

# **CHAPTER 3:**



## **AVAILABILITY OF APPROPRIATIONS AS TO TIME**

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## CHAPTER 3

### AVAILABILITY OF APPROPRIATIONS AS TO TIME

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

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

#### II. KEY DEFINITIONS.

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



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

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

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

**E. Commitment.**

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

and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying officer. [DOD FMR, Vol. 3, Ch. 15, para. 150202](#).

2. Purpose. A commitment document is an order form used to ensure that funds are available prior to incurring an obligation. Commitment accounting helps to ensure that the subsequent entry of an obligation will not exceed available funds. [DOD FMR, Vol. 3, Ch.15, para 150202](#). Commitments in the Army may be accomplished using [DA Form 3953 \(Purchase Request and Commitment\)](#) or similar documents having the effect of a firm order or authorization to enter into an obligation. [DFAS-IN 37-1, Ch. 7, para. 070601](#). The Air Force uses [AF Form 9](#) as a fund cite authorization document.
3. Who: The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment document. [DOD FMR, Vol. 3, Ch. 15, para. 150202A](#).
  - a. Army. Serviced activities or fund managers will maintain commitment registers, and are responsible for processing, recording, and performing the oversight function for commitment accounting. Fund control responsibilities may be delegated, in writing, to the Director of Resource Management (DRM)/ Comptroller or other appropriate official(s) IAW regulation. Designated officials will perform commitment accounting as required. [DFAS-IN 37-1, Ch. 3, para. 030209, and Ch. 7, para. 0703](#).
  - b. Air Force. Financial Service Office(r) will certify fund availability before obligations are authorized or incurred against funding documents. [DFAS-DE, Procedures for Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force, p. 1-7](#).
4. What: Activities may commit funds only to acquire goods, supplies, and services that meet the bona-fide needs of the period for which Congress appropriated funds, or to replace stock used during that period. In general, agencies record as a commitment the cost estimate set forth in the commitment document. [DFAS-IN 37-1, para. 070501](#); [DOD FMR, Vol.3, Ch.8, para. 080201](#).

#### F. **Obligation.**

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

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

2. General Rules.

- a. An obligation must be definite and certain. GAO Redbook, Vol. II, pg. 7-3. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it. Always obtain documentary evidence of the transaction before recording an obligation. [31 U.S.C. § 1501](#); [DOD FMR, Vol. 3, Ch.8, para. 080302](#); [DFAS-IN 37-1, chapter 8](#).
- b. Obligate funds only for the purposes for which they were appropriated. [31 U.S.C. § 1301\(a\)](#).
- c. Obligate funds only to satisfy the *bona fide* needs of the current fiscal year. [31 U.S.C. § 1502\(a\)](#); [DOD FMR, Vol. 3, Ch. 8, para. 080303A](#).
- d. Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. [DOD FMR, Vol. 3, Ch. 8, para. 080303B](#).
- e. Generally, obligate current funds when the government incurs an obligation (incurs a liability). [DOD FMR, Vol. 3, Ch. 8, para. 080302](#). Some exceptions, discussed in the obligations outline and in the “Time” outline, include: Protests (see section VIII A of this outline); Replacement contracts for contracts that have been terminated for default (see section VI of this outline) and “in-scope” contract changes (see section VI B of this outline).
- f. An improper recording of funds does not create a contractual right, [Integral Systems v. Dept. of Commerce, GSBICA 16321-COM, 05-1 BCA ¶ 32,946](#) (Board rejected a constructive option argument based on the recording of an option exercise which failed to occur).

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

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

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

### III. THE *BONA FIDE* NEEDS RULE.

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

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

B. **The *Bona Fide* Needs Rule.** Essentially, the *bona fide* needs rule is a timing rule that requires **both the timing of the obligation and the *bona fide* need to be within the fund's period of availability.** [DoD FMR, Vol. 3, Ch. 8, para. 080303.A](#); [DFAS-IN Reg. 37-1, para. 070501](#).

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

1. **Current year money for current year needs.** The basic principle is that “payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year....” [GAO Redbook, Appropriations Law, Volume I, page 5-14](#). “An agency’s compliance with the *bona fide* needs rule is measured at the time the agency incurs an obligation, and whether there is a *bona fide* need at the point of obligation depends on the purpose of the transaction and the nature of the obligation entered into.” [National Labor Relations Board – Funding of Subscription Contracts, B-309530, 17 Sept 2007, pg5](#).
2. The *Bona Fide* Needs Rule applies only to appropriations with limited periods of availability for obligation.
3. Appropriated funds may only be used for a requirement that represents the *bona fide* need of the requiring activity arising during the period of availability of the funds proposed to be used for the acquisition. [Modification to Contract Involving Cost Underrun, B-257617, 1995 U.S. Comp. Gen. LEXIS 258 \(April 18, 1995\); To the Secretary of the Army, B-115736, 33 Comp. Gen. 57 \(1953\); DoD FMR Vol. 14, Ch. 2, para. 020103.E; DFAS-IN 37-1, para. 080302](#).
4. **History:** “The *bona fide* need rule initially appeared in 1789. From what can be gleaned from the sparse legislative history, the intent of Congress was to instill a sense of fiscal responsibility in the newly formed United States departments and agencies. The Congress wanted the balance of appropriations not needed for a particular year’s operations to be returned to the Treasury so that it could be re-appropriated the following year in accordance with the Congress’s current priorities. Of even more importance to the Congress today, a limited period of availability means that after that period has expired an agency has to return to the Congress to justify continuing the program or discuss how much is needed to carry on the program at the same or a different level.” [Hon. Beverly Byron, B-235678, Comp. Gen. \(Jul 30, 1990\)](#).
5. **Determining the *Bona Fide* Need. Generally speaking, an agency has a need to acquire goods and services when it requires the use or benefit of those goods or services.** However, based on legislation and GAO case law, the *bona fide* need does not always arise at this time. The *bona fide* need may be earlier or later than the date the agency requires the use of goods or the benefit of services. Each main type of acquisition – supplies, services, and construction – has specific rules to help agencies determine the *bona fide* need. These are discussed at length in the discussion of the *Bona Fide* Needs Rule below.

6. Practical Considerations.

- a. Generally, the time limitations apply to the obligation of funds, not the disbursement, or payment, of them. [Secretary of Commerce, B-136383, 37 Comp. Gen. 861, 863 \(1958\)](#). See [DoD FMR, Vol. 3, Ch. 8, para. 080301](#).
- b. Absent express statutory authority in the appropriations act, agencies may not obligate funds after their period of availability expires. [National Endowment for the Arts-Time Availability for Appropriations, B-244241, 71 Comp. Gen. 39 \(1991\)](#). In this case, the authorizing legislation stated that money provided for the National Endowment of the Arts would remain available until expended. However, the appropriations act stated that the funds would expire on a date certain. The GAO held that the **appropriations act trumps the authorization act** if the two conflict.
- c. Any indefinite delivery/indefinite quantity (ID/IQ) contract must include a guaranteed minimum order of goods or services under that contract. The government is required to order at least that minimum quantity from the contractor (or contractors). Because the government must pay for at least the guaranteed minimum, that amount must reflect a valid *bona fide* need at the time the contract is executed. [B-321640, U.S. Small Business Administration—Indefinite-Delivery Indefinite-Quantity Contract Guaranteed Minimum \(2011\)](#).

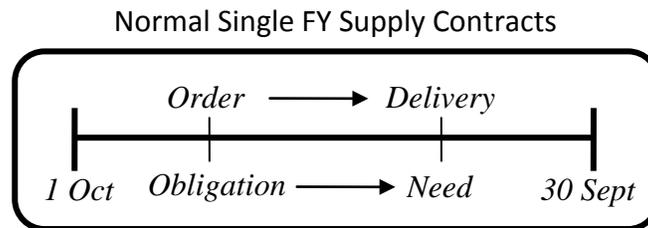
C. **Bona Fide Needs Methodology.** Generally speaking, an agency has a need to acquire goods and services when it requires the use or benefit of those goods or services. However, based on legislation and GAO case law, the *bona fide* need does not always arise at this time. The *bona fide* need may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

1. Classify what is being acquired (i.e. Are we acquiring a supply, service, or construction?). Application of the *Bona Fide* Needs Rule differs depending on the subject of the acquisition.

