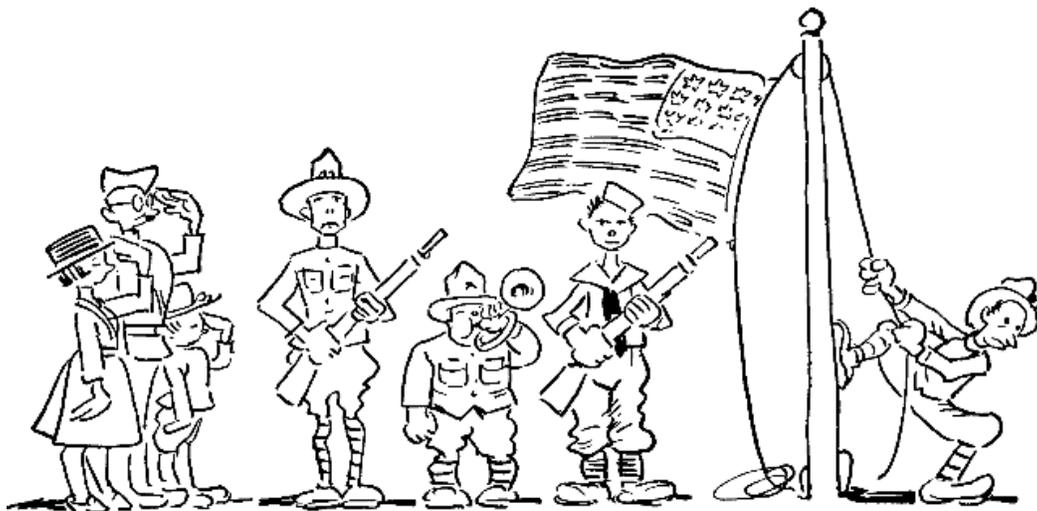


Chapter 11

Interagency Acquisitions



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CHAPTER 11

INTERAGENCY ACQUISITIONS

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CHAPTER 11

INTERAGENCY ACQUISITIONS

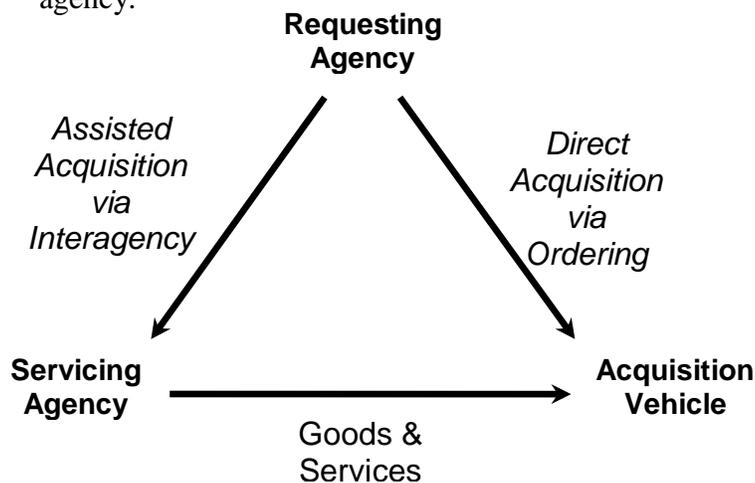
I. INTRODUCTION

A. Key References.

1. FAR Subpart 17.5; 17.7.
2. Department of Defense Financial Management Regulation (DoD FMR), volume 11A, chapters 1-4.
3. Department of Defense Instruction (DoDI) 4000.19, *Support Agreements* (April 25, 2013).

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

1. Interagency Acquisition types.
 - a. Direct Acquisitions: the requesting agency places an order directly against a servicing agency's contract.
 - b. Assisted Acquisitions: the servicing agency and requesting agency enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on behalf of the requesting agency, such as awarding a contract or issuing a task or delivery order, to satisfy the requirements of the requesting agency.



2. Determination of Best Procurement Approach. For all direct acquisitions and assisted acquisitions subject to the FAR,¹ a determination must be made that an interagency acquisition is the best procurement approach.
 - a. Assisted Acquisitions. Prior to requesting that another agency conduct an acquisition on its behalf, the requesting agency shall make a determination that the use of an interagency acquisition represents the best procurement approach. This determination requires the requesting agency's contracting office to concur that using the acquisition services of another agency satisfies the following criteria: meet the requesting agency's schedule, performance, and delivery requirements; is cost effective (taking into account the reasonableness of the servicing agency's fees); and, will result in the use of funds in accordance with appropriation limitations and compliance with the requesting agency's laws and policies. FAR 17.502-1(a)(1).
 - b. Direct acquisitions. Prior to placing an order directly against another agency's indefinite-delivery vehicle, the requesting agency shall make a determination that use of another agency's contract vehicle is the best procurement approach. This determination requires the requesting agency's contracting office to consider numerous factors including: the contract vehicle's suitability; the contract vehicle's value, including administrative cost savings from using an existing contract, prices, the number of vendors, and reasonable vehicle access fees; and, the requesting agency's expertise at placing orders and administering them against the selected contract vehicle. FAR 17.502-1(a)(2).

C. Interagency Agreements.

1. Assisted Acquisitions. Prior to the issuance of a solicitation under an assisted acquisition, the servicing and requesting agencies shall sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties. The agreement should cover roles and responsibilities for acquisition planning, contract execution, and contract administration. It should also include any unique terms and conditions² of the requesting agency that must be incorporated into the order or contract awarded by the assisting agency. If there are no unique terms or conditions, the agreement should so state. A copy of the

¹ FAR 17.500(c) excludes interagency reimbursable work (other than acquisition assistance), interagency activities where contracting is incidental to the purpose of the transaction, and orders of \$500,000 or less issued against Federal Supply Schedules, from the application of FAR 17.5.

² FAR 17.7 outlines many of the unique terms and conditions that apply when a non-Defense agency procures supplies and services on behalf of a DoD entity.

interagency agreement, prepared in accordance with current OFPP guidance, must be included in the files of both the servicing and requesting agencies. FAR 17.502-1(b).

