

Chapter 4
**Funding &
Funding Limitations**



2014 Contract Attorneys Deskbook

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CHAPTER 4

FUNDING AND FUND LIMITATIONS

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CHAPTER 4

FUNDING AND FUND LIMITATIONS

I. INTRODUCTION

- A. Source of Funding and Fund Limitations. The U.S. Constitution gives Congress the authority to raise revenue, borrow funds, and appropriate the proceeds for federal agencies. This Constitutional “power of the purse” includes the power to establish restrictions and conditions on the use of funds appropriated. To curb fiscal abuses by the executive departments, Congress has also enacted additional fiscal controls through statute.
1. U.S. Constitution, Art. I, § 8, grants to Congress the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States . . .”
 2. U.S. Constitution, Art. I, § 9, provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . .”
 3. The “Purpose Statute,” 31 U.S.C. § 1301. The Purpose Statute provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law.
 4. The Antideficiency Act (ADA), 31 U.S.C. §§ 1341, 1342, 1350, 1351, and 1511-1519, consists of several statutes that authorize administrative and criminal sanctions for the unlawful obligation and expenditure of appropriated funds.
 5. Congress and the Department of Defense (DoD) have agreed informally to additional restrictions. The DoD refrains from taking certain actions without first giving prior notice to, and receiving consent from, Congress. These restraints are embodied in regulation.
- B. The Basic Fiscal Limitations.
1. An agency may obligate and expend appropriations only for a proper **purpose**;
 2. An agency may obligate only within the **time** limits applicable to the appropriation (e.g., O&M funds are available for obligation for one fiscal year); and

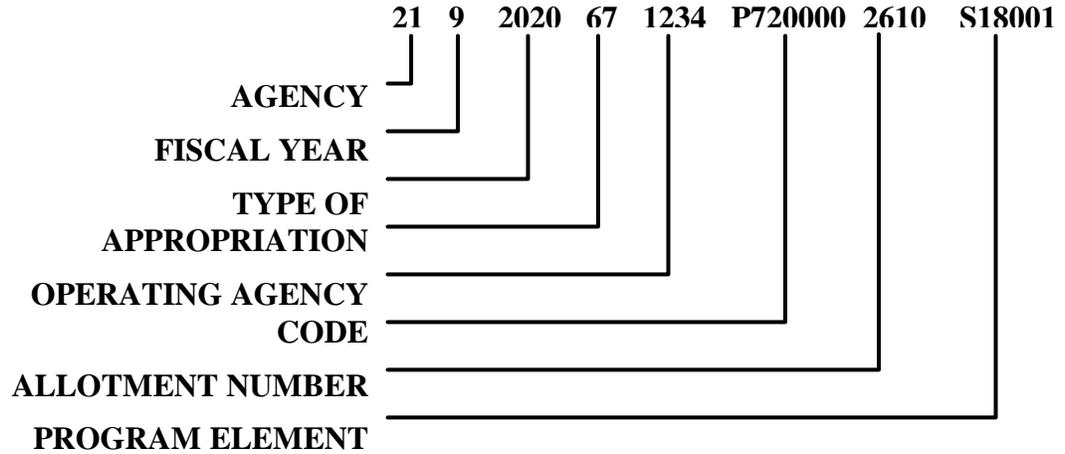
3. An agency may not obligate more than the **amount** appropriated by the Congress, amounts apportioned to the agency, or in excess of the amount permitted by agency regulation.
- C. The Fiscal Law Philosophy: “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” United States v. MacCollom, 426 U.S. 317 (1976).

II. KEY TERMINOLOGY

- A. Fiscal Year (FY). The Federal Government’s fiscal year begins on 1 October and ends on 30 September.
- B. Obligation. An obligation is any act that legally binds the government to make payment. Obligations represent the amount of orders placed, contracts awarded, services received, and similar transactions during an accounting period that will require payment during the same or a future period. DOD Financial Management Regulation 7000.14, Glossary, p. 21 (hereinafter, “DOD FMR”).
- C. Period of Availability. Most appropriations are available for obligation for a limited period of time. If activities do not obligate the funds during the period of availability, the funds expire and are generally unavailable for obligation.
- D. Budget Authority. Agencies do not receive cash to fund their programs and activities. Instead, Congress grants “budget authority,” also called obligational authority. Budget authority means “the authority provided by Federal law to incur financial obligations. . . .” 2 U.S.C. § 622(2).
- E. Contract Authority. Contract authority is a limited form of “budget authority.” Contract authority permits agencies to obligate funds in advance of appropriations but not to disburse those funds absent appropriations authority. See, e.g., 41 U.S.C. § 6301 (Feed and Forage Act).
- F. Authorization Act. An authorization act is a statute, typically passed annually, by Congress that authorizes the appropriation of funds for programs and activities. An authorization act does not provide budget authority. That authority stems from the appropriations act. Authorization acts frequently contain restrictions or limitations on the obligation of appropriated funds.
- G. Appropriations Act. An appropriation is a statutory authorization to “incur obligations and make payments out of the U.S. Treasury for specified purposes.” An appropriations act is the most common form of budget authority.

1. The Army receives the bulk of its funds from two annual Appropriations Acts: (1) the Department of Defense Appropriations Act; and (2) the Military Construction Appropriations Act.
 2. The making of an appropriation must be stated expressly. An appropriation may not be inferred or made by implication. Principles of Fed. Appropriations Law, Vol. I (3d ed,) p. 2-16, GAO-04-261SP (2004).
- H. Comptroller General and Government Accountability Office (GAO).
1. Investigative arm of Congress charged with examining all matters relating to the receipt and disbursement of public funds.
 2. The GAO was established by the Budget and Accounting Act of 1921 (31 U.S.C. § 702) to audit government agencies.
 3. The Comptroller General issues opinions and reports to federal agencies concerning the propriety of appropriated fund obligations or expenditures.

- I. Accounting Classifications. Accounting classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and to ensure that funds are used correctly. An accounting classification is commonly referred to as a **fund cite**. DFAS-IN 37-100-XX, The Army Mgmt. Structure, provides a detailed breakdown of Army accounting classifications. The following is a sample fund cite:



1. The first two digits represent the military department. In the example above, the “21” denotes the Department of the Army. For the Air Force, these two digits will be **57**; for the Navy, **17**; and for the Department of Defense, **97**.
2. The third digit shows the fiscal year/period of availability of the appropriation. The “9” in the example shown indicates FY 2009 funds. Installation contracting typically uses annual appropriations. Other fiscal year designators encountered less frequently include:
 - a. Third Digit = X = No year appropriation. This appropriation is available for obligation indefinitely.
 - b. Third Digit = 9/1 = Multi-year appropriation (in this case, a 3 year appropriation). In this example, funds were appropriated in FY 2009 and remain available through FY 2011.
3. The next four digits reveal the type of the appropriation. The following designators are used within DOD fund citations:

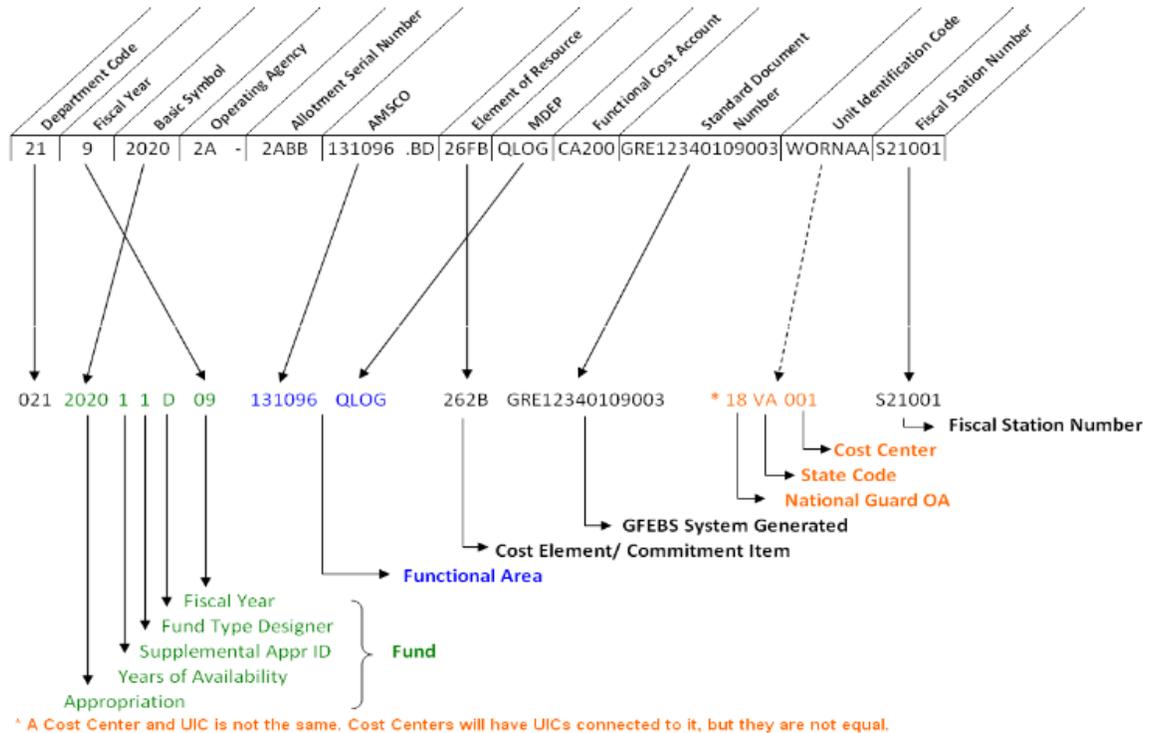
Appropriation Type	Army	Navy	Marine Corps	Air Force	OSD
Military Personnel	21*2010	17*1453	17*1105	57*3500	N/A
Reserve Personnel	21*2070	17*1405	17*1108	57*3700	N/A

National Guard Personnel	21*2060	N/A	N/A	57*3850	N/A
Operations & Maintenance	21*2020	17*1804	17*1106	57*3400	97*0100
Operations & Maintenance, Reserve	21*2080	17*1806	17*1107	57*3740	N/A
Operations & Maintenance, National Guard	21*2065	N/A	N/A	57*3840	N/A
Procurement, Aircraft	21*2031	17*1506		57*3010	N/A
Procurement, Missiles	21*2032	17*1507 (not separate – the combined appropriation is entitled Weapons Procurement)	17*1109	57*3020	N/A
Procurement, Weapons & Tracked Vehicles	21*2033			N/A	N/A
Procurement, Other	21*2035			17*1810	57*3080
Procurement, Ammunition	21*2034	17*1508		57*3011	N/A
Shipbuilding & Conversion	N/A	17*1611		N/A	N/A
Res., Develop., Test, & Eval.7	21*2040	17*1319		57*3600	97*0400
Military Construction	21*2050	17*1205		57*3300	97*0500
Family Housing Construction	21*0702	17*0703		57*0704	97*0706
Reserve Construction	21*2086	17*1235		57*3730	N/A
National Guard Construction	21*2085	N/A	N/A	57*3830	N/A

* The asterisk in the third digit is replaced with the last number in the relevant fiscal year. For example, Operations & Maintenance, Army funds for FY2009 would be depicted as 2192020.

** This chart is derived from the archived version of the DOD FMR, vol. 6B, App. A.

- J. General Fund Enterprise Business System (GFEBS). The Army has transitioned to GFEBS, which will modify the way information is captured, summarized, reviewed and presented. Among the changes is a new line of accounting (LOA). Information can be found in the FY 2014 Army Funds Management Data Reference Guide, ch. 4, available at the website for Office of the Assistant Secretary of the Army (Financial Management and Comptroller). Below is a comparison of the new LOA with the legacy LOA.



III. AVAILABILITY AS TO PURPOSE

- A. The “Purpose Statute” provides that agencies shall apply appropriations only to the objects for which the appropriations were made, except as otherwise provided by law. 31 U.S.C. § 1301(a).
1. The Purpose Statute does not require Congress to specify every item of expenditure in an appropriation act, although it does specify the purpose of many expenditures. Rather, agencies have reasonable discretion to determine how to accomplish the purpose of an appropriation. Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Mach., B-226065, 66 Comp. Gen. 356 (1987).

2. An appropriation for a specific purpose is available to pay expenses necessarily incident to accomplishing that purpose. Secretary of State, B-150074, 42 Comp. Gen. 226, 228 (1962); Major General Anton Stephan, A-17673, 6 Comp. Gen. 619 (1927).
- B. The “Necessary Expense” Doctrine (the 3-part test for a proper purpose). Where a particular expenditure is not specifically provided for in the appropriation act, it is permissible if it is necessary and incident to the proper execution of the general purpose of the appropriation. The GAO applies a three-part test to determine whether an expenditure is a “necessary expense” of a particular appropriation:
1. The expenditure must bear a **logical relationship** to the appropriation sought to be charged. In other words, it must make a direct contribution to carryout out either a specific appropriation or an authorized agency function for which more general appropriations are available.
 2. The expenditure must **not be prohibited by law**.
 3. The expenditure must **not be otherwise provided for**; that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

Principles of Fed. Appropriations Law, vol. I, ch. 4, 4-21, GAO-04-261SP (3d ed. 2004). See Presidio Trust—Use of Appropriated Funds for Audio Equipment Rental Fees and Services, B-306424, 2006 U.S. Comp. Gen. LEXIS 57 (Mar. 24, 2006).