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

D. **Supplies.**

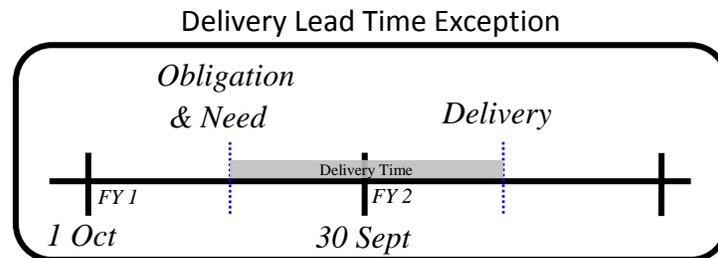
1. Generally, the *bona fide* need for a supply is determined by when the government actually requires (will be able to use or consume a requirement) the supplies being acquired. Accordingly, agencies generally must **obligate funds from the fiscal year in which the supplies will be used.** [Betty F.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



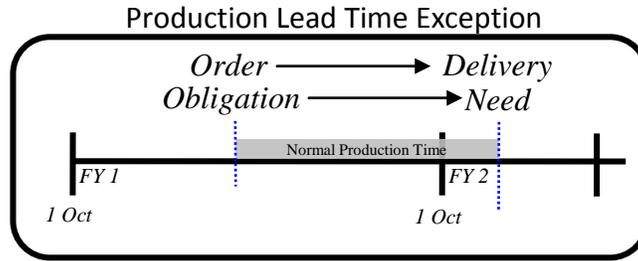
3. Supply needs of a future fiscal year are the *bona fide* need of the subsequent fiscal year, unless an exception applies. As demonstrated in the graphic above, this requirement does not usually create problems for agencies using annual funds. However, towards the end of the fiscal year, requiring activities must pay particular attention to adhering to the *Bona Fide* Needs Rule. Orders of supplies often cannot be delivered until the next FY, cannot be produced in time, or perhaps won't be used entirely during current FY. Two GAO recognized exceptions to the *Bona Fide* Needs Rule, **specific to supplies**, are the lead-time exception (for both delivery and production) and the stock-level exception. [DOD FMR, Vol. 3, Ch.8, para. 080303.](#)

4. *Lead-Time Exceptions to the Bona Fide Needs Rule.* There are two variants that comprise the lead-time exception.
  - a. Delivery Lead-Time: Current Year Requirement – Future Year Use. This aspect of the exception permits the agency to consider delivery lead-time in determining the *bona fide* need for a supply. Under the *Bona Fide Needs* rule, supplies delivered in the next fiscal year are a *Bona Fide Need* of the next fiscal year because they are not used until the next fiscal year. The delivery lead-time exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency currently requires the supply and (2) the delay is due to delivery lead-time. If an agency cannot obtain supplies in the same FY in which they are required and contracted for, delivery in the next FY does not violate the *Bona Fide Needs Rule* as long as the purchase meets the following:
    - (1) **Current Requirement.** If the agency could get the item in the current fiscal year, the agency would use the item in the current fiscal year. Practitioners should contrast “requirement” from “need.” In this situation the agency has a current year requirement (i.e. if I had it now I would use it now) for a future year *Bona Fide* need (i.e. future year use of the supply).
    - (2) **Delivery Lead-Time Delay.** The agency cannot obtain supply in the current FY due to delivery lead-time.
      - (a) The time between contracting and delivery must not be excessive.
      - (b) The government may not set a delivery date beyond the normal delivery lead-time and beyond the end of the fiscal year. The supplier must require the delivery lead-time.
      - (c) If the government directs the contractor to withhold delivery until after the next fiscal year, the DoD FMR states there is not a *bona fide* need for the item until next fiscal year, so next year’s fiscal funds must be used. [DoD FMR Vol. 3, ¶ 080303B](#).
      - (d) There is no requirement that the government pay increased delivery charges to ensure delivery before the end of the FY.

- (3) Example: If the normal lead-time for delivery of an item is 45 days, an obligation of FY 2014 funds is appropriate for a delivery on or before a required delivery date of 14 November 2014. (Remember 1 October 2014 is the beginning of FY 15). This represents the *Bona Fide* Need of FY 2014. However, if the government directs the contractor to withhold delivery until after 14 November 2014, there is not a *Bona Fide* Need for the item in FY 2014 because the necessary lead-time prior to delivery permits the government to order and deliver the item in FY 2015.

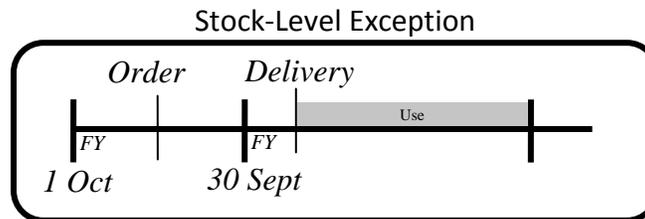


- b. Production Lead-Time: Future Year Requirement – Future Year Use. This aspect of the exception permits the agency to consider the normal production lead-time in determining the *bona fide* needs for an acquisition. Under the *Bona Fide* Needs rule, supplies produced in the next fiscal year are a *Bona Fide* Need of the next fiscal year because they are not used until the next fiscal year. The production lead-time exception allows agencies to use current year money to procure supplies that will not be used during the current fiscal year when (1) the agency requires the supply in the next fiscal year and (2) in order to use the supply when required, the agency must fund production now. An agency may use current FY funds to start production of a supply required for and used in the next FY. Agencies may contract in the current FY for production of a supply delivery in the next FY if the supply contracted for cannot otherwise be obtained on the open market at the time needed for use, so long as the intervening period is necessary for the production. [Chairman, Atomic Energy Commission, B-130815, 37 Comp. Gen. 155, 159 \(1957\)](#).
- (1) The procurement must not be for standard, commercial items readily available from other sources. [Administrator, General Services Agency, B-138574, 38 Comp. Gen. 628, 630 \(1959\)](#). If the item is a standard, commercial item readily available from other sources, the DoD FMR prohibits use of the delivery and production lead time exception to the *bona fide* needs rule to procure the item. [DoD FMR Vol. 3, Ch. 8, ¶ 080303B](#).



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

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



- (1) **Example:** The Department of Commerce produced a large number of “small business aids” that it distributed free to the public. During the fourth quarter of FY01, field offices were asked to inventory their stock of “aids” on hand to determine which aids were rapidly being exhausted so that stock could be replenished. It was determined that 263 titles should be retained and reprinted to replenish stock used during that fiscal year. The order for printing was placed with the government printing office (GPO) before the end of FY01, annual FY01 funds were obligated,

but many of the aids were not distributed and used until FY02. Is the *bona fide* needs rule violated?

- (2) **Answer:** No. GAO stated that the facts clearly established the aids were a replacement of materials used in FY01, so FY01 funds could be obligated even though the aids were not used until FY02. GAO did note that the order for the aids must be firm and complete. If the Department of Commerce had edited the order or provided the manuscripts after FY01 ended, then FY02 funds would have to be used. Replacement stock does NOT include materials that must be especially created for a particular purpose and which require a lengthy period for creation. [Mr. Abraham Starr, Dept. of Commerce Letter, B-95380, Jun 1, 1950, 29 Comp. Gen. 489.](#) See also, [Printing & Binding Requisition Seeking to Obligate Expiring Current Appropriations, A-44006, Sept. 3, 1941, 21 Comp. Gen. 1159,](#) and [Mr. Betty Leatherman, Dept. of Commerce, B-156161, May 11, 1965, 44 Comp. Gen 695.](#)

d. **STOCKPILING.** Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

- (1) **EXCESS OF NORMAL USAGE.** Agencies may only fund the replenishment of stock items (common-use standard type supplies) up to their “normal usage.”