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

D. Contract Vehicles: Interagency acquisitions are often arranged using indefinite delivery/indefinite quantity contracts, under FAR Subpart 16.5 authority, and rely upon task or delivery orders to acquire goods and/or services. Contract vehicles used most frequently to support interagency acquisitions are the General Services Administration's Schedules (the Federal Supply Schedules), government-wide acquisition contracts or GWACs and multi-agency contracts or MACs (a task or delivery order contract established by one agency for use by other agencies IAW the Economy Act). In addition to best procurement determinations, in order to establish new multi-agency or government-wide acquisition contracts, a business-case analysis must be prepared and approved in accordance with current Office of Federal Procurement Policy (OFPP) guidance. FAR 17.502-1(c).³

E. Fiscal Policy: Unless authorized by Congress, interagency transactions are generally prohibited.

1. Under 31 U.S.C. § 1301, a federal agency must use its appropriated funds for the purposes for which the appropriations were made (a.k.a., the "Purpose Statue"). Unless authorized by Congress, funds appropriated for the needs of one federal agency may not be used to fund goods and services for the use of another federal agency.
 - a. From the standpoint of the requesting agency, receiving goods or services funded by another agency's appropriations without reimbursing the servicing agency would constitute an improper augmentation of the requesting agency's funds.
 - b. Funds sent by the requesting agency to the servicing agency as reimbursement for goods or services provided could not be retained and spent by the servicing agency, but instead would have to be turned over to the Treasury under 31 U.S.C. § 3302(b) (a.k.a., the Miscellaneous Receipts statute).
2. Congress has provided several statutory authorities for interagency acquisitions, allowing agencies to avoid these fiscal law limitations.

³ See also, OFPP Memorandum, "Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions," 29 Sept. 2011.

- a. The Economy Act: 31 U.S.C. §§ 1535-1536. This is the general authority for interagency acquisitions, but is used only when more specific authority does not apply. *See* FAR 17.502-2(b).
- b. The Project Order Statute: 41 U.S.C. § 6307.
- c. Other Non-Economy Act Authorities: Government Employees Training Act (GETA), Federal Supply Schedules (FSS), Government Wide Acquisition Contracts (GWAC), and other required sources.

F. Practitioner's Note.

1. While the statutory requirements driving interagency acquisitions are fairly straightforward, this is an area of law that is predominately regulatory driven. Those practicing in this area need to be keenly aware as to whether the governing regulations have been updated.
2. Moreover, the regulatory framework for interagency acquisitions is incredibly fact-specific. Depending on the nature of the transaction, certain regulations may or may not apply.

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

A. Purpose: Provides authority for federal agencies to order goods and services from other federal agencies, or with a major organizational unit within the same agency, if:⁴

1. Funds are available;
2. The head of the ordering agency or unit decides the order is in the best interests of the government;
3. The agency or unit filling the order can provide or get by contract the goods or services; **and**
4. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise.⁵

B. Authorized Uses.

⁴ 31 U.S.C. §1535(a) ; DoD FMR, vol. 11A, ch. 3, para. 030102 and 030103.A. The Economy Act was passed in 1932 as an effort to obtain economies of scale and eliminate overlapping activities within the federal government.

⁵ *See Dictaphone Corp.*, B-244691.2, 92-2 Comp. Gen. Proc. Dec. ¶ 380 (Nov. 25, 1992). *See also*, DoD FMR, vol. 11a, ch. 3, para. 030104.A.

1. Inter-service Support: orders placed between DoD activities, including those: (1) between military departments; or (2) between military departments and other defense agencies.⁶ (a.k.a., intra-agency support within DoD).
2. Intra-service Support: orders placed between major organizational unit within the same service (e.g. Army Material Command and CENTCOM).⁷
3. Intra-governmental Support: orders placed with non-DoD federal agencies. (a.k.a., interagency support).
4. The Economy Act applies only in the absence of a more specific acquisition authority. (FAR 17.502-2(b)).⁸

C. Determinations and Findings (D&F) Requirements. FAR Subpart 17.502-2(c); DoD FMR vol. 11A, ch. 3, para. 030302.

1. Basic Determinations. All Economy Act orders must be supported with a written D&F by the requesting agency stating that:
 - a. The use of an interagency acquisition is in the government's best interest (FAR 17.502-2(c)(1)(i));
 - b. The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. FAR 17.502-2(c)(1)(ii) **and**
 - c. A statement that at least one of the three following circumstances apply:
 - (1) The acquisition will appropriately be made under an existing contract of the servicing agency, entered into before placement of the order, to meet the requirements of the servicing agency for the same or similar supplies or services;
 - (2) The servicing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or

⁶ See FAR 2.101 (defining executive agencies as including military departments); *Obligation of Funds under Military Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980); DoD FMR, vol. 11A, ch. 3, para. 030103.

⁷ The term "major organizational unit" is not a term defined by the DoD FMR or other pertinent DoD regulations.

⁸ See also, *An Interagency Agreement—Admin. Office of the U.S. Courts*, B-186535, 55 Comp. Gen. 1497 (1976).

- (3) The servicing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. (FAR 17.502-2(c)(1)(iii) *See also* DoD FMR, vol. 11A, ch. 3, para. 030202.B.⁹

2. DoD-specific Determinations.

- a. Interservice (a.k.a. Intra-Agency) Support. DoD activities shall render requested support to other DoD activities when the requesting activity head determines (1) it would be in the government's best interest and (2) the servicing activity head determines that capabilities exist to render support without jeopardizing assignment missions. DoD FMR, vol. 11A, ch. 3, para. 030203.
- b. Intragovernmental (a.k.a. Interagency) Support. DoD activities may enter into support agreements with non-DoD federal activities when the major organizational unit head ordering the support determines that (1) funding is available to pay for the support, (2) it is in the government's best interest, (3) the supplying activity is able to provide the support, (4) the support cannot be provided as conveniently or economically by a commercial enterprise, and (5) it does not conflict with any other agency's authority. This authority may be delegated no lower than the SES or flag officer levels. DoD FMR, vol. 11A, ch. 3, para. 030204.¹⁰
- c. NOTE: In Economy Act transactions *between* DoD activities, DoDI 4000.19 and DoD FMR vol. 11A, ch. 3, para. 030303 indicates that if the transaction is documented on a DD Form 1144 support agreement and is signed by the head of the requiring and supplying activity, then no further D&F is required. If there is not support agreement, a D&F is required. More on this below.

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

- a. The D&F must be approved by a contracting officer of the requesting agency with the authority to contract for the supplies or services ordered (or by another official designated by the agency head).

⁹ The current version of DoD FMR, vol. 11A, ch. 3, para. 030202.B, specifies that one of these statements would need to be included in D&Fs if the transaction contemplates a contract action by a non-DoD servicing agency. Note, however, that the current version of the FAR would seem to require broader application to *all* D&Fs. Despite this inconsistency, a best practice may be to include these statements in all D&Fs, regardless of whether the Economy Act transition requires a contract action or not.

¹⁰ Note the more robust determinations required when ordering outside of DoD.