- C. Application of the Necessary Expense Test.
1. The first prong of the “necessary expense” test has been articulated in some other, slightly different ways as well. See Internal Revenue Serv. Fed. Credit Union—Provision of Automatic Teller Machine, B-226065, 66 Comp. Gen. 356, 359 (1987) (“an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function”); Army—Availability of Army Procurement Appropriation for Logistical Support Contractors, B-303170, 2005 U.S. Comp. Gen. LEXIS 71 (Apr. 22, 2005) (“the expenditure must be reasonably related to the purposes that Congress intended the appropriation to fulfill”). However, the basic concept has remained the same: the important thing is the relationship between the expenditure to the appropriation sought to be charged.
 2. The concept of “necessary expense” is a relative one, and determinations are fact/agency/purpose/appropriation specific. See Federal Executive Board – Appropriations – Employee Tax Returns – Electronic Filing, B-259947, Nov. 28, 1995, 96-1 CPD ¶ 129; Use of Appropriated Funds for

an Employee Electronic Tax Return Program, B-239510, 71 Comp. Gen. 28 (1991).

3. 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).
4. Agencies have reasonable discretion to determine how to accomplish the purposes of appropriations. See Customs and Border Protection—Relocation Expenses, B-306748, 2006 U.S. Comp. Gen. LEXIS 134 (July 6, 2006). An agency’s determination that a given item is reasonably necessary to accomplishing an authorized purpose is given considerable deference. In reviewing an expenditure, the GAO looks at “whether the expenditure falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose is so attenuated as to take it beyond that range.” Implementation of Army Safety Program, B-223608 1988 U.S. Comp. Gen. LEXIS 1582 (Dec. 19, 1988).

D. Determining the Purpose of a Specific Appropriation.

1. Appropriations Acts. (beta.congress.gov/legislation/appropriations)
 - a. An appropriation is a statutory authorization to incur obligations and make payments out of the Treasury for specified purposes.¹ Aside from any emergency supplemental appropriations, Congress generally enacts twelve (12) appropriations acts annually, two of which are devoted specifically to DoD: The Department of Defense Appropriation Act, and the Military Construction Appropriations Act.² Within these two acts, the DoD has nearly 100 separate appropriations available to it for different purposes.
 - b. Appropriations are differentiated by service (Army, Navy, etc.), component (Active, Reserve, etc.), and purpose (Procurement, Research and Development, etc.). The major DoD appropriations provided in the annual Appropriations Act are:
 - (1) Operation & Maintenance (O&M) – used for the day-to-day expenses of training exercises, deployments, operating and maintaining installations, etc.;

¹ See A Glossary Of Terms Used In The Federal Budget Process, p.13-14, GAO-05-734SP (September 2005).

² As of late, Congress has relied upon Omnibus, Continuing Resolutions, or Consolidated Appropriations Acts. See e.g., Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5 (hereinafter, “FY 14 Appropriations Act”).

- (2) Personnel – used for pay and allowances, permanent change of station travel, etc.;
 - (3) Research, Development, Test and Evaluation (RDT&E) – used for expenses necessary for basic and applied scientific research, development, test, and evaluation, including maintenance and operation of facilities and equipment; and
 - (4) Procurement – used for production and modification of aircraft, missiles, weapons, tracked vehicles, ammunition, shipbuilding and conversion, and "other procurement."
- c. By regulation, the DoD has assigned most types of expenditures to a specific appropriation. See DFAS-IN Manual 37-100-XXXX, The Army Management Structure (August XXXX). The manual is reissued every FY. [XXXX = appropriate FY].

2. Authorization Act.

- a. Annual authorization acts generally precede DoD's appropriations acts. There is no general requirement to have an authorization in order for an appropriation to occur. However, Congress has by statute created certain situations in which it must authorize an appropriation. For example, 10 U.S.C. § 114(a) states that "No funds may be appropriated for any fiscal year" for certain purposes, including procurement, military construction, and RDT&E "unless funds therefore have been specifically authorized by law." However, there are no practical consequences if Congress appropriates funds without an authorization anyway, as such a statute is "essentially a congressional mandate to itself." Principles of Fed. Appropriations Law, vol. I, ch. 2, 2-41, GAO-04-261SP (3d ed. 2004).
- b. The authorization act may clarify the intended purpose of a specific appropriation, or contain restrictions on using appropriated funds. An authorization act does not provide budget authority.

3. Organic Legislation. Organic legislation is legislation that creates a new agency or establishes a program or function within an existing agency that a subsequent appropriation act will fund. This organic legislation provides the agency with authority (but not the money) to conduct the program, function, or mission and to utilize appropriated funds to do so.

4. Miscellaneous Statutory Provisions. Congress often enacts statutes that expressly allow, prohibit, or place restrictions upon the usage of appropriated funds. For example, 10 U.S.C. § 2491a prohibits DOD from

using its appropriated funds to operate or maintain a golf course except in foreign countries or isolated installations within the United States.

5. Legislative History. Legislative history is any Congressionally-generated document related to a bill from the time the bill is introduced to the time it is passed. This includes the text of the bill itself, conference and committee reports, floor debates, and hearings.
 - a. Legislative history can be useful for resolving ambiguities or confirming the intent of Congress. However, Congress's "authoritative statement is the statutory text, not the legislative history." Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005).
 - b. If the underlying statute clearly conveys Congress' intent, however, agencies will not be further restricted by what is included in legislative history. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001); ANGUS Chem. Co., B-227033, Aug. 4, 1987, 87-2 CPD ¶ 127 (stating that "there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into law that which is not there"); Navy – Re-enlistment Gifts, 2006 U.S. Comp. Gen. LEXIS 165 (Use of legislative history to "illuminate intent," as opposed to "writing into the law that which is not there."); SeaBeam Instruments, Inc., B-247853.2, July 20, 1992, 92-2 CPD ¶ 30 (indicating that if Congress provides a lump sum appropriation without statutorily restricting what can be done with the funds, a clear inference is that it did not intend to impose legally binding restrictions); LTV Aerospace Corp., B-183851, Oct. 1, 1975, 55 Comp. Gen. 307, 75-2 CPD ¶ 203 (indicating the Navy was not bound by a provision within the conference report accompanying the 1975 Defense Appropriations Act stipulating that adaptation of the Air Force's F-16 to enable it to be capable of carrier operations was the prerequisite for the Navy's use of \$20 million in funds provided for a Navy fighter). See also Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006)(rejecting claims for expert fees which were based solely on legislative history and not mentioned in the statute under which the claims were brought).
 - c. Legislative history also may not support an otherwise improper expenditure. Alberto Mora, Gen. Counsel, U.S. Info. Agency, B-248284.2, Sept. 1, 1992, 1992 U.S. Comp. Gen. LEXIS 1104 (agency violated the purpose statute when it utilized construction funds to host an overseas exhibit that should have been funded with

salaries and expenses funds where the agency had only received informal written approval from the Chairmen of the House and Senate Subcommittees to reprogram the construction funds into salaries and expenses funds).

6. Budget Request Documentation.

- a. Agencies are required to justify their budget requests. Within DoD, Volumes 2A and 2B of the DOD FMR provide guidance on the documentation that must be generated to support defense budget requests. These documents are typically referred to as Justification Books, with a book generated for each appropriation.
- b. These justification documents contain a description of the proposed purpose for the requested appropriations. An agency may reasonably assume that appropriations are available for the specific purposes requested, unless otherwise prohibited.
- c. Agencies generally place their past and current year budget submissions on the web. The Defense-wide budget materials can be found at <http://comptroller.defense.gov/Budget2014.html>. The Army's budget materials can be found at <http://asafm.army.mil/offices/office.aspx?officecode=1200>.

7. Agency Regulations.

- a. When Congress enacts organic legislation, it rarely prescribes exactly how the agency is to carry out that new mission. Instead, Congress leaves it up to the agency to implement the authority in agency-level regulations.
- b. If the agency, in creating a regulation, interprets a statute, that interpretation is granted a great deal of deference. Thus, if an agency regulation determines that appropriated funds may be used for a particular purpose, that agency-level determination will normally not be overturned unless it is clearly erroneous. Intertribal Bison Cooperative, B-288658, 2001 U.S. Comp. Gen. LEXIS 174 (Nov. 30, 2001).
- c. Agency-level regulations may also place restrictions on the use of appropriated funds. For example, although the GAO has sanctioned the use of appropriated funds to purchase commercially-produced business cards for agency employees, each of the military departments have implemented policies that permit only recruiters and criminal investigators to purchase them (everyone else must

produce their business cards in-house, using their own card stock and printers).

8. Case Law. Comptroller General opinions are a valuable source of guidance as to the propriety of appropriated fund obligations or expenditures for particular purposes. While not technically binding on the Executive Branch, these opinions are nonetheless deemed authoritative.
<http://gao.gov/legal/index.html>

E. Expense/Investment Threshold.

1. Expenses are costs of resources consumed in operating and maintaining DoD, and are normally financed with O&M appropriations. See [DOD FMR, vol. 2A, ch. 1, para. 010201](#). Common examples of expenses include civilian employee labor, rental charges for equipment and facilities, fuel, maintenance and repair of equipment, utilities, office supplies, and various services.
2. Investments are “costs to acquire capital assets,” or assets which will benefit both current and future periods and generally have a long life span. DOD FMR, vol. 2A, ch. 1, para. 010201.D.2. Investments are normally financed with procurement appropriations.
3. Exception Permitting Purchase of Investments With O&M Funds. In each year’s Defense Appropriation Act, Congress has permitted DoD to utilize its O&M appropriations to purchase investment items having a unit cost that is less than a certain threshold. See e.g., FY 14 Appropriations Act (current threshold is \$250,000).³ See also DOD FMR, vol. 2A, ch. 1, para. 010201.D.1 (implementing the \$250,000 threshold).
4. Systems. Various audits have revealed that local activities use O&M appropriations to acquire computer systems, security systems, video telecommunication systems, and other systems costing more than the investment/expense threshold. This constitutes a violation of the Purpose Statute, and may result in a violation of the Antideficiency Act.
 - a. Agencies must consider the “system” concept when evaluating the procurement of items. The determination of what constitutes a

³ Since 2008, Congress has allowed for an increase to \$500,000 for Combatant Commanders engaged in contingency operations overseas upon SECDEF approval. See FY 14 Appropriations Act, § 9010. CENTCOM has historically received approval to use the \$500,000 threshold in support of contingency operations. However, this increased threshold requires a determination by SECDEF each fiscal year and the determination does not always happen contemporaneously with the passage of the Appropriations Act. JAs must verify that SECDEF has made the determination before advising that the increased threshold is in effect.

“system” must be based on the **primary function** of the items to be acquired, as stated in the approved requirements document.

- b. A system exists if a number of components are designed primarily to function within the context of a whole and will be interconnected to satisfy an approved requirement.
- c. Agencies may purchase multiple end items of equipment (e.g., computers), and treat each end item as a separate “system” for funding purposes, only if the primary function of the end item is to operate independently.
- d. Agencies may not fragment or piecemeal the acquisition of an interrelated system of equipment merely to avoid exceeding the O&M threshold.
- e. Example: An agency is acquiring 200 stand-alone computers and software at \$2,000 each (for a total of \$400,000). The appropriate color of money for the purchase of the 200 computers is determined by deciding whether the primary function of the computers is to operate as independent workstations (i.e., 200 systems) or as part of a larger system. If the computers are designed to primarily operate independently, they should be considered as separate end items and applied against the expense/investment criteria individually. If they function as a component of a larger system (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.

IV. AVAILABILITY AS TO TIME

- A. The Time Rule. 31 U.S.C. §§ 1502(a), 1552. An appropriation is typically available for obligation for a definite period of time. An agency must incur a legal obligation to pay money within an appropriation’s period of availability. If an agency fails to obligate funds before they expire, those funds are no longer available for new obligations.
 - 1. Expired funds retain their “fiscal year identity” for five years after the end of the period of availability. During this time, the funds are available to adjust existing obligations, or to liquidate prior valid obligations, but not to incur new obligations.
 - 2. There are some important exceptions to the general prohibition against obligating funds after the period of availability.

- a. Bid Protests. Funds available for obligation on a contract at the time a protest is filed shall remain available for obligation for 100 calendar days after the date on which the final ruling is made on the protest. This authority applies to protests filed with the agency, at the Government Accountability Office, or in the Court of Federal Claims. See 31 U.S.C. § 1558; FAR 33.102(c); DFAS-IN 37-1, para. 080606.
- b. Terminations for default. If a contract or order is terminated for default, and the bona fide need still exists, then the originally obligated funds remain available for obligation for a re-procurement, even if they otherwise would have expired. See DOD FMR, Vol. 3, paragraph 080303.D; Lawrence W. Rosine Co., B-185405, 55 Comp. Gen. 1351 (1976). Note that certain restrictions and limitations apply.
- c. Terminations for convenience, pursuant to a court order or agency determination of erroneous award. Generally, a termination for convenience of the government extinguishes the availability of prior year funds remaining on the contract, but such funds may be used in certain instances. DOD FMR, vol. 3, ch. 10, para. 100206. Navy, Replacement Contract, B-238548, Feb. 5, 1991, 91-1 CPD ¶ 117; Matter of Replacement Contracts, B-232616, 68 Comp. Gen. 158 (1988). Again, note that certain restrictions and limitations may apply.