(a) **Example:** The Veterans Administration stocked a quantity of chemicals that went bad before they were used. The label stated the chemicals were good for two years. In reviewing a government claim, GAO questioned whether VA complied with the *bona fide* needs rule when it stocked chemicals that would not be used within one fiscal year of their purchase. See [Mr. H. V. Higley, B-134277, Dec. 18, 1957.](#)

(b) **Example:** Under the stock level exception, the Forest Service budgeted for 1000 slide rules but bought 5,800 at the end of FY84 by obligating FY84 money. They only used 1500 of them during FY85. GAO stated the Forest Service improperly obligating FY84 funds because they did not have a reasonable expectation that 5,800 replaced stock used during the fiscal year. [Mr. Hartgraves, Forest Service, B-235086, Apr. 24, 1991.](#)

(2) CREATION OF STOCK. Given the goal of the stock-level exception is to prevent interruption of on-going operations between the fiscal years, agencies may not “create stock” under this exception. However, Agencies may not create a new stock of supplies - one not needed in FY1. An agency may not obligate funds when it is apparent from the outset that there will be no requirement until FY2.

(a) **Example:** The Army created the new Common Access Cards (CACs, special plastic cards with an embedded chip) to be implemented on 1 Nov 2002. At that time, the Army maintained no stock level of blank cards. Can the Army use the stock level exception to justify obligating FY 2001 O&M to purchase enough stock for to cover making cards from 1 Nov 2002 thru 2 Feb 2003?

(b) **Answer:** No. The general rule states that a supply is not a need until it is used. Here the cards will not be imprinted until 1 Nov 02. Viewed narrowly, this is a FY2002 need that should be funded with FY2002 funds. The stock level exception cannot be used to justify spending FY2001 O&M to create “stock” that will sit in a supply room.

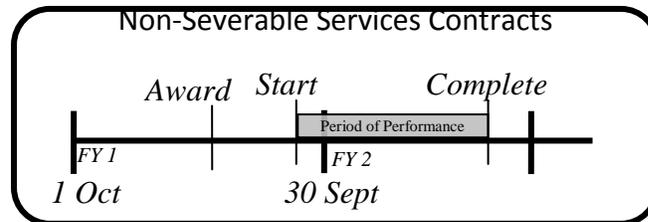
(c) **Nuance:** However, if the Army must receive the cards before the end of FY01 in order to prepare the cards and forward them to the field units (i.e. use the supply), the cards are a *Bona Fide* need of FY2001 and may be funded with FY2001 O&M. Additionally, if the cards are a BFN of FY 2002, the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

#### E. Services.

1. General Rule: The *Bona Fide* Need for services does not arise until the services are rendered. [Theodor Arndt GmbH & Co., B-237180, Jan. 17, 1990, 90-1 CPD ¶ 64](#); [EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154 \(1985\)](#). Thus, in general, services must be funded with funds current as of the date the service is performed.
2. 2 Categories: The *bona fide* needs rule is applied differently depending on the nature of the service. There are two categories of service contracts: (1) Non-severable service contracts; and (2) Severable service contracts.

3. Non-severable Services:

- a. A service is non-severable if the service produces a single or unified outcome, product, or report that cannot be subdivided for separate performance in different fiscal years. Whether the subdivision is feasible or not is a matter of judgment that includes as a minimum a determination of whether the government has received value from the service rendered. [Funding for Air Force Cost Plus Fixed Fee level of Effort Contract, B-277165, Comp. Gen. \(Jan. 10, 2000\)](#).
  
- b. The government must fund non-severable services contracts with dollars available for obligation at the time the contract is executed. Contract performance may cross fiscal years. [DFAS-IN 37-1, tbl. 8-1](#); [Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 \(1994\)](#) (fish and wildlife research projects); [Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, B-219829, 65 Comp. Gen. 741 \(1986\)](#) (study on psychological problems of Vietnam veterans); [Comptroller General to W.B. Herms, Department of Agriculture, B-37929, 23 Comp. Gen. 370 \(1943\)](#) (cultivation and protection of rubber-bearing plants).

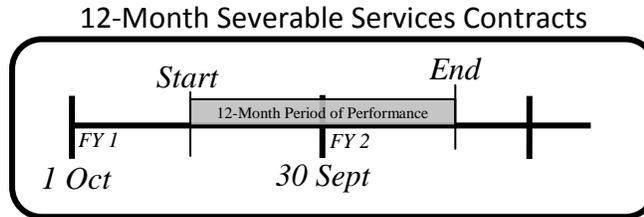


- (1) **Example:** The Fish & Wildlife Service issues a research work order for a 4 year research study on the effects of harvesting frogs. The study is to produce a publishable report. The work order is non-severable because it contemplates a defined end-product that cannot feasibly be subdivided for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

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

4. Severable Services:

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



- (1) This authority allows an agency to fund severable service contracts that cross fiscal years with funds current at the time of award. [Funding of Maintenance Contract Extending Beyond Fiscal Year, B-259274, May 22, 1996, 96-1 CPD ¶ 247](#) (Kelly AFB lawfully used FY 94 funds for an option period from 1 OCT 93 through 31 AUG 94, and a subsequent option for the period from 1 SEP 94 through 31 DEC 94).
  
- (2) This statutory exception is meant to give flexibility to annual funds so that all contracts do not have to end on 30 September. The exception only applies to annual year funds. It does not prohibit agencies with access to multiple year funds from entering into severable service contracts that exceed one year. However, it cannot be used to extend the period of availability of an expiring multiple year appropriation. [Severable Services Contracts, Comp. Gen. B-317636, 2009 CPD ¶ 89, 2009 WL 1140240, Apr. 21, 2009.](#)
  
- e. **Note on Research & Development Contracts:** GAO has opined that a service contract structured as a cost reimbursement level of effort term contract (CPFF term contract) is presumptively by its nature a severable service contract, unless the actual nature of the work warrants a different conclusion (ex: clearly calls for an end product). This is because a CPFF *term contract* typically requires performance of a certain number of hours within a specified period of time rather than requiring completion of a series of work objectives. A CPFF *completion contract*, however, may very well be non-severable. See [Funding for Air Force Cost Plus Fixed Fee level of Effort Contract, B-277165, Comp. Gen. \(Jan. 10, 2000\)](#) (launch vehicle integration analysis and support services for deployed infrared technology satellites was a severable service); See [The Hon. Bev. Bryon, 65 Comp. Gen. 154, B-214597, \(1985\)](#) (finding that research and development level of effort contracts may be either severable or non-severable depending on the nature of the work and the government's ability to define the needed work in advance).

- (1) **Example:** A lifecycle management contract may be a severable services contract that must be funded with appropriations current at the time the contract is entered into. [Chem. Safety & Hazard Investig. Bd – Interagency agreement with GSA, B-318425, 2009 WL 5184705 \(Dec 8, 2009\)](#). In this case, the Chemical Safety Board (CSB) proposed to enter an interagency agreement (IA) with the general services administration (GSA) for both the provision of ID cards and the lifecycle management of the cards to include card request, registration, maintenance, renewal and termination for five years. GAO opined that the lifecycle management portion consisted of repetitive recurring tasks such that the IA was for a severable service.
  
- (2) **Example:** Near the end of FY10, the National Labor Relations Board (NLRB) entered into 37 indefinite quantity/indefinite delivery (ID/IQ) contracts for court reporting services to be executed primarily during FY11. GAO found that the services were properly identified as severable services and could be funded entirely up-front at the time the contracts were awarded. [National Labor Relations Board – Recording Obligations for Training and Court Reporting, B-321296 \(2011\)](#). GAO also concluded that NLRB’s obligation of an estimated amount based on an estimate of the services it would need in the coming FY was proper.

#### F. **Training.**

1. Contracts for single training courses are considered similar to non-severable service contracts. In general, the training represents a single undertaking where the government receives the benefit of the training only when the employee has completed the training in full.
  