- b. If the servicing agency is not covered by the FAR, then the D&F must be approved by the requesting agency's Senior Procurement Executive. FAR 17.502-2(a)(2).
- c. The requesting agency shall furnish a copy of the D&F to the servicing agency with the order.
- d. DoD-specific Requirements. DoD FMR vol. 11A, ch. 3, paras. 030303 and 030304.
 - (1) While the FAR permits the contracting officer to sign the D&F, the DoD FMR requires a higher signatory authority.
 - (2) For Intra-Agency support, it is the "head of the major organizational unit ordering the support" that must make such a determination. However, this authority is, presumably, delegable, given the language in para. 030304. Moreover, the FMR provides that the D&F requirement may be "accomplished by signing a Support Agreement (blocks 8 and 9 on DD 1144, 'Support Agreement')" and that "no further written determinations are generally required for agreements between DoD Activities." Note that the signatory provided in blocks 8 and 9 are for the 'Comptroller'. DoD FMR vol. 11A, ch. 3, para. 030303.
 - (3) For Interagency support, it is the "head of the major organizational unit ordering the support" that signs the D&F. Note, however, that the FMR does not provide that signing blocks 8 and 9 on the DD 1144 will suffice, and that the authority may not be delegated below Senior Executive Service, Flag, or General Officer levels. DoD FMR, vol. 11A, ch. 3, para. 030304.

D. Additional Determinations by DoD Policy.

- 1. Using a non-DoD contract to procure goods or services in excess of the simplified acquisition threshold requires determinations in addition to the D&F. See FAR 17.7 and DFARS 217.7802.¹¹
 - a. A DoD acquisition official may place an order, make a purchase, or otherwise acquire supplies or services for DoD in excess of the simplified acquisition threshold through a non-DoD agency **only** if the head of the non-DoD agency has certified that the non-DoD

¹¹ See Appendix A which provides a collection of memoranda applicable to use of non-DoD contracts under both Economy Act and non-Economy Act authorities. These and other applicable memoranda related to interagency acquisitions can be found on the Defense Procurement and Acquisition Policy (DPAP) webpage under "Interagency Acquisition" available at http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.

agency will comply with defense procurement requirements for the fiscal year to include applicable DoD financial management regulations.

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

E. Fiscal Matters.

- 1. Economy Act orders are funded either on a reimbursable basis or by a direct fund citation basis. The ordering agency must pay the actual costs of the goods or services provided. 31 U.S.C. § 1535(b); DoD FMR, vol. 11A, ch. 3, para. 030501 and 030601.¹²
 - a. Actual costs include:

¹² Typically, between DoD Components, a DD Form 448, Military Interdepartmental Purchase Request (MIPR) is used to place the order. A DD Form 448-1, "Acceptance of MIPR" is used to show acceptance. *See also, Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network*, B-238024, 70 Comp. Gen. 592 (1991). However, note that the MIPR, alone, will not satisfy the D&F requirements.

- (1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased. DoD FMR, vol. 11A, ch. 3, para. 030601 and vol. 11A, ch. 1, para. 010203;¹³ and
 - (2) Indirect costs, to the extent they are funded out of currently available appropriations, bear a significant relationship to providing the goods or services, and benefit the ordering agency. DoD FMR, vol. 11A, ch. 3, para. 030601.¹⁴
 - (3) DoD activities not funded by working capital funds normally do not charge indirect costs to other DoD activities. DoD FMR, vol. 11A, ch. 3, para. 030601.¹⁵
- b. When providing goods or services via a contract, the servicing agency may not require payment of a fee or charge which exceeds the actual cost of entering into and administering the contract. FAR 17.502-2(d)(4); DoD FMR, vol. 11A, ch. 3, para. 030601.
 - c. Payments by the requesting agency are credited to the appropriation or fund that the servicing agency used to fill the order. 31 U.S.C. § 1536; 10 U.S.C. § 2205.
 - d. Economy Act orders may **NOT** be used to circumvent the fiscal principles of purpose, time, and amount for appropriations. It is the responsibility of the requesting agency to certify that the funds used are proper for the purpose of the order and for a bona fide need in the fiscal year for which the appropriation is available.¹⁶

2. Obligation and Deobligation of Funds.

- a. Obligation.
 - (1) Reimbursable Order: the requesting agency obligates funds current when the performing activity accepts the

¹³ See *Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978). See *GSA Recovery of SLUC Costs for Storage of IRS Records*, B-211953, Dec. 7, 1984 (unpub.) (storage costs); *David P. Holmes*, B-250377, Jan. 28, 1993 (unpub.) (inventory, transportation, and labor costs).

¹⁴ See *Washington Nat'l Airport, supra* (depreciation and interest); *Obligation of Funds Under Mil. Interdep'tal Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980) (supervisory and administrative expenses).

¹⁵ This tenet of IA support is reiterated in DoD Instruction 4000.19, *Interservice and Intragovernmental Support*, para. 4.a.5 (Apr. 25, 2013). A DoD Working Capital Fund is a revolving, reimbursable operations fund established by 10 U.S.C. § 2208 to sell support goods and services to DoD and other users with the intent to be zero-profit. See DoD FMR vol. 11B, chp 1-2.

¹⁶ DoD FMR vol. 11A, ch. 3, para. 030105. See also, FAR 17.501(b).

reimbursable order. 31 U.S.C. § 1535(d); DoD FMR, vol. 11A, ch. 3, para. 030404.A.

- (2) Direct Citation Order: the servicing agency will provide a copy of the contract or other obligating document to the requesting agency. This will provide the documentation required to record the obligation. DFAS-IN Reg. 37-1, para. 081207.A.7.e.

b. Deobligation.

- (1) At the end of the period of availability of the requesting agency's appropriation, funds must be deobligated to the extent that the servicing agency has not itself incurred obligations by: (1) providing the goods or services; or (2) by entering into an authorized contract with another entity to provide the requested goods or services. 31 U.S.C. § 1535(d).¹⁷
- (2) This deobligation requirement is intended to prevent misusing the Economy Act to "park" funds with another agency in order to extend an appropriation's availability.

F. Ordering Procedures.¹⁸

1. An Economy Act order may be placed on any form that is acceptable to both the requesting and servicing agencies. FAR 17.503(b).
 - a. DoD ordering activities typically use DD Form 448, Military Interdepartmental Purchase Request (MIPR), to place Economy Act orders. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR. Note, again, that a MIPR, by itself, will not satisfy the D&F requirements otherwise required.
 - b. An Economy Act order may be placed on DD Form 1144 or any form that is acceptable to both parties. If the MIPR or DD Form 1144 is not used, the terms of the supporting interagency agreement will determine the method of acceptance. DoD FMR, vol. 11A, ch. 3, para. 030501.

¹⁷ See GAO Redbook, vol. III, ch. 12 (3rd Ed.), pp. 12-43 to 12-50.