B. The “Bona Fide Needs” Rule.

1. Government agencies may not purchase goods or services they do not require. Because appropriations are generally only available for limited periods of time, it is important to understand when an agency actually requires a good or service. 31 U.S.C. § 1552. Until that requirement (need) accrues, no authorization exists to obligate appropriated funds. Once the need accrues, an agency may only obligate appropriated funds that are current at that time.
2. The “Bona Fide Needs” rule is a timing rule that requires **both the timing of the obligation and the bona fide need to be within the fund’s period of availability**. See DOD FMR, Vol. 3, Ch. 8, para. 080303.A; DFAS-IN Reg. 37-1, para. 070501.
3. **Current year money for current year needs.** “The basic principle is that payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year.” Principles of Fed. Appropriations Law, vol. I, p. 5-14, GAO-04-261SP (3d ed. 2004)

C. Bona Fide Needs Rule Applied to Supply Contracts.

1. Supplies are generally a bona fide need in the period in which they are used. Orders for supplies are proper only when the supplies are actually required. Thus, supplies needed for operations during a given fiscal year are bona fide needs of that year. Maintenance Serv. and Sales Corp., B-242019, 70 Comp. Gen. 664 (1991); 64 Comp. Gen. 359 (1985).
2. Exceptions. Supply needs of a future fiscal year are the bona fide needs of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are the lead-time exception and the stock-level exception. DOD FMR, vol. 3, ch. 8, para. 080303.
 - a. Stock-Level Exception. Supplies ordered to meet authorized stock levels are the bona fide need of the year of purchase, even if the agency does not use them until a subsequent fiscal year. A bona fide need for stock exists when there is a present requirement for items to meet authorized stock levels (replenishment of operating stock levels, safety levels, mobilization requirements, authorized backup stocks, etc.). To Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965); DOD FMR, vol. 3, ch. 8, para. 080303A. However, fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.
 - b. Lead-Time Exception. This exception recognizes that agencies may need and contract for an item in a current FY, but cannot physically obtain the item in the current FY due to the lead time necessary to produce and/or deliver it. There are two variants that comprise the lead time exception.
 - (1) Delivery Lead-Time. If an agency cannot obtain materials in the same FY in which they are needed and contracted for, delivery in the next FY does not violate the "Bona Fide Needs" rule as long as the time between contracting and delivery is not excessive, and the procurement is not for standard, commercial items readily available from other sources. DOD FMR vol. 3, ch. 8, para. 080303B; Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 (1959).
 - (2) Production Lead-Time. An agency may contract in one FY for delivery and use in the subsequent FY if the item cannot be obtained on the open market at the time needed for use, so long as the intervening period is necessary for the production of the item in question. Chairman, United States Atomic Energy Commission, B-130815, 37 Comp. Gen.

155 (1957). The procurement must not be for standard commercial items readily available from other sources. DOD FMR vol. 3, ch. 8, para. 080303B.

D. Bona Fide Needs Rule Applied to Service Contracts.

1. General Rule. Services are generally the bona fide need of the fiscal year in which they are performed. Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64; EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 (1985). Thus, in general, services must be funded with funds current as of the date the service is performed.
2. Severable services.
 - a. A service is severable if it can be separated into components that independently meet a separate need of the government. The services are continuing or recurring in nature. Examples include grounds and facilities maintenance, dining facility services, and transportation services. Most service contracts are severable.
 - b. Absent an exception, the default rule for severable services is to fund them with current year funds from the date of award through the end of the fiscal year.
 - c. Statutory Exception for Severable Services. 10 U.S.C. § 2410a permits DOD agencies to award severable service contracts for a period not to exceed 12 months at any time during the fiscal year, funded completely with current appropriations. This statutory exception essentially swallows the general rule. Non-DOD agencies have similar authority. See 41 U.S.C. § 253L. This statutory exception provides flexibility to annual funds so that all contracts do not have to end on 30 September, but it only applies to annual year funds. It cannot be used to extend the period of availability of an expiring multiple year appropriation. Severable Services Contract, B-317636, 2009 CPD ¶ 89 (Apr. 21, 2009).
3. Nonseverable Services. If the services are nonseverable (i.e., a contract that seeks a single or unified outcome, product, or report), agencies must obligate funds for the entire undertaking at contract award, even if performance will cross fiscal years. See Incremental Funding of U.S. Fish & Wildlife Serv. Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994) (work on an environmental impact statement properly crossed fiscal years); Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase, B-219829, 65 Comp. Gen. 741 (1986) (contract for

study and report on psychological problems among Vietnam veterans was nonseverable).

V. LIMITATIONS BASED UPON AMOUNT

- A. The Antideficiency Act (ADA), 31 U.S.C. §§ 1341-44, 1511-17, prohibits:
1. Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation. 31 U.S.C. § 1341(a)(1)(A).
 2. Making or authorizing expenditures or incurring obligations in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. § 1517(a).
 - a. Apportionment. The Office of Management and Budget (OMB) apportions funds over their period of availability to agencies for obligation. 31 U.S.C. § 1512. This means that OMB divides the funds up into quarterly installments, to prevent agencies from obligating the entire fiscal year's appropriations too quickly and needing supplemental appropriations.
 - b. Formal Administrative Subdivisions. The ADA also requires agencies to establish certain administrative controls of apportioned funds. 31 U.S.C. § 1514. These formal limits are referred to as allocations and allotments. In the Army, the Operating Agency/Army Command (ACOM) generally is the lowest command level at which the formal administrative subdivisions of funds are maintained for O&M appropriations.
 - c. Informal Administrative Subdivisions. DFAS-IN 37-1, ch. 3, para. 031402. Agencies may further subdivide funds at lower levels, e.g., within an installation. These subdivisions are generally informal targets or allowances. These are not formal subdivisions of funds, and obligating in excess of these limits does not, in itself, violate the ADA.
 3. Incurring an obligation in advance of an appropriation, unless authorized by law. 31 U.S.C. § 1341(a)(1)(B).
 4. Accepting voluntary services, unless otherwise authorized by law. 31 U.S.C. § 1342.
- B. Correcting a Potential ADA Violation. The use of the wrong color of money (in violation of the Purpose Statute), or the use of the wrong fiscal year funds, will not result in an ADA violation if the error can be properly corrected. The accounts can be adjusted to replace the erroneously-obligated funds with the proper funds

(correct color, year, and amount) without having an ADA violation if these two conditions are met:

1. The proper funds were available at the time of the obligation; and
2. The proper funds are available at the time of correction;

See DoD FMR Vol 14, ch. 2, 020202.B. (changing the traditional 3-part ADA Correction Test to a 2-part test), To the Hon. Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984); Interagency Agreements—Obligation of Funds under an Indefinite Delivery, Indefinite Quantity Contract, B-308969 (May 31, 2007); Principles of Fed. Appropriations Law, vol. II, ch. 6, pages 6-79 to 6-80, GAO-06-382SP (3d ed. 2006) (discussing the correction of a violation by making an appropriate adjustment of accounts).

- C. Investigating and Reporting Violations. If an Antideficiency Act violation is suspected, the agency must investigate to identify the responsible individual.
1. The DOD FMR contains the primary DOD guidance regarding investigation and reporting of ADA violations. According to the FMR, an individual learning of or detecting a suspected ADA violation must report within two weeks the possible violation to his/her chain of command.⁴
 2. The first step in the investigation process is a preliminary review to gather basic facts and establish whether an Antideficiency Act violation “may have occurred.” DOD FMR, vol. 14, ch. 3, para. 0302. The focus is on the potential violation, not on corrective actions. In the Army, the investigating officer is normally appointed by the installation commander or applicable Army Command (ACOM) commander. DFAS-IN 37-1, ch. 4, para. 040204. The results of the preliminary review should be forwarded to the applicable DOD component Comptroller.
 3. If the DOD component Comptroller determines there is a potential violation, a formal investigation must be initiated. If no violation is found, the preliminary review completes the investigation process.
 4. The purpose of the formal investigation is to determine the relevant facts and circumstances of the suspected violation – if a violation has occurred, what caused the violation, what the appropriate corrective actions and lessons learned might be, and who was responsible. DOD FMR, vol. 14, ch. 4, para. 0401. The relevant commander approves and appoints an

⁴ Army practitioners should note that DFAS-IN 37-1 (applying solely to the Army) requires that individuals detecting a possible violation must “inform the Director for Resource Management (DRM)” who will then *immediately* notify the responsible commander. *See* Defense Finance and Accounting Service Reg. 37-1, Finance and Accounting Policy Implementation, ch. 4, para. 040204. For the remainder of this outline, the text refers to DOD FMR requirements, which apply to all services.

adequately trained and qualified individual to conduct the formal investigation. DOD FMR vol. 14, ch. 4, para. 040201.

5. The investigation report *must* assign responsibility for the violation to “one or more individuals” so that “appropriate administrative or disciplinary action” may be imposed. DOD FMR, vol. 14, ch. 5, para. 050302. Generally, the responsible party will be the highest ranking official in the decision-making process who had actual or constructive knowledge of the actions taken and the impropriety or questionable nature of such actions. See To Dennis P. McAuliffe, B-222048, 1987 US Comp. Gen. LEXIS 1631, Feb. 10, 1987.
 6. At the conclusion of the formal investigation, the Report of Violation will be forwarded to OSD Comptroller. If OSD Comptroller agrees with the report, it will prepare notification letters to the President (through the Director of OMB), Congress, and the GAO. OMB Cir. A-11, para. 145.7; DOD FMR, vol. 14, ch. 7, para. 0705.
 7. The GAO maintains an online database of all reported ADA violations. See www.gao.gov/legal/antideficiency.html.
- D. Voluntary Services. An officer or employee may not accept voluntary services or employ personal services exceeding those authorized by law, except for emergencies involving the safety of human life or the protection of property. 31 U.S.C. § 1342; To Glenn English, B-223857, Feb. 27, 1987 (unpub.).
1. Voluntary services are those services rendered without a prior contract for compensation or without an advance agreement that the services will be gratuitous. Recess Appointment of Sam Fox, B-309301, 2007 US Comp. Gen. LEXIS 97, June 2007; Army’s Authority to Accept Servs. From the Am. Assoc. of Retired Persons/Nat’l Retired Teachers Assoc., B-204326, July 26, 1982 (unpub.).
 2. Acceptance of voluntary services does not create a legal obligation. Richard C. Hagan v. United States, 229 Ct. Cl. 423, 671 F.2d 1302 (1982); T. Head & Co., B-238112, July 30, 1990 (unpub.); Nathaniel C. Elie, B-218705, 65 Comp. Gen. 21 (1985). But see T. Head & Co. v. Dep’t of Educ., GSBCA No. 10828-ED, 93-1 BCA ¶ 25,241.
 3. Examples of Voluntary Services Authorized by Law
 - a. 5 U.S.C. § 593 (agencies may accept voluntary services in support of alternative dispute resolution).
 - b. 5 U.S.C. § 3111 (student intern programs).

- c. 10 U.S.C. § 1588 (implemented in DODI 1100.21) (military departments may accept voluntary services for medical care, museums, natural resources programs, or family support activities).
 - d. 10 U.S.C. § 2602 (the President may accept assistance from Red Cross).
 - e. 10 U.S.C. § 10212 (the SECDEF or a Secretary of military department may accept services of reserve officers as consultants or in furtherance of enrollment, organization, or training of reserve components).
 - f. 33 U.S.C. § 569c (the Corps of Engineers may accept voluntary services on civil works projects).
4. Application of the Emergency Exception. This exception is limited to situations where immediate danger exists. Voluntary Servs.—Towing of Disabled Navy Airplane, A-341142, 10 Comp. Gen. 248 (1930) (exception not applied); Voluntary Servs. in Emergencies, 2 Comp. Gen. 799 (1923). This exception does not include “ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.” 31 U.S.C. § 1342.
5. Gratuitous Services Distinguished.
- a. 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. See Sam Fox at 4; Army’s Authority to Accept Servs. From the Am. 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).
 - b. An employee may not waive compensation if a statute establishes entitlement, unless another statute permits waiver. To Tom Tauke, B-206396, Nov. 15, 1988 (unpub.); The Agency for Int’l Dev.—Waiver of Compensation Fixed by or Pursuant to Statute, B-190466, 57 Comp. Gen. 423 (1978) (AID employees could not waive salaries); In the Matter of Waiver of Compensation, Gen. Servs. Admin., B-181229, 54 Comp. Gen. 393 (1974); To the Director, Bureau of the Budget, B-69907, 27 Comp. Gen. 194 (1947) (expert or consultant salary waivable); To the President, United States Civil Serv. Comm’n, B-66664, 26 Comp. Gen. 956 (1947).

- c. 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). But see Federal Communications Comm'n, B-210620, 63 Comp. Gen. 459 (1984) (noting that augmentation entails receipt of funds).

E. Augmentation of Appropriations & Miscellaneous Receipts.

1. General rule: Augmentation of appropriations is not permitted.
 - a. Augmentation is action by an agency that increases the effective amount of funds available in an agency's appropriation. This generally results in expenditures by the agency in excess of the amount originally appropriated by Congress.
 - b. Basis for the Augmentation Rule. An augmentation normally violates one or more of the following provisions:
 - (1) [U.S. Constitution, Article I, section 9, clause 7](#): “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”
 - (2) [31 U.S.C. § 1301\(a\)](#) (Purpose Statute): “Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”
 - (3) [31 U.S.C. § 3302\(b\)](#) (Miscellaneous Receipts Statute): “Except as [otherwise provided], an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without any deduction for any charge or claim.”
2. Types of Augmentation.
 - a. Augmenting by using one appropriation to pay costs associated with the purposes of another appropriation. This violates the Purpose Statute, 31 U.S.C. § 1301(a). U.S. Equal Employment Opportunity Comm'n – Reimbursement of Registration Fees for Fed. Executive Board Training Seminar, B-245330, 71 Comp. Gen. 120 (1991); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); Department of Health and

Human Servs. – Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985).