2. Training contracts may be obligated in full with fiscal year money current at the time performance begins even though the course extends into the next fiscal year. [Matter of: EEOC - Payment for Training of Management Interns, B-257977, 1995 U.S. Comp. Gen. LEXIS 739, 745](#).
  - a. Training courses that begin on or after 1 October may constitute a *bona fide* need of the prior year if:
    - (1) The agency has an immediate need for the training in the prior year,
  
    - (2) Scheduling is beyond the agency’s control, and

- (3) The time between award of the contract and performance is not excessive.
  - (4) References: [Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course](#), B-238940, 70 Comp. Gen. 296 (1991) ("Leadership for a Democratic Society" 4-week course); [Proper Appropriation to Charge for Expenses Relating to Nonseverable Training Course](#), B-233243, Aug. 3, 1989. See [DFAS-IN 37-1. tbl. 8-1](#), Jan. 2008 (limiting the time for performance of training from civilian institutions to the first 90 days of the next FY).
- b. Some multiple course training may be considered a severable service. For example, an advanced degree from an accredited university may include many separate courses. In that situation, the government employee receives the benefit of the training after each single course is completed. [Matter of: EEOC - Payment for Training of Management Interns](#), B-257977, 1995 U.S. Comp. Gen. LEXIS 739, 746; [Comptroller General to Secretary of the Interior](#), B-122928, 34 Comp. Gen. 432 (March 8, 1955).
  - c. **Example:** In FY10, National Labor Relations Board (NLRB) coordinated for executive training for some senior officials. However, the training was not scheduled to begin until January 2011, well into FY11. NLRB obligated FY10 funds for the training, but the Office of Personnel Management (OPM), which manages the Federal Executive Institute that would provide the training, did not require the NLRB to send funds until 15 October 2010, two weeks after FY10 ended. GAO found that OPM's requirement did not mandate the use of FY11 funds, and since the training was not scheduled until January 2011, it was not a *bona fide* need of FY10. [National Labor Relations Board – Recording Obligations for Training and Court Reporting](#), B-321296 (2011).

## G. Construction.

- 1. Contracts for construction are considered as similar to non-severable service contracts. **Construction contracts may constitute a *bona fide* need of the fiscal year in which the contract is awarded even though performance is not completed until the following fiscal year.** However, the requirement to enter into the contract must exist during the funds' period of availability. The contracting agency must intend for the contractor to begin work without delay.

2. A determination of what constitutes a *bona fide* need of a particular year depends upon the facts and circumstances of a particular year (e.g. weather). [Associate General Counsel Kepplinger](#), B-235086, Apr. 24, 1991. In analyzing *bona fide* needs for construction contracts, the agency should consider the following factors:
  - a. Normal weather conditions. A project that cannot reasonably be expected to commence on-site performance before the onset of winter weather is not the *bona fide* need of the prior fiscal year.
  - b. The required delivery date.
  - c. The date the government intends to make facilities, sites, or tools available to the contractor for construction work.
  - d. The degree of actual control the government has over when the contractor may begin work.
    - (1) For example, suppose a barracks will not be available for renovation until 27 December 2012 because a brigade is deploying on 20 December and cannot be disrupted between 1 October and 20 December. If the normal lead-time for starting a renovation project of this type is 15 days, then the renovation is a *bona fide* need of FY 2013 and the contract should be awarded in FY 2013 using FY2013 funds. Accordingly, use of FY 2012 funds under these facts violates the *Bona Fide* Needs Rule.
3. The DoD FMR allows **agencies to obligate current year appropriations for maintenance and repair projects even though contractor performance may not begin until the next fiscal year**. The contract shall satisfy a *bona fide* need of the current year. [DoD FMR, Vol. 3, Ch. 8, para. 080303.D](#).
  - a. Work must begin before January 1 of the following calendar year.
  - b. To determine the commencement of work, the contracting officer should visually inspect the site or obtain documentary evidence that costs have been incurred or material ordered to allow performance of the contract.

H. **Leases.** Identically to the severable services exception, 10 U.S.C. 2410a provides statutory authority to lease real or personal property, including the maintenance of such property (when contracted as part of the lease agreement) for up to 12 months with funds current at the time the contract begins.

1. **Example:** The Securities and Exchange Commission (SEC) entered into a 10-year lease contract for the Constitution Center building in Washington, D.C., which it planned to use as its headquarters. The entire lease was estimated to cost between \$371.7 million and \$454.4 million (based on the amount of space ultimately leased). This cost was between one third and one half of the SEC's entire annual appropriation for Salaries and Expenses (which included leases) of \$1.1 billion. Thus, the SEC intended to incrementally fund the lease over multiple years. GAO found that because this was a 10-year firm term lease, it was non-severable and should have been funded entirely at the time the lease was entered into. [Securities and Exchange Commission – Recording of Obligation for Multiple-Year Contract, B-322160 \(2011\)](#).

#### IV. MULTIPLE YEAR APPROPRIATIONS

A. Introduction.

1. There is a clear distinction between multiple year appropriations and multi-year contracts. Proper analysis requires consideration of fiscal law issues independently from the type of contract use.
2. Multiple year appropriations are those appropriations that expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. [Office of Management and Budget Circular A-11, Instructions on Budget Execution](#), § 20.4(c) (2012). See also [DOD FMR, Vol. 3, Ch. 13, para. 130202.A.1.b](#).
3. The multiple year appropriations usually provided to DOD include:
  - (1) Overseas, Humanitarian, Disaster, and Civic Aid: 2 years.
  - (2) Research, Development, Test, and Evaluation (RDT&E): 2 years.
  - (3) Procurement: 3 years.
  - (4) Military Construction: 5 years.

- (5) Shipbuilding and Conversion, Navy: 5 years, except that certain obligations may be incurred for longer periods.
4. Agencies must have all of the funds necessary for an entire given procurement to ensure stable production runs and lower costs. This policy is referred to as "full funding." [DOD FMR, Vol. 2A, para. 010202](#).
5. The *Bona Fide* Needs Rule and most of its exceptions apply to multiple year appropriations. [Honorable Byron](#), B-235678, 30 Jul 1990; [Defense Technical Information Center-Availability of Two Year Appropriations](#), B-232024, 68 Comp. Gen. 170 (1989); [Chairman, Committee on Appropriations, House of Representatives](#), B-132900, 55 Comp. Gen. 768 (1976).
  - a. A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 2014 RDT&E Army Appropriation ([Pub. L. 113-76](#)), which is available for obligation until 30 September 2015, may be obligated for the needs of FY 2014 and 2015; it is not available for the needs of FY 2016.
  - b. The statutory severable services exception, 10 U.S.C. 2410a, does NOT apply to severable services contracts funded with multiple-year appropriations. [Severable Services Contracts](#), Comp. Gen. B-317636, 2009 CPD ¶ 89, 2009 WL 1140240, Apr. 21, 2009.
6. Administrative controls, including regulations, may impose independent restrictions on the use of multi-year funds. *See, e.g.,* [DOD FMR, Vol. 2A, Budget Formulation and Presentation](#).

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

1. As a general rule, revolving funds are “no-year” funds that do not depend on annual appropriations. [10 U.S.C. § 2210\(b\)](#). The GAO has ruled that the *bona fide* needs rule does not apply to “no-year” funds. [Small Business Administration](#), 43 Comp. Gen. 657, 661 (1964); [Education and the Workforce](#), B-279886 (1998).

