file does not contain a fund certification document and does not identify the funds proposed for obligation. You dash off a quick memo, then call the contracting officer, who responds to your concerns about the money with, "Well, what do you think I should do?"

After telling the contracting officer exactly what you think he should do, you go to the next file in the in-basket. It is the routine maintenance contract for 27 other remote solar collection sites. The backup documentation indicates that the original manufacturer's warranty expires on 15 November 1992. The new contract is for 12 months of services, with service beginning on 16 November 1992 and ending on 15 November 1993. The contract file indicates that award will not occur until the FY 1993 appropriation is enacted. Again, you reach for the phone to say

The contracting officer responded to your advice by explaining patiently that there is no problem with a service contract crossing fiscal years. He added that he had seen contracts like this when he was in the Air Force, and that the contract auditors had not objected! How should you respond?

NOTESFACTS

III. MR. PENNEY'S O&M LEDGER.

In the following problem, determine the amount of the adjustment (e.g., obligation, decommitment, recovery), if applicable, for each transaction. Explain the rationale for the accounting entries you recommend. Decide whether the amount previously certified or recorded is adequate.

Mr. Link N. Penney, a budget analyst, attacks his in-box on his first day back from the Fiscal Law Course. He addresses the following contract actions eagerly:

- a. Type: Award of \$295,000 firm-fixed-price contract with economic price adjustment (+/-10%).
Previously Certified: \$324,500.
Amount Recorded: _____
Adjustment: _____
- b. Type: Award of \$150,000 estimated cost-plus-fixed-fee (\$20,000) contract.
Previously Certified: \$160,000.
Amount Recorded: _____
Adjustment: _____
- c. Type: Contract award of letter contract with ceiling price not to exceed \$100,000 and a maximum government liability prior to definitization of \$55,000.
Previously Certified: \$100,000.
Amount Recorded: _____
Adjustment: _____
- d. Type: Definitization of a letter contract with definitized firm-fixed price of \$237,621.
Previously Recorded: \$100,000.
Amount Recorded: _____
Adjustment: _____

Appendix B

NOTES

FACTS

- e. Type: Award of an indefinite quantity/
indefinite delivery contract with a minimum
quantity of 100 widgets and a maximum
quantity of 1000 widgets. The unit price is
\$10 per widget.
Previously Certified: \$5,000.
Amount Recorded: _____
Adjustment: _____

- f. Type: Delivery order D00001, under the
previous contract, for 47 widgets.
Amount Recorded: _____
Adjustment: _____

- g. Type: Termination for convenience of a \$2.1M
firm-fixed-price contract.
Previously Recorded: \$2.1M
Amount Disbursed: \$680,000
Amount Recorded: _____
Adjustment: _____

- h. Type: Default termination of a \$375,000
construction contract that was 60% complete.
Previously Recorded: \$375,000.
Amount Disbursed: \$180,000
Amount Recorded: _____
Adjustment: _____

NOTESFACTS

IV. THE NEVER ENDING STORY -- A TALE OF TWO AUDITS.

On 5 September 1991, Art Dodger, an experienced contract attorney with the National Guard Bureau (NGB), finished reviewing the default termination notice for the 5-ton truck replacement engine contract with the contracting officer and the item manager. The defaulted contract cited FY 1989 National Guard and Reserve Procurement, Army funds. It was lucky that the contractor had defaulted since the Army had decided to replace the entire truck instead of only the engines. As the contracting officer put the letter in the mail, Art asked, "What are you going to do with the \$5 million left over from this defaulted contract? You have less than a month to spend it!" The item manager remarked that she would need many spare parts to keep the old engines running. The contracting officer chimed in that there was a basic ordering agreement for spares with the old engine manufacturer and he could obligate all of the funds tomorrow. After a quick decision briefing to the Chief, NGB, the contracting officer obligated the \$5 million for spare parts by issuing orders to the truck manufacturer.

In January 1992, as the new spare parts poured into the depot, a DOD IG audit team arrived to perform a long overdue review of inventory management practices. The team was struck immediately by the pallets of truck engine parts dumped in an open field. The team seized all of the paperwork related to the acquisition and, in due course, sent a draft audit report citing the NGB for an Antideficiency Act (ADA) violation for buying spare parts with procurement funds rather than operations and maintenance funds (O&M).