¹⁸ See FAR 17.503; DoD FMR, vol. 11A, ch. 3. In addition, individual agencies will have their own policies for ordering. Note that DoDI 4000.19, *Support Agreements* has limited applicability here, as the DoDI does not apply to "Interagency assisted acquisitions that are defined as a type of interagency acquisition where a servicing agency performs acquisition activities on a requesting agency's behalf, such as awarding and administering a contract, task order, or delivery order, in accordance with sub-part 2.101 of the Federal Acquisition Regulation."

2. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself. DoD FMR, vol. 11A, ch. 3, para. 030401. Minimum order requirements under FAR 17.503(b) and DoD FMR, vol. 11A, ch. 3, para. 030501 include:
 - a. Specific description of the supplies or services required;
 - b. Delivery requirements,
 - c. Fund citation (either direct or reimbursable);
 - d. Payment provision; and
 - e. Acquisition authority as may be appropriate.
3. The requesting agency shall furnish a copy of the required D&F to the servicing agency with the request for order. FAR 17.502-2(c)(3).
 - a. When the requesting agency is within DoD, a copy of the executed D&F shall also be furnished to the servicing agency as an attachment to the order.
 - b. When a DoD contracting office is acting as the servicing agency, a copy of the executed D&F shall be obtained from the requesting agency and placed in the contract file for the Economy Act order. DFARS 217.503(d).
4. The work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing agency. DoD FMR, vol. 11A, ch. 3, para. 030405. The requesting agency should therefore ensure in advance of placing an order that such capability exists.
5. Although the servicing activity may require advance payment for all or part of the estimated cost of the supplies or services,¹⁹ DoD policy generally prohibits the practice of advance payment unless the DoD components are specifically authorized by law, legislative action, or Presidential authorization.²⁰

G. Recurring Interagency Support. DoDI 4000.19 (if applicable).

1. Each party to a reimbursable support agreement will annually review the agreement for financial impacts. DoDI 4000.19, Encl. 3, para. 1.e.(1)).

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

²⁰ Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007 (Appendix B).

2. In DoD, recurring interagency support that requires reimbursement should be documented on a DD Form 1144, Support Agreement, or similar format that contains all the information required on the form. DoDI 4000.19, Encl. 3, para. 2.a.(1).
3. Reimbursement may not be charged for provided support that has been included in the supplier's budget process. DoDI 4000.19, Encl. 3, para. 4.a.(2).
4. Support provided by the supplier for the benefit of the supplier's component that also benefits other activities without increasing the cost is not reimbursable. DoDI 4000.19, Encl. 3, para. 4.a.(3).
5. Support is reimbursable to the extent that provision of the specified support for a receiver increases the support supplier's direct costs. These costs must be measurable and directly attributable to the support received and should be expressed in units of support appropriate to the type of service calculation of reimbursement charges. DoDI 4000.19, Encl. 3, para. 4.a.(4).
6. Indirect costs are not normally reimbursable between DoD components. Indirect costs may be included in reimbursement charges to the extent they have a significant relationship to providing the support and benefit the receiver. DoDI 4000.19, Encl. 3, para. 4.a.(5).
7. Costs associated with common use infrastructure are non-reimbursable, except for support provided solely for the benefit of one or more receivers. DoDI 4000.19, Encl. 3, para. 4.a.(6).

H. Interagency Details of Personnel.

1. General Rule: Details of employees from one agency to another must be done under Economy Act authority on a reimbursable basis.²¹
2. Exception: Details of employees may be made on a non-reimbursable basis when: (1) specifically authorized by law; (2) the detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission; or (3) the detail is for a brief period and entails minimal cost.²² For this exception to apply, the statute must not only authorize the transfer, but also the nonreimbursement. (*Matter of: Nonreimbursable Transfer of*

²¹ The detail must be on a reimbursable basis in order to avoid a violation of the Purpose Statute and an improper augmentation of the appropriations of the agency making use of the detailed employees. Note that other detail statutes may apply.

²² See *Department of Health & Human Servs. Detail of Office of Community Servs. Employees*, B-211373, 64 Comp. Gen. 370 (1985).

Administrative Law Judges, B-221585, 65 Comp. Gen. 635 (June 9, 1986)).

I. Limitations.

1. **Funding Limitations.** An agency shall not use an interagency acquisition to circumvent any conditions or limitations imposed on the funds. FAR 17.501(b).
2. **Disputes.** The requesting and servicing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including, in appropriate circumstances, the use of a third party forum. FAR 17.503(c). DoD components will resolve support agreement differences and disputes with federal agencies through their chains of command. DoDI 4000.19, Encl. 3, para. 3.c.(2).
3. **CICA Compliance.** The requesting agency may not procure from a servicing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5); 41 U.S.C. § 253(f)(5); *Valenzuela Eng'g, Inc.*, B-277979, 98-1 Comp. Gen. Proc. Dec. ¶ 51 (Jan. 26, 1998).

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

- A. Purpose: A "project order" is a specific, definite and certain order issued under the authority contained in 41 U.S.C. § 6307.
1. Allows DoD to place orders or contracts pertaining to approved projects with Government-owned establishments. All orders or contracts for work placed with government owned establishments shall be considered as obligations in the same manner as prescribed for similar orders or contracts placed with commercial manufacturers or private contractors. These orders are considered to be obligations "in the same manner as provided for similar orders or contracts placed with...private contractors."
 - a. The term "approved projects" in the statute simply refers to projects approved by officials having legal authority to do so. DoD FMR, vol. 11A, ch. 2, para. 020103.
 - b. A "project order" is a specific, definite, and certain order issued under the Project Order Statute. DoD FMR, vol 11A, ch.2, para 020301.
 2. Within DoD, regulatory guidance on project orders is found at DoD FMR, vol. 11A, ch. 2, and DFAS-IN Regulation 37-1, ch. 12, para. 1208.²³

²³ The Coast Guard has similar project order authority, at 14 U.S.C. § 151.

B. Applicability.

1. DoD-Owned Establishment. Although the language of the statute refers broadly to “Government-owned establishments,” it applies only to transactions between military departments and government-owned, government-operated (GOGO) establishments within DoD. DoD FMR, vol. 11A, ch. 2, para. 020303.
2. GOGO establishments include:
 - a. Equipment overhaul or maintenance shops, manufacturing or processing plants or shops, research and development laboratories, computer software design activities, testing facilities, proving grounds, and engineering and construction activities. DoD FMR, vol. 11A, ch. 2, para. 020303.
 - b. GAO decisions have also “found arsenals, factories, and shipyards owned by the military to be GOGOs.” *Matter of John J. Kominski*, B-246773, 72 Comp. Gen. 172 (1993).
3. Government-Operated.
 - a. The DoD-owned establishment must substantially do the work in-house.
 - b. While the DoD-owned establishment may contract for incidental goods or services pursuant to a project order, the GOGO must itself incur costs of not less than 51% of the total costs attributable to performing the work. DoD FMR, vol. 11A, ch. 2, para. 020515.
4. Nonseverable Work Only.
 - a. Under DoD FMR, vol. 11A, ch. 2, para. 020509, activities may use project orders only for nonseverable or “entire” efforts that call for a single or unified outcome or product, such as the manufacture, production, assembly, rebuild, reconditioning, overhaul, alteration, or modification of:
 - (1) Ships, aircraft, and vehicles of all kinds;
 - (2) Guided missiles and other weapon systems;
 - (3) Ammunition;
 - (4) Clothing;
 - (5) Machinery and equipment for use in such operations;

- (6) Other military and operating supplies and equipment (including components and spare parts);
- (7) Construction or conversion of buildings and other structures, utility and communication systems, and other public works;
- (8) Development of software programs and automated systems when the purpose of the order is to acquire a specific end-product; and
- (9) Production of engineering and construction related products and services.