2. Parking Funds through Interagency Acquisitions. The GAO has ruled that the *Bona Fide* Needs Rule does apply to funds placed by an agency into a revolving fund and an agency may not "bank" funds to meet future needs. [Implementation of the Library of Congress FEDLINK Revolving Fund](#), Comp. Gen. B-288142, Sep. 6, 2001; [Continued Availability of Expired Appropriation for Additional Project Phases](#), Comp. Gen. B-286929, Apr. 25, 2001.
  - a. Elements of the General Services Administration (GSA), e.g., The Federal Systems Integration and Management Center (FEDSIM) and the Federal Computer Acquisition Center (FEDCAC), provide services under separate authority (a designation by the Office of Management and Budget) as an executive agent for government wide acquisitions, and the Information Technology Fund ([40 U.S.C. § 757](#)).
  - b. Parking funds in the GSA Information Technology Fund was a possible violation of the Antideficiency Act when the United States Army Claims Service (USARCS) provided the GSA fund with \$11.6 million of FY 1997 through FY 2000 Operation and Maintenance Funds for procurement of support services and information technology. See [OFFICE OF THE INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE, ARMY CLAIMS SERVICE MILITARY INTERDEPARTMENTAL PURCHASE REQUESTS](#), REPORT NO. D-2002-109 (June 19, 2002) (hereinafter DOD REPORT NO. 02-109).
    - (1) Of the \$11.6 million, \$3.8 million were obligated without defining USARCS' needs and without establishing a *bona fide* need for tasks relating to the personnel claims software development project, the torts and affirmative claims software development project, and the acquisitions of hardware and software. \$2.8 million of these funds were "banked" in the GSA IT Fund to meet "future" requirements.
    - (2) The report also found that \$8.5 million of the funds were obligated within the last three days of the applicable FY. Although USARCS could technically obligate funds at the end of a fiscal year, the obligation should be based on a valid need in the fiscal year of the appropriation in order to comply with the *bona fide* need rule.<sup>2</sup>

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

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

- (1) **Facts:** GSA is the single government wide provider of vehicles in the federal government. In 2009, GSA had a Summer AutoChoice Program to provide agencies with an efficient method for buying new cars. In the summer, the car manufacturers were switching to the next year’s model cars so GSA could not order them. Instead, GSA allowed agencies to go on-line during the 4<sup>th</sup> quarter of the FY and place orders for next year’s car models based on an estimate of what was likely to be available. A percentage was added to the price to approximate next year’s price increases. At the time of the order, agencies obligated FY1 funds. GSA did not do anything with the order at that time. After 1 October, new model information was available. Agencies then went online again, re-selected all the model information, got a finalized price quote and re-submitted their order. GSA took the finalized order and processed it in FY2 with the obligated FY1 funds. Once the manufacturer received the order, the vehicles would arrive about three months later (in FY2).
- (2) **Q: Did the agencies violate the *bona fide* need rule?**
- (3) **Answer:** Yes. From a fiscal standpoint, the vehicles are classified as a “supply” so they are a *bona fide* need when they can be used. Here, the vehicles arrived in FY2 so the agencies *bona fide* need did not arise until the next fiscal year. GSA cited to a statute for intra-agency acquisitions, 31 USC 1501(a)(3). This statute provides that an agency “incurs an obligation when it places an order required by law to be made from another agency.” GSA believed that this statute allowed the agency to place the order in the summer and obligate FY1 funds, even though the order wasn’t going anywhere until FY2. GAO disagreed. Although the agency was required to order from GSA, the 4<sup>th</sup> quarter FY1 “order” was “inchoate” or incomplete. GAO stated that agencies may not incur obligations against current appropriations based on inchoate or incomplete orders. In this case, the agencies had to resubmit all the order information in October when actual information was available. Only in October was the agencies order firm enough to justify obligation of funds. [Natural Resources Conservation Service – Obligating Orders with GSA’s AutoChoice Summer Program](#), Comp. Gen. B-317249, 2009 WL 2004210, July 1, 2009.

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

## **VI. *BONA FIDE* NEEDS RULE APPLIED TO INTERAGENCY ACQUISITIONS.**

- A. See the Chapter on Interagency Acquisitions for a more complete fiscal analysis.
- B. The Economy Act ([31 U.S.C. § 1535](#)) provides general authority for one agency (requesting agency) to transfer funds to another agency (servicing agency) to enter into a contract under certain conditions. The DOD FMR provides that the *bona fide* need determination is made by the requesting activity and not by the servicing activity. A servicing activity should, however, refuse to accept an Economy Act order if it is obvious that the order does not serve a need existing in the fiscal year for which the appropriation is available. [DOD FMR, Vol. 11A, Ch. 3, para. 030403](#).
- C. If the servicing agency does not award the contract before the end of the fiscal year, the funds expire as provided by [§ 1535\(d\)](#) and the funds must be de-obligated and returned to the requesting agency. Neither the servicing agency nor the requesting agency can use these funds for new obligations. Memorandum, Under Secretary of Defense Dov S. Zakheim, to Chairman of the Joint Chiefs of Staff, et. al, subject: Fiscal Principles and Interagency Agreements (24 Sep. 2003). See [Interagency Agreement with the Department of Energy for Online Research and Education Information Service](#), Comp. Gen. B-301561 (Jun. 14, 2004).

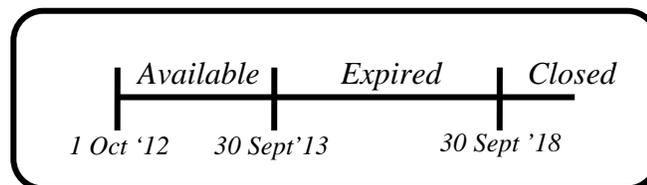
- D. When an authority other than the Economy Act is used for an interagency agreement, the de-obligation provisions of 31 U.S.C. § 1535 may not apply. If funds were properly obligated, they remain obligated and can continue to be used by the other agency. See [Transfer of Fiscal Year 2003 Funds from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

## VII. USE OF EXPIRED/CLOSED APPROPRIATIONS.

### A. Definitions.

1. **Current Appropriation.** An appropriation that is still available for new obligations under the terms of the applicable appropriations act. [31 U.S.C. § 1502](#).
2. **Expired Appropriation.** An appropriation whose period of availability has ended and is no longer available for new obligations. It retains its fiscal identity and is available to adjust and liquidate previously incurred obligations for five years. [31 U.S.C. § 1553\(a\)](#).

Appropriation Life-Cycle (1 Year Money.)



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

### B. Expired Appropriations.

- a. Some adjustments are possible after the end of the period of availability, but before an account closes. [31 U.S.C. § 1553\(a\)](#).

- b. Appropriations retain their complete accounting classification identifiers throughout the entire five-year “expired” period. [See DOD FMR, Vol. 3, Ch. 13, para. 130208.B.](#)
- c. Appropriations remain available for recording, adjusting, and liquidating prior obligations properly chargeable to the account. [31 U.S.C. § 1553\(a\).](#) [See also DOD FMR, Vol. 3, Ch. 10, para. 100201.A.](#)
- d. If the appropriation has expired and if an obligation of funds from that appropriation is required to provide funds for a program, project, or activity to cover a contract change:
  - (1) For the Department of Defense, the Under Secretary of Defense (Comptroller) may approve applicable obligations in excess of \$4 million. [31 U.S.C. § 1553 \(c\)\(1\).](#) [See also DOD FMR, Vol. 3, Ch. 10, para. 100204.](#)
  - (2) For all changes exceeding \$25 million, the Under Secretary of Defense (Comptroller) must take the following actions: notify Congress of an intent to obligate funds and wait 30 days before obligating the funds. [31 U.S.C. § 1553\(c\)\(2\);](#) [See also DOD FMR, Vol. 3, Ch. 10, para. 100205.](#)
- e. For purposes of the notice requirements discussed in the preceding paragraph, a "contract change" is defined as a change to a contract that requires the contractor to perform additional work. The definition specifically excludes adjustments necessary to pay claims or increases in contract price due to the operation of an escalation clause in the contract. [31 U.S.C. § 1553\(c\)\(3\).](#) [See also DOD FMR, Vol. 3, Ch. 10, para. 100202.](#)
- f. The heads of the defense agencies are required to submit annual reports on the impact of these revisions to the procedures for accounting for expired funds and for closing accounts.