- b. Augmenting an appropriation by retaining government funds received from another source.
 - (1) This violates the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b). See Scheduled Airlines Traffic Offices, Inc. v. Dep’t. of Def., 87 F.3d 1356 (D.C. Cir. 1996) (indicating that a contract for official and unofficial travel, which provided for concession fees to be paid to the local morale, welfare, and recreation account, violates Miscellaneous Receipts Statute; note, however, that Congress has subsequently enacted statutory language – found at [10 U.S.C. § 2646](#) – that permits commissions or fees in travel contracts to be paid to morale, welfare, and recreation accounts); Interest Earned on Unauthorized Loans of Fed. Grant Funds, B-246502, 71 Comp. Gen. 387 (1992); But see Bureau of Alcohol, Tobacco, and Firearms – Augmentation of Appropriations – Replacement of Autos by Negligent Third Parties, B-226004, 67 Comp. Gen. 510 (1988) (noting that 31 U.S.C. § 3302 **only applies to monies** received, not to other property or services).
 - (2) Expending the retained funds generally violates the constitutional requirement for an appropriation. See Use of Appropriated Funds by Air Force to Provide Support for Child Care Ctrs. for Children of Civilian Employees, B-222989, 67 Comp. Gen. 443 (1988).
- 3. Statutory Exceptions to the Miscellaneous Receipts Statute. Some examples of the statutes Congress has enacted which expressly authorize agencies to retain funds received from a non-Congressional source include:
 - a. Economy Act. 31 U.S.C. § 1535 authorizes interagency orders. The ordering agency must reimburse the performing agency for the costs of supplying the goods or services. 31 U.S.C. § 1536 specifically indicates that the servicing agency should credit monies received from the ordering agency to the “appropriation or fund against which charges were made to fill the order.” See also 41 U.S.C. § 6307 (providing similar intra-DOD project order authority).

- b. Foreign Assistance Act. 22 U.S.C. § 2392 authorizes the President to transfer State Department funds to other agencies, including DOD, to carry out the purpose of the Foreign Assistance Act.
- c. Revolving Funds. Revolving funds are management tools that provide working capital for the operation of certain activities. The receiving activity must reimburse the funds for the costs of goods or services when provided. See 10 U.S.C. § 2208; National Technical Info. Serv., B-243710, 71 Comp. Gen. 224 (1992); Administrator, Veterans Admin., B-116651, 40 Comp. Gen. 356 (1960).
- d. Proceeds received from bond forfeitures, but only to the extent necessary to cover the costs of the United States. 16 U.S.C. § 579c; USDA Forest Serv. – Auth. to Reimburse Gen. Appropriations with the Proceeds of Forfeited Performance Bond Guarantees, B-226132, 67 Comp. Gen. 276 (1988); National Park Serv. – Disposition of Performance Bond Forfeited to Gov’t by Defaulting Contractor, B-216688, 64 Comp. Gen. 625 (1985) (forfeited bond proceeds to fund replacement contract).
- e. Defense Gifts. 10 U.S.C. § 2608. The Secretary of Defense may accept monetary gifts and intangible personal property for defense purposes. However, these defense gifts may not be expended until appropriated by Congress.
- f. Health Care Recoveries. 10 U.S.C. § 1095(g). Amounts collected from third-party payers for health care services provided by a military medical facility may be credited to the appropriation supporting the maintenance and operation of the facility.
- g. Recovery of Military Pay and Allowances. Statutory authority allows the government to collect damages from third parties to compensate for the pay and allowances of soldiers who are unable to perform military duties as a result of injury or illness resulting from a tort. These amounts “shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned.” 42 U.S.C. § 2651. The U.S. Army Claims Service takes the position that such recoveries should be credited to the installation’s operation and maintenance account. See [Affirmative Claims Note, Lost Wages under the Federal Medical Care Recovery Act, ARMY LAW., Dec, 1996, at 38.](#)
- h. Military Leases of Real or Personal Property. 10 U.S.C. § 2667(d)(1). Rentals received pursuant to leases entered into by a military department may be deposited in special accounts for the

military department and used for facility maintenance, repair, or environmental restoration.

- i. Damage to Real Property. 10 U.S.C. § 2782. Amounts recovered for damage to real property may be credited to the account available for repair or replacement of the real property at the time of recovery.
 - j. Proceeds from the sale of lost, abandoned, or unclaimed personal property found on an installation. 10 U.S.C. § 2575. Proceeds are credited to the operation and maintenance account and used to pay for collecting, storing, and disposing of the property. Remaining funds may be used for morale, welfare, and recreation activities.
 - k. Host nation contributions to relocate armed forces within a host country. 10 U.S.C. § 2350k.
 - l. Government Credit Card and Travel Refunds. Section 8067 of the FY 2008 Defense Appropriations Act (Pub. Law 110-116) granted permanent authority (“in the current fiscal year and hereafter . . .”) to credit refunds attributable to the use of the Government travel card, the Government Purchase Card, and Government travel arranged by Government Contracted Travel Management Centers, to the O&M and RDT&E accounts of the Department of Defense “which are current when the refunds are received.”
 - m. Conference Fees. 10 U.S.C. § 2262. Congress recently (in section 1051 of the FY 2007 Defense Authorization Act) authorized the Department of Defense to collect fees from conference participants and to use those collected fees to pay the costs of the conference. Any amounts collected in excess of the actual costs of the conference must still be deposited into the Treasury as miscellaneous receipts. NOTE: this new statutory authority contains reporting requirements, and has not yet been implemented within DoD as of the time of this writing.
4. GAO Sanctioned Exceptions to the Miscellaneous Receipts Statute. In addition to the statutory authorities detailed above, the GAO recognizes other exceptions to the Miscellaneous Receipts Statute, including:
- a. Replacement Contracts. An agency may retain recovered excess procurement costs to fund replacement contracts. Bureau of Prisons – Disposition of Funds Paid in Settlement of Breach of Contract Action, B-210160, 62 Comp. Gen. 678 (1983).

- (1) This rule applies regardless of whether the government terminates for default or simply claims for damages due to defective workmanship.
- (2) The replacement contract must be coextensive with the original contract, i.e., the agency may repro cure only those goods and services that would have been provided under the original contract.
- (3) Amounts recovered that exceed the actual costs of the replacement contract must be deposited as miscellaneous receipts.

b. Refunds.

- (1) Refunds for erroneous payments, overpayments, or advance payments may be credited to agency appropriations. Department of Justice – Deposit of Amounts Received from Third Parties, B-205508, 61 Comp. Gen. 537 (1982) (agency may retain funds received from carriers/insurers for damage to employee’s property for which agency has paid employee’s claim); International Natural Rubber Org. – Return of United States Contribution, B-207994, 62 Comp. Gen. 70 (1982).
- (2) Amounts that exceed the actual refund must be deposited as miscellaneous receipts. Federal Emergency Mgmt. Agency – Disposition of Monetary Award Under False Claims Act, B-230250, 69 Comp. Gen. 260 (1990) (agency may retain reimbursement for false claims, interest, and administrative expenses in revolving fund; treble damages and penalties must be deposited as miscellaneous receipts).
- (3) Funds recovered by an agency for damage to government property, unrelated to performance required by the contract, must be deposited as miscellaneous receipts. Defense Logistics Agency – Disposition of Funds Paid in Settlement of Contract Action, B-226553, 67 Comp. Gen. 129 (1987) (negligent installation of power supply system caused damage to computer software and equipment; insurance company payment to settle government’s claim for damages must be deposited as miscellaneous receipts).
- (4) Refunds must be credited to the appropriation charged initially with the related expenditure, whether current or expired. Accounting for Rebates from Travel Mgmt. Ctr.

Contractors, B-217913.3, 73 Comp. Gen. 210 (1994); This rule applies to refunds in the form of a credit. See Principles of Fed. Appropriations Law, vol. II, ch. 6, 6-174, GAO-06-382SP (3d ed. 2006); Appropriation Accounting—Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130 (recoveries under fraudulent contracts are refunds, which should be credited to the original appropriation, unless the account is closed).

- c. 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).
- d. Funds held in trust for third parties. When the government receives custody of cash or negotiable instruments that it intends to deliver to the rightful owner, it need not deposit the funds into the treasury as a miscellaneous receipt. The Honorable John D. Dingell, B-200170, 60 Comp. Gen. 15 (1980) (money received by Department of Energy for oil company overcharges to their customers may be held in trust for specific victims).
- e. Nonreimbursable Details. The Comptroller General has held that nonreimbursable agency details of personnel to other agencies are generally unallowable. Department of Health and Human Servs.—Detail of Office of Cmty. Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985). However, as exceptions to this rule, nonreimbursable details are permitted under the following circumstances:
 - (1) A law authorizes nonreimbursable details. See, e.g., 3 U.S.C. § 112 (nonreimbursable details to White House); The Honorable William D. Ford, Chairman, Comm. on Post Office and Civil Serv., House of Representatives, B-224033, 1987 U.S. Comp. Gen. LEXIS 1695.
 - (2) The detail involves a matter similar or related to matters ordinarily handled by the detailing agency and will aid the detailing agency's mission. Details to Congressional Comm'ns., B-230960, 1988 U.S. Comp. Gen. LEXIS 334.
 - (3) The detail is for a brief period, entails minimal cost, and the agency cannot obtain the service by other means. Dept. of

VI. TYPICAL QUESTIONABLE EXPENSES AND COMMON PROBLEMS

- A. Agencies may have specific guidance about “questionable” expenditures. See, e.g., AFI 65-601, Budget Guidance and Procedures, vol. 1, ch. 10 (16 Aug 2012).

- B. Clothing. Buying clothing for individual employees generally does not materially contribute to an agency’s mission performance. Therefore, clothing is generally considered a personal expense unless a statute provides to the contrary. See IRS Purchase of T-Shirts, B-240001, 70 Comp. Gen. 248 (1991) (Combined Federal Campaign T-shirts for employees who donated five dollars or more per pay period not authorized).
 - 1. Statutorily-Created Exceptions. See 5 U.S.C. § 7903 (authorizing purchase of special clothing, for personnel, which protects them against hazards in the performance of their duties); 10 U.S.C. § 1593 (authorizing DOD to pay an allowance or provide a uniform to a civilian employee who is required by law or regulation to wear a prescribed uniform while performing official duties); and 29 U.S.C. § 668 (requiring federal agencies to provide certain protective equipment and clothing pursuant to OSHA). See also Purchase of Insulated Coveralls, Vicksburg, Mississippi, B-288828, Oct. 3, 2002 (discussing the rules for purchasing clothing); Purchase of Cold Weather Clothing, Rock Island District, U.S. Army Corps of Eng’s, B-289683, Oct. 7, 2002 (unpub.) (discussing all three authorities).

2. Opinions and Regulations On-point. See also White House Communications Agency—Purchase or Rental of Formal Wear, B-247683, 71 Comp. Gen. 447 (1992) (authorizing tuxedo rental or purchase); Internal Revenue Serv.—Purchase of Safety Shoes, B-229085, 67 Comp. Gen. 104 (1987) (authorizing safety shoes); DOD FMR vol. 10, ch. 12, para. 120220; AR 670-10, Furnishing Uniforms or Paying Uniform Allowances to Civilian Employees, (1 July 1980).
- C. Food. Buying food for individual employees – at least those who are not away from their official duty station on travel status – generally does not materially contribute to an agency’s mission performance. See 31 U.S.C. § 1345 stating that except as provided by law, an appropriation may not be used for subsistence expenses at a meeting, but that this prohibition does not apply to expenses of an employee of the government carrying out an official duty. As a result, food is generally considered a personal expense. See Department of The Army—Claim of the Hyatt Regency Hotel, B-230382, Dec. 22, 1989 (unpub.) (determining coffee and donuts to be an unauthorized entertainment expense).
1. GAO-sanctioned exception where food is included as part of a facility rental cost. GAO has indicated that it is permissible for agencies to pay a facility rental fee that includes the cost of food if the fee is all inclusive, non-negotiable, and competitively priced to the fees of other facilities that do not include food as part of their rental fee. See Payment of a Non-Negotiable, Non-Separable Facility Rental Fee that Covered the Cost of Food Service at NRC Workshops, B-281063, 1999 U.S. Comp. Gen. LEXIS 249 (Dec. 1, 1999).
 2. Regulatory-based “Light Refreshments” Exception.
 - a. In a 2003 opinion, the GAO all but eliminated the “Light Refreshment” exception by prohibiting agencies from paying for refreshments given to any personnel *NOT* on travel status. See Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, 2003 U.S. Comp. Gen. LEXIS 224, (Jan. 27, 2003).
 - b. This decision was somewhat reversed two years later in National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 03, 2005) (“NIH opinion”). In that case, the GAO authorized the use of appropriated funds for light refreshments, even for individuals *NOT* in travel status, under certain criteria.⁵

⁵ If 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only

- c. The Department of Justice, Office of Legal Counsel (OLC) prohibited the executive branch from following the NIH opinion.
<http://www.justice.gov/olc/2007/epa-light-refreshments13.pdf>. OLC opined that “meetings” as used in 31 U.S.C. § 1345 included formal conferences sponsored by government agencies and that “subsistence expenses” included meals and light refreshments.⁶ Therefore the 31 U.S.C. § 1345 prohibits conference attendees, who are from the local PDS area, from utilizing “light refreshment exception.” The OLC opinion controls the activities of agencies of the federal government even though it is more restrictive than the opinions given by the GAO.

3. Statutory-based Exceptions.

- a. Basic Allowance for Subsistence. Under 37 U.S.C. § 402, DOD may pay service members a basic allowance for subsistence.
- b. Meetings and Conferences. Under the Government Employees Training Act, 5 U.S.C. § 4110, there is authority for the government to pay for “expenses of attendance at meetings which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.”