5. Activities may not use project orders for:

- a. Severable services, such as custodial, security, fire protection, or refuse collection;
- b. Routine maintenance in general, such as grounds maintenance, heat and air conditioning maintenance, or other real property maintenance;
- c. Services such as education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, utilities, or communications; or
- d. Efforts where the stated or primary purpose of the order is to acquire a level of effort (e.g., 100 hours, or one year) rather than a specific, definite, and certain end-product;

C. Fiscal Matters.

1. Obligation of Funds.

- a. A project order is a valid and recordable obligation of the requesting agency when the order is issued and accepted. DoD FMR, vol. 11A, ch. 2, para. 020301.A.²⁴
- b. The project order must serve a valid *bona fide need* that exists in the fiscal year in which the project order is issued. DoD FMR, vol. 11A, ch. 2, para. 020508.

2. Deobligation of Funds.

²⁴ Providing the obligation otherwise meets the criteria for recording an obligation contained in 31 U.S.C. § 1501(a) (the “Recording Statute”).

- a. Unlike orders under the Economy Act, there is no general requirement to deobligate the funds if the servicing agency has not performed before the expiration of the funds' period of availability. 41 U.S.C. § 6307.
- b. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.
- c. If evidence existed at the time of acceptance and is documented in the file, then there are no consequences if the servicing agency subsequent fails to begin work within the 90 days unless that delay extends beyond 1 January of the following calendar year.
 - (1) If work on a project order does not begin, or is not expected to begin, by January 1 of the following calendar year, then the project order must be returned for cancellation and the funds deobligated.
 - (2) If it is documented that the delay is unavoidable and could not have been foreseen at the time of project order acceptance, and that documentation is retained for audit review, then the project order can be retained and executed. DoD FMR, vol. 11A, ch. 2, para. 020510.B.

D. Ordering Procedures.

- 1. Project orders are analogous to contracts placed with commercial vendors and, similar to such contracts, must be specific, definite, and certain both as to the work and the terms of the order itself. DoD FMR, vol. 11A, ch. 2, para. 020506.
- 2. Project orders shall be issued on a reimbursable basis only (no direct cite orders). DoD FMR, vol. 11A, ch. 2, para. 020519. The project order may be on a fixed-price or costs-incurred (cost-reimbursement) basis.
- 3. The MIPR is normally used for issuing and accepting project orders.
 - a. The DoD FMR states that although "the use of a specific project order form is not prescribed," activities shall use the "Universal Order Format" described in DoD FMR, vol.11A, ch. 1, whenever practicable. DoD FMR, vol. 11A, ch. 2, para. 020302.
 - b. The Army, however, requires that project orders be issued on a MIPR. DFAS-IN Reg. 37-1, para. 120803.A.

4. At the time of acceptance, evidence must exist that the work will be commenced without delay (usually within 90 days) and that the work will be completed within the normal production period for the specific work ordered. DoD FMR, vol. 11A, ch. 2, para. 020510.A.
5. Because project orders are not made under the authority of the Economy Act, there is no requirement for determinations and findings (D&F).²⁵

IV. OTHER NON-ECONOMY ACT AUTHORITIES.

- A. Purpose: Provides specific statutory authority for interagency acquisitions allowing DoD to obtain goods and services from a non-DoD agency outside of the Economy Act. When any of these specified, non-Economy Act authorities apply, they must be used instead of the Economy Act.
- B. Fiscal Matters.
 1. Obligation of Funds. The requesting agency records an obligation upon meeting all the following criteria:²⁶
 - a. A binding agreement, in writing, between the agencies;
 - b. For a purpose authorized by law;
 - c. Serve a bona fide need of the fiscal year or years in which the funds are available for new obligations;²⁷
 - d. Executed before the end of the period of availability of the appropriation used; and
 - e. Provides for specific goods to be delivered or specific services to be supplied.
 2. De-obligating Funds.
 - a. General Rule: the order is generally treated like a contract with a private vendor in that requesting agency does not have to deobligate its funds if the servicing agency has not performed or

²⁵ See also, FAR 17.500(c), which excludes interagency reimbursable work performed by federal employees from the requirements of FAR 17.5.

²⁶ DoD FMR vol. 11A, ch. 18, para. 180301.

²⁷ While *bona fide need* is generally a determination of the requesting agency and not that of the servicing agency, a servicing agency can refuse to accept a non-Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. (DoD FMR, vol. 11A, ch. 18, para. 180208).

incurred obligations at the end of the funds' period of availability.²⁸

- b. DoD Policy: In response to several GAO and DoD Inspector General audits indicating contracting and fiscal abuses with DoD agencies' use of interagency acquisitions, the DoD has issued policy that severely restricts the flexibility that these non-Economy Act authorities provide and now applies a deobligation requirement similar to that of the Economy Act. DoD FMR, vol. 11A, ch. 18, para. 180302.²⁹
- (1) General: Expired funds must be returned by the servicing agency and deobligated by the requesting agency to the extent that the servicing agency has not:
 - (a) Provided the goods or services (or incurred actual expenses in providing the goods or services); or
 - (b) Entered into a contract with another entity to provide the goods or services before the funds expired, subject to the bona fides need rule.
 - (2) Non-severable services: the contract must be funded entirely with funds available for new obligations at the time the contract was awarded, even though performance may extend across fiscal years. DoD FMR, vol. 11A, ch. 18, para. 180302.C.
 - (3) Severable Services: one-year funds may be used to fund up to twelve months of continuous severable services beginning in the fiscal year of award and crossing fiscal years under the authority of 10 U.S.C. § 2410a. DoD FMR, vol. 11A, ch. 18, para. 180302.B.³⁰
 - (4) Goods: if the contract is for goods that were not delivered within the funds period of availability, the funds must be

²⁸ *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157

²⁹ Office of the Under Secretary of Defense (Comptroller) memorandum, Subject: Non-Economy Act Orders, dated October 16, 2006. (Appendix C).