Art wrote a response to the draft audit report for his commander, noting that there was no ADA violation since the activity made the allegedly improper transaction in good faith,

Appendix B

NOTES

FACTS

and it could correct the error easily. The Commander, on Art's advice, directed the Resource Manager to replace the funds with FY 1991 O&M funds that the NGB had not obligated before the end of the fiscal year. The Resource Manager acted swiftly to replace the funds.

The audit team, smelling blood, revised its report to note that DOD had withheld 1% of the O&M from the NGB's allotment until the last day of the fiscal year, and these funds were the only unobligated FY 1991 O&M appropriations remaining. The NGB had obligated the other 99% by late August 1991.

Undeterred, Art noted that the spares ordered far exceeded authorized inventory levels; that they were a bona fide need of FY 1992; and that the training budget contained plenty of FY 1992 O&M appropriations. Luckily, the DOD IG accepted this theory. Unfortunately, the GAO picked up on the spare parts inventory investigation and scheduled an investigation of its own.

Discuss all of the potential ADA violations arising from these facts.

NOTESFACTS

V. CAPTAIN GREEN'S FISCAL TRAINING EXERCISE.

A few weeks later, you receive a phone call from Captain (CPT) Green of Headquarters Company. The installation Finance and Accounting Office has returned, unpaid, a request for reimbursement submitted by CPT Green, and Captain Green is seeking for your assistance in getting paid. It seems that during a recent training exercise, there was a problem with food distribution, and a superior officer directed CPT Green to demonstrate initiative and obtain meals for 39 members of his company. In response, CPT Green used his own funds to purchase pizzas from the local pizzeria, at a cost of \$137.00.

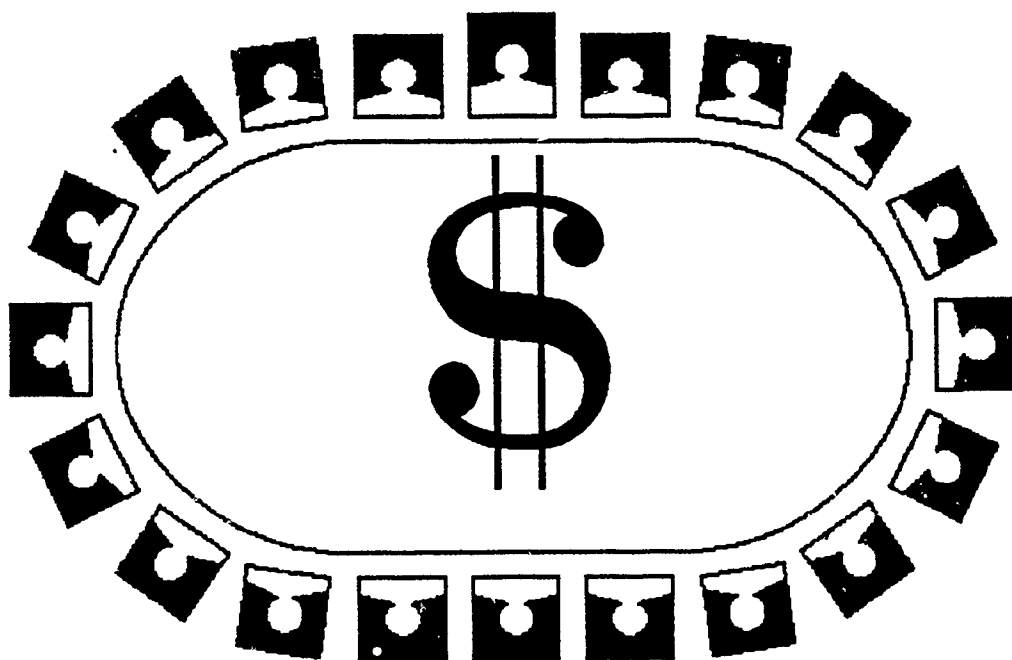
While he has you on the phone, CPT Green asks for your assistance concerning another matter. While returning to his unit with the pizzas, the Captain's armored personnel carrier broke down. Luckily, he was just a couple of blocks from Al's Garage. Al, a retired motor pool Noncommissioned Officer, said that he remembered fondly his days in the Army and would provide any help that he could to the Captain. It was his patriotic duty. Although Al had given him an invoice marked "No Charge," CPT Green knew it took Al two hours to fix the truck and that Al usually charged \$40 per hour for repairs. CPT Green wants the Army to pay Al for his efforts.