- (1) Conference Sponsored by Non-Federal Entities. Costs associated with meals included in a conference fee can be considered legitimate expenses of attendance under this statute if: 1) the meals are incidental to the conference or meeting; 2) attendance of the employees at the meals is necessary for full participation in the conference or meeting; and 3) the conference or meeting includes not only the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. See National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).

the functions (speeches, lectures, or other business) taking place when the meals are served, but also includes substantial functions taking place separately from the meal-time portion of the meeting/conference. National Institutes of Health - Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42, at 3, (Mar. 03, 2005).

⁶ Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences, 32 Op. Off. Legal Counsel 1, 5 (2007).

- (a) For purposes of this exception, the conference or meeting **must not be purely internal government business meetings/conferences.** National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005). Moreover, luncheons disguised as meetings or conferences cannot utilize 5 U.S.C. § 4110. See B-21570, Mar. 22, 1985, 64 Comp. Gen. 406, 408. This authority does not specifically authorize agencies to pay the expenses, including food, of non-governmental employees

 - (b) As this authority is based on 5 U.S.C. § 4110, it does not apply to military members (it applies only to civilian employees). But see JFTR, ch. 4, para. U4510, which authorizes military members to be reimbursed for occasional meals within the local area of their Permanent Duty Station (PDS) when the military member is required to procure meals at personal expense outside the physical limits of the PDS.

 - (c) The OLC opinion may impact the ability of a civilian, who is not in a travel status, to utilize this authority. See Section IX.C.2.c. above.
- (2) Government Sponsored Conference. As part of the NIH opinion, the GAO authorized agencies to pay for the expenses, including food, of conference attendees from other agencies, and even *non-governmental organizations*, at “formal conferences.” National Institutes of Health – Food at Government-Sponsored Conferences, B-300826, 2005 U.S. Comp. Gen. LEXIS 42 (Mar. 3, 2005).
- (a) As part of the decision, the GAO applied the same 5 U.S.C. § 4110 criteria⁷ to “formal conferences,” but also required sufficient indicia of formality (including, among other things, registration, a published substantive agenda, and scheduled speakers), and stated that the conference must involve **topical matters of interest to (and the participation of) multiple agencies and/or nongovernmental participants.**

 - (b) The OLC opinion may impact the ability of an agency to utilize this authority. See Section IX.C.2.c. above.

⁷ See Section IX.C.3.b.

- (3) Recent Army Guidance. Since late 2011, the Army has become more restrictive on use of appropriated funds for conferences, generally. Be sure to check for the latest Army (or DoD) guidance in this area, to include, Army Directive 2014-01, “Army Conference Policy” (18 DEC 13), Supplemental Conference Guidance and Data Call for Proposed FY 13 Conference, 29 October 2012, and Army Directive 2011-20- Department of Army Conferences (14 October 2011). Under these standards, it is much hard to pay for any food at an approved conference.
- c. Training. Under 5 U.S.C. § 4109 (applicable to civilian employees) and 10 U.S.C. § 4301 and 10 U.S.C. § 9301 (applicable to service members), the government may provide meals when it is “necessary to achieve the objectives of a training program.” See U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (May 9, 2009), Coast Guard—Meals at Training Conference, B-244473, 1992 U.S. Comp. Gen. LEXIS 740 (Jan. 13, 1992); Use of Appropriated Funds to Purchase Light Refreshments at Conferences, B-288266, Jan. 27, 2003, 2003 U.S. Comp. Gen. LEXIS 224 (including a discussion of providing food, in general, where it furthers the needs of the training program).
- (1) This generally requires a determination that attendance during the meals is necessary in order for the attendees to obtain the full benefit of the training. See Coast Guard – Coffee Break Refreshments at Training Exercise – Non-Federal Personnel, B-247966, 1993 U.S. Comp. Gen. LEXIS 639 (Jun. 16, 1993). See also Pension Benefit Guar. Corp. – Provision of Food to Employees, B-270199, 1996 U.S. Comp. Gen. LEXIS 402 (Aug. 6, 1996) (food was not needed for employee to obtain the full benefit of training because it was provided during an ice-breaker rather than during actual training). In many GAO opinions, the application of this rule appears to be indistinguishable from the 3-part test for Formal Conferences and Meetings under 5 U.S.C. § 4110.

- (2) This exception may even apply to non-federal employees if they are necessary to the training and taking a lunch break separately from the government employees would hurt the training. See U.S. Army Garrison Ansbach- Use of Appropriated Funds to Purchase Food for Participants in Anti-Terrorism Exercises, B-317423 (Mary 9, 2009) (stating that there was no objection if the Garrison Commander involved in an anti-terrorism training exercise determined that the provision of food to nonfederal participants, including host national first responders, allowed federal and nonfederal personnel to train to work in a coordinated fashion without separating for food breaks, as, most likely, they would in an actual antiterrorism response).

- (3) The Training exception requires that the event be genuine "training," rather than merely a meeting or conference. The GAO and other auditors will not merely defer to an agency's characterization of a meeting as "training." Instead, they will closely scrutinize the event to ensure it was a valid program of instruction as opposed to an internal business meeting. See Corps of Eng'rs – Use of Appropriated Funds to Pay for Meals, B-249795, 72 Comp. Gen. 178 (1993) (determining that quarterly managers meetings of the Corps did not constitute "training").

- (4) This exception is often utilized to provide small "samples" of ethnic foods during an ethnic or cultural awareness program. See Army – Food Served at Cultural Awareness Celebration, B-199387, 1982 U.S. Comp. Gen. LEXIS 1284 (Mar. 23, 1982). See also U.S. Army Corps of Engineers, North Atlantic Division – Food for a Cultural Awareness Program, B-301184 (January 15, 2004) ("samplings" of food cannot amount to a full buffet lunch and must be related to the culture being celebrated); AFI 65-601, vol. 1, para. 4.26.1.2.

- d. Award Ceremonies (for Civilian Incentive Awards). Under 5 U.S.C. §§ 4503-4505 (civilian employees incentive awards), federal agencies may “incur necessary expenses” including purchasing food to honor an individual who is given an incentive award.
- (1) Relevant GAO Opinions. Defense Reutilization and Mktg. Serv. Award Ceremonies, B-270327, 1997 U.S. Comp. Gen. LEXIS 104 (Mar. 12, 1997) (authorizing the agency expending \$20.00 per attendee for a luncheon given to honor awardees under the Government Employees Incentive Awards Act); Refreshments at Awards Ceremony, B-223319, 65 Comp. Gen. 738 (1986) (agencies may use appropriated funds to pay for refreshments incident to employee awards ceremonies under 5 U.S.C. § 4503, which expressly permits agency to “incur necessary expense for the honorary recognition . . .”).
 - (2) Relevant Regulations. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DoD civilians must also be done in accordance with DODI 1400.25, Volume 451 as well as DOD FMR, vol. 8, ch. 3, para. 0311 (Aug. 1999). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).
 - (3) Military Awards. Food may also be provided at ceremonies honoring military recipients of military cash awards under 10 U.S.C. §1124 (Military Cash Awards), which also contains the “incur necessary expenses” language. However, military cash awards are very rare. Typical military awards, such as medals, badges, trophies, etc., are governed by a separate statute (10 U.S.C. § 1125) which does not have the express “incur necessary expenses” language. Therefore, food may not be purchased with appropriated funds for a typical military awards ceremony.

Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to pay for receptions for distinguished visitors. See discussion *infra* Part VI of this chapter for an overview.

- D. Bottled Water. Bottled water generally does not materially contribute to an agency’s mission accomplishment. It is therefore generally a personal expense.
1. GAO-Sanctioned Exception Where Water is Unpotable. Agencies may use appropriated funds to buy bottled water where a building's water supply is

unwholesome or unpotable. See United States Agency for Int'l Dev. – Purchase of Bottled Drinking Water, B-247871, 1992 U.S. Comp. Gen. LEXIS 1170 (Apr. 10, 1992) (problems with water supply system caused lead content to exceed "maximum contaminant level" and justified purchase of bottled water until problems with system could be resolved).

2. GAO-Sanctioned Exception Where Duty is in Remote Area With No Access to Potable Water. Agencies have the discretion to decide between providing water in coolers or jugs for transport or by providing bottled water at remote sites without access to potable water. The agency must administratively determine that the best way to provide the water is by using bottled water. Dept. of the Army – Use of Appropriations for Bottled Water, B-310502, Feb. 4, 2008, 2008 U.S. Comp. Gen. LEXIS 38. See also Dept. of the Army, Military Surface Deployment and Distribution Command – Use of Appropriations for Bottled Water, B-318588, Sept. 29, 2009 (allowing purchase of bottled water for use at temporary work sites where potable water is not available).
3. Bottled Water as a Condition of Employment. Even if providing bottled water to union employees had become a condition of employment, once drinking water is potable, the agency does not have the authority to continue to provide bottled water. An agency cannot bargain over a matter that is inconsistent with federal law. United States Department Of The Navy, Naval Undersea Warfare Center Division Newport, Rhode Island v. Federal Labor Relations Authority, 665 F.3d 1339, 1347 (D.C. Cir. 2012).

4. Relevant Regulations. See also DOD FMR, vol. 10, ch. 12, para. 120324 (permitting the purchase of water where the public water is unsafe or unavailable); AFI 65-601, vol. 1, para. 4.58 (discussing the same); AR 30-22, para. 5-19 (discussing the need to obtain approval from HQDA prior to purchasing bottled water, except in the context of a deployment / contingency).
 5. Water Coolers. As distinguished from the water itself, which must be purchased with personal funds unless the building has no potable water, agencies may use appropriated funds to purchase water coolers as “Food Storage Equipment” (see discussion in next paragraph below), but arguably only under severely limited circumstances. There is arguably no valid purpose for water coolers in buildings that are already equipped with chilled water fountains or with refrigerators that dispense chilled water or ice. Where the facility is not so equipped, water coolers may be purchased with appropriated funds so long as the primary benefit of its use accrues to the organization. Under those circumstances, the water in the cooler must be available for use by all employees, including those who did not chip in for the water.
- E. Workplace Food Storage and Preparation Equipment (i.e. microwave ovens; refrigerators; coffee pots).
1. In June 2004 the GAO reversed its own precedent⁸ and held that food storage/preparation equipment reasonably relates to the efficient performance of agency activities, and thus appropriated funds could be spent for these items regardless of the availability of commercial eating facilities. See Use of Appropriated Funds to Purchase Kitchen Appliances, B-302993 (June 25, 2004). The Comptroller General observed that food storage/preparation equipment provided a benefit to the agency holding that they “increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment.” Further, the opinion noted that such equipment “is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force and supporting valuable human capital policies.”

⁸ See e.g., Central Intelligence Agency – Availability of Appropriations to Purchase Refrigerators for Placement in the Workplace, B-276601, 97-1 CPD ¶ 230 (commercial facilities were not proximately available when the nearest one was a 15-minute commute from the federal workplace); Purchase of Microwave Oven, B-210433, 1983 U.S. Comp. Gen. LEXIS 1307 (Apr. 15, 1983) (commercial facilities unavailable when employees worked 24 hours a day, seven days a week and restaurants were not open during much of this time).

2. Bottom line: Food preparation and storage equipment may be purchased with appropriated funds, so long as the primary benefit of its use accrues to the agency and the equipment is placed in common areas where it is available for use by all personnel. (Note: agency regulations and policies should be consulted prior to applying this decision.)

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

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

2. Exception Based Upon Statutory Authority. The Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., requires federal agencies to implement programs to expand employment opportunities for handicapped individuals. The regulations implementing this Act require agencies to make “reasonable accommodations” to include purchasing special equipment or devices in order to carry out these programs. See 29 C.F.R. 32.3 (“Definitions”). Thus, agencies may purchase equipment for its **qualified handicap employees** as a reasonable accommodation. See Use of Appropriated Funds to Purchase a Motorized Wheelchair for a Disabled Employee, B-240271, 1990 U.S. Comp. Gen. LEXIS 1128 (Oct. 15, 1990) (authorizing purchase); see also Equal Employment Opportunity Commission – Special Equipment for Handicapped Employees, B-203553, 63 Comp. Gen. 115 (1983) (agency could not purchase air purifier for person with allergies because the person did not meet the regulatory definition of a handicapped individual).

G. Entertainment. Entertaining people generally does not materially contribute to an agency’s mission performance. As a result, entertainment expenses are generally considered to be a personal expense. See HUD Gifts, Meals, and Entm’t Expenses, B-231627, 68 Comp. Gen. 226 (1989); Navy Fireworks Display, B-205292, Jun. 2, 1982, 82-2 CPD ¶ 1 (determining fireworks to be unauthorized entertainment); Liability of Alexander Tripp, B-304233, Aug. 8, 2005, 2005 U.S. Comp. Gen. LEXIS 158 (Sunset dinner cruise in conjunction with staff retreat a “personal expense”; official held not personally liable where he was not properly designated by the agency as a certifying officer).

1. Statutory-based Exceptions. Congress does occasionally provide authority to entertain. See Claim of Karl Pusch, B-182357, 1975 U.S. Comp. Gen. LEXIS 1463 (Dec. 9, 1975) (Foreign Assistance Act authorized reimbursement of expenses incurred by Navy escort who took foreign naval officers to Boston Playboy Club -- twice); Golden Spike Nat’l Historic Site, B-234298, 68 Comp. Gen. 544 (1989) (discussing authority to conduct “interpretive demonstrations” at the 1988 Annual Golden Spike Railroader’s Festival).