³⁰ The funding availability period does not start upon obligation of the funds by the servicing agency, but upon obligation of the funds by the requesting agency. See DoD FMR, vol. 11A, ch. 18, para. 180203.F (requiring a statement on the funding document that states: "all funds not placed on contract this fiscal year shall be returned promptly to the ordering activity, but *no later than one year after the acceptance of the order, or upon completion of the order, which ever is earlier.*")(emphasis added). Therefore, a DoD requesting activity can still "lose" funds if the servicing agency does not award a contract promptly after acceptance of the order.

deobligated and current funds used, unless the goods could not be delivered because of delivery, production or manufacturing lead time, or unforeseen delays that are out of the control and not previously contemplated by the contracting parties at the time of contracting. DoD FMR, vol. 11A, ch. 18, para. 180302.A.

3. Advance Payment.³¹

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

C. DoD Policy for non-DoD orders.³²

1. If the non-Economy Act order is over the simplified acquisition threshold (SAT), additional Service Component regulatory requirements may apply.
2. Non-Economy Act orders may be placed with a non-DoD agency for goods or services if:³³
 - a. Proper funds are available;
 - b. The non-Economy Act order does not conflict with another agency's designated responsibilities (*e.g.*, real properly lease agreements with GSA);
 - c. The requesting agency determines the order is in the best interest of the Department; and
 - d. The servicing agency is able and authorized to provide the ordered goods or services.

³¹ Under Secretary of Defense (Comptroller) memorandum, subject: Advance Payments to Non-Department of Defense Federal Agencies for Interagency Acquisitions, dated March 1, 2007, *available at* <http://www.acq.osd.mil/dpap/specificpolicy/attachments/advance-payments-20070307.pdf>.

³² *See generally*, DoD FMR, vol. 11A, ch. 18.

³³ DoD FMR, vol. 11A, ch. 18, para. 180202

3. Best Interest Determination.
 - a. Each requirement must be evaluated to ensure that non-Economy Act orders are in the DoD's best interest. Factors to consider include: satisfying customer requirements; schedule, performance, and delivery requirements; cost effectiveness, taking into account the discounts and fees; and contract administration, to include oversight. DoD FMR, vol. 11A, ch. 18, para. 180204; *see also* FAR 17.502-1(a) requiring a determination of best procurement approach and consideration of similar factors.
 - b. If the order exceeds the SAT, then the best interest determination must be documented in accordance with individual service component requirements.

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

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

E. Commonly used non-Economy Act transaction authorities.

1. Government Employees Training Act (GETA). 5 U.S.C. § 4104.
 - a. Purpose: permits agencies to provide training to employees of other federal agencies on a reimbursable basis.
 - (1) Servicing agency is authorized to collect and to retain a fee to offset the costs associated with training the employees of other agencies.
 - (2) Reimbursement is NOT authorized for training of other agency employees if funds are already provided for interagency training in its appropriation.³⁴
 - b. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.
 - c. Limitation: Non-government personnel.
 - (1) This authority applies only to transactions between federal government agencies; therefore, it does not authorize the provision of training to non-government personnel.
 - (2) The Comptroller General has not objected to federal agencies providing training to non-government personnel on a space-available basis incidental to the necessary and authorized training of government personnel, but the non-government personnel must reimburse the government for the costs of that training, and the agency providing the training must deposit the fees collected in the Treasury as miscellaneous receipts.³⁵
2. Federal Supply Schedules (FSS). 41 U.S.C. 251 *et seq* -- The Federal Property and Administrative Services Act of 1949; 40 U.S.C. § 501; FAR Subpart 8.4.
 - a. Purpose: authorizes the General Services Administration (GSA) to enter into contracts for government-wide use outside of the restrictions of the Economy Act.

³⁴ Office of Personnel Management, Training Policy Handbook: Authorities and Guidelines 26, May 11, 2007.

³⁵ *Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses*, B-271894, 1997 U.S. Comp. Gen. LEXIS 252; *To the Secretary of Commerce*, B-151540, 42 Comp. Gen. 673 (1963).

- (1) The FSS program (also known as the GSA Schedules Program or the Multiple Award Schedule Program) provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.
 - (2) The GSA negotiates with vendors for the best prices afforded their preferred customers for the same or similar items or services, and awards thousands of government-wide ID/IQ contracts for over 11 million commercial items and services.
 - (3) Agencies place orders or establish blanket purchasing agreements against these Schedule contracts.
- b. The procedures of FAR 17.5 do not apply to orders of \$500,000 or less issued against Federal Supply Schedules. FAR 17.500(c)(2).
 - c. Ordering Guidelines: FAR Subpart 8.4 provides detailed guidance on the use of FSS, including ordering procedures for services requiring or not requiring a statement of work, establishing blanket purchase agreements under an FSS contract, and the limited “competition” requirements for FSS orders (*see also* DFARS 208.405-70, for competition requirements for DoD orders exceeding the SAT).
 - d. DoD Policy: contracting officers must: (1) consider labor rates as well as labor hours and labor mixes when establishing a fair and reasonable price for an order; (2) evaluate proposed prices for both services and products when awarding combination orders; (3) seek discounts and explain why if they were not obtained; and (4) solicit as many contractors as practicable.³⁶
3. Committee for Purchase From People Who Are Blind or Severely Disabled. 41 U.S.C. §§ 46-48c – The Javits-Wagner-O’Day Act (JWOD Act); 41 C.F.R. Part 51; FAR Subpart 8.7.
 - a. Purpose: Provides authority to orchestrate agencies’ purchase of goods and services provided by nonprofit agencies employing people who are blind or severely disabled.

³⁶ Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Use of Federal Supply Schedules and Market Research, dated January 28, 2005 *available at* <http://www.acq.osd.mil/dpap/specificpolicy/DPAP%20Memo%20dtd%20Jan%2028%202005.pdf>.

- b. Program Oversight: the Committee for Purchase From People Who Are Blind or Severely Disabled (the Committee) oversees the AbilityOne program (formerly known as the JWOD Program).
 - c. Ordering Requirements:
 - (1) The JWOD Act requires agencies to purchase supplies or services on the Procurement List maintained by the Committee (this list may be accessed at <http://www.abilityone.gov>), at prices established by the Committee, from AbilityOne nonprofit agencies if they are available within the period required.
 - (2) These supplies or services may be purchased from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee.
4. Federal Prison Industries, Inc. (FPI or UNICOR). 18 U.S.C. §§ 4121-4128; FAR Subpart 8.6.
- a. Originally required federal departments and agencies to purchase products of FPI that met requirements and were available at market price or less, unless FPI granted a waiver for purchase of the supplies from another source. 10 U.S.C. § 2410n.³⁷
 - b. Current Requirements:
 - (1) The law has changed in recent years, minimizing the “mandatory source” nature of FPI.³⁸
 - (2) When acquiring an item for which FPI has a significant market share DoD must use competitive procedures or fair opportunity procedures under the FAR to procure the product.³⁹ (DFARS 208.602-70.
 - (3) If FPI does not have a significant market share, comply with procedures under FAR 8.602.