What do you advise CPT Green?

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APPENDIX C

SELECTED FISCAL LAW PROBLEMS SEMINAR



APPENDIX C

SELECTED FISCAL LAW PROBLEMS

NOTES

FACTS

I. BARRACKS RENOVATION.

You are just settling in to your new job as legal advisor in the Contract Law Division of the Fort Jackson Staff Judge Advocate's Office when your new boss gives you your first project.

Three years ago, the Army Inspector General (IG) noted several deficiencies in barracks number one (B1) and barracks number two (B2) on Fort Jackson. The barracks were not air conditioned, there was no carpeting in certain common areas of the barracks, and senior non-commissioned officers (NCOs) lived in open bays. The IG stated that the command had to correct these three discrepancies to comply with current Army barracks standards.

Colonel Smithe, the Installation Commander, immediately began to remedy the situation. In fiscal year (FY) 1990, Colonel Smithe had the barracks air conditioned. During that year, a fire had destroyed three-fourths of an installation training center. Colonel Smithe ordered the year-old air conditioning unit to be removed from the training center and to be installed in B1 at a total cost of \$75,000. Using Operation and Maintenance, Army (OMA or O&M) funds, the command purchased a new air conditioning system and installed it in B2 at a cost of \$260,000.

Colonel Smithe attacked the carpeting problem during the next year, FY 1991. The job was more expensive than expected because workmen had to replace some floor boards and moldings prior to installing the carpeting. Colonel Smithe also decided to have the reception area carpeted, even though this was not required by the IG's report. The total cost to carpet B1 and B2 was \$425,000.

Contract Law Faculty
Fiscal Law Course

Appendix C

NOTES

FACTS

Finally, Colonel Smithe corrected the last IG deficiency in FY 1992 by creating 10 separate rooms in each barracks building for senior NCO's. This was the most challenging project of all due to the scarcity of funds. Since peace had broken out in eastern Europe, DOD budgets had been cut to the bone. Consequently, Colonel Smithe had only \$150,000 in OMA funds to perform this work, yet the lowest quote from a construction contractor was \$500,000. Colonel Smithe determined that the solution to this shortage of funds was to do part of the work "in house," so he arranged for a company of reservists to do the required carpentry work during their two weeks of active duty at Fort Jackson. In response to phone calls by his executive officer, Colonel Smithe was able to obtain lumber and other building materials at cost from several local contractors. As a result of these arrangements, he was able to fund the project fully with the \$150,000 of available OMA funds and \$27,000 of Military Construction, Army (MCA) dollars. The latter funds had been left over from recently-completed mess hall construction project.

The culmination of the project was a stroke of genius. During the annual organizational day, soldiers, their spouses, and their children all chipped in to paint the rooms and to clean-up the barracks.

During the ceremony, dedicating the refurbished barracks, Colonel Smithe credited his plan to his friend Colonel Jonas who had directed a similar project at an industrially-funded depot in nearby Sanniston.

Army Audit Agency recently cited the Command for possible violations of the Antideficiency Act in the funding of these projects. The Staff Judge Advocate tasks you to assess whether such violations occurred and what action, if any, the Command can take to remedy any funding errors that occurred.

NOTES.FACTS

II. HAS MR. GREEN COME FROM WASHINGTON?

You are a contracting officer at Coral Reef Air Force Base, Florida. You are responsible for the contract with Acme Services, under which Acme provides base support services for \$1,000,000 per month. A separate contract line item is for janitorial services for a tenant activity, the Federal Marine Fisheries Agency, which funds that portion of the contract through an Economy Act order. The contract expires on 30 September.