2. Agencies may use appropriated funds to pay for entertainment (including food) in furtherance of equal opportunity training programs. Internal Revenue Serv. – Live Entm't and Lunch Expense of Nat'l Black History Month, B-200017, 60 Comp. Gen. 303 (1981) (determining a live African dance troupe performance conducted as part of an Equal Employment Opportunity (EEO) program was a legitimate part of employee training); U.S. International Trade Commission – Cultural Awareness, B-278805, Jul. 1999, 1999 U.S. Comp. Gen. LEXIS 211 (Int'l Trade Comm'n funds were available to pay for musical performance at cultural awareness event, subject to time limits on reimbursement.).
 3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to entertain distinguished visitors to the agency. See To The Honorable Michael Rhode, Jr., B-250884, 1993 U.S. Comp. Gen. LEXIS 481 (March 18, 1993) (interagency working meetings, even if held at restaurants, are not automatically social or quasi-social events chargeable to the official reception and representation funds).
- H. Decorations. Under a “necessary expense” analysis, GAO has sanctioned the use of appropriated funds to purchase decorations so long as they are modestly priced and consistent with work-related objectives rather than for personal convenience. See Department of State & Gen. Serv. Admin – Seasonal Decorations, B-226011, 67 Comp. Gen. 87 (1987) (authorizing purchase of decorations); Purchase of Decorative Items for Individual Offices at the United States Tax Court, B-217869, 64 Comp. Gen. 796 (1985) (modest expenditure on art work consistent with work-related objectives and not primarily for the personal convenience or personal satisfaction of a government employee proper); But see The Honorable Fortney H. Stark, B-217555, 64 Comp. Gen. 382 (1985) (determining that Christmas cards and holiday greetings letters were not a proper expenditure because they were for personal convenience). See also AFI 65-601, vol. 1, para. 4.28.2. 41 C.F.R. § 101.26.103-2 (2003) governs the purchase decorative items for federal buildings. Note: Practitioners should consider also the constitutional issues involved in using federal funds to purchase and display religious decorations (e.g., Christmas, etc.).
- I. Business Cards. Under a “necessary expense” analysis, the GAO has sanctioned the purchase of business cards for agency employees. See Letter to Mr. Jerome J. Markiewicz, Fort Sam Houston, B-280759, Nov. 5, 1998 (purchase of business cards with appropriated funds **for government employees who regularly deal with public or outside organizations** is a proper “necessary expense”).
1. This decision reversed a long history of Comptroller General decisions holding that business cards were a personal expense because they did not materially contribute to an agency’s mission accomplishment. See, e.g.,

Forest Serv. – Purchase of Info. Cards, B-231830, 68 Comp. Gen. 467 (1989).

2. See Section VII.B.3 for a discussion on the more restrictive agency regulations on purchasing business cards.

J. Telephones. Even though telephones might ordinarily be considered a “necessary expense,” appropriated funds may not generally be used to install telephones in private residences or to pay the utility or other costs of maintaining a telephone in a private residence. Congress decided to prohibit government phones in personal residences because their use was subject to great abuse. See 31 U.S.C. § 1348; see also Centers for Disease Control and Prevention – Use of Appropriated Funds to Install Tel. Lines in Private Residence, B-262013, Apr. 8, 1996, 96-1 CPD ¶ 180 (appropriated funds may not be used to install telephone lines in Director’s residence); Use of Appropriated Funds to Pay Long Distance Tel. Charges Incurred by a Computer Hacker, B-240276, 70 Comp. Gen. 643 (1991) (agency may not use appropriated funds to pay the phone charges, but may use appropriated funds to investigate).

1. Exceptions for DoD and State Department. The above prohibition does not apply to the installation, repair, or maintenance of telephone lines in residences owned or leased by the U.S. Government. It also does not apply to telephones in private residences if the SECDEF determines they are necessary for national defense purposes. See 31 U.S.C. § 1348(a)(2) and (c). See also Timothy R. Manns – Installation of Tel. Equip. in Employee Residence, B-227727, 68 Comp. Gen. 307 (1989) (telephone in temporary quarters of National Park Service employee allowed, using same rationale). DoD may install telephone lines in the residences of certain volunteers who provide services that support service members and their families, including those who provide medical, dental, nursing, or other health-care related services as well as services for museum or natural resources programs. See 10 U.S.C. § 1588(f).
2. Exception for Data Transmission Lines. If the phone will be used to transmit data, the above prohibition does not apply. See Federal Commc’ns Comm’n – Installation of Integrated Servs. Digital Network, B-280698, Jan. 12, 1999 (unpub.) (agency may use appropriated funds to pay for installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in private residences of agency’s commissioners to agency’s local area network).
3. Cell Phones. The prohibition on installing telephones in a personal residence does not prevent an agency from purchasing cell phones for its employees, if they are otherwise determined to be a necessary expense. Agencies may also reimburse their employees for the costs associated with

any official government usage of personal cell phones, but such reimbursement must cover the actual costs – not the estimated costs – of the employee. See Reimbursing Employees' Government Use of Private Cellular Phones at a Flat Rate, B-287524, 2001 U.S. Comp. Gen. LEXIS 202 (Oct. 22, 2001) (agency may not pay the employees a flat amount each month – in lieu of actual costs – even if the calculation of that flat amount is made using historical data); see also Nuclear Regulatory Commission: Reimbursing Employees for Official Usage of Personal Cell Phones, B-291076, 2003 U.S. Comp. Gen. LEXIS 240 (March 6, 2003).

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

- K. Fines and Penalties. The payment of a fine or penalty generally does not materially contribute towards an agency's mission accomplishment. Therefore, fines and penalties imposed on government employees and service members are generally considered to be their own personal expense and not payable using appropriated funds. Alan Pacanowski - Reimbursement of Fines for Traffic Violations, B-231981, 1989 U.S. Comp. Gen. LEXIS 635 (May 19, 1989); To the Honorable Ralph Regula, B-250880, Nov. 3, 1992, 1992 U.S. Comp. Gen. LEXIS 1279 (Fines imposed on Government employees driving Government vehicles also a personal expense). Where the fine itself is not reimbursable, related legal fees are similarly nonreimbursable. In the Matter of Attorney's Fees in Traffic Offense, B-186857, Feb. 9, 1978, 57 Comp. Gen. 270.

1. Exception Based Upon “Necessary Expense” Rule. If, in carrying out its mission, an agency forces one of its employees to take a certain action which incurs a fine or penalty, that fine or penalty may be considered a “necessary expense” and payable using appropriated funds. Compare To The Honorable Ralph Regula, B-250880, 1992 U.S. Comp. Gen. LEXIS 1279 (Nov. 3, 1992) (military recruiter is personally liable for fines imposed for parking meter violations because he had the ability to decide where to park and when to feed the meter); with To The Acting Attorney Gen., B-147769, 44 Comp. Gen. 313 (1964) (payment of contempt fine proper when incurred by employee forced to act pursuant to agency regulations and instructions).
 2. Agencies may also pay fines imposed upon the agency itself if Congress waives sovereign immunity. See, e.g., 10 U.S.C. § 2703(f) (Defense Environmental Restoration Account); 31 U.S.C. § 3902 (interest penalty).
- L. Licenses and Certificates. Employees are expected to show up to work prepared to carry out their assigned duties. As a result, fees that employees incur to obtain licenses or certificates enabling them to carry out their duties are considered a personal expense rather than a “necessary expense” of the government. See A. N. Ross, Federal Trade Commission, B-29948, 22 Comp. Gen. 460 (1942) (fee for admission to Court of Appeals not payable); Colonel Dempsey, B-277033, Jun. 27, 1997, 1997 U.S. Comp. Gen. LEXIS 410 (Fee for state physician’s license, DEA certifications not payable, even where advantageous for the Government). But see AFI 65-601, vol. 1, para. 4.60 (Payment for *certain* licenses and certificates, where not used to qualify individuals for employment, allowed).
1. GAO Sanctioned Exception—When the license is primarily for the benefit of the government and not to qualify the employee for his position. National Sec. Agency – Request for Advance Decision, B-257895, 1994 U.S. Comp. Gen. LEXIS 844 (Oct. 28, 1994) (allowing drivers’ licenses for scientists and engineers to perform security testing at remote sites); Air Force—Appropriations – Reimbursement for Costs of Licenses or Certificates, B-252467, 73 Comp. Gen. 171 (1994) (approving payment of licenses necessary to comply with state-established environmental standards); Dept. of the Army – Availability of Funds for Security Clearance Expenses, B-307316, Sep. 7, 2006, 2006 U.S. Comp. Gen. LEXIS 144 (agreeing that costs associated with service-member renouncing foreign citizenship in order to obtain security clearance payable are allowable).
 2. Professional Credentials. In 2001, Congress enacted legislation permitting agencies to use appropriations for “expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials.” Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at 5 U.S.C. § 5757. The statutory

language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them. *See* AFI 65-601, vol. 1, para. 4.47. But see Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (prohibiting payment for an employee's membership in a professional association not required for licensing). In 2006, the military received similar authority, codified at: 10 U.S.C. § 2015.

3. On 20 June 2003 the Assistant Secretary of the Army (Manpower and Reserve Affairs) issued a memorandum to MACOM Commanders authorizing payment for professional credentials, as permitted in 5 U.S.C. § 5757. <http://cpol.army.mil/library/train/tld-062003.html> This authority may be redelegated at the discretion of the MACOM Commanders. Scope of Professional Credentials Statute, B-302548, 2004 U.S. Comp. Gen. LEXIS 176 (GAO analysis of the scope of 5 U.S.C. § 5757).

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

1. Awards For Service Members. Congress has provided specific authority for the SECDEF to “award medals, trophies, badges, and similar devices” for “excellence in accomplishments or competitions.” 10 U.S.C. § 1125.
 - a. The Army has implemented this statute in [AR 600-8-22, Military Awards \(11 Dec. 2006\)](#). The bulk of this regulation deals with the typical medals and ribbons issued to service members (i.e. the Army Achievement Medal, the Meritorious Service Medal, etc).
 - b. Chapter 11 of the regulation allows the presentation of other nontraditional awards for “excellence in accomplishments or competitions which clearly contribute to the increased effectiveness or efficiency of the military unit, for example, tank gunnery, weapons competition, and military aerial competition.”

- c. While the regulation discusses contests and events of a continuing nature, awards “may be made on a one-time basis where the achievement is unique and clearly contributes to increased effectiveness.” See AR 600-8-22, para. 11-2b.
 - d. Theoretically, these awards could be made in the form of a coin, a trophy, a plaque, or a variety of other “similar devices.” However, the ACOM/ASCC commander or head of the principal HQDA agency, or delegee, must approve the trophies and similar devices to be awarded within their command or agency. See AR 600-8-22, para. 1-7d. See also Air Force Purchase of Belt Buckles as Awards for Participants in a Competition, B-247687, 71 Comp. Gen. 346 (1992) (belt buckles may be purchased as awards for the annual "Peacekeeper Challenge").
 - e. Specific Issues Concerning Unit or Regimental Coins. For a detailed discussion of the issues related to commanders’ coins, see Major Kathryn R. Sommercamp, *Commanders’ Coins: Worth Their Weight in Gold?*, Army Law., Nov. 1997, at 6.
 - f. The Air Force and Navy/Marine Corps have similar awards guidance. See generally AFPD 36-28, Awards and Decorations Programs, (Jul 30, 2012); SECNAVINST 3590.4A, Award of Trophies and Similar Devices in Recognition of Accomplishments (28 Jan. 1975). See also AFI 65-601, vol. 1, para. 4.31.2.
2. Awards For Civilian Employees. Congress has provided agencies with various authorities to pay awards to their employees. See Chapter 45 of Title 5 of the U.S. Code. The most often utilized authority used as a basis to issue an award to a civilian employee is that found at 5 U.S.C. § 4503.
- a. Regulatory Implementation of this Authority. Awards to civilian employees must be made in accordance with 5 C.F.R. Part 451. Awards to DOD civilians must also be done in accordance with DoD 1400.25-M, subchapter 451 as well as DOD FMR, vol. 8, ch. 3, (June 2010). For Army civilians, the award must also be made in accordance with AR 672-20, Incentive Awards (29 January 1999) and DA Pam 672-20, Incentive Awards Handbook (1 July 1993).

- b. Non-Cash Awards. The statute technically states that the “head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of” one of their employees. The plain reading of this statute implies that non-cash awards, such as plaques and coins, are not authorized to be given to civilian employees. The agency regulations each expressly permit non-cash awards, however. The GAO has sanctioned the giving of non-cash awards to civilian employees. See Awarding of Desk Medallion by Naval Sea Sys. Command, B-184306, 1980 U.S. Comp. Gen. LEXIS (Aug. 27, 1980) (stating that desk medallions may be given to both civilian and military as awards for suggestions, inventions, or improvements); Nat’l Security Agency – Availability of Appropriations to Purchase Food as a Non-Monetary Award, B-271511, Mar. 4, 1997, 1997 U.S. Comp. Gen. LEXIS 105 (deciding that food vouchers may be given to civilian employees as awards). As discussed *supra*, the GAO has also sanctioned the purchase of food as one of the expenses that it deems could be necessary to honor the awardees accomplishments under 5 U.S.C. § 4503. In such circumstances, the award is not the food; the food is just an incidental expense incurred to honor the awardee.
 - 3. Agencies that are authorized emergency and extraordinary expense or similar funds may also use these funds to purchase mementoes for their distinguished visitors.
- N. Use of Office Equipment. Governed by the Joint Ethics Regulation, DOD 5500.07-R (Nov. 17, 2011), Standards of Conduct, DOD Directive 5500.07 (Nov. 29, 2007), 5 C.F.R. § 2635, and 5. C.F.R. Part 3601. The use of government property to respond to National Guard, Reserve matters is authorized, within certain restrictions. Lorraine Lewis, Esq., B-277678, 1999 U.S. Comp. Gen. LEXIS 104 (Jan. 4, 1999) (agency may authorize use of office equipment to respond to reserve unit recall notification as all government agencies have some interest in furthering the governmental purpose of, and national interest in, the Guard and Reserves). See 5 C.F.R. § 251.202; see also Office of Personnel Management memorandum, Subject: Use of Official Time and Agency Resources by Federal Employees Who Are Members of the National Guard or Armed Forces Reserves (3 June 1999), which provides general guidance to assist federal agencies in determining under what circumstances employee time and agency equipment may be used to carry out limited National Guard or Reserve functions. An electronic copy of this memorandum is on file with the Contract and Fiscal Law Department. See also CAPT Samuel F. Wright, *Use of Federal Government Equipment and Time for Reserve Unit Activities*, Reserve Officers Ass’n L. Rev., May 2001 (providing a good overview of this authority).