³⁷ FPI products are listed in the FPI Schedule, at <http://www.unicor.gov>. FPI also offers services, though agencies have never been required to procure services from FPI.

³⁸ National Defense Authorization Act for FY2002, Pub. L. No. 107-107; Bob Stump National Defense Authorization Act for FY2003, Pub. L. No. 107-314; Consolidated Appropriations Act of 2004, Pub. L. No. 108-199.

³⁹ Significant market share is defined as “FPI share of the Department of Defense market is greater than five percent.” See Appendix E, Office of the Under Secretary of Defense (AT&L) Policy Memorandum, Subject: Competition Requirements for Purchases from Federal Prison Industries, dated 28 March 2008.

- (a) Before purchasing products from FPI, agencies must conduct market research to determine whether the FPI item is comparable to supplies available from the private sector in terms of price, quality, and time of delivery. This is a unilateral determination of the contracting officer that is not subject to review by FPI. FAR 8.602.
- (b) If the FPI item is determined not to be comparable, then agencies should acquire the items using normal contracting (i.e., competitive) procedures, and no waiver from FPI is required.
- (c) If the FPI item is comparable, then the agency must obtain a waiver to purchase the item from other sources, except when:
 - (i) Public exigency requires immediate delivery or performance;
 - (ii) Used or excess supplies are available;
 - (iii) The supplies are acquired and used outside the United States;
 - (iv) Acquiring supplies totaling \$2,500 or less; or
 - (v) Acquiring services.

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

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

- b. Presently, five agencies serve as executive agents to award and administer GWACs pursuant to OMB designation: GSA, Department of Commerce, NASA, the National Institutes of Health, and the Environmental Protection Agency. These agencies operate approximately 13 GWACs as follows:

Government-wide Acquisition Contracts (GWACs)⁴⁰

Managing Agency	Vehicle	Available Information Technology Products and Services	Agency website address for more information
1. Commerce	Commerce Information Technology Solutions (COMMITTS) NexGen	Wide range of services from small businesses	http://oam.ocs.doc.gov/commits/index.html
2. EPA	Recycling Electronics and Asset Disposition (READ) Services	Services associated with recycling of electronic equipment and disposal of excess or obsolete electronic equipment in an environmentally responsible manner	http://www.epa.gov/oam/read/
3. GSA	Applications and Support for Widely-diverse End User Requirements (ANSWER)	Full-service support	www.gsa.gov/gwacs
4. GSA	HUBZone	Services from historically underutilized business zone (HUBZone) contractors	www.gsa.gov/gwacs
5. GSA	Information Technology Omnibus Procurement (ITOP II)	Information systems engineering and security support; systems operations and management	www.gsa.gov/gwacs
6. GSA	Millennia	Services to support large systems integration and software development projects	www.gsa.gov/gwacs
7. GSA	Millennia Lite	Planning, studies, and assessment; high end services; mission support; legacy systems migration; new enterprise systems development	www.gsa.gov/gwacs
8. GSA	STARS	Services from disadvantaged small businesses	www.gsa.gov/gwacs
9. GSA	Veterans Technology Services	Information systems engineering and systems operations and maintenance from service-disabled veteran-owned small businesses.	www.gsa.gov/gwacs
10. HHS- NIH	Chief Information Officer Solutions & Partners 2 Innovations (CIO-SP2i)	Hardware; software development; systems integration; technical support services	http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/
11. HHS- NIH	Electronic Commodities Store (ECS III)	Commercial-off-the-shelf products; software; maintenance; peripherals	http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/
12. HHS- NIH	Image World2 <i>New Dimensions</i> (IW2nd)	Imaging and document management services	http://olao.od.nih.gov/Acquisitions/MultipleVehicleContracts/GWACs/
13. NASA	Scientific Engineering	High-end scientific and engineering	http://www.sewp.nasa.gov/

⁴⁰ http://www.whitehouse.gov/omb/procurement/interagency_acq/gwac_list.pdf

	Workstation Procurement (SEWP)	products	
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6. Franchise Funds. The Government Management Reform Act of 1994, Pub. L. No. 103-356, Title IV, § 403, 103 Stat. 3413 (Oct. 13, 1994).

a. Purpose: Authorizes OMB's Director to establish six franchise fund pilot programs to provide common administrative support services on a competitive and fee basis.

(1) OMB designated pilots at Department of Interior, Department of Treasury, Department of Commerce, Environmental Protection Agency, Veterans Affairs, and Department of Health and Human Services.

(2) DoD activities frequently use Interior's GovWork and Treasury's FedSource.⁴¹

b. Operating Details:

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

(2) To cover their costs, the franchise funds charge fees for services. Unlike other revolving funds, the laws authorizing each franchise fund allow them to charge for a reasonable operating reserve and to retain up to 4 percent of total annual income for acquisition of capital equipment and financial management improvements.

c. Recent Change: although these pilots were to expire at the end of fiscal year 1999, they have been extended several times.

(1) Recently, the termination provision at section 403(f) was amended so as to be limited to the DHS Working Capital Fund. (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, Title VII, § 730, 121 Stat. 1844 (Dec. 26, 2007)).

⁴¹ A previous DoD-wide prohibition on purchases in excess of \$100,000 through GovWorks imposed on June 14, 2007, has since been rescinded. See Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) memorandum, subject: Revision to DoD Prohibition to Order, Purchase, or Otherwise Procure Property or Services through the Acquisition Services directorate of the Department of Interior's National Business Center locations, Herndon, Virginia (formerly known as GovWorks and now known as AQD-Herndon) and Sierra Vista, Arizona (formerly known as Southwest Branch and now known as ACQ-Sierra Vista), dated March 28, 2008. However, this memo imposed a new restriction on acquisition of furniture.

- (2) Because the termination provision no longer applies to the other franchise fund pilot programs, the others are now apparently permanent.
- d. NOTE: while the deobligation requirements of the Economy Act do not apply, various audits have identified contracting and fiscal abuses with DoD's use of franchise funds.⁴² Accordingly, the deobligation policies described in section IV.B supra, would apply here as well.