### C. Closed Appropriations.

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

- b. All remaining balances in the account, obligated and unobligated, are canceled; and
  - c. No funds from the closed account are available thereafter for obligation or expenditure for any purpose. 31 U.S.C. § 1552. See also [DOD FMR, Vol. 3, Ch. 10, para. 100201.B.](#) and [DOD FMR, Vol. 3, Ch. 15, para. 150308](#)
2. Agencies will deposit collections authorized or required to be credited to an account, but received after an account is closed, in the Treasury as miscellaneous receipts. [31 U.S.C. § 1552\(b\)](#); [Appropriation Accounting - Refunds and Uncollectibles, B-257905, Dec. 26, 1995, 96-1 CPD ¶ 130.](#) See also [DOD FMR, Vol. 3, Ch. 10, para. 100209.B.](#)
- a. After an account is closed, agencies may charge obligations (and adjustments to obligations) formerly chargeable to the closed account and not otherwise chargeable to another current agency appropriation to any current agency account available for the same general purpose. [31 U.S.C. § 1553\(b\)](#). See also [DOD FMR, Vol. 3, Ch. 10, para. 100201.E.](#)
  - b. Charges may not exceed the lesser of:
    - (1) The unexpended balance of the canceled appropriation (the unexpended balance is the sum of the unobligated balance plus the unpaid obligations of an appropriation at the time of cancellation, adjusted for obligations and payments which are incurred or made subsequent to cancellation, and which would otherwise have been properly charged to the appropriation except for the cancellation of the appropriation); or
    - (2) The unobligated expired balance of the original appropriation available for the same purpose; or
    - (3) One percent (1%) of the current appropriation available for the same purpose. [31 U.S.C. § 1553\(b\)\(2\)](#); [DOD FMR, Vol. 3, Ch. 10, para. 100201.F.](#)
  - c. Under an equity theory, if a suit is filed prior to funds' expiration, a federal court can enjoin the expiration of funds to allow for the payment of a judgment. [National Ass'n of Regional Councils v. Costle](#), 564 F.2d 583 (D.C. Cir. 1977).

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

A. **General.** There are four important exceptions to the general prohibition on obligating funds after the period of availability:

1. Contract Modifications;
2. Bid Protests
3. Terminations for Default; and
4. Terminations for Convenience (only in limited circumstances).

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

1. General Rule:

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

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

- (2) Provisions in the contract that may result in such “antecedent liability” include most clauses granting equitable adjustments to the contract price. Thus if modifications are within the scope of the changes clause, within the scope of a government property clause or within the scope of a negotiated overhead rates clause, then the change is essentially “within the contract’s statement of work” and it is considered a *bona fide* need of the same year in which funds were obligated for the original contract. [GAO Redbook, Appropriations Law, Vol. I](#), page 5-34; [Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase](#), B-219829, 65 Comp. Gen. 741 (1986); [Obligations and Charges Under Small Business Administration Service Contracts](#), B-198574, 60 Comp. Gen. 219 (1981).
- (3) The determination of whether a contract change is “in-scope” is highly fact specific and depends on the application of multiple factors. For a more complete discussion, please refer to the Contract Changes Outline in the Contract Attorneys Deskbook.
- (a) As a shortened discussion, GAO, courts and boards look to the materiality of the change to see to what extent the product or service, as changed, differs from the requirements of the original contract. They may examine (1) changes to the function/type of work, (2) changes in quantity; (3) the number and cost of changes; and (4) changes to the time of performance. These factors and their application are discussed at length in the Contract Changes outline.
- (b) As a shortened discussion, a contract change is generally within the scope of a contract’s changes clause if either test is met below:
- (i) Offerors (prior to award) should have reasonably anticipated this type of contract change based upon what was in the solicitation. In other words, the field of competition for this contract, as modified, is not significantly different from that obtained for the original contract. [Krykowski Const. Co., Inc. v. U.S.](#), 94 Fed.3d 1537 (Fed. Cir. 1996); [H.G. Properties A. LP v. U.S.](#), 68 fed. Appx. 192 (Fed. Cir. 2003).

**OR**

- (ii) The contract, as modified, is for essentially the same work as the parties originally bargained for. The contract, as modified could “be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into.” See [Freund v. United States](#), 260 U.S. 60 (1922); [Shank- Artukovich v. U.S.](#), 13 Cl. Ct. 346 (1986); [Air-A-Plane Corp. v. United States](#), 408 F.2d 1030 (Ct. Cl. 1969); [GAP Instrument Corp.](#), ASBCA No. 51658, 01-1 BCA ¶ 31,358; [Gassman Corp.](#), ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.
  
- (4) Limitations. For an expired, fixed appropriations account, obligations for contract changes to a program, project, or activity, may not exceed:
  - (a) \$4 million in one FY without the approval of the head of the agency. 31 U.S.C. § 1553 (c)(1). Within DoD, the action is submitted to the USD(C) for approval. [DOD FMR, Vol. 3, Ch. 10, paras. 100204 and 100206.E](#).
  
  - (b) \$25 million in one FY without notice to Congress and a 30 days waiting period. [31 U.S.C. § 1553 \(c\)\(1\)](#). [31 U.S.C. § 1553 \(c\)\(2\)](#). See also [DOD FMR, Vol. 3, Ch. 10, para. 100205](#).
  
- b. Increases to Quantity: The government accountability office and [Volume 3](#), Chapter 8 of the DoD Financial Management Regulation offer quite a bit of guidance on how to determine the funding source for contract modifications that add a quantity of supplies or additional services. The DoD FMR should be consulted on fact specific questions.
  - (1) In general, increases to the quantity of items to be delivered on a contract are viewed as outside the scope of most changes clauses. Thus, a modification to increase quantity will amount to a new obligation chargeable to funds current at the time the modification is made. See [Request Concerning Funding of Contract Modification After Expiration of Appropriations](#), B-207433 (1983).

- (2) Example: The IRS issued a task order with FY1 funds for a specific amount of computer equipment under an ID/IQ contract. There was a cost underrun (it cost less money), so the IRS proposed to modify to the task order in FY2 to use the FY1 money it “saved” to purchase additional computers. GAO opined that a modification of a contract to increase the quantity constitutes a new obligation and is chargeable only to funds current at the time of the modification, even though it was an ID/IQ contract and the IRS argued it “needed” the computers in FY1 but had limited funds available. [Modification to Contract Involving Cost Underrun](#), B-257617, 1995 U.S. Comp. Gen. LEXIS 258 (April 18, 1995);
- (3) Example: In FY7, The Army had a *bona fide* need for 557 thermal viewers. Due to a limitation of funds, the Army was only able to enter into a fixed price contract for 509 viewers. The Army obligated \$8.2 million for the viewers. In FY8, Army modified the contract to purchase an additional 285 viewers, obligating FY8 funds. In FY9, there was a cost underrun (it cost less than 8.2 million to produce 509 viewers). The Army wanted to use the remaining FY7 funds to purchase 48 viewers. GAO opined that the Army could not use surplus FY7 funds in a succeeding fiscal year. Even though the Army had a *bona fide* need for 557 viewers in FY7, the Army chose not to obligate for 557 viewers. Any increased quantities in FY9 are a *bona fide* need of FY9. The funds do not relate back. [Magnavox—Use of Contract Underrun Funds](#), B-207433, 83-2 CPD ¶ 401 (1983).
- (4) DoD FMR Guidance on Increases in Quantity. “Changes in the quantity of the major items called for by a contract generally are not authorized under the “Changes” clause. Therefore, a change that increases the number of end items ordered on a contract is a change in the scope of the contract and would have to be funded from funds available at the time the change is made.”
- (a) “For example, if the original contract provided for delivery of 50 items and a modification was issued to provide for the delivery of 70 items, the additional 20 items would represent a change in the scope of the contract. . . .However, changes in the quantity of subsidiary items under a contract, such as spare parts, generally are considered to be within the scope of a contract unless they are so significant that they alter the basic contractual undertaking. [See also DOD FMR, Vol.3, Ch. 8, para. 080304.C.](#)