Colonel Felicia Flyer, the Base Commander, calls you on 30 September 1992. Colonel Flyer asks you how base services will be funded tomorrow as Congress has not passed an appropriation act or a continuing resolution authority statute to fund DOD during FY 1993. She reminds you that there are one-year, priced options (one option for services at Coral Reef AFB and a separate option for services for the tenant activity) for FY 1993 services in the Acme contract. The option clause in the contract requires the government to give the contractor a nonbinding notice of intent to exercise options 60 days prior to the expiration of the term of the contract. The contracting officer gave this notice on 15 July 1992. The option clause also provides that the government must exercise the options within 30 days of the receipt of appropriations for the new fiscal year. What do you tell Colonel Flyer?

In a midnight session on 3 October 1992, Congress passes a joint resolution funding DOD for 30 days, through 3 November 1992. The phone is ringing as you arrive at work on the next day --it's Colonel Flyer asking about the Acme contract. Colonel Flyer would like to renew the base services contract for FY 1993 while DOD has funding; she also would like to exercise the additional option on the Acme contract for maintenance, club house services, and operation of the pro shop at the newly opened Coral Reef Golf Course.

Appendix C

NOTES

FACTS

Upon review of the contract file, you discover that there is a FY 1993 option for base services at \$1,100,000 per month, a FY 1993 option for the Federal Marine Fisheries Activity, and that contract contains a separate option for the Golf Course, priced at \$234,000 per year.

You take the following actions

NOTESFACTS

III. MEDICAL EQUIPMENT DEPOT.

It is 4 October 1992, and all is well; the year-end contracting frenzy at the U.S. Army Medical Equipment Depot has passed. You are talking with Major Sam Hurt, a Division Chief in Resource Management, as your car pool approaches the main gate. Major Hurt has a few issues that he hopes you can help him with, since you are the Deputy Command Counsel.

First, Major Hurt tells you that the depot awarded a contract last month to buy some tactical x-ray equipment using Army Stock Funds (ASF). The x-ray equipment costs \$16,000 per system. Yesterday, while thumbing through the regulations, one of your contract attorneys discovered that the depot can not use stock funds to purchase equipment costing more than \$3,000. Major Hurt asks what he should do.

Second, Major Hurt also is holding up the funding on a proposed purchase of 500 new bed pans. The depot initiated the purchase in early September 1992 after Walter Reed Army Medical Center ordered 500 bedpans through the supply system. The requisition contained an O&M fund citation. Major Hurt verified that the depot already has 750 bedpans in stock, but that the usage statistics show that the Army uses only 300 bedpans per year. The depot's contracting division has negotiated a contract, which is ready for award, citing the Army Stock Fund, not the O&M funds which accompanied the requisition.

Major Hurt asks whether he should release the O&M funds that were originally certified as available or if he should provide stock funds for this contract.

Lastly, Major Hurt asks what the depot should do with the reimbursements it has received from the Department of State for excess medical supplies that were transferred to United Nations Relief Organizations.

NOTES

FACTS

V. AUTOMATING FORT TIEFORT: WANTING IT BADLY
AND GETTING IT BADLY IN THE END.

On 10 November 1992, the commanding general at Fort Tiefert called your boss to discuss how the general might reward the installation's Director of Logistics (DOL) and Information Management Officer (IMO) for their innovative planning and implementation of a recent Local Area Network (LAN) acquisition. Your boss asked politely to what acquisition was the general referring. The general explained.

In late August 1992, the DOL recognized the need for a LAN at Fort Tiefert to "tie together" the installation's directorates, command elements, and base operations contractor. The estimated cost of the LAN was \$97,000. Both the DOL and the IMO convinced the general to "earmark" for this system some of the Operations and Maintenance (O&M) funds that the Fort had just received as a fiscal year-end distribution from its major command.

On 15 September, after finalizing the system specifications, the IMO forwarded a direct citation project order for the LAN to the nearby Department of Energy (DOE) activity at Edgewood Research Laboratories. The order cited \$97,000, FY 1992 O&M funds. The IMO felt that issuing the project order to Edgewood was the most expeditious means of acquiring the LAN. In fact, she knew that Edgewood's management & operating (M&O) contractor could "get things done" quickly.

The DOE contracting office was inundated with similar orders at this time but managed to accept the Fort Tiefert project order in writing on 27 September. On 13 October 1992, the contracting office issued a task order for the LAN to the M&O contractor. The parties finalized the task order the next day, and, in only two weeks, Fort Tiefert had a fully-functional system.