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

VII. MILITARY CONSTRUCTION

- A. Congressional oversight of the Military Construction Program, and construction throughout the Federal Government, is extensive and pervasive. For example, no contract relating to erection, repair, or furnishing of a public building or to make any public improvement shall require the government to pay more than the amount specifically appropriated for the activity covered by the contract. 41 U.S.C. § 6303. There are different categories of construction work with distinct funding requirements.
- B. Specified Military Construction (MILCON) Program -- projects costing over \$2 million.
1. Congress authorizes and funds these projects by location. The Army's principle appropriations are the "Military Construction, Army" (MCA) appropriation, and the "Family Housing, Army" (FHA) appropriation.
 2. The conference report that accompanies the Military Construction Appropriations Act breaks down the lump sum appropriations by specific individual projects.
- C. Unspecified Minor Military Construction (UMMC) Program -- military construction projects costing between \$750,000 and \$2 million. 10 U.S.C. § 2805(a).
1. Congress provides annual funding and approval to each military department for minor construction projects that are not specifically identified in a Military Construction Appropriations Act.
 2. The Service Secretary concerned uses these funds for minor projects not specifically approved by Congress.

3. Statute and regulations require approval by the Secretary of the Department and notice to Congress before a minor military construction project exceeding \$750,000 is commenced.
 4. If a military construction project is intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening, an unspecified minor military construction project may have an approved cost equal to or less than \$3 million.
- D. O&M Construction: Minor Military Construction projects costing less than \$750,000. 10 U.S.C. § 2805(c); DOD Dir. 4270.36; AR 415-15, para. 1-6.c.(1).
1. The Secretary of a military department may use O&M funds to finance Unspecified Minor Military Construction projects costing not more than \$750,000.
 2. Construction includes alteration, conversion, addition, expansion, and replacement of existing facilities, plus site preparation and installed equipment.
 3. Project splitting is prohibited. The Honorable Michael B. Donley, B-234326.15, 1991 U.S. Comp. Gen. LEXIS 1564 (Dec. 24, 1991) (Air Force improperly split into multiple projects, a project involving a group of twelve related buildings).
 4. Using O&M funds for construction in excess of the \$750,000 project limit violates the Purpose Statute and may result in a violation of the Antideficiency Act. See DOD Accounting Manual 7220.9-M, Ch. 21, para. E.4.e; AFR 177-16, para. 23c; The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).
- E. Maintenance and repair projects. **Maintenance and repair projects are not construction.** AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20F, ch. 3, para. 3.1.1, and ch. 4, para 4.1.1. Therefore, maintenance and repair projects are not subject to the \$750,000 O&M limitation on construction.⁹ See 10 U.S.C. § 2811(a) (specifically permitting the Secretary of a military department to use O&M funds to carry out repair projects for “an entire single-purpose facility or one or more functional areas of a multipurpose facility”). DOD funds these projects with O&M appropriations.
1. Definitions.

⁹ But see 10 U.S.C. § 2811. If the estimated cost of a repair project exceeds \$7.5 million, the Secretary concerned must approve the project in advance. 10 U.S.C. § 2811(b). The Secretary must then notify the appropriate committees of Congress of: (1) the justification and current cost estimate for the project; and (2) the justification for carrying out the project under this section. 10 U.S.C. § 2811(d).

a. Maintenance.

- (1) AR 420-1, Glossary, sec. II, defines maintenance as the “work required to preserve or maintain a facility in such condition that it may be used effectively for its designated purpose.” It includes work required to prevent damage and sustain components (e.g., replacing disposable filters; painting; caulking; refastening loose siding; and sealing bituminous pavements). See also DA Pam 420-11, para. 1-6a.
- (2) AFI 32-1032, para. 4.1.1, defines maintenance as “work required to preserve real property and real property systems or components and prevent premature failure or wearing out of the same.” It includes: (a) work required to prevent and arrest component deterioration; and (b) landscaping or planting work that is not capitalized. See AFI 65-601, vol. 1, attachment 1.
 - (a) OPNAVINST 11010.20F, para. 4.1.1, defines maintenance as “the day-to-day, periodic, or scheduled work required to preserve or return a real property facility to such a condition that it may be used for its designated purpose.”
 - (b) The term “maintenance” includes work undertaken to prevent damage to a facility that would be more costly to repair (e.g., waterproofing and painting interior and exterior walls; seal-coating asphalt pavement; resealing joints in runway concrete pavement; dredging to previously established depths; and cleaning storage tanks).
 - (c) Maintenance differs from repair in that maintenance does not involve the replacement of major component parts of a facility. It is the work done to:
 - (i) Minimize or correct wear; and
 - (ii) Ensure the maximum reliability and useful life of the facility or component.

b. Repair.

- (1) Statutory Definition. 10 U.S.C. § 2811(e). A “repair project” is defined as a project to restore a real property

facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.

- (2) DoD Definition. DOD FMR, vol. 2B, ch. 8, para. 080105. See also Memorandum, Deputy Comptroller, Office of the Under Secretary of Defense (Program/Budget), subject: Definition for Maintenance and Repair (2 July 1997) [hereinafter DOD Repair Memorandum]. The term “repair” means to restore a real property facility, system, or component to such a condition that the military department or agency may use it effectively for its designated functional purpose.
- (a) When repairing a facility, the military department or agency may:
- (i) Repair components of the facility by replacement; and
 - (ii) Use replacements that meet current building standards or code requirements.¹⁰
- (b) The term “repair” includes:
- (i) Interior rearrangements that do not affect load-bearing walls; and
 - (ii) The restoration of an existing facility to:
(a) allow for the effective use of existing space; or
(b) meet current building standards or code requirements (e.g., accessibility, health, safety, or environmental).
- (c) The term “repair” does not include additions, new facilities, and functional conversions. See 10 U.S.C. § 2811(c).
- (d) Army Definition. AR 420-1, Glossary, sec. II; DA Pam 420-11, paras. 1-6 and 1-7. See Memorandum, Assistant Chief of Staff for Installation Management,

¹⁰ DOD FMR, vol. 2B, ch. 8, para. 080105, and AR 420-1, para. 4-17b, provide the same example. Both state that “heating, ventilation, and air conditioning (HVAC) equipment can be repaired by replacement, can be state-of-the-art, and can provide for more capacity than the original unit due to increased demands and standards.” See DA Pam 420-11, para. 1-7h (stating that the Army should use energy and water saving materials whenever feasible).

subject: New Definition of “Repair” (4 Aug. 1997) [hereinafter DA Repair Memorandum]. The term “repair” means to restore a facility or a facility component to such a condition that the Army may use it effectively for its designated functional purpose.

- (e) The DA Repair Memorandum states that: “The new definition is more liberal and expands [the Army’s] ability to provide adequate facilities for [its] soldiers and civilians;” however, the DA Repair Memorandum also states that: “**A facility must exist and be in a failed or failing condition in order to be considered for a repair project.**” See DA Pam 420-11, para. 1-7e (stating that “[r]epair means that the facility or facility component has failed, or is in the incipient stages of failing, or is no longer performing the functions for which it was designated”).
- (f) The term “**repair**” includes:
 - (i) Overhauling, reprocessing, or replacing deteriorated components, parts, or materials;
 - (ii) Correcting deficiencies in failed or failing components to meet current building standards or code requirements if the Army can perform the work more economically by performing it concurrently with the restoration of other failed or failing components;¹¹
 - (iii) Relocating or reconfiguring components (e.g., partitions, windows, and doors) during a major repair project if they are replacements for existing components;¹²
 - (iv) Relocating or reconfiguring utility systems during a major repair project to meet current building standards or code requirements if

¹¹ The DA Repair Memorandum indicates that the Army can add a sprinkler system or air conditioning to bring a facility up to applicable standards or codes, provided the facility is in a failed or failing condition.

¹² A major repair project would include gutting the interior of a building.

the total area or population served by the utility system remains the same; and

- (v) Incorporating additional components during a major repair project if: (a) the system is in a failed or failing condition;¹³ and (b) incorporating the additional components makes the replacement system safer and more efficient.
- (g) The term “repair” does not include:
 - (i) Bringing a facility or facility component up to applicable building standards or code requirements when it is not in need of repair;
 - (ii) Increasing the quantities of components for functional reasons;
 - (iii) Extending utilities or protective systems to areas not previously served;
 - (iv) Increasing exterior building dimensions; or
 - (v) Completely replacing a facility.
- (3) Air Force Definition. AFI 32-1032, paras. 4.1.2 and 5.1.2. See AFI 65-601, vol. 1, atch 1. The term “repair” means to restore real property, real property systems, and real property components to such a condition that the Air Force may use it effectively for its designated functional purpose. However, AFI 32-1032, para. 4.1.2, specifically states that real property, real property systems, and real property components “need not have failed to permit a repair project.” (emphasis added).
 - (a) The term “repair” includes:
 - (i) Replacing existing heating, ventilation, and air conditioning equipment with “functionally sized,” state-of-the-art equipment;

¹³ Under certain circumstances, the Army may classify a utility system or component as “failing” if it is energy inefficient or technologically obsolete. See AR 420-1, Glossary, sec. II.

- (ii) Rearranging or restoring the interior of a facility to: (a) allow for the effective use of existing space; or (b) meet current building standards or code requirements (e.g., accessibility, health, safety, seismic, security, or fire);¹⁴
 - (iii) Removing or treating hazardous substances for environmental restoration purposes unless the work supports a construction project;
 - (iv) Replacing one type of roofing system with a more reliable or economical type of roofing system;
 - (v) Installing exterior appurtenances (e.g., fire escapes, elevators, ramps, etc.) to meet current building standards, code requirements, and/or access laws; and
 - (vi) Installing force protection measures outside the footprint of the facility.
- (b) The term “repair” does not include:
- (i) Expanding a facility’s foundation beyond its current footprint;
 - (ii) Elevating or expanding the “functional space” of a facility;
 - (iii) Increasing the “total volume” of a facility;
 - (iv) Installing previously uninstalled equipment unless required to comply with accessibility, health, safety, seismic, security, or fire standards and codes;
 - (v) Relocating a facility;
 - (vi) Upgrading unpaved surfaces;

¹⁴ Moving load-bearing walls is construction. AFI 32-1032, para. 4.1.2.1.2.

- (vii) Increasing the dimensions of paved surfaces unless required to comply with Air Force standards or applicable code requirements;
- (viii) Changing the permanent route of real property transportation systems;
- (ix) Installing walkways, roadway curbs, gutters, underground storm sewers, bicycle paths, jogging paths, etc;
- (x) Completely replacing the vertical section of a facility and a substantial portion of its foundation;
- (xi) Completely replacing a facility;
- (xii) Converting a facility or portion of a facility from one functional purpose to another; 15 or
- (xiii) Repairing a facility if the repair work exceeds 70% of the facility's replacement cost.¹⁶

c. Navy Definition. OPNAVINST 11010.20F, para. 3.1.1.¹⁷ The term “repair” refers to “the return of a real property facility to such condition that it may be effectively utilized for its designated purposes, by overhaul, reconstruction, or replacement of constituent parts or materials which are damaged or deteriorated to the point where they may not be economically maintained.”

(1) The term “repair” includes:¹⁸

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

¹⁵ Repair work required regardless of a functional conversion may still be repair work. AFI 32-1032, para. 5.1.2.3.2.

¹⁶ This limit does not apply to facilities on a national or state historic register. In addition, the SAF/MII can waive it under appropriate circumstances. AFI 32-1032, para. 5.1.2.3.2.

¹⁷ This regulatory provision pre-dates the DoD's new definition of repair. See DOD Repair Memorandum.

¹⁸ OPNAVINST 11010.20F, para. 3.1.3, contains several additional examples of repair projects.

protection; and removing asbestos containing materials);

- (b) Minor additions to components in existing facilities to return the facilities to their customary state of operating efficiency (e.g., installing additional partitions while repairing deteriorated partitions);
- (c) The replacement of components with higher quality or more durable components if the replacement does not substantially increase the capacity or change the function of the component;
- (d) The replacement of energy consuming equipment with more efficient equipment if:
 - (i) The shore activity can recover the additional cost through cost savings within 10 years;
 - (ii) The replacement does not substantially increase the capacity of the equipment; and
 - (iii) The new equipment provides the same end product (e.g., heating, cooling, lighting, etc.).

(2) The term “repair” does not include:

- (a) Additions, expansions, alterations, or modifications required solely to meet new purposes or missions;
- (b) The extension of facility systems or components to areas the shore activity is not repairing and/or areas not previously served;
- (c) Increases to exterior facility dimensions or utility plant capacity; and
- (d) Alterations to quarters to meet current DOD or Navy design standards.