- (5) Severable Services: A modification providing for increased additional deliverable services must be charged to the fiscal year or years in which the services are rendered. [Hartgraves](#), B-235086, 1991 WL 122260 (Comp. Gen)(Apr 24, 1991); [Dept. of the Interior, FY Approp. Chargeable for Contract Modifications](#), B-202222, 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, Aug. 2, 1983; [Acumenics Research & Tech.](#), B-224702, 87-2 CPD ¶128 (Aug 5, 1987). Note: In dicta, GAO has suggested that an increased services modification to a contract awarded for 12 months under 2410a would relate back to the funds initially placed on the contract. See [GAO Redbook](#), Volume I, Appropriations Law, page 5-34 (2008).
2. General Rule for Cost –Reimbursement Contracts. Contract modifications that increase the original estimated cost ceiling of a contract are funded with an appropriation current at the time the modification is signed by the contracting officer. The reason is that the agency cannot anticipate the need for or the amount of cost increases at the time of award and ultimately, this type of modification is viewed as discretionary in nature. Therefore, GAO considers it a *bona fide* need at the time of modification. [FINCEN – Obligations Under a Cost Reimbursement Nonseverable Services Contract](#), Comp. Gen. B-317139, 2009 CPD ¶158, 2009 WL 1621304, June 1, 2009.
3. Cost Plus Fixed Fee - Level of Effort Contracts. See also Contract Types and Contract Changes outlines.
  - a. A term level of effort contract is by presumption, a severable services contract. This is because it requires the performance of a certain number of hours of work within a specified time period, rather than requiring the completion of a series of work objectives. [FAR 16.306\(d\)\(2\)](#); [EPA Level of Effort Contracts](#), B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216. GAO has held that in some cases, this presumption can be overcome because it is always the nature of the work being performed, not the contract type, that drives the analysis. [Honorable Byron](#), B-235678, 30 July 1990; [Funding for Air Force CFFF Level of Effort Contract](#), B-277165, 10 Jan. 2000.
  - b. A completion contract, in contrast, is generally a non-severable services contract because it requires the contractor to complete and deliver a specified end product. [FAR 16.306\(d\)\(1\)](#).

- c. A severable term level of effort contract cannot be converted by modification into a non-severable completion-type level of effort contract. [EPA Level of Effort Contracts](#), B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216.
  
- C. Bid Protests. Funds available for obligation on a contract at the time a protest is filed shall remain available for obligation for 100 calendar days after the date on which the final ruling is made on the protest. This authority applies to protests filed with the agency, at the Government Accountability Office (GAO), or in the Court of Federal Claims. [31 U.S.C. § 1558](#); [FAR 33.102\(c\)](#); [DFAS-IN 37-1](#), para. 080606.
  
- D. Terminations for Default (T4D).
  - 1. Replacement Contract: A new contract the agency enters into to satisfy a continuing *bona fide* need for a good or service covered by the original contract that was terminated. [Lawrence W. Rosine Co.](#), B-185405, 55 Comp. Gen. 1351 (1976).
  
  - 2. If a contract or order is terminated for default, and the *bona fide* need still exists, then the originally obligated funds remain available for obligation for a re-procurement, even if they otherwise would have expired. The agency must award the re-procurement contract on the same basis. The contract must be substantially similar in scope and size as the original contract and awarded without delay. [DOD FMR, Vol. 3, paragraph 080303.D](#); [Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action](#), B-210160, Sept. 28, 1983, 84-1 CPD ¶91; [Lawrence W. Rosine Co.](#), B-185405, 55 Comp. Gen. 1351 (1976). The policy reasons for allowing the use of original funds is to facilitate contract administration.
  
  - 3. If additional funds are required for the replacement contract, and the funds have otherwise expired, then under certain circumstances, the original year's funds may be used to fund the additional cost (and if listed conditions are not met or funds are unavailable, then current funds may be used). See [DoD FMR, Vol. 3, Ch. 10, para. 100206](#); [DFAS-IN 37-1, tbl. 8-7](#).

4. As a remedy for the government, the agency may retain all re-procurement or completion costs, liquidated damages and performance bond money from the contractor as “refunds” to be applied to the replacement contract’s specific appropriation in order to make the appropriation “whole.” [Settlement of Faulty Design Dispute](#), B-220210, 65 Comp. Gen. 838 at \*4-7 (Sept. 8, 1986); Department of the Interior—Disposition of Liquidated Damages Collected for Delayed Performance.

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

1. General Rule: A termination for the convenience of the government generally extinguishes the availability of prior year funds remaining on the contract. In most instances, such funds are not available to fund a replacement contract in a subsequent year. [DOD FMR, Vol. 3, Ch. 10, para. 100206](#).
2. Exceptions. Funds originally obligated may be used in a subsequent fiscal year to fund a replacement contract if the original contract was terminated as a result of:
  - a. Court Order;
  - b. Determination by a contracting officer that the contract award was improper due to explicit evidence the award was erroneous; or
  - c. Determination by other competent authority (e.g. a Board of Contract Appeals) that the contract award was improper. [DOD FMR, Vol. 3, para. 100206](#); [Funding of Replacement Contracts](#), B-232616 (1988).
3. If the original award was improper and the contract is terminated for convenience, either by the contracting officer or by judicial order, then the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:
  - a. The original award was made in good faith;
  - b. The agency has a continuing *bona fide* need for the goods or services involved;

- c. The replacement contract is of the same size and scope as the original contract; and
- d. The replacement contract is executed without undue delay after the original contract is terminated for convenience. [Funding of Replacement Contracts](#), B-232616, 68 Comp. Gen. 158, 162 (Dec. 19, 1988), [DOD FMR, Vol. 3, para. 100206](#); [DFAS-IN 37-1, tbl. 8-7](#).
- e. If all of the conditions above cannot be met, then current year funds shall be used to fund the requested action. [DoD FMR, Vol. 3, Ch.10 para. 100206](#).
- f. Example: The U.S. Mint contracted for an asbestos abatement contract in FY1. Subsequently, a federal district court ordered the Mint to terminate the award and re-solicit. The Mint T4C'd the contract. If the FY1 funds have expired, may the Mint still obligate those funds on a replacement contract? Yes, provided the original award was made in good faith, the Mint has a continuing *bona fide* need for the services, the replacement contract is of the same size and scope as the original contract and the replacement contract was executed without delay. [Funding of Replacement Contracts](#), B-232616, 68 Comp. Gen. 158 (Dec. 19, 1988).

## **IX. MULTI-YEAR CONTRACTS AND FULL FUNDING POLICY**

### **A. Full Funding Policy.**

1. It is the policy of the Department of Defense to fully fund procurements of military useable end items in the fiscal year in which the item is procured. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.A](#). The full funding policy is intended to prevent the use of incremental funding, under which the cost of a weapon system is divided into two or more annual portions or increments. Thus, full funding provides disciplined approach for program managers to execute their programs within cost and available funding.
2. The total estimated cost of a complete, military useable end item or construction project must be fully funded in the year it is procured. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B](#).

3. There are two basic policies concerning full funding:
    - a. The policy rationale is to provide funds in the budget for the total estimated cost of a complete, military usable end item to document the dimensions and cost of a program. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.1.](#)
    - b. Exceptions to this policy are advance procurement for long lead-time items and advance economic order quantity (EOQ) procurement. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.2.](#)
  4. The DOD full funding policy is not statutory. Violations of the full funding policy do not necessarily violate the Anti-Deficiency Act. [Newport News Shipbld'g and Drydock Co.](#), B-184830, Feb. 27, 1976, 76-1 CPD ¶ 136 (holding option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).
- B. Incremental Funding of Major Defense Systems. The efficient production of major defense systems has necessitated two general exceptions to the full funding policy. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.B.2;](#) [DFARS 217.172.](#)
1. Advance Procurement (Long Lead-time Items). Advance procurement for long lead-time items allows acquisition of components, material, parts, and effort in an earlier fiscal year than the year the government acquires the related end item.
    - a. To be eligible for advance procurement, long lead-time items must have a significantly longer lead-time than other items. The cost of the advanced procurement items must be relatively small when compared to the remaining costs of the end item.
    - b. An annual budget request must include at least the estimated termination liability for long lead-time item procurements. The advanced procurement is for one fiscal year's program increment. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.C.3;](#) [DFARS 217.172.](#)

2. Economic Order Quantity (EOQ) Procurement. Advance EOQ procurement for multi-year procurement allows the agency to acquire components, materials, and parts for up to five fiscal-year program increments to obtain the economic advantage of multi-year procurements. The advance procurement may obligate the termination costs, or, if cheaper, the entire cost. The government may also include EOQ costs in an unfunded cancellation clause. [DOD FMR, Vol. 2A, Ch. 1, para. 010202.C.4](#); [DFARS 217.172](#).