V. DOD POLICY ON USE OF NON-DOD CONTRACTS.⁴³

- A. General Policy: "use of non-DoD contracts and the services of assisting agencies to meet DoD requirements, when it is done properly, is in the best interest of the Department, and necessary to meet our needs."⁴⁴
- B. Requirements For Use of Non-DoD Contracts Over the Simplified Acquisition Threshold.⁴⁵
 1. The policies of the Military Departments require certain written determinations or certifications prior to using a non-DoD contract for goods or services over \$150,000 (under the Economy Act or under any non-Economy Act authority, to include orders against GSA's FSS).
 2. The officials with authority to make these determinations/certifications are designated by agency policy (e.g., Army policy requires that these written certifications be executed by the head of the requiring activity (O-6/GS-15 level or higher)).
 3. This requirement is separate and distinct from the D&F required for Economy Act transactions, but may be combined with the D&F for

⁴² See, e.g., GOVERNMENT ACCOUNTABILITY OFFICE, INTERAGENCY CONTRACTING: FRANCHISE FUNDS PROVIDE CONVENIENCE, BUT VALUE TO DOD IS NOT DEMONSTRATED, GAO-05-456 (July 2005); *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 Comp. Gen. Proc. Dec. ¶ 157.

⁴³ Common policy applicable for Economy Act and non-Economy Act transactions.

⁴⁴ See e.g., Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Interagency Acquisition, dated January 18, 2008 available at <http://www.acq.osd.mil/dpap/policy/policyvault/2007-0203-dpap.pdf>.

⁴⁵ See e.g., Office of the Secretary of Defense memorandum, Subject: Proper Use of Non-DoD Contracts, dated October 29, 2004 available at <http://www.acq.osd.mil/dpap/specificpolicy/attachments/2005-0924-DPAP.pdf>.

approval by an official with authority to make all determinations and issue all approvals.

4. While there are differences between Service Components, most require the following findings:
 - a. The order is in the Service Component's best interest considering the factors of ability to satisfy customer requirements, delivery schedule, availability of a suitable DoD contract vehicle, cost effectiveness, contract administration (including ability to provide contract oversight), socioeconomic opportunities, and any other applicable considerations;
 - b. The supplies or services to be provided are within the scope of the non-DoD contract;
 - c. The proposed funding is appropriate for the procurement and is being used in a manner consistent with any fiscal limitations; and
 - d. The servicing agency has been informed of applicable DoD-unique terms or requirements that must be incorporated into the contract or order to ensure compliance with applicable statutes, regulations, and directives.

5. Several of the Army's unique requirements are as follows:
 - a. For all non-DoD orders over the SAT, the required written certification must be prepared with the assistance (and written coordination) of the Army contracting officer and the fund certifying official.
 - b. For direct acquisitions of services, the requiring activity must also obtain written concurrence from the non-DoD contracting officer at the servicing agency that the services are within the scope of the contract (unless the Army contracting office has access to the non-DoD contract document), and the Army contracting officer must obtain written coordination from supporting legal counsel.
 - c. For assisted acquisitions of both supplies and services:
 - (1) The requiring activity must first consult with the Army contracting office, which will advise regarding the various DoD contractual options available to obtain the goods or services, and which will provide any unique terms, conditions and requirements that must be incorporated into the resultant non-DoD order to comply with DoD rules.

- (2) The fund authorizing official must annotate the MIPR with the following statement: “This requirement has been processed in accordance with Section 854 of the Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005 (Public Law 108-375) and the Army Policy memorandum on Proper Use of Non-Department of Defense contracts, dated July 12, 2005. The order is properly funded (correct appropriation and year), and it is in compliance with Army procedures for placement of orders on the Army’s behalf by a non-DoD organization.”
- (3) The head of the requiring activity shall obtain written coordination from supporting legal counsel prior to sending the order to the servicing agency.
- (4) The requiring activity must also provide a copy of the certification to the non-DoD contracting officer.

- C. Certifications. Under DFARS 217.7802, the requesting agency may not procure from a non-DoD servicing agency that fails to comply with DoD procurement laws and regulations unless the Under Secretary of Defense determines in writing that “it is necessary in the interest of the Department of Defense to continue to procure property and services through the non-defense agency during such fiscal year.” (Pub. L. No. 110-181 (2008 National Defense Authorization Act, § 801)).⁴⁶ Certifications from non-DoD agencies indicating that they will comply with defense procurement and financial management regulations are maintained at: http://www.acq.osd.mil/dpap/cpic/cp/interagency_acquisition.html.
- D. Interagency Agreements. Prior to the issuance of a solicitation arising from an assisted acquisition, the servicing agency and the requesting agency shall both sign a written interagency agreement that establishes the general terms and conditions governing the relationship between the parties.⁴⁷ (FAR 17.502-1(b)).

⁴⁶ See e.g., Office of the Under Secretary of Defense (AT&L) memorandum, Subject: Delegation of Authority under Section 801 of the National Defense Authorization Act for Fiscal Year 2008, dated July 19, 2008 available at <https://dap.dau.mil/policy/Documents/Policy/Internal%20Controls%20for%20Procurements%20for%20DOD%20by%20Certain%20Non-DOD%20Agencies.pdf>. See also Office of the Under Secretary of Defense (AT&L) memorandum, Subject: National Defense Authorization Act for Fiscal Year 2008 (Pub. L. No. 110-181, Section 801, *Internal Controls for Procurements on Behalf of the Department of Defense by Certain Non-Defense Agencies, Requests for “Waiver,”* dated September 18, 2009 available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA004969-09-DPAP.pdf>.

⁴⁷ Since the requesting agency administers an order in a direct acquisition themselves, there is generally no need for a written interagency agreement outlining roles and responsibilities as there is in an assisted acquisition. See FAR 17.502-1(b)(2).

1. An interagency agreement should cover roles and responsibilities related to acquisition planning, contract execution, and contract administration. It should also cover procedures for resolution of disputes that may arise.⁴⁸
2. DoD agencies are specifically required to use an Agreement for all assisted IAs regardless of dollar value. Additionally, DoD agencies must include specific enumerated elements or utilize a model agreement per Office of Federal Procurement Policy Memo.⁴⁹

VI. CONCLUSION

⁴⁸ FAR 17.503(c); *see also* Office of Federal Procurement Policy Memorandum, Subject: Improving the Management and Use of Interagency Acquisitions, dated June 6, 2008, *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/procurement/iac_revised.pdf.

⁴⁹ *See* Office of the Under Secretary of Defense (AT&L) Memorandum, Subject: Meeting Department of Defense Requirements Through Interagency Acquisition, dated October 31, 2008 *available at* <http://www.acq.osd.mil/dpap/policy/policyvault/USA000871-08-DPAP.pdf> . This memo does not eliminate requirements under FAR 17.5 or DFARS 217.78, which take precedence in any conflict with OFPP guidance.

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