F. Exercise-related construction. See The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.); The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984).

1. Congress has prohibited the use of O&M for minor construction outside the U.S. on Joint Chiefs of Staff (JCS) directed exercises.
2. All exercise-related construction projects coordinated or directed by the JCS outside the U.S. are limited to unspecified minor construction accounts of the Military Departments. Furthermore, Congress has limited the authority for exercise-related construction to no more than \$5 million per Department per fiscal year. 10 U.S.C. § 2805(c)(2). Currently, Congress funds exercise-related construction as part of the Military Construction, Defense Agencies, appropriation.
3. DOD's interpretation excludes from the definition of exercise-related construction only truly temporary structures, such as tent platforms, field latrines, shelters, and range targets that are removed completely once the exercise is completed. DOD funds the construction of these temporary structures with O&M appropriations.

G. Combat and Contingency Related O&M Funded Construction.

1. O&M funded contingency construction started with section 2808 of the FY 04 NDAA and has been extended and modified by each NDAA since 2004 (including National Defense Authorization Act, 2014).
 - a. Authority derived from the National Defense Authorization Act- the Secretary of Defense may obligate appropriated funds available for operation and maintenance to carry out a construction project inside the area of responsibility of the United States Central Command or the area of responsibility and area of interest of Combined Joint Task Force-Horn of Africa that the Secretary determines meets each of the following conditions:
 - (1) The construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of a declaration of war, the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621), or a contingency operation.
 - (2) The construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence, unless the military installation is located in Afghanistan, for which projects using this authority may be carried out at installations deemed as supporting a long-term presence.

- (3) The United States has no intention of using the construction after the operational requirements have been satisfied.
 - (4) The level of construction is the minimum necessary to meet the temporary operational requirements.
- b. Notification of Obligation of Funds. Before using appropriated funds available for operation and maintenance to carry out a construction project outside the United States that has an estimated cost in excess of the amounts authorized for unspecified minor military construction projects under section 2805(c) of title 10, United States Code, the Secretary of Defense shall submit to the congressional committees specified in subsection (f) a notice regarding the construction project. The project may be carried out only after the end of:
- (1) the 10-day period beginning on the date the notice is received by the committees or, if earlier,
 - (2) the end of the 7-day period beginning on the date on which a copy of the notification is provided in an electronic medium pursuant to section 480 of title 10, United States Code. The notice shall include the following:
 - (a) Certification that the conditions specified in subsection (a) are satisfied with regard to the construction project.
 - (b) A description of the purpose for which appropriated funds available for operation and maintenance are being obligated.
 - (c) All relevant documentation detailing the construction project.
 - (d) An estimate of the total amount obligated for the construction.
- c. Annual Limitation on Use of Authority.—
- (1) The total cost of the construction projects carried out under the authority of this section using, in whole or in part, appropriated funds available for operation and maintenance shall not exceed \$100,000,000 in a fiscal year.
 - (2) The Secretary of Defense may authorize the obligation of not more than an additional \$10,000,000 of appropriated

funds available for operation and maintenance for a fiscal year if the Secretary determines that the additional funds are needed for costs associated with contract closeouts. Funds obligated under this paragraph are not subject to the limitation in the second sentence of paragraph (1).

d. Other Contingency Construction Authority.

(1) See 10 U.S.C. § 2804. See DOD Dir. 4270.5; AR 420-1, para. 4-9; AFI 32-1021, para. 5.2.3; AFI 65-601, vol. 1, para. 9.12.4; OPNAVINST 11010.20G, para. 4.4.5; see also DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

(a) **Scope of Authority.** The Secretary of Defense may use this authority—or permit the Secretary of a military department to use this authority—to carry out contingency construction projects not otherwise authorized by law.

(b) **Proper Appropriation.** Funds are specifically appropriated for construction under 10 U.S.C. § 2804.

(c) **Requirements for Use.**

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

(2) In addition, the SECDEF must:

(a) Notify the appropriate committees of Congress; and

(b) Wait 21 days.

(3) **Limitations.**

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

(i) The legislative history of the MCCA indicates that the Secretaries of the military departments should use this authority only for extraordinary projects that develop unexpectedly.

- (ii) In addition, the legislative history of the MCCA indicates that the Secretaries of the military departments may not use this authority for projects denied authorization in previous Military Construction Appropriations Acts. See DOD Reg. 7000.14-R, vol. 3, ch. 7, para. 070303.B.
 - (b) DoD Limitations.
 - (i) DOD Dir. 4270.5, para. 4.2, requires the Heads of DOD Components to consider using other available authorities to fund military construction projects before they consider using SECDEF authorities.
 - (ii) DOD Reg. 7000.14-R, vol. 3, ch. 17, para. 170102.F.4, states that: “Actual construction shall not commence prior to the receipt of appropriate DOD and congressional approval [of the reprogramming request].”
 - (c) Army Limitations. AR 420-1, para. 4-9b(6).
 - (i) The Army generally reserves this authority for projects that support multi-service requirements.
 - (ii) Commanders should normally process urgent projects that support only one service under 10 U.S.C. § 2803.
 - (d) Air Force Limitations. AFI 32-1021, para. 5.2.3.1.
 - (i) The use of this authority is rare.
 - (ii) The Air Force must consider using its 10 U.S.C. § 2803 authority first.
- 2. Train and Equip Related Construction: Section 1201 of the 2013 NDAA (as modified in the 2014 NDAA) expanded the authority normally contained in the train and equip provisions allowed in section 1206 of the 2006 NDAA by adding authority to conduct “small scale military construction activities.”

- a. Limitations
 - (1) Not more than \$750,00 may be obligated for small scale military construction activities; and
 - (2) Not more than \$25,000,000 may be obligated or expended for small-scale military construction activities under all programs authorized under this authority.

VIII. EMERGENCY AND EXTRAORDINARY EXPENSE FUNDS (INCLUDING OFFICIAL REPRESENTATION FUNDS)

- A. Definition. Emergency and extraordinary expense funds are appropriations that an agency has much broader discretion to use for "emergency and extraordinary expenses." Expenditures made using these funds need not satisfy the normal purpose rules.
- B. Historical Background. Congress has provided such discretionary funds throughout our history for use by the President and other senior agency officials. See Act of March 3, 1795, 1 Stat. 438.
- C. Appropriations Language.
 - 1. For DOD, Congress provides emergency and extraordinary funds as a separate item in the applicable operation and maintenance appropriation. For example, in FY 2014, Congress provide the following O&M to the Army: "For expenses, not otherwise provided for, necessary for the operation and maintenance of the Army, as authorized by law; ***and not to exceed \$12,478,000 can be used for emergencies and extraordinary expenses, to be expended on the approval or authority of the Secretary of the Army, and payments may be made on his certificate of necessity for confidential military purposes***, \$30,768,069,000 (emphasis added)."
 - 2. Not all agencies receive emergency and extraordinary funds. If Congress does not specifically grant an agency emergency and extraordinary funds, that agency may not use other appropriations for such purposes. See HUD Gifts, Meals, and Entm't Expenses, B-231627, 68 Comp. Gen. 226 (1989).
- D. Statutory Background.
 - 1. 10 U.S.C. § 127. Emergency and extraordinary expenses.
 - a. Authorizes the Secretary of Defense and the Secretary of a military department to spend emergency and extraordinary expenses funds

for "any purpose he determines to be proper, and such a determination is final and conclusive."

- b. Requires a quarterly report of such expenditures to the Congress.
 - c. Congressional notice requirement. In response to a \$5 million payment to North Korea in the mid-90s using DOD emergency and extraordinary expense funds, Congress amended 10 U.S.C. § 127, imposing the following additional restrictions on our use of these funds:
 - (1) If the amount to be expended exceeds \$1 million: the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 15 days.
 - (2) If the amount exceeds \$500,000 (but is less than \$1 million): the Secretary of the Service involved must provide Congress with notice of the intent to make such expenditure and then wait 5 days.
2. Other executive agencies may have similar authority. See, e.g., 22 U.S.C. § 2671 (authorizing the State Department to pay for "unforeseen emergencies").
- E. Regulatory Controls. Emergency and extraordinary expense funds have strict regulatory controls because of their limited availability and potential for abuse. The uses DOD makes of these funds and the corresponding regulation(s) dealing with such usage are as follows:
- 1. Official Representation (Protocol). This subset of emergency and extraordinary expense funds are available to extend official courtesies to authorized guests, including dignitaries and officials of foreign governments, senior U.S. Government officials, senior officials of state and local governments, and certain other distinguished and prominent citizens.
 - a. DOD Regulations: DOD Instruction 7250.13, Official Representation Funds (30 June 2009); DOD FMR, vol. 10, ch. 12, para. 120322.B.
 - b. Army Regulation: AR 37-47, Representation Funds of the Secretary of the Army (9 Sept.2012).
 - c. Air Force Regulation: AFI 65-603, Official Representation Funds: Guidance and Procedures (24 Aug. 2011).

- d. Navy Regulation: SECNAV 7042.7K, Guidelines for Use of Official Representation Funds (25 May 2006).
2. Criminal Investigation Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during criminal investigations or crime prevention.
 - a. Army Regulation: AR 195-4, Use of Contingency Limitation .0015 Funds For Criminal Investigative Activities (30 Aug. 2011).
 - b. Air Force Regulation: AFI 71-101, vol. 1, Criminal Investigations, para. 1.18 (8 Apr. 2011).
 3. Intelligence Activities. This subset of emergency and extraordinary expense funds are available for unusual expenditures incurred during intelligence investigations.
 - a. Army Regulation: AR 381-141(C), Intelligence Contingency Funds (30 July 1990).
 - b. Air Force Regulation: AFI 71-101, Criminal Investigations, (8 Nov. 2011).
 4. Other Miscellaneous Expenses (other than official representation). This subset of emergency and extraordinary expense funds are available for such uses as Armed Services Board of Contract Appeals witness fees and settlements of claims. AR 37-47, para. 1-5b. Other examples include:
 - a. Acquisition of weapons from Panamanian civilians. (currently considered to be a proper expenditure of operation and maintenance funds);
 - b. Reward for search teams at the Gander air crash; and
 - c. Mitigation of erroneous tax withholding of soldiers' pay.

F. Use of Official Representation Funds.

1. Official courtesies. Official representation funds are primarily used for extending official courtesies to authorized guests. DOD Directive 7250.13, Enc. 3; AR 37-47, para. 2-1. Official courtesies are subject to required ratios of authorized guests to DOD personnel. See, e.g., DOD Instruction 7250.13, para. E2.4.3; AR 37-47, paras. 2-1b and 2-5. Official courtesies are defined as:

- a. Hosting of authorized guests to maintain the standing and prestige of the United States;
 - b. Luncheons, dinners, and receptions at DOD events held in honor of authorized guests;
 - c. Luncheons, dinners, and receptions for local authorized guests to maintain civic or community relations;
 - d. Receptions for local authorized guests to meet with newly assigned commanders or appropriate senior officials;
 - e. Entertainment of authorized guests incident to visits by U.S. vessels to foreign ports and visits by foreign vessels to U.S. ports;
 - f. Official functions in observance of foreign national holidays and similar occasions in foreign countries; and
 - g. Dedication of facilities.
2. Gifts. Official representation funds may be used to purchase, gifts, mementos, or tokens for authorized guests.
- a. Gifts to non-DOD authorized guests may cost no more than \$335.00. See DOD Instruction 7250.13, Encl. 3 (which cross references 22 U.S.C. § 2694, which in turn cross references 5 U.S.C. § 7342; the amount established in the latter statute is revised by GSA.
 - b. If the guest is from within DOD and is one of the specified individuals listed in Enclosure 1 to DOD Instruction 7250.13, then the command may present him or her with only a memento valued at no more than \$40.00. Enclosure 2 to DOD Directive 7250.13, para. E2.4.2.10.
3. Levels of expenditures. Levels of expenditures are to be “modest.” DOD Instruction 7250.13, para. E2.2.1.2.4.2; AR 37-47, para. 2-4a; AFI 65-603, para. 2.1. Army Regulation prohibits spending in excess of \$20,000 per event (an entire visit by an authorized guest constitutes one event for purposes of this threshold). AR 37-47, para. 2-4b.
4. Prohibitions on Using Representational Funds. DOD Instruction 7250.13, para. E2.4.2; AR 37-47, para. 2-10; AFI 65-603, para. 7.2; SECNAVINST 7042.7K, para. 9.
- a. Any use not specifically authorized by regulation requires an exception to policy (or for Air Force, advance approval of the

Secretary of the Air Force). AR 37-47, para. 2-10; AFI 65-603, para. 7.2.

- b. Exceptions will not be granted for the following:
- (1) Classified projects and intelligence projects;
 - (2) Entertainment of DOD personnel, except as specifically authorized by regulation;
 - (3) Membership fees and dues;
 - (4) Personal expenses (i.e., Christmas cards, calling cards, clothing, birthday gifts, etc.);
 - (5) Gifts and mementos an authorized guest wishes to present to another;
 - (6) Personal items (clothing, cigarettes, souvenirs);
 - (7) Guest telephone bills;
 - (8) Any portion of an event eligible for NAF funding, except for expenses of authorized guests; and
 - (9) Repair, maintenance, and renovation of DOD facilities.

See AR 37-47, para. 2-10.

5. Community Relations and Public Affairs Funds. AR 360-1, para. 4-5. Do not use public affairs funds to supplement official representation funds. Doing so violates 31 U.S.C. § 1301.

IX. CONCLUSION