C. Incremental Funding of RDT&E Programs.

1. The government executes the RDT&E Program through the incremental funding of contracts and other obligations. [DOD FMR, Vol. 2A, Ch. 1, para. 010213](#).
2. Program managers using RDT&E usually prefer to incrementally distribute funding among various programs, giving more to those programs showing progress and withholding from other programs.
3. The incremental funding policy budgets an amount for each fiscal year sufficient to cover the obligations expected during that fiscal year. Each contract awarded limits the government's obligation to the costs estimated to be incurred during the fiscal year. The government obligates funds for succeeding years during later years. Through the incremental funding policy, the government maintains very close control over R&D programs by limiting their funding.
4. Contract Provisions.
  - a. An incrementally funded cost-reimbursement contract contains [FAR 52.232-22](#), Limitation of Funds. This provision limits the government's obligation to pay for performance under the contract to the funds allotted to the contract. The contract also contains a schedule for providing funding. Typically, the contractor promises to manage its costs and to perform the contract until the government provides the next increment.
  - b. Incrementally funded fixed-price contracts contain a similar clause, Limitation of Government's Obligation. See [DFARS Part 232.704-70](#) and [DFARS 252.232-7007](#).
  - c. The government allots funds to the contract by an administrative modification identifying the funds.

- d. To prevent funding gaps associated with late appropriations, the contracting officer may use current research and development funds to fund contract performance for 90 days into the next fiscal year.
  5. Incremental funding transforms two-year RDT&E appropriations into one-year funds. However, the government may obligate RDT&E funds during their second year of availability. Frequently, agencies receive permission from the appropriation manager to obligate funds during the second year where problems prevent obligating an annual increment during the first year. [Defense Technical Information Center--Availability of Two Year Appropriations](#), B-232024, 68 Comp. Gen. 170 (1989).
- D. Multi-year Contracts. [10 U.S.C. 2306b](#); [10 U.S.C. 2306c](#).
1. Multi-year contracts is a generic term describing the process under which the government may contract for the purchase of supplies or services for more than one year, but not more than five program years. Such contracts may provide that performance during the subsequent years of the contract is contingent upon the appropriation of funds, and generally provide for a cancellation of payments to be made to the contractor if such appropriations are not made. [DOD FMR, Vol. 2A, Ch.1 , para. 010203.A](#).
  2. Title 10, U.S.C. § 2306b provides that the head of a contracting agency may enter into a multi-year contract for the acquisition of “property” (i.e., major end items). This authority is subject to a significant number of statutory limitations and approval criteria. [10 U.S.C. § 2306b](#); [DFARS 217.172](#); [DOD FMR, Vol. 2A, Ch.1 , para. 010203.B](#).
  3. Similar authority at 10 U.S.C. § 2306c provides that the head of a contracting agency may enter into a multi-year contract for the acquisition of services, to include environmental remediation services. This statute is also subject to a significant number of limitations and approval criteria. [10 U.S.C. § 2306c](#); [DFARS 217.171](#).
  4. The DFARS restricts the use of multi-year contracts for supplies to only those for complete and usable end items. [DFARS 217.172 \(e\)\(5\)](#). In addition, the DFARS restricts the use of advanced procurement to only those long-lead items necessary in order to meet a planned delivery schedule for complete major end items. [DFARS 217.172 \(e\)\(6\)](#).

- E. Incremental Funding of Fixed-Price Contracts. [DFARS 232.703-1](#) and [252.232-7007](#).
1. Department of Defense policy is to fully fund fixed price contracts, as opposed to incremental funding. Incremental funding is the partial funding of a contract or an exercised option with the anticipation that additional funds will be provided at a later time.
  2. Exception #1: DoD permits incremental funding of service contracts if:
    - a. The contract (excluding any options) or any exercised option does not exceed one year in length, and
    - b. Is incrementally funded using funds available (unexpired) as of the date the funds are obligated.
  3. Exception #2: DoD permits incremental funding on contracts funded with research and development appropriations as long as the funds are multiple year funds.
  4. Exception #3: Congress has otherwise authorized incremental funding.

## **X. MISCELLANEOUS**

- A. Options.
1. Contracts with options are one means of ensuring continuity of a contractual relationship for services from fiscal year to fiscal year. The contract continues to exist, but performance must be subject to the availability of funds. [Contel Page Servs., Inc.](#), ASBCA No. 32100, 87-1 BCA ¶ 19,540.
  2. There are restrictions on the use and exercise of options. [FAR Subpart 17.2](#).

- a. The government must have synopsised the contract with the option(s) in the Government-wide Point of Entry (GPE) and must have priced and evaluated the option at the time of contract award. [FAR 5.003](#), [FAR 17.206](#). If the government did not evaluate the option at the time of the award, or if the option is unpriced, then the government must justify the exercise of the option IAW FAR Part 6 (the contracting activity must obtain approval for other than full and open competition through the justification and approval (J&A) process).
- b. The government cannot exercise the option automatically. The government must determine that the option is the most advantageous means of filling a requirement.
- c. The government must have funds available.
- d. The contract must contain the Availability of Funds clause. [FAR 32.703-2](#). Cf. [Blackhawk Heating, Inc. v. United States](#), 622 F.2d 539 (Ct. Cl. 1980).
- e. The government must obligate funds for each option period when proper funds become available. After it exercises the option, the government may fund the option period incrementally; for example, during continuing resolution (CR) periods, the government may provide funding for the period of the CR. [United Food Servs., Inc.](#), ASBCA No. 43711, 93-1 BCA ¶ 25,462 (holding that if the original contract contains the Availability of Funds clause and the government exercises the option properly, funding the option period in multiple increments does not void the option).
- f. The government must obligate funds consistent with all normal limitations on the obligation of appropriated funds, e.g., *Bona Fide* Needs Rule, period of availability, type of funds.

B. Requirements or Indefinite Quantity Contracts.

1. Requirements contracts and indefinite quantity contracts also allow the contractual relationship to cross fiscal years. [FAR Subpart 16.5](#).
2. Use of the Availability of Funds clause is mandatory. [FAR 32.705-1](#).

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

## **XI. CONCLUSION – SHORT OUTLINE**

- A. Most appropriations, or funds, have a period of availability during which an agency may obligate funds for needs that arise, or continue to exist, during that period. Only *bona fide* needs of that FY may be met by obligating funds current at that time.
  1. **Supplies** are a *bona fide* need of the fiscal year in which the supplies will be **used**. However, FY1 funds may be used for supplies that won't arrive until FY2 if the delivery or production lead-time exceptions apply. Also, stock items may be ordered and used into the next FY if the stock level exception applies.
  2. **Services** are the *bona fide* need of the year they are **performed**. Services are either severable (repeatable) or non-severable (singular).
    - a. Non-severable services are funded with money current at the time of **contract award**.
    - b. Severable services are funded in the FY during which they are **performed**, unless 10 U.S.C. 2410a applies.
  3. **Construction** is a *bona fide* need of the year in which the construction must be **contracted** for in order to have the building completed when required. However, considerations like site availability and weather could push the *bona fide* need into the next FY.
  4. **Training** is a *bona fide* need at the time the training is **received**. Individual courses are non-severable services; multiple repeated courses are severable from each other. Some training courses can be funded with FY1 funds even though they don't start until FY2 under some circumstances.
  5. Upon expiration of an appropriation, the remaining funds are not available for new obligations. However, they may be reached to adjust old obligations. Contract modifications that are within the scope of the original contract relate back to the original contract date and may be funded with expired funds.

**APPENDIX A –  
BONA FIDE NEEDS ANALYSIS**

